

Notes Brownfields Study Group

Liability Subgroup Meeting – Tuesday March 25th

Michael Prager - DNR
Dan Kolberg - DNR
Louis Thorton - Foley
Mark Thimke- Foley
Andy Skwierawski - Friebert, Finerty & St. John
Margaret Brunette (on phone)
Matt Leffler - Axley
George J. Marek, Quarles & Brady
Karen Dettmer – City of Milwaukee
Roy Wittenberg – Natural Resource Technology
Jodie Peotter – True North Consultants
Bill Scott - Gonzalez Saggio & Harlan (on phone for part of meeting)
Josh Neudorfer - The Sigma Group
Jennifer Drury Buzdecky - Whyte Hirschboeck Dudek (on phone)
Ken Lassa – REI
Dan Kolberg - DNR

1:00 – 3:15

Introductions

Mark Thimke did introduction of group purpose and history, prepare issue papers and recommendations for full Brownfields Study Group meeting, goal is to have a report by Fall to Secretary of DNR, Legislature, DOA and Governor's office for budget. Schedule for report on Study Group webpage. Mark T. is chair of liability subcommittee – his goal is to get input from range of people, everyone welcome, anyone can participate anyone, but task people with assignments to research and write up issues. As we go over topics we are looking for volunteers.

Everyone may not always agree, everyone's views are important, dissenting opinions are ok

Goals to improve programs, laws and tools.

WI has well tuned cleanup programs, good but room for improvements, some times creative legal solutions can lead to other problems.

Range of issues

Mark T. - New issues have emerged since brownfields programs were created – not thought about before. Lenders change how they operate, LLCs, bankruptcies, etc.

PCB guidance out for draft for review, does it/ should it address demolition issues? Can the One Cleanup Program cover all PCB issues at a cleanup and demolition project?

Incentives for cleanup – look at other environmental programs, air permits

Summarized topics on the list

Look for volunteers, write up issues

List of topics

- **Private cost recovery statute**

Limited tools available, now for private party to compel another private party to do a cleanup/ or to get money from other responsible parties, RCRA citizen suit is an option to compel action. Art Harrington has brought this up for consideration. Should this be similar to the cost recovery provision currently available for Local governments ? Could be useful when State not aggressive enough.

Mark Thimke, not really a topic he thinks would be very useful/ important, if it is like Superfund contribution actions, costs are high, would they make lawyers money.

Josh N- schedule for redevelopment not consistent with cost recovery, how would it jive with VPLE

Andy S. / Ted W. were talking about this topic, we provide defense for people trying to cleanup their site. This could be an incentive, shake money tree, if one RP is at \$ disadvantage, without a private right of action, this could be useful to get other RP to come to table, or we will go to court, leverage

Volunteer to write up issue: Ted W. and Andy S.– volunteer write it

Dan K. – Local government cost recovery / cause of action is in law now, it is used to motivate RP to come to table and negotiate

Mark T. When local government cause of action was proposed by Study Group, WMC had concerns, there are some exceptions / protections in the local government one that you should look at for this, one is if you have an order signed, local government can't use it

- **Underfunded or single-purpose LLCs** – Mark – this sounds good but creates situation where otherwise responsible business uses artificial shield
- Roy W. – they often sit on property for a while without doing anything When they are used it is hard to pierce corporate veil

Mike P. – DNR experience with large industrial closures, paper mills, etc. LLC gets it and doesn't have money to do investigation, demolition and cleanup. Hard for DNR and city to get the site moving towards remediation and redevelopment. They may buy it on spec, may want to salvage scrap metal.

Dan K. – lender letters recently have been situations where banks create LLCs to own foreclosed property, LLCs are not lenders or not lending activities. Don't have protection.

Abandonment ways of insulating liability, Creative warehousing of property.

Karen D. – we have seen where assets are sold and the owner disappears

LLC would become liable – hard to pursue LLC for cleanup who got rid of assets.

Volunteer to write up issue: Mark T.– volunteer to help with Jodie and Roy W., Karen D., George M. and Bill Scott topic will include several related issues: LLCs, lender issues, plant closings, other???receiverships and bankruptcies-making sure sites are not abandoned????

- **Access** – challenges when RP needs access to neighboring sites to finish their cleanup work. Mark T, should we give state more authority? Make it easier to get access or warrant,\

Karen – for local governments – need different access for what you are doing, phase I, II, demolition, cleanup, etc. NOTE: access for local governments to brownfields will be addressed by local government subgroup.

Sometimes for groundwater or Vapor testing, neighbor doesn't want to allow for testing/ access. One problem with court warrants – DNR has to use DOJ, group decided we should focus mostly on access for private parties

Volunteer to write up issue: Louie T. volunteers to write up issue

- **Fine tune possess & control (292.11)** – In the spill law these are used. what is possession ? Dan K. – this has come up in context of lender exemption questions have come up. Dan examples of lender case in Oshkosh, did not take title but sold stuff, handled drums, etc. Jennifer B. – issue should be evaluated in context, lender, tenants, the group could recommend the DNR take a certain view. DNR provides Lease letters. Clarify dnr interpretations at future meeting, safe harbor position, clarify how DNR interest this issue in different contexts
- **Environmental Cleanup & Bankruptcy including abandonment/ ownership** – will be looked at as part of LLC issue??
- **Environmental Cleanup & Receivership including abandonment/ ownership** –Will be looked at as part of LLC issue??
- **Lenders liability exemption (292.21)**; several issues including how does the tool work now, how does exemption apply when lender puts property in LLC

Jennifer B. there are other issues regarding the lender exemption that have come up. Reporting obligations, when you have to sample, etc.

