

Lessons Learned

Wisconsin's Evaluation of its Institutional Controls Program

"Achieving a Comprehensive, Statewide Institutional Control Information System
for Broad Use by the General Public"

PUB-RR-869

EPA Grant # RP00E48201

January 29, 2010



Wisconsin Department of Natural Resources
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January 29, 2010

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Subject: Wisconsin's Institutional Controls Grant Report and *Lessons Learned*

Dear Ms. Cragan:

We are pleased to present you with the Wisconsin Department of Natural Resources' (WDNR's) third grant report for our institutional controls (IC) grant using federal 128(a) funds. This report covers the time period from July 2009 through December 31, 2009.

In this report WDNR has compiled *Lessons Learned* about implementation of ICs in Wisconsin during the time covered by the grant. We hope these lessons will be helpful to EPA and to other states. In summary, these lessons are:

Lesson 1. The sky is not falling, institutional controls without UECA

Wisconsin IC law is not based on the Uniform Environmental Covenants Act (UECA), but responsibility for an IC clearly attaches to a purchaser. WDNR is required to maintain a publicly accessible data system of all properties with ICs, which contains property-specific IC documents. In the three and one-half years since the legislation WDNR has experienced no legal concerns in regard to its implementation of the law.

Lesson 2. They don't care until they care

WDNR has informed lenders, realtors, developers and others about its comprehensive, on-line IC data system. The lesson learned is that local government officials, lenders, developers and realtors were too busy to absorb generic information about IC information they might need in the future, since they do not encounter contamination at the majority of real estate transactions.

Lesson 3. How environmental professionals earn their keep

Lesson three is the corollary to lesson two. Public and private brownfield activists have their own IC strategy - they turn to private environmental consultants with experience in technical, liability and financial issues. WDNR recognizes the essential role of private professionals in brownfield cleanup and redevelopment and welcomes continued partnership with these experts.

Lesson 4. Where's the (lean) beef? Savings under Wisconsin's IC system

Wisconsin's comprehensive on-line data system is updated daily with information about brownfields, including ICs. This IC information, including PDF records defining property-specific ICs, offers these savings:

- Users may access information at any time and find everything in one place.
- The system is sustainable. No traveling is required and the state doesn't need to copy records.
- Local governments have no unfunded mandates to identify or enforce ICs.

Lesson 5. Let's be comprehensive, loads of on-line information

WDNR's comprehensive IC data system works because:

- All Appropriate Inquiry requires checking "state and tribal institutional control/engineering control registries". WDNR's on-line data is one of these registries.
- WDNR's on-line data system is updated daily and easy to navigate.
- WDNR has staff dedicated to outreach about its cleanup and redevelopment program, including ICs.

Lesson 6. What about residential properties?

WDNR focused its outreach about ICs on commercial property transactions for these reasons:

- The higher likelihood of contamination at commercial properties,
- Wisconsin's residential real estate disclosure law, which protects residential purchasers through a mandatory *Real Estate Condition Report*, and
- Few effective methods to reach the public at the time of a property transfer.

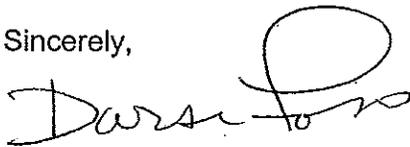
This grant report also describes:

- Wisconsin's current law governing ICs,
- Benefits of the current IC program,
- WDNR's comprehensive, on-line IC data system,
- Previous efforts to develop effective IC programs in Wisconsin,
- Statewide outreach efforts to increase understanding of ICs, and
- Procedural improvements to WDNR's IC program.

In this report WDNR has identified the remaining work to fully earn the IC grant. These activities will include continued implementation of the IC procedures described in the report, especially "catching up" on previously approved cleanups that meet the current definition of an IC.

