

ENVIRONMENTAL LIABILITY MITIGATION STRATEGIES
FOR
LOCAL PUBLIC AGENCIES

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A. WISCONSIN REFORMS AND INITIATIVES FOR BROWNFIELD REDEVELOPMENT.

I. Introduction. Over the past few years, the Wisconsin legislature has created a broad array of programs and enacted a variety of legislative initiatives designed to promote the redevelopment of “brownfields” and to stem the tide of “greenfields” development. The budget bills, for example, have frequently contained a number of significant liability and funding-related provisions to facilitate further redevelopment. These types of legislative changes effectively afford municipalities and developers with the means to achieve significant progress toward the goal of redeveloping brownfields.

II. Liability Exemption for Local Governmental Units. Under the current statutory landscape most local governmental units are exempt from a number of the Spill Statute’s requirements to investigate and remediate contamination at properties which they owned provided that certain conditions were met.

A. Expanded Definition of Local Governmental Unit. The definition of local governmental units includes:

- Municipalities -- defined to include any city, town, village, county, county utility district, town sanitary district, public inland lake protection and rehabilitation district or metropolitan sewerage district;
- Redevelopment Authorities created under Wis. Stats. §66.431;
- Public bodies designated by a municipality under Wis. Stats. §66.435(4);
- Community Development Authorities; and
- Housing Authorities.

B. Means Through Which the Property May be Acquired. The Spill Statute liability exemption is available to local governmental units provided that the property is acquired through one of the following means:

- Tax delinquency proceedings;
- Bankruptcy (as the result of the order of a bankruptcy court);
- Condemnation or other proceedings under Wis. Stats. Ch. 32;
- For the purpose of slum clearance or blight elimination;
- Escheat;
- By using funds appropriated under Wis. Stats. §20.866(2)(tz) (the Warren Knowles-Gaylord Nelson Stewardship Program); or

- Acquisition of the property from a local governmental unit that is also exempt from liability pursuant to this provision.
- C. The Exemption Applies to Property Acquired at Any Time. The Spill Statute liability exemption applies to property acquired by the local governmental unit either “before, on or after” the effective date of the statutory provisions.
- D. Elimination of Certain Exceptions to the Exemption. Despite the existence of an exemption from liability under the Spill Statute, most local governmental units have been reluctant to acquire contaminated property for redevelopment purposes due to the fact that the exemption did not exempt the local governmental unit from liability for releases of hazardous substances from federally regulated underground storage tanks. In other words, if contamination was present at the property as a result of a release from a federally regulated UST, the local governmental unit would be liable for investigation and cleanup costs. 1999 Wis. Act 9 repealed this exception to the liability exemption. Thus, under current law, a local governmental unit that has acquired the property through one of the specified means (see Paragraph B, above) is exempt from the liability provisions of the Spill Statute for releases from underground storage tanks.
- E. Limitations. The local governmental unit is not exempt from liability under the Spill Statute if the local governmental unit caused the discharge through:
- Failure to take appropriate action to restrict access to the property in order to minimize costs or damages that result from unauthorized persons entering the property;
 - Failure to sample and analyze unidentified substances in containers stored aboveground on the property;
 - Failure to remove and properly dispose of or place in a different container and properly store any hazardous substance stored aboveground on the property in a container that is leaking or is likely to leak; or
 - An action taken by the local governmental unit (i.e. actually causes the discharge).

In addition, in order to maintain the exemption, the local governmental unit must agree to allow the DNR (or its authorized representatives), the responsible party, and its consultants or contractors to enter the property to take action necessary to respond to the discharge.

With regard to property acquired by the local governmental unit through the use of stewardship funds, the exemption will only be available if the local governmental unit enters into an agreement with the DNR to ensure that: (i) appropriate action is taken to restrict access; (ii) unidentified substances in

containers stored aboveground are sampled and analyzed; and (iii) hazardous substances stored in leaking containers are removed or placed in different containers.

It is also important to note that the exemption may be lost if the DNR determines that actions must be taken to reduce substantial threats to public health or safety at the property and the local governmental unit fails to take such actions when directed to do so by the DNR.

Wis. Stats. §292.11(9)(e).

III. Liability Exemption for Economic Development Corporations. A tax exempt economic development corporation (“EDC”) or entities wholly owned and operated by an EDC are also eligible for an exemption under the Spill Statute provided the property is acquired “before, on or after October 14, 1997” for the purposes which qualify the EDC for federal taxation exemption.

The exemption is not available if the contamination resulted from an action taken by the EDC, or from the EDC’s failure to take appropriate action to prevent the discharge.

It should be noted that the DNR may require the EDC to take steps to reduce any substantial threat to public health or safety, taking into consideration the intended use or development of the property. If the EDC fails to take such steps, as directed by the DNR, the exemption will not apply.

The exemption potentially available to EDC is further limited by the requirements obligating the EDC to:

- A. respond to discharges which pose an imminent threat to health, safety or the environment;
- B. conduct necessary investigative and remedial activities within 3 years of acquiring the property (pursuant to an agreement which must be executed with DNR); and
- C. allow DNR, its representatives, the responsible party and its consultants to access the property and conduct response actions.

Wis. Stats. §292.11(9)(e).

