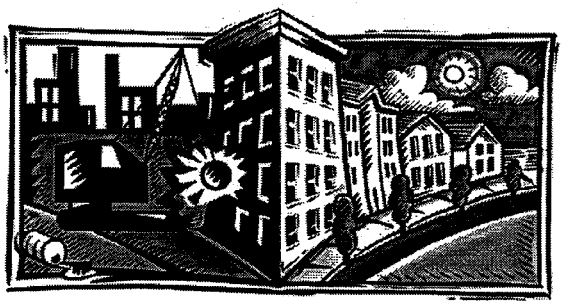


Liability Protection for Local Governmental Units and Economic Development Corporations

Wisconsin Department of Natural Resources

RR-579 Fact Sheet 7 January 2000

This replaces Fact Sheet 7, "Liability Protection for Local Governmental Units and Certain Economic Development Corporations", published January 1998.

INTRODUCTION

In the past 10 years, municipalities across the country have experienced a new type of growth. Instead of expanding outward, churning greenspaces into suburbs, developers, commercial property owners and homeowners are beginning to relocate to rural and urban centers, redeveloping land that was once considered permanently abandoned.

Integral to this new growth is the cleanup and redevelopment of brownfields sites. "Brownfields" are defined as abandoned or under-utilized properties where the cleanup and redevelopment is hindered by real or perceived environmental contamination.

There are thousands of brownfields properties located in Wisconsin, with many in need of local cleanup and redevelopment assistance. However, even when local governmental units (LGUs) have the authority to acquire such properties, officials are reluctant to do so because of concerns about potential environmental liability.

For some communities, brownfields properties are seen as a resource which communities can redevelop to increase tax revenues and employment opportunities. Brownfields redevelopment can also mean an increase in open space and recreational areas for residents and nonresidents alike.

In the past, LGUs and Economic Development Corporations (EDCs) that acquired contaminated property, even if they

In This Fact Sheet

did not purchase it, were considered responsible under Wisconsin's Hazardous Substance Discharge Law, known as the Spill Law (S. 292.11, Wis. Stats.), because they "possessed" or "controlled" the contaminated property.

As a result, they were required to investigate and clean up the contamination. The Land Recycling Law (1994) and the 1997-1999 state budget removed this liability and created incentives for LGUs and certain EDCs to redevelop property depending upon how the property is acquired.

The 1999-2001 state budget expands the definition of an LGU as well as eligibility for a liability exemption to the Spill Law and creates a cost recovery statute for LGUs.

LIABILITY EXEMPTION FROM WISCONSIN'S SPILL LAW

If an LGU acquires property through tax delinquency, bankruptcy proceedings, condemnation, eminent domain (according to Ch. 32, Wis. Stats.), escheat, for slum clearance or blight elimination, by using Stewardship funds, or from another eligible LGU, the LGU is not responsible to investigate or clean up a hazardous substance discharge at the property.

This exemption from liability protects a municipality unless the spill is caused by an action taken by the municipality or failure of the municipality to take "limited actions" to prevent further spills.

Those limited actions include:

- restricting access to the property in order to minimize costs or damages that may result from unauthorized persons entering the property;

A Local Governmental Unit (LGU) *means any city, town, village, county, county utility district, town sanitary district, public inland lake protection and rehabilitation district, metropolitan sewage district, certain types of redevelopment authorities, certain types of public bodies designated by a municipality, a community development authority, or a housing authority.*

- sampling and analyzing unidentified substances in containers stored above ground on the property;
- removing and disposing or properly storing any hazardous substances in above ground containers that are leaking or likely to leak; and
- immediately reporting the presence of hazardous substances on the property to the DNR.

HAZARDOUS WASTE EXEMPTION

The 1999-2001 state budget included a new liability exemption for LGUs. State statute s. 292.24, Wis. Stats., exempts LGUs from certain hazardous waste requirements with respect to hazardous waste discharges on property acquired "involuntarily" (as described in the previous section of this fact sheet) if all the following conditions have been met:

- an investigation is conducted that identifies hazardous waste discharges and that is approved by DNR;
- hazardous waste discharges are cleaned up;
- the LGU received an approval from the DNR that the

hazardous waste has been satisfactorily cleaned up;
- the LGU maintains and monitors the property;
- the LGU did not cause the hazardous waste discharge; and
- a hazardous waste treatment, storage, or disposal facility did not operate on the property after the date that the LGU acquired the property.