We sincerely thank Region 5 EPA for your support of our institutional controls review. WDNR believes it has implemented the best possible IC program for Wisconsin's citizens

Sincerely,



Darsi Foss, Chief, Brownfields and Outreach Section
Bureau for Remediation and Redevelopment

cc: David Lloyd, EPA Headquarters
Joe Dufficy, EPA Region 5
Glynis Landers, EPA Region 5
Tim Cooke, WDNR

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- A. Background

Purpose of the institutional controls grant

The Wisconsin Department of Natural Resources' (WDNR) goal in seeking this grant was to evaluate its comprehensive institutional control (IC) program. WDNR's program provides detailed information about all Wisconsin properties with environmental ICs on the internet, including a "packet" of portable document format (PDF) pages with the site-specific requirements for each property (see "Lesson 4 on page 7 for a list of documents). In particular, WDNR assessed Wisconsin's current procedures, which use neither deed restrictions nor Uniform Environmental Covenants Act (UECA) model legislation. Further, the WDNR assessed

how well its on-line IC system was known to and used by the real estate industry, developers and planners to make land-use decisions. WDNR believes that the lessons learned by Wisconsin may be useful to other states, tribes and agencies.

Wisconsin law on institutional controls

On May 19, 2006, Wisconsin Governor Jim Doyle signed legislation that amended [s. 292, Wis. Stats.](#) to provide incentives that promote cleanup and reuse of contaminated properties. Proposed by the Wisconsin [Brownfields Study Group](#), this legislation had wide support, including Wisconsin Manufacturers and Commerce, 1000 Friends of Wisconsin, the Wisconsin Counties Association, Wisconsin League of Municipalities, Alliance of Cities, Wisconsin Chapter of the National Brownfields Association, City of Milwaukee, Dane County, Wisconsin Economic Development Association, Wisconsin Realtors Association, Wisconsin Petroleum Marketers, American Council of Engineering Companies in Wisconsin, Alliant Energy and the Wisconsin Departments of Commerce, Agriculture and Natural Resources. The law became effective on June 3, 2006.

The legislation changed the way Wisconsin implements closures, or environmental cleanup approvals, when they include ICs to address residual contamination. The state no longer relies on deed restrictions to ensure that conditions placed on a property at the time of closure are maintained over time. Instead, the state utilizes specific statutory authority to institute ICs that carry forward to all subsequent property owners. WDNR is mandated to make these property-specific conditions available on the internet, and WDNR also uses the internet to explain that current and future property owners must comply with these legal responsibilities.

The legislation did not change the environmental situations where the state requires ICs. The three general situations are:

1. When there is a requirement to maintain an engineering control.
2. When a physical structure inhibited full investigation of the contamination, and further investigation and/or cleanup must be completed if the structure is removed.
3. When the state imposes other limitations (e.g., closure approval with industrial soil standards) and the property use subsequently changes.

Wisconsin's ICs are called "continuing obligations" and they accomplish:

- 1) public notification about residual contamination,
- 2) reduction of human and natural resource exposure to contamination, and, when necessary,
- 3) require or restrict certain actions to protect public health and the environment.

B. Lessons Learned about Institutional Controls

Lesson 1. The sky is not falling, institutional controls without deed restrictions or UECA

WDNR requested the May, 2006 change to state statutes covering ICs after considering three other, less successful, options described below. In the three and one-half years since the legislation, WDNR has experienced no lawsuits or contested case hearings in regard to its implementation of the new law.

Wisconsin has clear statutory authority placing the responsibility for ICs on the current property owner, similar to other environmental laws, e.g. RCRA Part B permits and solid waste licenses. This responsibility remains with the property and attaches to the new owner when ownership changes. It also applies regardless of regulatory jurisdiction, important in Wisconsin where some cleanups are overseen by other state agencies - the Departments of Commerce (low priority petroleum tank leaks) and Agriculture, Trade and Consumer Protection (agricultural chemicals). The law requires WDNR to maintain an internet data system of all properties with ICs and interested parties need not search for individual paper records such as deed restrictions. This data system includes detailed state letters spelling out the specific conditions that must be maintained on each property to ensure that residual contamination is properly managed.

[s. 292.12, Wis. Stats](#) reads:

(2) AGENCY AUTHORITY. The agency with administrative authority may do any of the following as a condition of approving remedial action or of issuing a case closure letter if residual contamination remains on a site after the conclusion of remedial action at the site:

- (a) Require maintenance of an engineering control on the site.
- (b) Require an investigation of the extent of residual contamination and the performance of any necessary remedial action if a building or other structural impediment is removed that had prevented a complete investigation or remedial action at the site.
- (c) Impose limitations or other conditions related to property, in accordance with rules promulgated by the department, to ensure that conditions at the site remain protective of public health, safety, and welfare and the environment, and, as applicable, to promote economic development.