Lender exemption issues will for now be included in the LLC group.

- **Wisconsin v. Chrysler Outboard Corporation decision outreach** – you have immediate liability, but people shield liability with unique structures. Part of the LLC topic.
- **Delete s. 292.35** – it has only been used once or twice– Panzer created with M. Thimke, Jennifer used it too Waukesha – did not work easily, group agreed to recommend removing this from statute
- Other topics – a searchable database of letters and liability issues would help people. Mike P. explained recent changes to provide documents in BRRTS to be accessed.
- **Sediments and VPLE** (this overlaps with the Waterfront subgroup)- Mark T. summarized the issues, proposed VPLE options for sediments has already been discussed with Study Group and statutory changes are being introduced now, fixing 292.12 for sediment cleanups, what is soil what is sediment. Ordinary high water mark- put in statute. **Volunteer to write up issue:** Mark T. would volunteer to work on this one.

- **Landfills/ fill areas** – tools for DNR to limit environmental impacts and exposure from these sites and clear process and responsibilities for property owners and developers

Mike P. – There are several related issues, one issue, there is a regulatory grey area, regarding historic fill sites. Building on abandoned landfill process is fairly clear but how can DNR make sure unlicensed sites are closed properly, no direct contact issues. Also, some early listed landfills, hard for DNR to provide clear certainty that nothing else is needed.

Jennifer B. - When is exemption to build needed? Not always clear

Another issue raised regarding redevelopment of sites with fill. Who should work on it, DNR Waste or RR program. Some discussion about 2 programs overseeing this work.

Mark T. - not efficient – process.

DNR could share our experience with Building on Landfill process.

moving fill to another BF is issue that is being worked on

Josh N. – permitted landfills, landfill closure, different than RR closure. He has seen some challenging sites. Technical issues, too, subgroup look at 500.08 asphalt and wood, 718, creating new sites. What is fill, what is not. Jurisdictional issues, who at dnr should work on this. Margaret B. – in SER, Tom Wentland from DNR RR looks at every one. Consistent process. SER has engineer. We don't have many engineers in RR. *Tech sub committee will take up all these issues and group did not feel that any of these need to be looked at by this group.*

- **PCBs** – remediation and demolition and decommission – Mark T. One Cleanup Program agreement with EPA addresses role of DNR and EPA (because of TSCA), improvements to current agreement could be made

One cleanup program doesn't deal with demo issue. PCBs in Concrete, on floor. Not clearly part of one cleanup program for demo. This is important issue for brownfields, one cleanup program unique to WI, Giesfeldt worked hard on this and got DC EPA to approve it. Under agreement DNR is lead on many PCB cleanups. Don't have to deal with state and feds. However EPA can't delegate it to state. Strange situation, contaminated media handled differently. More of a technical issue.

- **Other topics**
 - **Environmental related Incentives to locate businesses on brownfields** - air or other permit help - Mark T. how do we make brownfield sites more competitive with other sites, we can use more Manufacturing, air laws, create incentives to located new manufacturing on BF. If you install state of the art air pollution equipment. Will meet DNR requirements for X years, maybe money, grants, low interest loans, provide known costs upfront, reduce uncertainty. Mark talked to DNR Air staff and they were luke warm because they are focused on permit streamlining right now, **Volunteer to write up issue:** Mark T and Josh N. and Jennifer B. volunteered to work on issue
 - Karen D. – would this be like WEDC certified sites where permits are not needed. Mark T. No, could be similar to the clean unit exemption that was not enacted in federal law/ need to consider federal overlay of clean air act. Karen D. – maybe waste water/ industrial. Josh. N. – Green tier? Maybe, low interest loans or grants induce people.
 - **Post-closure obligations / due care/ before closure** - who is responsible for post closure obligations due care? After discussion is was clear this issue can apply to sites that are not closed and to those that are. Incentives, liability, etc. letters of credit, etc. what type of situations, engineering controls, transparency for post closure obligations, Mike P. under 292.12, resonsbilty for post closure continuing obligations are clear. incentives for post care obligations, make sites competitive, is it a development impediment, Mike P. one problem is sites with large corporate RPs who don't want to sell or redevelop site ever, especially before closure. **Volunteer to write up issue:** Louie T. – issue paper , prepare paper
 - **Off-site liability exemption (292.13)** no issues to look at
 - **VPLE (292.15) – how can this be improved? Insurance for VPLE NA sites – any changes needed?**
Josh N. and others brought up discussion about splitting properties. How many fees, properties vs sites, what is covered. **Volunteer to write up issue:** Jennifer and Josh N.
- holistic how do we insure redevelopment can happen. Multiple issues, timing \$, etc. guidance, only has had a few experience. DNR will bring info about vple insurance
- **Protection from 3rd party lawsuits and VPLE-** Art Harrington has raised this, Mark T. has not seen much of this being a concern. Discussion about how

and why this would be an issue. Under state law – can you file suit, legally challenging to do this, could we do it? Who could sue for site that got closure? Makes claim, eats dirt, residential, Mark T. - state can't indemnify someone

- Louis T. – may invest lots of political capital to push this, is there a risk of any law suits after cleanup? Art Harington raised this for local governments – which is being discussed by local government group. Is it a priority? Group decided this is not issue at this time.

Next steps, 2 more meetings in next few weeks at least, volunteers will work on issue papers, ask Michael Prager for any help they need. Michael P will send out issue paper template. Mark will send out possible dates to the group and set up meetings, try to find dates when most people can make it, on maybe outside of Milwaukee and Madison.