Notification by LGU of Discharge on Property Owned by the LGU

Regional DNR offices routinely send Responsible Party (RP) letters to persons who cause or possess a hazardous substance discharge when the DNR is notified of the discharge.

If you are an LGU that qualifies for the LGU exemption to the Spill Law contained in s. 292.11(9)(e), Wis. Stats., you should not receive an RP letter. If you think you are exempt under the LGU exemption, it would be in your best interest to notify the DNR.

Once an LGU has informed the DNR that it qualifies for the exemption, the DNR will send a standard letter to the LGU outlining the LGU's responsibilities, including information on what the LGU is responsible for if it develops or uses the property.

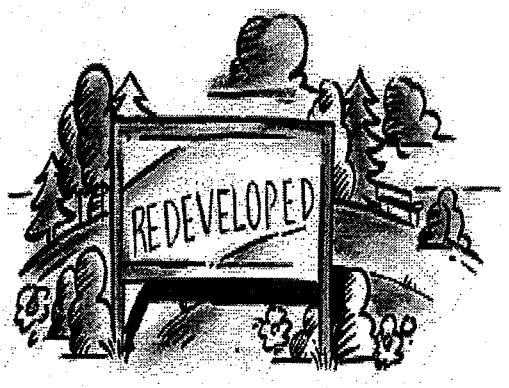
Federally Regulated Underground Storage Tanks

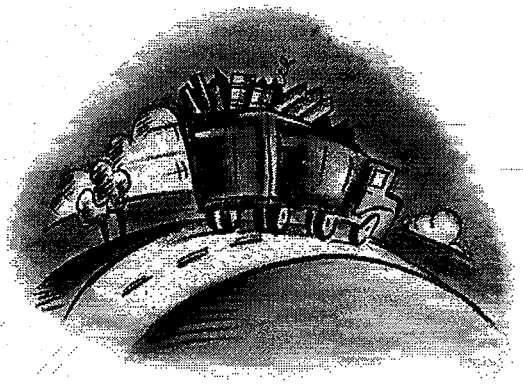
In the past, the LGU exemption from the Spill Law did not apply to discharges from a federally regulated underground storage tank. The 1999-2001 state budget changes the exemption to include properties where a discharge was from a federally regulated underground storage tank. However, LGUs are still responsible under Department of Commerce rules for removing abandoned underground storage tanks. Please see *Underground Storage Tanks: Clarifying Local Governmental Unit's Responsibility to Remove Tanks on Property They Own*, Fact Sheet 8, publication #RR-627, for more information.

Redevelopment for Private Use

An LGU may wish to investigate and remediate existing contamination on a property and then offer the property for sale, or may choose to offer the property for sale to a third party that intends to conduct the necessary investigation and remediation. In either case, the liability protections offered under the LGU exemption are <u>not</u> transferable.

However, Wisconsin law offers incentives to attract future private party development. A private party that acquires a property from an LGU can enter the Voluntary Party Liability Exemption (VPLE) process. The voluntary party can then conduct the necessary investigation and remediation of the discharged hazardous substances to receive a certificate of completion (COC).





A certificate exempts the voluntary party from future liability under most provisions of the Spill Law as well as certain hazardous and solid waste laws. The COC is also transferable to any eligible future owner of the property. Please see *Voluntary Party Remediation and Exemption from Liability*, Fact Sheet 2, publication #RR-506, for more detailed information.

REDEVELOPMENT FOR PUBLIC USE

If an LGU intends to retain possession of a property and develop or use that property, s. 292.11(9)(e)4, Wis. Stats., applies. This provision says that if an LGU or EDC qualifies for the LGU exemption and decides to develop or use the property, the DNR may determine that action is necessary to reduce any substantial threat to public health or safety that may exist from that use. The LGU or EDC would then need to work with DNR staff to reduce the threat to acceptable levels.

Situations in which the DNR could require an LGU that intends to use or develop a property to conduct additional environmental sampling include the following:

- when the DNR has a reasonable belief that a substantial threat to public health or safety may exist when the property is used or developed; based upon existing information or information it has collected, the DNR may ask the LGU to collect data to confirm or rule out that concern; and
- if the LGU asks for a General Liability Clarification Letter under s. 292.55, Wis. Stats.; this letter states that the DNR does not expect to direct action based on the intended use or development of the property; the DNR can ask for an investigation sufficient to make that determination.