(3) DATABASE. (a) The department shall maintain a database listing sites for which remedial action has been approved or a case closure letter has been issued and that have residual contamination and listing sites for which the department has directed that action be taken under s. 292.11 (9) (e) 4. The department shall make the database available to the public. The department shall include any requirements, limitations, or conditions imposed under sub. (2) (a) to (c) in the database...

A checkered background: Other, less-than-successful, IC methods Wisconsin has tried or considered:

Method A. [Digger's Hotline](#)

Diggers Hotline is a non-profit organization established to prevent damage to utilities and to protect public health and the environment. Anyone planning to dig in Wisconsin is required by law (s. 182.0175, Wis. Stats.) to contact Diggers Hotline three working days before digging. The hotline arranges for the participating services to mark the locations of their utilities. The service is supported by the participating industries, including telephone companies, petroleum transmission companies, electric and natural gas providers, cable television providers, sewer districts, municipalities and state agencies.

Well drillers are required to contact WDNR's water program for well construction instructions prior to constructing a well in areas of contaminated groundwater. However, they lacked an efficient mechanism to identify those locations. WDNR elected to participate in Digger's Hotline to remedy this situation and provided the geo-locations of groundwater contamination to the hotline.

WDNR subsequently received all notifications for proposed underground work, not just well installations, due to standard operating procedures at Digger's Hotline. WDNR believed it could easily screen out the non-well locations, but problems arose when the hotline notified WDNR of very broad geographic areas where digging was planned. Because the hotline had been developed to protect utility lines that extended for many miles, WDNR was notified of proposed digging far from sources of contamination, sometimes miles away. This turned into hundreds of requests for WDNR to identify groundwater contamination each month, many more times than contamination actually existed. WDNR was required to pay for every notification that it received, and subsequently dropped its participation in Digger's Hotline.

Method B. Deed restrictions

Prior to the 2006 change in the IC law, Wisconsin used property law and deed restrictions to create public records regarding residual contamination. Three primary problems arose:

1. Deed restrictions could not always be implemented.

Under Wisconsin law, only a property owner may record a deed restriction. WDNR reviewed requests for case closure (cleanup approval) and allowed a person responsible for residual contamination to record a restriction regarding the residual contamination in order to obtain case closure. Two issues arose from this practice:

- Some property owners decided to forgo both the deed restriction and the cleanup approval because no property transaction was anticipated. The state could not force the deed restriction and could not take enforcement because the cleanup had been performed. The public was unable to locate a clear public record showing whether a new property owner would be responsible for cleanup. The state also lost fees that would have been paid to review the closure request.
- Sometimes the person responsible for cleaning up contamination was not the property owner, such as when a fuel oil company overfills a tank. The fuel company could complete an approvable cleanup, but fail to obtain case closure if the property owner refused to record a deed restriction.

2. Locating and understanding a deed restriction may be difficult.

Legally recorded deed restrictions are available in Tract Indices at Register of Deeds offices in county courthouses, open during regular business hours on weekdays. While title insurers know how to locate these records, it can be difficult for others. For example, a deed record without a clear description could be filed under a miscellaneous listing. Those unfamiliar with the legal jargon might have difficulty understanding a deed restriction even after they found it. In addition, while deed restrictions are recorded with the title, an environmental deed restriction does not impact ownership of the property (clear title), so its impact may not be understood. Finally, a title insurer's document of commitment to insure the title is the tool that advises a prospective purchaser of deed restrictions. It is one of many papers signed during a real estate closing, and may not be read or understood at that critical time.

3. Deed restrictions were impediments to property transactions.

WDNR undertook significant outreach efforts to inform realtors, lenders and developers that Wisconsin allows some residual contamination to remain after cleanup of a contaminated property, and that environmental deed restrictions were a standard practice in this situation. Nonetheless, in a largely rural state like Wisconsin, small town lenders could view a deed restriction as a significant defect on the property when reviewing a loan application for redevelopment of a brownfield, and decide not to grant the loan.