IV. Cost Recovery Actions by Local Governmental Units. Local governmental units have the statutory authority to initiate cost recovery actions against responsible parties to recover the costs the local governmental unit incurred in responding to a hazardous substance discharge. Specifically, with regard to property the local governmental unit has acquired through one of the methods listed in II.B. (i.e., tax delinquency, bankruptcy, condemnation, escheat, slum clearance or blight elimination or through the Warren Knowles-Gaylord Nelson Stewardship Program), the local governmental unit may initiate cost recovery proceedings to recover costs associated with (i) performing an investigation

to determine the extent of the contamination, (ii) remedial action planning, (iii) conducting remedial action, and (iv) administrative expenses including engineering fees but excluding attorney fees. The recoverable costs must be reduced by the fair market value of the property after the completion of the cleanup but are not reduced by the amount of any state or federal moneys received by the local governmental unit for any of the eligible activities. However, if the local governmental unit received money from the state, the local governmental unit must reimburse the state a proportionate share of the total amount recovered under this provision.

The local governmental unit may initiate proceedings against any person who:

- caused the discharge, or
- who, at the time the local governmental unit acquired the property, possessed or controlled the hazardous substance that was discharged.

Cost recovery proceedings may not be initiated against (i) persons exempt from liability under some other provision of law, (ii) persons who have entered into a consent order or agreement with the DNR with respect to the hazardous substance discharge, (iii) persons causing the discharge, if the discharge was in compliance with a NPDES or air permit, or (iv) the person is exempt from liability because they can establish that the person's contribution to the discharge was caused by an act of God, an act of war, or an act or omission by certain third parties as established by Wis. Stat. §292.35(9)(e).

The liability of a person causing the discharge is limited to that person's pro rata share of the total amount of hazardous substances discharged on the property. Also, the liability of a person who possessed or controlled the hazardous substance discharge when the local governmental unit acquired the property (i.e., the owner or operator) is limited to the amounts the local governmental unit is unable to recover from the person causing the discharge. In other words, it appears that the local governmental unit must first attempt to recover its costs from the person who caused the discharge before they may initiate a cost recovery action against a property owner who possessed or controlled the discharge at the time when the local governmental unit acquired the property.

Wis. Stats. §292.33.

- V. Interest Free Loans for the Investigation and Remediation of Contaminated Properties. Pursuant to the land recycling loan program loans are available to political subdivisions (defined as cities, villages, towns, redevelopment authorities and housing authorities, and counties) at subsidized interest rates for the investigation and remediation of property owned by the political subdivision, including approved and non-approved solid or hazardous waste disposal facilities, waste sites or sites where a hazardous substance has been discharged on or after May 21, 1978. Wis. Stats. §281.60.

The loan program is designed to provide financial assistance to eligible applicants to remediate contamination that has or threatens to effect groundwater or surface water. The funds can be used to:

- A. make zero interest loans to fund remediation activities including demolition activities that occur as a component of the remediation;
- B. purchase or refinance debt obligations of municipalities incurred to finance eligible redevelopment projects;
- C. guarantee or procure insurance for municipal obligations incurred to finance the cost of eligible projects; and
- D. authorize payments to the Board of Commissioners of Public Land to reduce principal or interest payments on loans made to municipalities for eligible projects.

Municipalities are required to submit a notice to the DNR if they intend to apply for financial assistance under the loan program at least six months prior to the start of the fiscal biennium in which it intends to receive funding. The DNR is required to establish a priority list ranking each potential loan project based upon the potential reduction of environmental pollutants and the extent to which the project will preserve greenfields by making additional brownfield redevelopment land available.

Wis. Stats. §281.60.

- VI. Brownfield Site Assessment Grants. The Brownfield site assessment grant program is a program that can be used exclusively by local governmental units (i.e., city, village, town, county, redevelopment authority, community development authority or housing authority) for the following activities: (i) site investigation; (ii) demolition of structures; (iii) removal of abandoned containers; (iv) asbestos abatement; and (v) removal of underground storage tanks.

To be eligible for a grant, the local governmental unit must not have caused the contamination and the actual responsible party must be unknown, cannot be located or is unable to pay for the activity. The local governmental unit must also contribute matching funds (or perform in-kind services) equal to at least 20 percent of the grant amount. No more than 15 percent of the total available grant funds can go to any one community in a single year. Grants will be awarded based on the local governmental unit's demonstrated commitment to performing and completing remediation activities, the degree to which the project will have a positive impact on public health and the environmental, and other criteria that the DNR finds necessary.

Wis. Stats. §292.75.

- VII. Grant Program for Redevelopment of Brownfields. Under 1997 Wis. Act 27, a grant program was created to assist in the redevelopment of brownfields. Wis. Stats. §560.13.

Brownfields are defined under this program to include abandoned, idle or underused industrial or commercial facilities or sites, the expansion or redevelopment of which is adversely affected by actual or perceived environmental contamination. Funding for this program comes from the Recycling Fund. The program is administered by the Department of Commerce (“DComm”). DComm is authorized to make a grant to any person provided the following conditions are met.

- A. The grant proceeds are used for brownfields redevelopment and associated environmental remediation activities. Brownfield redevelopment includes acquisition, demolition, removal, reconstruction and renovation to promote the facility’s use for commercial, industrial or other purposes. Environmental remediation expenses include investigation, analysis, abating and removing contaminants and restoration of soil or groundwater.
- B. The party responsible for the environmental contamination cannot be located or is unknown.
- C. The person applying for the grant is required to contribute a proportional share (either cash or in-kind contributions) of the cost of the redevelopment project. The proportional share varies depending upon the size of the grant. Proportional shares are as follows:
 - (i) Grants of \$300,000 or less require a proportional share contribution of at least 20%;
 - (ii) Grants ranging from \$300,000 to \$700,000 require a proportional share contribution of 35%; and
 - (iii) Grants ranging from \$700,000 to \$1,250,000 require a proportional share contribution of 50%.