The DNR has authority to direct the LGU to take action to reduce threats to public health or safety to acceptable levels if the intended use or development of the property is related to a new or pre-existing substantial threat to public health or safety.

The determination to direct action will be made on a case-by-case basis. Examples include:

- if the LGU intends to develop the property as a park, and significant soil contamination on the site would pose a direct contact or inhalation threat when the property is used as a park, the DNR has the authority to direct the LGU to take action to eliminate that threat; the LGU would then have to reduce the threat to acceptable levels;
- if the intended use or development includes demolition of a building or surface that serves as a cap that prevents direct contact, the DNR has the authority to direct the LGU to replace

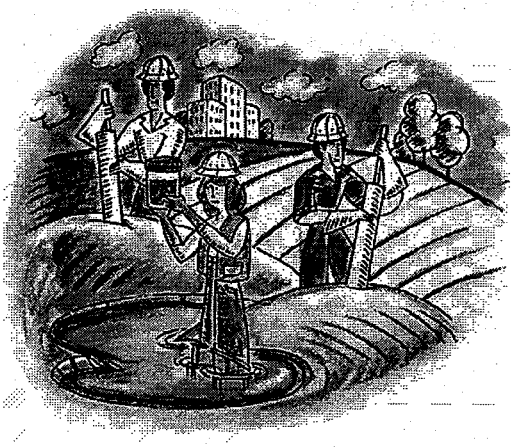
the building with a suitable cap if uncapped contamination would threaten public health or safety; and

- if soil contamination is currently contributing to contamination of a nearby well, and the proposed development would further contribute to that contamination by increasing infiltration, the DNR has the authority to direct the LGU to develop the property in a manner that avoids this result.

If an LGU declines to take action directed by the DNR and continues with its intended use or development, the exemption is no longer in effect and the DNR then has the authority to undertake enforcement actions against the LGU at the property.

Local Government Cost Recovery

The 1999-2001 state budget created a new mechanism to help LGUs recover costs of environmental cleanup on properties the LGU acquires involuntarily. If an LGU acquires property through tax delinquency, bankruptcy proceedings, condemnation, eminent domain (according to Ch. 32, Wis. Stats.), escheat, for slum clearance or blight elimination, by using Stewardship funds, or from another eligible LGU, the LGU is authorized to take action to recover costs it incurs in investigating and cleaning up a property on which a hazardous substance has been discharged (s. 292.33, Wis. Stats.).



This action may be initiated against one or more of the following persons: 1) a person who causes or caused the discharge of a hazardous substance on the property; and 2) a person who, at the time the property is acquired by the LGU, possesses or controls the hazardous substance that was discharged on the property.

If the person that caused the discharge is not known or financially able to pay for all or a portion of the costs, the LGU may recover those costs from the person from whom the LGU acquired the property.

If a responsible party that caused the discharge is known and able to pay all or a portion of the costs, the person that last possessed the property before the LGU acquired the property is only responsible to pay any costs not recoverable from the persons that caused the discharge of the hazardous substance.

An LGU cannot recover costs from a responsible person who qualifies for an exemption under the Spill Law. The LGUs can recover the following reasonable and necessary costs that it incurs:

- investigating environmental contamination on the property and planning remedial activities;
- conducting remedial activities to restore the property for its intended future use;
- administering the investigation or remedial activities; and

- bringing the cost recovery action, including costs, disbursement and engineering fees, but not attorney fees.

Recoverable costs are reduced by the fair market value of the property after completion of the cleanup activities. In addition, if an LGU that recovers costs received any state funds for the investigation, remediation and administration of the investigation or remedial activities – other than state-funded response program funds under the hazardous substance spills and environmental repair statute – the LGU is required to reimburse the state for those granted funds.

A cost recovery action by the local government has to be started within six years after the date the local government completes the remedial activities.

Local governments could use the cost recovery procedures instead of or in addition to the existing negotiation and cost recovery procedures laid out in s. 292.35, Wis. Stats. This negotiation and cost recovery procedures authorize LGUs to negotiate with parties responsible for hazardous substance spills to allow those parties to share the costs of, and cooperate in, cleanup action on contaminated land owned by the LGU.

This provision also applies to landfills owned by LGUs. This process is conducted with the help of an umpire but without direct involvement in the negotiations by the DNR or the Wisconsin Department of Justice.