Method C. Uniform Environmental Covenants Act (UECA)

The National Conference of Commissioners on Uniform State Laws prepared the Uniform Environmental Covenants Act (UECA), model legislation for states that is intended to remove legal barriers to implementing IC. Essentially, UECA was designed to ensure that ICs are maintained as long as necessary to protect human health and surrounding property. However, WDNR believes the complex procedures in UECA are not necessary to implement ICs in Wisconsin. Members of WDNR's Brownfields Study Group concurred that experience in other states showed UECA to present these difficulties:

1. UECA does not cover all off-site impacts

It is fairly common for contamination to extend across property lines. UECA may be utilized where more than one private property is involved, but fails to cover public properties such as city streets owned by a municipality. Not only are these public areas likely to become contaminated due to their proximity to manufacturing and transportation activities, they are also likely to be disturbed in the future as road repairs and expansions are undertaken.

In contrast, Wisconsin's IC law places publicly owned property into the public IC database along with private properties. In addition, responsible parties are required by administrative rule to notify a municipality when an IC is proposed as part of a cleanup that extends onto a public right-of-way. For example, the Wisconsin Department of Transportation receives and records these notifications, and tells its road contractors to plan for the residual contamination when they are awarded a contract for road construction or repair.

2. UECA can not be "sized" for minor impacts

UECA involves a legal restraint on a contiguous property. While this makes sense as a tool to ensure that ICs are maintained after changes in property ownership, it also means that a property transaction covering a 100 acre industrial property is complicated by a petroleum spill that affected .2 acres. There is no reduction in the legal and administrative procedures based on the size or significance of the contaminated area.

While Wisconsin's IC law starts with the same concept - identifying ICs by property regardless of property size or the significance of the discharge - the extensive on-line information, including the site-specific PDF documents, makes it easy to determine the location, size and significance of the contaminated area, the nature of the IC (including inspection and maintenance requirements) and who to contact in order to request state approval to change an area covered by an IC to accommodate redevelopment.

3. UECA may make it difficult to modify or remove an IC

No legal representation is necessary to modify an IC in WDNR's system. Instead, an interested party may simply contact WDNR's project manager, listed in the database, with a request. WDNR requires a fee to process these requests.

For example, an IC may require maintaining a "cap" of pavement over contaminated soil, but the owner may need to construct a new building in that area. The owner may work with a private environmental consultant to review the state file and recommend whether contaminated soil should be removed for a foundation, could remain in place and be capped by the new building, or whether both solutions may apply in part. The state would review this

proposal and amend or remove the IC. If an owner subdivides a property and wants an uncontaminated parcel removed from the IC data system, the owner may request a fee-based general liability clarification letter from WDNR regarding the uncontaminated parcel, following a demonstration of the legal division of the property.

Based on the experiences described above, WDNR worked with state legislators to pass the IC legislation requested by WDNR in May, 2006. This legislation both strengthened the responsibilities of Wisconsin landowners for maintaining ICs regardless of changes in ownership, and mandated that the WDNR maintain an on-line, searchable data system for properties with ICs.

Lesson 2. They won't care until they care

Under this grant, WDNR undertook a concerted effort to inform lenders, realtors, developers and others about [CLEAN](#), the Contaminated Lands Environmental Action Network, WDNR's extensive on-line data system that includes ICs. WDNR expanded its web pages explaining ICs ("continuing obligations" in Wisconsin), met with interest groups (see grant accomplishments below), spoke at local government conferences and provided information in its two widely read electronic newsletters. The lesson learned is that local officials, lenders, developers and realtors are enormously busy people who do not encounter contamination at the majority of the real estate transactions they undertake. With the plethora of other issues involved with commercial property transactions, they were politely disinterested in general information that they *might* need in the future.

Lesson 3. How environmental professionals earn their keep

The corollary to Lesson 2 above is that most local government and real estate professionals have their own strategy when they encounter contamination issues during property transactions. They turn to private environmental professionals with whom they have established a working relationship. Most smaller local governments trying to redevelop their brownfields can not afford the time or expense of training their limited staff on the many technical and legal aspects surrounding the assessment, acquisition, funding, cleanup and redevelopment of contaminated properties. Instead, they turn to professional consultants. Realtors, lenders and developers generally take the same approach. Please see Lesson 5a) for more information regarding how environmental professionals are directed toward WDNR's on-line system of ICs.

WDNR will continue to help these parties negotiate brownfield redevelopment without the expense of hiring private environmental professionals. However, private professionals provide an essential service, having expanded their scope to include redevelopment advice in addition to their historic technical services. WDNR endorses Wisconsin's public-private brownfield partnership that includes these private consulting services as well as state and local governments. In fact, the highly effective and proactive Wisconsin [Brownfield Study Group](#) is a prime example of this partnership.