DComm must consider the recommendations of the Department of Administration and the DNR in the award granting process. DComm is required to consider the following criteria in making awards:

- (i) the extent to which economic development in the area would be promoted as a result of the project (a weight of 50% is assigned to this criterion);
- (ii) the extent to which the project would have a positive effect on the environment (a weight of 25% is assigned to this criterion);
- (iii) the extent to which the person applying for the grant would contribute to the redevelopment project (a weight of 15% is assigned to this criterion); and
- (iv) the extent to which the proposal for remediation and redevelopment reflects innovation (a weight of 10% is assigned to this criterion).

Individuals and entities that are eligible to apply for a grant include individuals, partnerships, corporations, limited liability companies, non-profit organizations, cities, villages, towns, counties, local development corporations, or trustees, including bankruptcy trustees.

It should also be noted that a separate portion of the Act authorizes DComm to give priority to brownfield redevelopment projects in awarding grants under the Community Development Block Grant (“CDBG”) Program.

DComm will award grants to projects that include minimal job creation, but these application must include compensatory factors that score well to maintain their consideration in the competition.

Wis. Stats. §560.13.

- VIII. Municipality Can Require County to Acquire Ownership of Tax Delinquent Contaminated Property. A municipality (defined as a city, village or town) may submit a written request to the county effectively requiring the county to take title to tax delinquent contaminated property. Specifically, if the county has not taken a tax deed for property that is (i) subject to a tax certificate and (ii) contaminated by a hazardous substance or substances, within two years after the statutory redemption period described in Wis. Stats. §§74.57(2) and 75.14(1); then the county is required to take a tax deed for the property if it receives a written request from the municipality in which the property is located.

The county then has the right to either retain ownership or transfer ownership to the municipality, at no cost to the municipality (“for no consideration”), within 180 days after receiving the written request.

Wis. Stats. §75.17.

- IX. Expanded Environmental Remediation Tax Incremental Financing. The 1997 Budget Bill created “environmental remediation tax increments” for payment of remediation expenses incurred in remediating contamination on property located within a political subdivision (city, town, village, county) provided the property is not part of a tax incremental district. These provisions afforded the political subdivision with an opportunity to create an Environmental Remediation TIF through a streamlined process in which public hearings and other aspects of traditional TIFs were eliminated. The baseline value of the unimproved, contaminated property is compared to the value of the property after remediation and/or improvements have been completed. The taxes generated on the incremental increase in value can be recouped by the political subdivision for up to sixteen years. The value of the property does not count towards the total aggregate TIF valuation limitation.

The costs which are eligible for recoupment by the political subdivision include:

- Costs associated with the investigation, removal, containment or monitoring of, or the restoration of soil, air, surface water, sediments or groundwater affected by groundwater and pollution (including investigation and remediation of off-site groundwater contamination);
- Monitoring costs incurred within two years after the date on which the DNR certifies that environmental pollution on the property has been remediated;
- Property acquisition costs;
- Demolition costs, including asbestos removal; and
- Costs associated with removing and disposing of underground storage tanks or abandoned containers.

The total costs which are eligible for recoupment must be reduced by:

- Any amounts received, or reasonably expected by the political subdivision to be received from a local, state or federal program for the remediation of contamination which do not require reimbursement or repayment;
- The amount of net gain from the sale of the property by the political subdivision; and
- Any amounts received from persons responsible for the discharge.

Wis. Stats. §66.1106.

X. Tax Credits for Environmental Remediation Expenditures in Development Zones. A credit equal to 50% of the amount expended for environmental remediation in a development zone may be applied against taxes imposed on a person's business activity income. Development zones are defined to include a development zone under Wis. Stats. §560.70, development opportunity zones under Wis. Stats. §560.795 or enterprise development zones under Wis. Stats. §560.797. Environmental remediation is defined to include the removal or containment of environmental pollution, restoration of soil and/or groundwater that is affected by environmental pollution in a brownfield, provided that the removal, containment or restoration fulfills certain requirements set forth in Wis. Stats. §71.07(2de). Wis. Stats. §71.07(2dx).

XI. Delinquent Property Tax Cancellation. The City of Milwaukee and counties are authorized to cancel delinquent property taxes, interest and penalties at any time prior to the recording of a tax deed based on a tax certificate issued on the property for nonpayment of taxes provided that all of the following conditions are met:

- A. hazardous substance contamination is present at the property as confirmed by an environmental assessment;

- B. the property owner or another person agrees to remediate the property by restoring the environment to the extent practicable and to maintain and monitor the property; and
- C. the owner or the other person supplies the county or Milwaukee with a written agreement to which DNR is a signatory agreeing to investigate and remediate the property.

Wis. Stats. §75.105

The ability to cancel delinquent property taxes, when coupled with the fact that the City of Milwaukee and counties may proceed against property owners individually for the recovery of delinquent taxes (Wis. Stats. §74.53) may provide a substantial financial incentive for the owner to remediate the property.

XII. Exemption from Certain Hazardous Waste Requirements for Local Governmental Units. Local governmental units are exempt from hazardous waste licensing, closure and long-term care and certain corrective action requirements when they acquire property if all of the following occur:

- A. An environmental investigation to identify hazardous waste discharges is conducted and approved by the DNR;
- B. The hazardous waste discharges identified by the investigation are cleaned up by restoring the environment to the extent practicable and minimizing the harmful effects from the discharges;
- C. The local governmental unit obtains approval from the DNR stating that the property has been satisfactorily restored;
- D. The property is maintained and monitored as required by the DNR;
- E. The local governmental unit does not engage in activities inconsistent with the maintenance of the property; and
- F. The local government unit did not cause the discharge of any hazardous waste identified on the property.

Wis. Stats. §292.24.

