



Lease Letters: Clarifying Environmental Liability When Leasing Property

PUB-RR-620

July 2012

The State of Wisconsin has enacted a number of brownfields initiatives to encourage the redevelopment of properties where contamination is suspected or confirmed. One particular initiative allows the Department of Natural Resources (DNR) to issue **lease liability clarification letters**. For persons who lease property, these letters are intended to clarify whether or not the DNR would consider them liable for existing contamination on the leased property. The overall intent of this provision is to encourage productive use of these properties, yet continue to require those responsible for the contamination to conduct appropriate investigation and cleanup actions.

BACKGROUND

Most investigations and cleanups in Wisconsin are undertaken pursuant to the Hazardous Substance Spill Law, s. 292.11, Wis. Stats. This law requires a person who “possesses or controls” a hazardous substance which is discharged, or who “causes” a discharge of a hazardous substance, to take the actions necessary to restore the environment to the extent practicable and to minimize the harmful effects of the discharge.

Under certain circumstances, persons who lease contaminated properties may be held responsible for cleaning up the property because they “possess or control” the hazardous substance discharge.

Section 292.55, Wis. Stats., allows the DNR to clarify whether a tenant would be considered to “possess or control” the discharge of a hazardous substance under the Spill Law. If certain conditions are met, the DNR will issue a letter to the tenant clarifying that the DNR would not consider them responsible for existing contamination merely by virtue of their status as tenants.

Tenants may still be held liable under the Spill Law if they caused or contributed to the existing contamination, take actions that exacerbate the degree or extent of existing contamination, or cause or contribute to a new hazardous substance discharge on the property.

The letters are designed only to assure tenants who had no role in causing or contributing to the existing contamination on the property that they will not be held responsible by the DNR for cleaning up that contamination.

GUIDANCE

This fact sheet was developed to help tenants and owners of contaminated properties to understand: (1) the purpose of the lease letter; and (2) the steps they must take and site-specific conditions they must meet to acquire the letter. While the availability of each letter will be based on property-specific information, the following questions and answers should provide general guidelines for determining when a person is eligible for the letter, the criteria they must meet and the procedures they should follow.



Wisconsin Department of Natural Resources
P.O. Box 7921, Madison, WI 53707
dnr.wi.gov, search “brownfield”



1. What types of discharges does the lease letter address?

A hazardous substance must be discharged to the property, either to groundwater or soil. Hazardous substances are broadly defined, and include any substances which pose a substantial present or potential hazard to human health or the environment. Examples of what constitutes a discharge include leaking underground storage tanks, industrial spills or dumping of hazardous substances.

2. Who can request the lease letter?

Any person, either the lessor (owner) or the lessee (tenant), can request the letter regarding a particular lease. This includes: individuals, governmental bodies, corporations, partnerships or associations. However, the lessee cannot have caused or be in any way responsible for the existing contamination.

3. What site-specific factors will the DNR evaluate in determining whether a person caused, possesses or controls a hazardous substance discharge at a property they intend to lease?

The DNR will generally evaluate the following to determine whether or not to issue a lease letter:

- whether the person caused the discharge of the hazardous substance on the property either individually or as the owner of a business or entity, which includes a subsidiary or parent corporation – persons who cause the discharge are liable for the contamination;
- current information regarding the existence and extent of any hazardous substance discharges on the property;
- whether the person would exercise “control” of activities on a property, such as the lease of an underground storage tank, that could result in the discharge of a hazardous substance;
- whether the person agrees to provide reasonable access to the property to any persons responsible for the discharge, their consultants, and the DNR – access may be required for environmental testing and/or remediation; and
- whether the person agrees to minimize, to the extent practicable, the placement of any structures in areas of the property impacted by environmental contamination or in areas that would prevent the conduct of any investigative or remedial work.