Lesson 4. Where's the lean beef? Savings under Wisconsin's IC system

The information in *CLEAN*, Wisconsin's comprehensive on-line brownfield data system, provides up-to-date information about ICs 24 hours a day, plus significant background information about the nature of the contaminants and approval of various cleanup steps. The public may access this information at any time from any location. The system also offers a GIS application with maps of property locations.

This extensive on-line data system offers these savings:

- a) Realtors, developers and lenders may easily access information at any time and find everything in one place. WDNR's *CLEAN* system includes ICs at environmental cleanups approved by other state agencies - Commerce (low priority petroleum tank leaks) and Agriculture, Trade and Consumer Protection (agricultural), as well as cleanups conducted under federal authority.
- b) It's sustainable. Private and public parties can find pertinent information on-line instead of traveling to state or local government offices to review files. The state need to respond to far fewer record requests and provide paper copies. *CLEAN* provides an extensive packet of downloadable portable document format (PDF) records, including:
 - An explanatory cover sheet,
 - A checklist summarizing the information to be found in the PDF packet,
 - The state's case closure approval that specifies the legal requirements on current and future property owners to inspect and maintain the IC,
 - The property's deed,
 - A map showing the portion of the property covered by the IC, and
 - Summary data showing the types and levels of residual contaminants.
- c) Local governments have no unfunded mandates to enforce ICs or to respond to information requests. The responsibility is on the state to maintain the on-line data system, as well as to ensure that property owners maintain their ICs over the long term.

Lesson 5. Let's be comprehensive, loads of on-line information

WDNR's *CLEAN* data system is Wisconsin's information source for all properties with environmental ICs. (Please read the grant accomplishments section to learn more about *CLEAN*). This comprehensive data system is effective for the following reasons:

- a) The federal All Appropriate Inquiry rule (40 CFR, Part 312) and ASTM International's E1527-05 *Standard Practice for Environmental Site Assessments* lead readers to state information systems. Specifically, section 8.2.1 of 40 CFR calls for checking "state and tribal institutional control/engineering control registries". WDNR's *CLEAN* system is one of these.
- b) In addition to its on-line property information, WDNR has provided explanatory [web text](#) informing Wisconsin citizens of the role of ICs in environmental cleanups, the responsibilities of property owners, and how to find property-specific ICs in *CLEAN*.

- c) The *CLEAN* data system is easy to navigate and provides a glossary, instructions, disclaimers and a bulk data download feature. WDNR is constantly upgrading its system. In addition to daily data uploads, WDNR has initiated an extensive rebuild that will visually highlight ICs as well as streamline finding downloadable documents.
- d) WDNR's Remediation and Redevelopment Program has staff that are dedicated to outreach and carry out broad efforts to inform current and potential users of *CLEAN* about its contents and provide tips for users. Please see part C, Grant Accomplishments, for more information on this topic.

Lesson 6. What about residential properties?

Throughout its efforts to provide comprehensive information regarding ICs, WDNR considered additional outreach to those involved in non-commercial (residential) real estate transactions. For example, throughout the 1990s a spate of leaking home heating oil tanks were identified. These incidents clearly fall under WDNR's regulatory jurisdiction and the *CLEAN* data system includes all residential contamination incidents known to WDNR.

In addition, Wisconsin's residential real estate disclosure law, s. 709.02, Wis. Stats., protects the interests of those purchasing residential property by mandating these disclosures prior to sale on the *Real Estate Condition Report form*:

- I am aware of underground or aboveground fuel storage tanks on or previously located on the property.*
- I am aware of a defect caused by unsafe concentrations of, or unsafe conditions relating to, radon, radium in water supplies, lead in paint, lead in soil, lead in water supplies or plumbing system, or other potentially hazardous or toxic substances on the premises.*
- I am aware of the presence of asbestos or asbestos-containing materials on the premises.*
- I am aware of a defect caused by unsafe concentrations of, unsafe conditions relating to, or the storage of, hazardous or toxic substances on neighboring properties.*

This residential real estate disclosure requirement serves those residential property purchasers who have not consulted *CLEAN*. These additional factors led WDNR to focus on commercial real estate transactions:

- There is a low number of residential sales that involve contaminated property, and
- WDNR lacks additional effective means to reach the general public at the time of a property transfers.