Inspection Ability

To assist Wisconsin taxing authorities – which are counties and the City of Milwaukee – in determining the nature and extent of environmental contamination, state law authorizes these parties to conduct an environmental inspection of properties if a tax certificate has been issued (for nonpayment of property taxes or other special taxes or assessments).

This inspection authority allows a county or the City of Milwaukee to investigate the property before taking title so local officials can make informed decisions during tax delinquency proceedings.

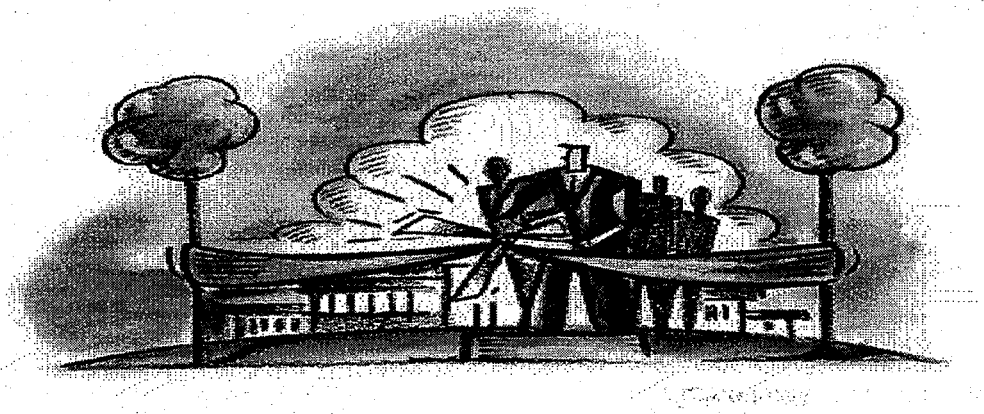
Local governments other than counties or the City of Milwaukee must have an access agreement or a warrant from a judge before performing an inspection on property they have not yet acquired. However, there may be other mechanisms to access the property through – local ordinances, slum and blight proceedings, etc. – and local officials should consult an attorney about these legal recourses.

Civil Immunity

According to state law, an LGU is immune from liability related to the discharge of a hazardous substance from property formerly owned or controlled by the LGU if the LGU acquired the property through the following methods: tax delinquency, bankruptcy proceedings, condemnation, eminent domain, escheat, for slum clearance or blight elimination, by using Stewardship funds, or from another eligible LGU.

Economic Development Corporations

Certain Economic Development Corporations (EDCs) are exempt from the Spill Law if the property is acquired to further the economic development purposes that qualify the EDC as exempt from federal taxation. However, EDCs have specific



responsibilities in order to maintain an exemption from the Spill Law.

- First, EDCs must respond to a discharge of a hazardous substance on or originating from the property that poses an imminent threat to public health, safety or welfare or to the environment.

- Second, EDCs must enter into an agreement with the DNR to conduct any necessary investigation and remediation activities at the property no later than three years after acquiring the property.

- Finally, EDCs must allow the DNR, any authorized representatives of the DNR, responsible parties and any consultant or contractor of such a party to enter the property if necessary to take action to respond to the discharge.

U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA) LIMITS MUNICIPAL LIABILITY FOR SUPERFUND

In addition to state law, there are liability protections under the federal law, called the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also know as Superfund.

MUNICIPAL EXEMPTION UNDER CERCLA

According to the Superfund law (Section 101(20)(D) of CERCLA), a "unit of state or local government which acquired ownership or control *involuntarily* through bankruptcy, tax delinquency, abandonment or other circumstances in which the government *involuntarily* acquires title by virtue of its function as a sovereign" is not considered to be an "owner" or "operator".

This exemption does not apply to a municipality that caused the spill. A municipality should ensure that it does not cause or contribute to an actual or potential release at a property that it has acquired involuntarily.

In October 1995, the EPA issued a policy clarifying that when a municipality acquires property through tax delinquency, foreclosure, demolition lien foreclosure, escheat, abandonment, condemnation, or eminent domain, *the municipality will not be held liable for contamination by the federal Superfund program.*

This policy was adopted as law in the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996. The

exemption also applies to municipalities that acquire property from a county that took the property through an involuntary action. Although tax foreclosure and other acquisitions of property by municipalities often require some action by the LGUs, they are still considered to be "involuntary acquisitions". The EPA has concluded that it is not necessary for the municipality to be completely passive in order for the acquisition to be considered "involuntary" for purposes of CERCLA.

