Appendix H:

Legal Opinion Demonstrating Authority to Manager an RLF

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 manage a revolving loan fund

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 WDNR have legal authority to perform the actions necessary to manage a revolving loan fund, such as the ability to hold funds, make loans, enter into loan agreements and collect repayments?

My legal opinion on this question is as follows:

> **WDNR has the legal authority to perform the actions necessary to manage a revolving loan fund (such as the ability to hold funds, make loans, enter into loan agreements and collect repayments).**

After applying for the USEPA Revolving Loan Fund program in 2003, WDNR pursued legislation to allow it to administer a loan program, specific to the money it would receive through the USEPA Revolving Loan Fund program. The legislation passed, and s. 292.72, Wis. Stats., was created. That statute provides as follows:

> **292.72 Brownfields revolving loan program.**
> **(1)** The department may enter into an agreement with the federal environmental protection agency under which the department receives funds under 42 USC 9604 (k) (3) (A) (i) to establish and administer a brownfields revolving loan program. If the department receives funds under this subsection, it may make loans or grants for the remediation of brownfield sites, as defined in 42 USC 9601 (39), in accordance with the agreement.
> **(2)** At the request of another governmental entity, the department may administer funds received under 42 USC 9604 (k) (3) (A) (i) by the other governmental entity for the establishment of a brownfields revolving loan program.

In administering other grant programs, WDNR has utilized the authority under s. 66.0301, Wis. Stats., to enter into intergovernmental agreements with municipalities in order to disperse grant money to the municipalities. Sec. 66.0301, Wis. Stats., states that it is to be interpreted liberally in favor of cooperative action between municipalities (including the State and State agencies)

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and between municipalities and federally recognized Indian tribes and bands. The statute also provides that such agreements or contracts may include provisions for the deposit and disbursement of funds appropriated. The relevant provisions of the statute are as follows:

> **66.0301(2)** In addition to the provisions of any other statutes specifically authorizing cooperation between municipalities, unless those statutes specifically exclude action under this section, any municipality may contract with other municipalities and with federally recognized Indian tribes and bands in this state, for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law. If municipal or tribal parties to a contract have varying powers or duties under the law, each may act under the contract to the extent of its lawful powers and duties. A contract under this subsection may bind the contracting parties for the length of time specified in the contract. This section shall be interpreted liberally in favor of cooperative action between municipalities and between municipalities and Indian tribes and bands in this state.
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> **(3)** Any contract under sub. (2) may provide a plan for administration of the function or project, which may include but is not limited to provisions as to proration of the expenses involved, deposit and disbursement of funds appropriated, submission and approval of budgets, creation of a commission, selection and removal of commissioners, and formation and letting of contracts.

Since the legislation passed that authorizes WDNR to administer a separate loan program specific to the money it receives from the USEPA Revolving Loan Fund program, WDNR can utilize s. 66.0301, Wis. Stats., to enter into loan agreements with municipalities and federally recognized Indian tribes. The agreements can specify the terms of the loans, including how loan repayments would be made.

Applicants who are successful in obtaining a Revolving Loan Fund will be allowed to award some of the money as grants and some as loans. WDNR and the other members of the Coalition applying for the Revolving Loan Fund currently administer a number of Brownfield grant programs and loan programs. WDNR administers the following programs:

1. Brownfield site assessment grant (SAG) program under s. 292.75, Wis. Stats. This program provides grants to local governments from the appropriation under s. 20.370(6)(et) for the purpose of conducting environmental investigation of environmental contamination at eligible sites or facilities and conducting certain removal actions at those sites or facilities. Grant recipients must provide a minimum match of 20% of the amount of the grant. Each recipient is required to sign a contract that includes enforceable conditions and sanctions if the grantee does not meet the conditions of the program.
2. Brownfield green space grant program under s. 292.79, Wis. Stats. This program provides grants to local governments for projects to remedy environmental contamination of brownfields, if the project will have a long-term public benefit, including the preservation of green space the development of recreational areas, or the use of a property by the local government. Grant recipients must provide a match of 20% to 50% of the amount of the grant. Each recipient is required to sign a contract

that includes enforceable conditions and sanctions if the grantee does not meet the conditions of the program.

3. Land recycling loan program under s. 281.60, Wis. Stats. This program provides financial assistance (through loans) to local governments for projects to remedy environmental contamination of sites or facilities at which environmental contamination has affected or threatens to affect groundwater or surface water.

Wisconsin's Department of Administration ("WDOA") works with WDNR to administer the clean water fund program, safe drinking water loan program and land recycling loan program, which include revolving loan funds (s. 281.59(2), Wis. Stats.). These loan programs include authority to enter into financial assistance agreements with applicants, to collect repayments and to collect the amount of any unpaid loan balance by deducting that amount from any state payments due the municipality (s. 281.59(2) and (11), Wis. Stats.).

In addition to the WDNR grant and loan programs, two other Wisconsin State agencies administer grant programs relating to Brownfields. The Department of Commerce administers the Brownfields Grant program under s. 560.13, Wis. Stats. This program awards grants based on the potential of the project to promote economic development in the area, whether the project will have a positive effect on the environment, the amount and quality of the recipient's contribution to the project and the innovativeness of the proposal. Also, the Department of Administration administers a Coastal Management program, which awards grants to eligible projects that protect or improve water quality in counties along the shores of Lake Michigan and Lake Superior. Examples of eligible projects include projects relating to public access, waterfront redevelopment, cleanup of brownfields, preservation of wetlands and land use planning.

Thus, WDNR and the other members of the Coalition have the current legal authority to perform the actions necessary to manage USEPA's Brownfields Revolving Loan Fund, such as the ability to hold funds, make loans, enter into loan agreements, collect repayments, and collect the amount of any unpaid loan balance if the loan recipient defaults on the loan.