C. Grant Accomplishments

Accomplishment 1.

We can build it, a comprehensive on-line database

WDNR's comprehensive, searchable statewide public records show all confirmed contamination incidents reported to the state. Our data system is [CLEAN](#), the Contaminated Lands Environmental Action Network. While *CLEAN* itself was developed prior to the time period covered by WDNR's IC grant, during the grant period WDNR improved the display of ICs. *CLEAN* holds almost 70,000 site-specific public records that are refreshed daily, including:

- The locations of on-going and completed cleanups,
- Timely information about spill incidents and responses,
- Liability exemptions and clarifications,
- Brownfield grants and loans,
- Approvals to redevelop on abandoned landfills,
- Locations where WDNR determined that no investigation or cleanup was required, and, of course,
- The location and nature of ICs.

The system is a successful format for displaying ICs because:

- The ASTM Phase I standard requires checking "state and tribal institutional control/engineering control registries",
- Commercial lenders require Phase I assessments of commercial and industrial properties,
- It is accessible 24 hours a day from any location,
- A property can easily be removed from the database upon demonstration that conditions have changed,
- It summarizes cleanup steps completed on specific dates, and, most importantly,
- It holds a packet of PDF information that includes:
 - An explanatory cover sheet,
 - A checklist summarizing the information to be found in the PDF packet,
 - The state's case closure approval that specifies the legal requirements on current and future property owners to inspect and maintain the IC,
 - The property's deed,
 - A map showing the portion of the property covered by the IC, and
 - Summary data showing the types and levels of residual contaminants.

During this grant period, WDNR added these specific "action codes" that are displayed at sites with the relevant ICs:

- Soil cleaned up to industrial land use requirements
- Cap of pavement of soil required to prevent direct human contact
- A structural impediment impeded cleanup, more work needed if structure is removed
- Potential for vapor migration, mitigation may be needed for future construction
- Site-specific IC (defined in the cleanup approval letter)
- Local government owner is exempt from cleanup requirements, more work needed if ownership changes

Accomplishment 2. Outreach Activities Completed:

Accomplishment 2a.

Discussions with interest groups

WDNR met with the following groups to learn more about customer needs in regard to public information about ICs.

August 15, 2006, Wisconsin Land Title Association (WLTA)

(This meeting pre-dated the grant period and is included here for background information only.)

WDNR met with the legislative committee of the WLTA regarding the recent change to Wisconsin IC law. With the law change, WDNR stopped using deed restrictions recorded at county Register of Deeds' offices and instead placed IC information in *CLEAN*, WDNR's on-line data system. Title insurers are one of the primary users of county deed records.

WLTA said that title insurers nationwide use a standard policy from the American Land Title Association that defines the public records used for title insurance searches. These records are in the Tract Indexes at county courthouses. Searching the chain of title in the Tract Index is the basis for offering a commitment to insure the title, which lists all relevant chain of title information regarding deed restrictions, easements, liens, etc. WLTA acknowledged that few buyers not represented by a diligent real estate attorney read or understand their title insurance commitment.

The title insurance industry definition of the public record does not include on-line databases such as WDNR's, and WLTA noted that purchasers may rely on the title insurance commitment to identify environmental issues. Nonetheless, when determining whether contamination is present at commercial property, commercial property buyers usually are required by their lender to conduct environmental due diligence and engage a private environmental consultant for this purpose. Consultants follow the ASTM Phase I assessment standard which requires checking state IC registries such as *CLEAN*.

In summary, the change in law that placed WDNR's ICs on the internet instead of at the courthouse removed this information from the chain of title. Because title insurance commitments were poorly understood as a mechanism to identify environmental ICs, WDNR believes its current on-line system offers better information, including maps, data tables, IC maintenance requirements, etc. 24-hours per day. WDNR needs to continue to help those involved with real estate transactions understand its value as an information source.