XIII. Negotiated Schedule for Conducting Non-Emergency Response Actions. The DNR is authorized to enter into negotiated agreements with local governmental units setting forth a schedule for conducting non-emergency response actions in instances where the local governmental unit is either:

- Acting on behalf of the owners of contaminated property located within a business improvement district; or

- Acting on behalf of owners of contaminated property within an area designated by the local governmental unit which contains two or more properties affected by a contiguous plume of groundwater contamination or which contains two or more properties that are defined as brownfields as referenced in the Brownfield Grant Program (discussed in Section VII, supra).

Wis. Stats. §292.11(7)(d).

XIV. Voluntary Party Remediation and Exemption From Liability – The Land Recycling Act. The Land Recycling Act (“LRA”) was created pursuant to 1993 Wisconsin Act 453 and represented the initial efforts by the Wisconsin legislature to promote the redevelopment of Brownfields.

The LRA sets forth a number of provisions designed to assist in the redevelopment of brownfields by providing voluntary parties with certain limited protection from environmental liabilities under the Spill Statute. A voluntary party is defined as a person who submits an application to obtain an exemption and pays any required fees. Wis. Stat. §292.85(1)(f).

To obtain the exemption, the voluntary party must:

- (i) conduct an environmental investigation that is approved by the DNR;
- (ii) restore the property to the extent practicable and minimize the harmful effects from the discharge;
- (iii) obtain a certificate of completion that the property has been restored to the extent practicable and that the harmful effects of the discharge have been minimized;
- (iv) maintain and monitor the property as necessary under applicable cleanup rules;
- (v) refrain from taking any action(s) inconsistent with the property’s maintenance; and
- (vi) refrain from obtaining the Certification of Completion by fraud, misrepresentation or knowing failure to disclose material information.

The liability exemption under the voluntary party program is now available for sites where natural attenuation is selected as a remedy for the remediation of contaminants in the groundwater in excess of the enforcement standards. In effect, the requirement that the environment be restored to the extent practicable and the harmful effects of the discharge be minimized does not apply to groundwater that the DNR has determined will be brought into compliance through natural attenuation. However, the DNR may require a voluntary party to obtain insurance, naming the state as the insured, that will cover the

cost of additional remediation in case the natural attenuation remedy fails. Wis. Stats. §292.15(2)(ae).

The liability exemption under the voluntary party program is also available for properties affected by an off-site discharge. While protection from Spill Statute liability for off-site discharges is still available under Wis. Stats §292.13, the protections afforded under the voluntary party program are more expansive. The requirement that the environment be restored to the extent practicable and the harmful effects of the discharge be minimized does not apply to discharges originating from an off-site source. Wis. Stats. §292.15(2)(ag).

The voluntary party exemption is also available for discharges that occur before the environmental investigation is completed and are discovered in the course of conducting a cleanup of the property. Wis. Stats. §292.15(2)(at). To be eligible for the exemption under this provision, the voluntary party must obtain insurance to cover remediation of discharges that are discovered in the course of conducting the cleanup. Additionally, the DNR may require the voluntary party to enter into an agreement whereby the voluntary party agrees to conduct a cleanup approved by the DNR.

A. Partial Cleanups. The DNR may approve a partial cleanup and issue a Certificate of Completion for a portion, or portions, of the property which have been remediated. Wis. Stats. §292.15(2)(am). The partial cleanup may focus on a specific geographic area, a specific contaminant(s) or a specific media (e.g., soil). Once a partial cleanup has been completed and approved, the voluntary party is exempt from liability for the substances or area addressed. A Certificate of Completion will only be issued for a partial cleanup provided that:

- public health, safety and the environment will not be endangered by the hazardous substances which remain on the property following the partial cleanup;
- proposed use and/or development of the property will not aggravate the environmental condition of or interfere with or increase the costs of restoring the property and minimizing the harmful effects of the discharge; and
- the owner cooperates with the DNR to address problems caused by the hazardous substances, which remain at the property.

B. Successors and Assigns. The exemption which the voluntary party obtains by conducting the environmental investigation and restoring the environment to the extent practicable applies to any successor or assignee provided the successor or assignee complies with any monitoring and maintenance requirements and does not engage in activities that are inconsistent with the maintenance of the property. Wis. Stats. §292.15(3). The successor/assignee is not entitled to the exemption if the successor/assignee knew that the certification was wrongfully obtained.

C. Monetary Cap for Voluntary Parties Who are Purchasers of Contaminated Properties. The responsibility of a voluntary party to clean up a property in accordance with DNR rules may be monetarily limited by an agreement between the voluntary party and the DNR if the voluntary party purchased the property from a local governmental unit that acquired it through either tax delinquency or bankruptcy proceedings, through condemnation; for the purpose of slum clearance or blight elimination; through escheat; or by using funds appropriated under Wis. Stats §20.866(2)(tz) (the Warren Knowles-Gaylord Nelson stewardship program). The agreement must provide as follows:

- voluntary party may discontinue the cleanup effort at the point the cost reaches 125% of the estimated cleanup expense;
- voluntary party will still be eligible for the liability exemption after the cleanup ceases provided that the voluntary party complies with maintenance and/or monitoring requirements; and
- if the voluntary party ceases the cleanup, the voluntary party shall use reasonable efforts to sell the property in accordance with DNR rules that define “reasonable efforts” in a manner substantively equivalent to 40 C.F.R. 300.1100(d)(2)(i).

D. DNR’s Superior Lien. The voluntary party exemption does not apply to the DNR’s superior lien authority under §292.81(3) for costs incurred by the DNR prior to the date a Certificate of Completion is issued for the property. Wis. Stats. §292.15(6).

E. Voluntary Party Protections Unavailable for Certain Facilities. The voluntary party protections are not available in connection with (i) hazardous waste treatment, storage or disposal facilities which first begin operation following acquisition by the voluntary party, (ii) licensed hazardous waste treatment, storage or disposal facilities operating prior to and after acquisition by the voluntary party or (iii) hazardous waste disposal facilities licensed for operation prior to the effective date of the Act. Wis. Stats. §292.15(7).