THIRD-PARTY DEFENSE TO CERCLA LIABILITY

Often under Superfund one private party sues another to obtain money to assist with cleanup costs. This is known as a "third-party" lawsuit. A municipality that acquires property involuntarily, or through the exercise of eminent domain by purchase or condemnation, can be protected from the "third-party" liability under CERCLA, if they meet certain minimum requirements.

COMMON QUESTIONS AND ANSWERS

ACQUISITION

Q1. Does the way in which an LGU acquires property affect environmental liability exemptions under state or federal law?

A1. Yes. The liability exemption from the Wisconsin Spill Law applies for LGUs that acquire property through tax delinquency, bankruptcy proceedings, condemnation, eminent domain, escheat, for slum clearance or blight elimination, by using Stewardship funds, or from another eligible LGU.

If an LGU acquires property "involuntarily" through tax delinquency, foreclosure, demolition, lien foreclosure, escheat, abandonment, condemnation, or eminent domain, the LGU cannot be held liable under federal law for contamination.

Q2. Can an LGU acquire a property through one of the eligible means stated above and not do any of the investigation or cleanup if they don't intend to resell the property?

A2. Yes. As long as the LGU does not cause or exacerbate a discharge of a hazardous substance, the LGU is exempt under the Spill Law. The LGU needs to consider possible contamination on the property and whether or not the contamination would preclude the specific planned use of the property. The LGU should work with local and state health departments as well as the DNR to ensure that the use of this property is protective of public health, safety, and welfare.

Q3. What if the LGU wants to reuse the property?

A3. An LGU may retain possession of a property and develop or use that property as long as the LGU makes sure the reuse of the property poses no substantial threat to public health or safety. If the DNR determines that there is a substantial threat to public health or safety, the DNR may direct the LGU to take action to reduce that threat, and if the LGU does not take that action as directed, the LGU liability exemption does not apply.

Q4. What are some of the issues LGUs might consider before acquiring contaminated properties?

A4. Local officials should consider risks associated with leaving the property unattended rather than acquiring the property:

- *injury to trespassers;*
- *unpaid taxes accumulate;*
- *neighboring property values reduced; and*
- *visual eyesore.*

Officials should also consider the way in which a property is acquired since it affects liability issues (see questions #1-2), whether liability issues exist under environmental laws other than the Spill Law and whether liability exists for harm to persons or property.

Other environmental laws to consider include but are not limited to hazardous waste laws. For instance, if a barrel containing hazardous waste is found on the site, it must be properly disposed. Also, consider all costs associated with cleaning up the property versus leaving it contaminated.

Q5. Is the LGU exemption transferable to a private party?

A5. No. The local government exemption is not transferable. However, Wisconsin law offers incentives to attract future private party development. When a private party acquires such a property from an LGU, the party can work through the DNR's Remediation and Redevelopment (RR) Program and enter the Voluntary Party Liability Exemption (VPLE) process.

The voluntary party can then conduct the necessary investigation and remediation of the discharged hazardous substances to receive a Certificate Of Completion. A COC exempts the voluntary party from future liability under most provisions of the Spill Law as well as certain hazardous and solid waste laws. The COC is also transferable to any eligible future owner of the property.

Q6. Is the LGU exemption transferable between LGUs?

A6. Yes. If an LGU acquires property from another eligible LGU, they are not responsible to investigate or clean up a hazardous substance discharge at the property. This exemption from liability protects a municipality unless the spill is caused by an action taken by the municipality or failure of the municipality to take "limited actions' to prevent further spills (for a definition of "limited actions," please see page 2).

FUNDING

Q7. If an LGU acquires property and decides to clean it up, what funds could they use?

A7. There are a range of grants, loans and tax incentives that an LGU can use to help pay for brownfield redevelopment. The *Financial Resource Guide to Redevelopment* (publication #RR-539), is available from the DNR to help you identify resources for funding a cleanup or redevelopment.

Q8. Can a county forgive back taxes to encourage a developer to purchase contaminated, tax delinquent property?

A8. Yes. Counties and the City of Milwaukee have statutory authority to forgive either a portion or all back taxes owed on a property, plus interest and penalties, when an environmental investigation indicates that the property is contaminated. Before the taxes can be forgiven, the developer must present the county or the City of Milwaukee with an