January 20, 2009, meeting with members of Wisconsin's Brownfields Study Group

WDNR met with Nancy Frank & Chris De Sousa at the University of Wisconsin at Milwaukee. Nancy Frank is an associate professor of Urban Planning and a member of DNR's Brownfields Study Group. Chris De Sousa is an associate professor of geography and co-director of UWM's Brownfields Research Consortium. The purpose of the meeting was to discuss WDNR's IC grant from EPA. The topics discussed included:

- Wisconsin's title search procedures;
- An outreach strategy focusing on property with commercial and industrial history rather than residential property;
- The structure of the property information in WDNR's on-line data system;
- The importance of WDNR's web mapping (GIS) function within *CLEAN*, because redevelopment may occur after changes to property lines and street addresses;
- The importance of WDNR's on-line maps of contaminated areas. De Sousa said his research illustrates the difficulty in finding areas of residual contamination years after redevelopment;
- Determining whether WDNR can enlist those who issue building permits to help applicants learn about the locations of ICs; and
- The importance of WDNR's discussions with commercial realtor and developer organizations.

February 10, 2009, Wisconsin Realtors Association (WRA)

WDNR met with the Director of Regulatory and Legislative issues of WRA and asked how it can most effectively help realtors find environmental information about properties in WDNR's *CLEAN* data system. Brokers of commercial properties need information about ICs, but identify properties in ways that WDNR does not, such as by parcel number. WDNR was offered the opportunity to provide an article for the Realtors Association monthly newsletter. See Attachment A for this article.

WDNR was advised that commercial real estate attorneys and commercial lenders are the two groups that would typically "drive" due diligence searches (Phase I and Phase II assessments) into the environmental condition of a property. WDNR subsequently contacted the Wisconsin Department of Regulation & Licensing to help update the state's commercial real estate offer-to-purchase form so that it includes a reference to WDNR's on-line data system.

WDNR inquired about a lack of inquiries from the real estate industry regarding the 2006 legislation that authorized WDNR to use on-line data rather than deed restrictions to record ICs. This most likely reflects the fact that this change is not yet widely understood in the industry. WRA related that on at least one occasion a property owner did not know about an IC on a newly purchased property until WDNR contacted the owner while performing an IC audit.

WDNR requested that WRA provide links on its web site to WDNR's property information, and WRA subsequently added the following web links:

- o [DNR's Remediation and Redevelopment Program](#)
- o [CLEAN – Contaminated Lands Environmental Action Network](#)
- o [Brownfields - Redeveloping Contaminated Property](#)
- o [Brownfield Legislation & Land Use Controls](#)
- o [Continuing Obligations to Protect Public Health and the Environment](#)

April 8, 2009, Commercial Association of Realtors, Wisconsin developers (NAIOP Wisconsin)

WDNR met jointly with members of both of the above groups during their legislative affairs day meeting and provided a brief demonstration of its *CLEAN* data system. The WDNR representatives noted that while many realtors and developers will naturally turn to private environmental consultants for contamination problems, *CLEAN* is designed to provide "step one" information, i.e. "Does DNR have any contamination records for this property?"

WDNR also noted that the distinction between "open" (ongoing) cleanups and "closed" (completed and approved) cleanups is becoming outmoded as residual contamination and post-closure ICs become increasingly common. It's important for realtors and developers to understand the completed and approved cleanups may have continuing legal obligations, such as a requirement for the property owner to contact WDNR before demolishing a structure that served as a "cap" over contamination. The *CLEAN* data system may be consulted by anyone at any time for IC information.

WDNR also said that another important tool for realtors and developers can be a liability clarification letter, which for \$500 provides WDNR's answers to specific liability questions. This is one method by which WDNR helps property owners and developers figure out how to manage residual contamination within a property redevelopment plan.

The discussion among the attendees included the fact that commercial lenders almost always require a Phase I environmental site assessment, and that private consultants that are completing the Phase I will check DNR's on-line data. Attendees also discussed whether finding a property in WDNR's database triggers a duty to disclose a defect under real estate law, and concluded that it did. One member pointed out that WDNR should attempt more outreach to lender associations.

Following the meeting, the developers group added this link to its web site:

WDNR Provides info regarding Redeveloping Brownfields
[WDNR Redeveloping Brownfields](#)

WDNR also requested and received these links in the weekly on-line *Commercial Real Estate News* edition of the *Milwaukee Business Journal*:

[DNR brownfield services](#)
[DNR contaminated property database](#)

In addition, WDNR provided an article about ICs for the Summer, 2009 newsletter of the Wisconsin City/County Management Association. This article (Attachment B) was titled *Brownfields Redevelopment: 5 ways to Benefit Your Economy and Environment*.