B. FEDERAL REFORMS AND INITIATIVES FOR BROWNFIELD REDEVELOPMENT.

I. Impetus For Change. Since the original enactment of the federal superfund law in 1980, parties involved in real estate transactions had a strong incentive to avoid ownership of contaminated property. The liability provisions contained in the federal superfund law create joint and several liability for owners of contaminated property, whether or not they caused the contamination.

While there were limited exemptions available to innocent parties, these exemptions proved unworkable, given the high standard of care that was required to be met before an innocent party could be shielded from liability for pre-existing contamination.

Under existing law, there was little or no funding sources available at the federal level for assisting innocent parties to remediate property for productive re-use. Any funding that had been available under the federal superfund law was created for the benefit of the federal government to clean up the property and seek reimbursement for such clean up costs from other responsible parties including current owners of the property.

The dual system of federal and state clean up liability created a one-two punch which frequently knocked out sensible real estate developers from any interest in property that may be subject to pre-existing contamination. Indeed, limitations that shielded developers from state law liability did not operate to exempt those same parties from liability under the federal superfund law.

In addition to law suits from the government, innocent parties who own contaminated real estate could be subjected to suits for contribution by other responsible parties, even if the government chose not to sue innocent current owners. This liability for pre-existing contamination applied to a broad range of types of waste which included even normal household garbage known as municipal solid waste. Compounding these draconian liability concerns further, is the liberal statute of limitations for clean up liability for latent contamination. The statute of limitation for such liability may linger years beyond the initial discovery of the contamination by the government even though the contamination was deposited at the site many years before the government's discovery of those conditions.

All of these factors contributed to the stigma that attached to property located in central city areas where properties had a long history of industrial and commercial activity. Local governments interested in seeing these inner city properties redeveloped put pressure on Congress to enact some changes in these laws that would provide greater incentives for redevelopment of these inner city properties.

Congress saw the light, and on January 11, 2002, President Bush signed one of the most significant improvements in the federal superfund law in this area known as the Small Business Liability Relief and Brownfields Revitalization Act. This law is designed to provide an incentive for productive redevelopment of contaminated properties through the creation of funding sources and mitigation of the draconian liability provisions which were so unfair to innocent parties in the federal superfund context.

The Act provides funding in the form of separate grants for site assessment and remediation and alleviates some regulatory burdens on small businesses and municipalities. In addition, the Act exempted certain contiguous property owners and prospective purchasers from Superfund liability and clarified appropriate inquiry for innocent land owners. Finally, the Act authorized funding for state response programs and limited the involvement EPA can have at sites cleaned up under the state programs.

II. DeMicromis Contribution Protection. EPA had previously adopted a settlement policy where it exercised discretionary enforcement for small volume waste contributors.¹ The new federal reform legislation codifies protection for parties who generate waste under a specified maximum quantity amounts. For sites that are listed on the National Priority Site List (“NPL”), potential responsible parties who can demonstrate that the amount of material containing hazardous substances for which that person arranged for disposal or treatment was less than 110 gallons of liquid or less than 200 pounds of solid material, have the ability to rely on a new liability exemption under this federal legislation. However, the generator must establish that its waste was disposed of at the NPL site prior to April 1, 2001.

This new demicromis exemption does not apply when any of the following factors are present: (1) the waste generated by the small quantity generation contributes significantly to the cost of the response action or natural resource restoration; (2) the Potentially Responsible Party (“PRP”) fails to comply with an information request or administrative subpoena issued by U.S. EPA; or (3) the PRP has impeded government’s performance of a response action or natural resource restoration at an NPL site.

This new demicromis exemption provides a shift of the burden of proof to a private party opposing the application of this exemption. In particular, where a third party seeks a contribution action against another private party, relying on this new exemption, the party seeking the contribution action has the burden to prove any of these exceptions to the exemption apply if the demicromis party establishes the necessary pre-requisites for the demicromis exemption.

In addition, the party that is entitled to demicromis exemption can seek reimbursement of attorneys fees from the unsuccessful party opposing the application of the exemption.

These provisions will give pause to contribution plaintiffs who are seeking liability against parties that provide a limited volume of material to NPL sites. This new demicromis exemption should enhance the fairness of the federal superfund law.

III. MSW Generators Exemptions. There is a new category of liability exemptions for generators of household wastes commonly referred to as Municipal Solid Waste (“MSW”).² Under this new exemption, generators of wastes from residential properties,

¹ See 42 U.S.C. §9622(g) and see U.S. EPA Revised Guidance on CERCLA Settlements with DeMicromis Waste Contributors (1996).

² The definition of municipal solid waste is provided in 42 U.S.C. §9602(p)(4). Municipal solid waste under this section means waste material (i) generated by a household (including a single or multi-family residence); or (ii) generated by commercial, industrial or institutional entity, to the extent that the waste material is essentially the same as waste normally generated by a household; is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single family household.

small businesses who employ less than 100 employees, and non-profit entities that employ less than 100 employees are able to avail themselves of this new exemption.³

This new municipal solid waste exemption provides the same burden of proof and attorney fee shifting characteristics that is available for parties that qualify for the demicromus exemption mentioned in the previous section of this article.

It is important to note that the benefits of this MSW exemption is limited to superfund liability for NPL sites. This MSW exemption does not apply to clean up liability for non-NPL sites, impacted by federal clean up statutes other than the Federal Superfund statute, or by federal common law.

