Appendix G:

Wisconsin's Legal Opinion on Access and Ability to Secure Site if Loan Default

CORRESPONDENCE/MEMORANDUM

State of Wisconsin

DATE: November 30, 2006

TO: Darsi Foss—RR/3
Brownfields Section Chief

FROM: Judy Mills Ohm—LS/5 JMO
Legal Counsel

SUBJECT: Legal Opinion regarding application for Brownfields Revolving Loan Fund; Legal authority to access and secure sites

You have requested a legal opinion on the following question regarding your application for a Brownfields revolving loan fund from the United States Environmental Protection Agency ("USEPA"):

> Does the Wisconsin Department of Natural Resources ("WDNR") have legal authority to access and secure sites in the event of an emergency or default of a loan agreement or non-performance under a sub-grant?

My legal opinion on this question is as follows:

> **WDNR has the legal authority to obtain access to properties and to secure them in the event of an emergency or default of a loan agreement or non-performance under a sub-grant, in order to take environmental repair action at a site or facility, or if entry is necessary to prevent increased damage to the air, land or waters of the state.**
>
> WDNR has legal authority to obtain access to properties under ss. 292.11(8) and 292.31(3)(e), Wis. Stats. Section 292.11(8), Stats., provides as follows:
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> > **292.11 (8) Access to property and records.** Any officer, employee or authorized representative of the department, upon notice to the owner or occupant, may enter any property, premises or place at any time for the purposes of sub. (7) if the entry is necessary to prevent increased damage to the air, land or waters of the state, or may inspect any record relating to a hazardous substance for the purpose of ascertaining the state of compliance with this section and the management rules promulgated under this section. Notice to the owner or occupant is not required if the delay attendant upon providing it will result in imminent risk to public health or safety or the environment.
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> There is similar language in s. 292.31(3)(e), Stats., which relates to environmental repair actions at designated sites or facilities:
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> > **292.31 (3)(e) Access to property.** Any officer, employee or authorized

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representative of the department may enter onto any site or facility and areas surrounding the site or facility at reasonable times and upon notice to the owner or occupant to take action under this section. Notice to the owner or occupant is not required if the delay required to provide this notice is likely to result in an imminent risk to public health or welfare or the environment.

One of these two statutes would most likely apply in cases in which WDNR would make a loan or a grant under the revolving loan fund. WDNR could obtain access to any site or facility, under these statutes, to determine whether the site or facility is in compliance with the law regarding hazardous substance discharges, upon providing notice to the owner or occupant, in either emergency or non-emergency situations. If immediate access was necessary in order to prevent imminent harm to the environment, notice to the owner or occupant would not be required. In addition, if the owner of the property denied access to the property, WDNR has the authority to obtain a special inspection warrant in order to gain access to the property. This authority is found in s. 66.0119(2), Wis. Stats., which provides as follows:

> **66.0119 (2)** A peace officer may apply for, obtain and execute a special inspection warrant issued under this section. Except in cases of emergency where no special inspection warrant is required, special inspection warrants shall be issued for inspection of personal or real properties which are not public buildings or for inspection of portions of public buildings which are not open to the public only upon showing that consent to entry for inspection purposes has been refused.

Thus, WDNR would have the authority under these statutes to access and secure sites in the event of an emergency or default of a loan agreement or non-performance under a sub-grant. As lead agency of the Coalition applying for the Brownfields revolving loan fund, WDNR could use this inspection authority to ensure adequate program performance by other Coalition members, borrowers and subgrantees, if necessary.