4. How does a person obtain a lease letter?

A person may request a lease letter by using Section 4 of DNR’s [Technical Assistance and Environmental Liability Clarification Request form \(# 4400-237\)](#) and including the fee and information listed under the lease liability clarification:

- a copy of the proposed lease;
- the name of the current owner of the property and the person who will lease the property;
- the lease holder’s association with any persons who have possession, control, or caused a discharge of a hazardous substance on the property;
- map(s) showing property location, and any suspected or know sources of contamination detected on the property;
- all reports or investigations (e.g. Phase I and Phase II Environmental Assessment Reports) that identify areas of the property where a discharge has occurred; and
- a description of the intended use of the property by the lease holder with reference to the maps to indicate which areas will be used. Explain how the proposed uses will not interfere with any future investigations or cleanup efforts at the property.

5. What information about the hazardous substance discharge should be submitted to make the determination that a person would not possess or control that contamination under a lease?

The information that should be submitted to the department to determine whether a person would possess or control a hazardous substance discharge under a lease will vary depending on the nature and extent of the discharge and the proposed use of the property. Ordinarily, a Phase I and Phase II Environmental Assessment, or equivalent information, will be sufficient for the department to make the determination.

In some instances, more extensive information on the degree and extent of contamination may be necessary. In addition, the person should show that no changes have occurred at the site since the investigations were conducted which may have resulted in a discharge.

6. What is a Phase I and Phase II Assessment?

Briefly, a Phase I Environmental Assessment documents the historical uses of a property and identifies areas of the property where contamination may be present. A Phase II assessment involves sampling for contaminants in those areas identified in the Phase I where contamination may be present. The RR Program fact sheet entitled *Selecting An Environmental Consultant* (publication #RR-502) provides useful information on how to find a consultant qualified to conduct these investigations. For more information on Phase I and II environmental assessments, please contact program staff at the DNR's regional offices (phone numbers listed at the back of this fact sheet).

7. Who may compile the information about the hazardous substance discharge?

Either the owner (lessor) or the tenant (lessee) of the property may compile the information about the hazardous substance discharge. What is important for both parties is that the information compiled is complete. The lease letters only provide clarification for the lessee that he/she would not be considered to "possess or control" contamination that is known to the DNR.

For the owner, complete documentation of the contamination that exists on the property will protect him/her from liability for discharges that are caused by the tenant. For the tenant, complete documentation will protect him/her from liability for contamination that the tenant did not cause and did not possess or control under the lease.

8. What if no discharges of hazardous substances are documented on the site?

Generally there is no need to obtain a lease letter if there are no environmental issues at a site. If there is no documented discharge at a property but you suspect contamination may be present, provide that information with your application.

9. What if a person who receives a lease letter later refuses to allow access to the leased property?

The lease letter will be conditioned upon granting the DNR and parties responsible for a discharge access to the property. Allowing the DNR, the responsible parties and their consultants to have reasonable access to the property is necessary to ensure that the contamination is cleaned up. If access is denied, the DNR may determine that the lessee is exercising "control" over the hazardous substance and may be liable for investigation and cleanup of any hazardous substance discharges on the property.

10. Is the lease letter transferable to subsequent lessees?

No, the letters are not transferable between parties. When a subsequent tenant would like a letter clarifying whether the DNR considers them liable for contamination on the property, that person will need to request a letter from the DNR and provide the information and fee necessary for the DNR to issue him or her a new lease letter.

FOR MORE INFORMATION

Questions should be directed to the brownfield specialist in your local DNR regional office - dnr.wi.gov/topic/Brownfields/Contact.html

You can also find additional information about lease letters, liability and other contaminated property issues through the RR Program's web site at dnr.wi.gov/topic/brownfields/.

This document contains information about certain state statutes and administrative rules but does not necessarily include all of the details found in the statutes and rules. Readers should consult the actual language of the statutes and rules to answer specific questions. The Wisconsin Department of Natural Resources provides equal opportunity in its employment, programs, services, and functions under an Affirmative Action Plan. If you have any questions, please write to Equal Opportunity Office, Department of Interior, Washington, D.C. 20240. This publication is available in alternative format upon request. Please call 608-267-3543 for more information.