Nonetheless, this new MSW exemption will provide many important benefits to parties that generate municipal solid waste that is deposited at NPL sites. The exemption should serve to create greater exposure for the parties that generate non-municipal solid waste, which is normally the driving force for the need for cleaning up most of the NPL sites.

IV. Contiguous Property Owner Exemptions. The federal reform legislation creates a new groundwater contamination exemption for innocent property owners that are located adjacent to federal superfund sites and who have been impacted by a groundwater contamination plume that has migrated from these sites. Under the new contiguous property owner exemption, the party must establish all of the following in order to avail itself of this new exemption:

- A. The person did not cause the release;
- B. The person is not affiliated with a party that has caused the contamination;
- C. The person has taken appropriate measures to mitigate contamination concerns;
- D. The party has cooperated with the government agencies;
- E. The person has complied with land use restrictions established in connection with response actions at the contaminated site; and
- F. The person performed all necessary due diligence at the time the property was acquired, and did not know or have reason to know that the property was or could have been contaminated.⁴

³ Small business entity must qualify as a small business concern within the meaning of the Small Business Act described in 15 U.S.C. §631 et seq. A non-profit entity must qualify within the meaning of §501(c)(3) of the Internal Revenue Code of 1996 and be exempt from tax under §501(a) of the Code during the taxable year preceding the date of transmittal of written notification of the potential liability and clean up. See 42 U.S.C. §9607(p)(1)(B) and (C).

⁴ See 42 U.S.C. §9607(q)(1)(A).

The most significant legal concern relating to this new contiguous property exemption involves the requirement to conduct the appropriate due diligence inquiry prior to acquiring the adjacent property.⁵ The specified level of appropriate due diligence which must be conducted prior to purchase may limit the usefulness of this exemption. It places a burden on the contiguous property owner to conduct this inquiry and not discover the latent contamination concerns as a necessary pre-condition for the contiguous property exemption.

It is likely that there are relatively few situations where conducting appropriate inquiry would not cause a discovery of the contamination that could give rise to the liability concerns. For this reason, this contiguous property exemption will have provided limited benefits to adjacent property owners.

- V. Prospective Purchaser Exemption. A new prospective purchaser exemption should be considered for purchasers who acquire contaminated property after January 11, 2002. In order to avail itself of this new property exemption, the prospective purchaser must meet all of the following requirements:
- A. Disposal of the contamination on the property must have occurred prior to the purchaser's acquisition of the property.
 - B. The person has engaged in all appropriate inquiry prior to acquiring ownership of the property.⁶
 - C. The person provided all legal required notifications to the government for the discovery of any releases of hazardous substances.
 - D. The person took reasonable steps to contain any hazardous substances discovered on the property.
 - E. The person provided full cooperation to governmental entities conducting the remediation on the property.
 - F. The person complied with any applicable institutional controls for the property.
 - G. The person complied with all information requests which may have been directed by the governmental authorities.
 - H. The person is not affiliated with other parties that may be potentially responsible parties by corporate relationship or contractual relationship.⁷

⁵ The appropriate due diligence inquiry that must be conducted is specified in 42 U.S.C. §9601(35)(B).

⁶ In particular, the person must conduct such appropriate inquiry which is generally accepted good commercial and customary standards and practices, which include the scope of inquiry defined in 42 U.S.C. §9601(35)(B). With regard to residential property, the extent of inquiry is much more limited, in that all that is required is a facility inspection and title search which reveals no basis for further investigation. See 42 U.S.C. §9601(40)(B)(iii).

This new prospective purchaser exemption provides an important new liability protection that should be considered for new owners of property. However, the exemption also creates some interesting legal issues. One of the most significant issues involves the scope of due diligence standard which must be satisfied as a necessary pre-requisite to obtaining the prospective purchaser exemption. In particular, there is some uncertainty about the extent of the environmental due diligence that is required for this new exemption. For example, if a Phase I audit identifies potential contamination concerns, would the prospective purchaser be required to conduct some additional sampling in order to adequately satisfy the due diligence inquiry? It is important to note that EPA is required to establish standards within the next two years to provide greater specificity for the nature and extent of the appropriate inquiry that must be conducted in order to take advantage of this new exemption.⁸

Even if the party qualifies for the prospective purchaser exemption, the property can be subjected to a “windfall lien” for the benefit of the government. In particular, if the United States conducts a response action at the property and has unrecovered response costs, a lien against the property is created to the benefit of the United States to the extent the response action increases the fair market value of the property.⁹

In any event, a purchaser involved in property transactions involving property that has a commercial or industrial history should include a consideration of this new exemption.

- VI. State Response Programs. There are some new changes to the federal law which preclude EPA enforcement where the party has already conducted response actions in accordance with applicable state law.¹⁰ This new provision is designated to blunt the overfiling concerns raised by the dual system of federal and state regulation for contaminated property.

It is important to note that EPA many nonetheless take administrative or judicial enforcement action at sites where the state is taking the lead for clean up in the following narrow situations:

- A. The state requests EPA’s assistance on this;
- B. EPA determines that the contamination has migrated or will migrate across state lines;

⁷ See 42 U.S.C. §9601(40).

⁸ In the interim, the American Society for Testing and Materials Standards for Due Diligence known as “Standard E1527-97” entitled “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process” will satisfy the all appropriate inquiry standard. See 42 U.S.C. §9601(35)(B).

⁹ See 42 U.S.C. §9607(r)(2).

¹⁰ See 42 U.S.C. §9628(b).

- C. Contamination has migrated onto federal property;
- D. EPA determines the site may present an imminent and substantial endangerment to public health or welfare; or
- E. EPA determines, based on newly discovered information, that the conditions at the site require further remediation.

This new bar for EPA to bring actions where the state is taking response actions under its applicable state law will provide important new protections for dual regulation of contaminated sites. In the past, parties have been concerned about EPA “over filing” on sites where the state is already taking clean up actions. This new prohibition of federal oversight will provide more significant protection for parties who want to rely on state exemptions such as under the Wisconsin Land Recycling Act.¹¹ This is an important new development, which should provide greater measure of protection and will provide encouragement for parties to redevelop contaminated properties where the state is taking the lead on clean up.

- VII. Settlement Reductions Based upon Limited Ability to Pay. The new federal reform legislation authorized EPA to exercise its discretion to reduce a party’s settlement liability based upon an inability to pay its allocated share of clean up liability.¹² In determining a PRP’s ability to pay, the EPA is required to take into consideration the ability of the party to maintain its basic business operations, including a consideration of the overall financial condition of the responsible party and constraints on that person to raise revenues in the business to cover its allocated share of liability.¹³

The PRP who attempts to take advantage of these new settlement provisions must be willing to provide the EPA with all relevant financial information required by the agency to assess that person’s financial resources.¹⁴

- VIII. Brownfield Funding Sources. The new federal reform legislation also provides \$1.25 billion for brownfield funding over the next five years. It is important to note that brownfield funding is not available for NPL sites and which are subject to administrative orders, court order, or judicial consent decrees.

There is a broad category of “eligible entities” for the brownfield revitalization funding. Generally speaking, “eligible entities” are include states, municipalities, and governmental and Quasi governmental entities.

¹¹ See Wis. Stat. §292.15.

¹² See 42 U.S.C. §9622(g)(7).

¹³ See 42 U.S.C. §9622(g)(7)(B).

¹⁴ See 42 U.S.C. §9622(g)(7)(C).

Governmental entities and property may seek grants for remediation of up to \$200,000 (available up to \$350,000). In addition, loans may be made available to the qualifying governmental entities to private owners or site developers. In addition, the governmental entities can make grants to other eligible entities for remediation or site assessment activities.

In determining whether grants under the new brownfield funding program are warranted, EPA must consider a number of specified factors for ranking applicants.¹⁵ It is also important to note that the brownfield revitalization grants can be utilized for purchasing environmental insurance for qualified sites.¹⁶

IX. Importance of New Federal Reform Legislation. The new federal legislation provides many new initiatives which serve to reduce liability for qualifying entities under the federal superfund law as well as provide more fairness to the liability scheme under the federal superfund law. In particular, the new federal legislation provides reduced risk for over filing by federal agencies where the state is providing adequate clean up direction. The new prospective purchaser exemption is a new benefit that should be considered by purchasers of potentially contaminated property in the future. In addition, there are many new federal sources of brownfield funding which must be considered by eligible governmental entities as well as private developers. Also, the new federal legislation provides new liability exemptions at superfund sites, including the demicromis and municipal solid waste exemptions. Finally, the federal reform legislation codifies and authorizes EPA's exercise of discretion to consider ability to pay in settlement for responsible parties in superfund sites.

C. **INSURANCE PRODUCTS FOR BROWNFIELDS REDEVELOPMENT.**

Some of the primary concerns in any brownfields transaction are the potential liabilities associated with the investigation and remediation of known contamination, the potential of future claims for unknown contamination and the potential of third party claims for property damage or bodily injury due to known or unknown contamination at the site. There are two major environmental insurance products that can be used to fix the cost of known liabilities and provide protection against unknown future liabilities. These products are commonly referred to as Remediation Cost Cap and Pollution Legal Liability ("PLL") policies.

I. Environmental Remediation Cap Insurance (a/k/a Remediation Stop Loss Insurance or Remediation Cost Cap). These policies allow an insured to cap the costs of remediating known contamination, by indemnifying the insured for cleanup costs, as defined in a remedial action plan, that are above the expected cleanup costs. The insured generally assumes costs up to a certain projected value, as well as a level of self-insured retention or participation percentage and the insurer covers cost overruns to a certain policy cap. Cost Cap policies can also be used to facilitate cost sharing among multi-parties at a site. Because the risk regarding

¹⁵ See 42 U.S.C. §9604(k)(4)(C).

¹⁶ See 42 U.S.C. §9604(k)(4)(D).

cleanup costs at a site is reduced, the parties can focus on determining their respective shares of liability.

- (1) Covers unexpected cost overruns associated with investigation, remediation and/or monitoring of the property.
- (2) Usually include a retention amount of 10-30% of the estimated cleanup cost.
- (3) Co-payment can be used to lower premium. Typically 20-25% of the policy limit.
- (4) Policy limits are usually set at some multiple of the estimated cleanup cost.
- (5) Policy period is usually the same as the time estimated to complete the remediation. Note, the insured should ensure that policy period is sufficient to cover any possible time overruns encountered during remediation.
- (6) Premiums are dependent on many factors. Typically in the range of 3-6% of the estimated remediation cost.

II. Pollution Legal Liability (First and Third Party Liability Coverage) (a/k/a environmental impairment insurance). These policies provide coverage for first party (where no actual claim has been made against the insured but environmental laws require action) and/or third party (where a claim has been made by the government or other third party) coverage. Coverages are often segregated into numerous policy sections or may be made available in different policies.

- (1) Covers the long-term liabilities associated with contaminated properties including undiscovered and new contamination and third party liabilities (i.e., bodily injury, property damage or cleanup responsibility) both on and off site.
- (2) Deductible (retention) typically \$10,000 - \$100,000 per claim.
- (3) Policy limits are variable based on potential maximum magnitude of loss, risk tolerance of insured and other requirements. Can be as high as \$100 million.
- (4) Policy period can vary, but 5 – 10 years is typical. Second policy period can be guaranteed at some percentage of original premium provided claims do not exceed a specified amount in the first policy period. Longer coverage terms provide advantages of not having to undergo underwriting for additional policy periods. Longer policy terms also remove the risk of not being able to obtain a new policy at a reasonable price if additional conditions are discovered at the site, the insurance market changes or environmental laws change during the policy period. However, since there are aggregate caps for coverage, it is necessary to make sure that sufficient coverage exists for the full length of the policy. Moreover, the insurance market has recently become somewhat more conservative with regard to PLL policies making multi-years policies more difficult to obtain.

- (5) Premiums are variable dependent upon site history and conditions, documentation (how extensively the site has been studied), risk transfer mechanisms (e.g., indemnities, covenants not to sue, statutory relief), and the terms of the policy.

PLL policies have a number of distinct advantages in brownfields transactions including the following:

- (1) Use in property transfers. This coverage is probably most attractive in property transfer situations, where a buyer plans to take property with suspected but unknown contamination problems. If properly negotiated, it can serve as a substitute for indemnification from the seller with respect to at least some of the preexisting conditions at the site. It should be noted, however, that these policies likely may not provide coverage for known conditions where closure has not been obtained (remediation cap insurance may be used for these known conditions) or for compliance issues. These policies may allow a transaction to go forward with less testing on site, which may substantially lower the risk to the seller.

NOTE: While environmental impairment coverage is often most useful in transactional settings, it should be noted that it often takes at least two weeks to obtain a quote from an underwriter and longer to negotiate appropriate provisions in the policy. Accordingly, it is important that, if insurance is to serve as a vehicle for promoting a transaction or other time sensitive event, insurance be obtained early in the process.

- (2) Use as replacement for seeking voluntary certification or closure. In situations where the time, investigation and remediation necessary to obtain closure or certification make those options unattractive, environmental impairment insurance may be helpful. Moreover, the insurance may provide protections substantially beyond those obtainable via certification or closure, since it can protect against federal and common law claims as well as WDNR state statutory claims. However, unlike closure or certification, the insurance is limited in time.
- (3) Use to make property more attractive to potential developers. In addition to or in place of obtaining voluntary party certification, closure or other governmental protections, an owner of developable brownfields property may wish to obtain first- and third-party liability coverage as a means of making property more attractive to potential developers.

III. Specialized Policies. There are also a number of commercially available “specialized policies” that can be used to cover specific environmental concerns.

- (1) Asbestos Abatement. Coverage for bodily injury and property damage resulting from asbestos abatement operations.
- (2) Asbestos Containment. Coverage for building owners from liability due to a release of asbestos in the building.

- (3) Closure/Post Closure. Coverage for closure/post closure requirements, e.g., UST or RCRA facilities. May satisfy financial assurance requirements.
- (4) Contractors Pollution Liability. Provides coverage to contractors for claims made as a result of contractor's activities on a client's site.
- (5) Transportation Spill Liability. Coverage for cleanup liability and third party claims arising from a spill or incident occurring during transportation.
- (6) Secured Creditor. Coverage for lenders from cleanup liability and third party claims for which the lender may become liable as a result of a default.
- (7) Storage Tank Pollution. Coverage for corrective action and third party claims due to a release from storage tanks (above or below ground).

D. KENOSHA/AMERICAN BRASS - FACILITY BROWNFIELD DEVELOPMENT STRATEGY.

I. Background.

- A. Former American Brass Foundry.
 - (1) 100 year history as a foundry.
 - (2) 29 acres.
- B. Current ownership/status of property.
- C. Property is vacant.
- D. Known soil and groundwater contamination.

II. Pre-Negotiation Strategy.

- A. Potential condemnation with municipal exemption liability for clean up.
- B. Potential cost recovery for remediation necessary to support residential redevelopment.
- C. Estimated cost difference for industrial vs. residential remediation was in excess of \$15 million.

III. Negotiated Agreements.

- A. Offer to sell.
- B. Remediation Agreement.

- C. Property Conveyance Settlement Agreement.
- D. Pollution Legal Liability Select Clean-up Cost Cap Insurance Policy.

IV. Summary of Deal.

- A. City takes title to property.
- B. City pays fixed amount.
- C. Prior owners pay fixed amount.
- D. Consultant's responsibilities:
 - (1) Decontaminate and demolish buildings.
 - (2) Assume baseline clean-up obligation in perpetuity.
 - (3) 30-year insurance policy.
 - (4) Benefits are assignable to future site owners.

V. The Remediation Contract.

- A. Building Demolition.
- B. "Baseline Remediation" (negotiated standard for clean-up).
- C. Consultant indemnification obligations.
- D. Developer benefits.

VI. Property Conveyance, Settlement Agreement & Release.

- A. Land transfer to the City.
- B. City releases and indemnifies former owners.

VII. The Insurance Policy.

- A. Ensure that Consultant performs its clean-up.
- B. Premium for insurance policy included in total price of the deal.
- C. 30-year term.
- D. No deductibles.

VIII. Coverage.

- A. Insurance coverage.

- (1) On-site and off-site clean-up for pre-existing contamination.
- (2) Third party claims for off-site clean-up.
- (3) Remediation cost cap insurance.

B. Insureds – Consultant, City, former owners, and future owners and developers.

IX. Redevelopment Strategy.

- A. City retained Urban Land Institute for unbiased mater plan for site.
- B. ULI prepared a comprehensive suggested development plan with full public input.
- C. Bid process for redevelopment.
- D. Case Study – American Brass

Photos from American Brass Site:



Other Examples of Redevelopment Work:

City of Kenosha Harbor Park



City of Oshkosh Universal Foundry



Kenosha Unified School District



Quad/Graphics West Allis Facility