Accomplishment 2b. Other Outreach Activities Completed:

As part of its IC grant activities, WDNR completed a new fact sheet on the requirements for ICs ("continuing obligations") in Wisconsin. This [fact sheet](#) (Attachment C) is designed to be mailed to those property owners whose environmental cleanups include ICs.

WDNR also completed comprehensive [web pages](#) (Attachment D) that:

- Describe what types of ICs are used in Wisconsin,
- Emphasize that ICs remain in place when property owners change,
- Describe how to find ICs in WDNR's *CLEAN* system,
- Inform how to comply with IC requirements, and
- Say how to amend or extinguish ICs when property conditions change.

Accomplishment 3. Improvements to internal Wisconsin procedures

A significant accomplishment under WDNR's IC grant was updating and improving WDNR's internal procedures to ensure that comprehensive, accurate and up-to-date information is displayed on the web. This included:

3a. New data system procedures

These procedures add certain ICs at *ongoing cleanups* to the *CLEAN* system data system as authorized under Wisconsin law. This applies to:

- 1) Situations where the responsible party (RP) is conducting a cleanup and:
 - has asked for approval of a remedial action plan, and
 - WDNR’s project manager does not expect the cleanup to be completed within the next five years, and
 - WDNR has created at least one IC in the remedial action plan (RAP) approval, and
 - The RP pays appropriate fees for the RAP approval and adding the IC to the data system.
- 2) Situations where a local government has acquired a brownfield through “involuntary” methods such as condemnation or tax delinquency and is not required under state law to complete a full cleanup.
- 3) Situations at Superfund sites where an IC is established in order to satisfy the Record of Decision.

In order to help customers understand the difference between ICs at completed cleanups versus those imposed as a part of a remedial action approval, WDNR also completed a new explanatory cover sheet for these remedial action approvals (Attachment E).

3b. Catching up

In evaluating its overall IC procedures under this grant, WDNR recognized that certain previous state approvals of cleanup activities may have included ICs that were not identified as such in the data system. To rectify this, WDNR undertook a review of the sites in these three categories:

- 1) Superfund remedial action decisions,
- 2) State-funded remedial actions, and
- 3) Local government owned sites that are exempt from most cleanup requirements under state law.

For each of these three types of sites, WDNR developed an internal process to:

- ensure that procedures are in place so that future approvals with ICs are identified as such in the data system, and
- review of certain prior approvals to determine how to add them to the data system.

3c. Improving WDNR’s publicly accessible IC data system

In evaluating its IC procedures under this grant, WDNR also recognized that its publicly accessible data system lacked certain user-friendly features, which led to these improvements:

- 1) Modifying our database to make it clear which sites had ICs placed on them, and specifically the types of ICs that apply to that property,
- 2) Creating a mechanism by which “types” of ICs can be searched (e.g. “caps” over contamination),
- 3) Creating clear definitions for these IC are with their practical meaning for lenders, property owners, etc.

Related activities not funded by this grant

- Adding missing information (site cleanups completed before August 2002)

WDNR began adding information about ICs to its data system in the summer of 2002. At that time procedures were initiated to add all future ICs related to closed sites with residual soil and/or groundwater contamination to the data system. In addition, all previous deed restrictions for residual groundwater contamination were added. However, WDNR staffing did not permit adding previous ICs for sites with residual contamination in soil but not groundwater. The ICs at these sites are usually not of major concern to property owners (i.e. properly treat or dispose of excavated contaminated soil, obtain state approval to construct a water supply well). Nonetheless, WDNR felt that its IC data system must be a reliable source of comprehensive information. For the last several years WDNR has used limited-term staff not funded by this IC grant to add these sites into its data system, adding several hundred historic sites and their relevant clean-ups documents.

- Notifications to owners & off-site owners

WDNR has undertaken a broad effort to inform property owners about newly enacted ICs. Each responsible party that obtains approval of cleanup activities with one or more ICs receives a detailed letter defining the ICs and how they must be maintained. In addition, if the person conducting the cleanup is not the property owner, and when an IC extends across a property line, those property owners receive a letter from the responsible party 30 days prior to WDNR's review of the cleanup activities. This letter must advise the property owner:

- That the owner may contact WDNR with any technical concerns,
- The property would be listed in WDNR's on-line data system with the IC,
- How the IC would need to be inspected and maintained, and
- That the IC would require WDNR approval for construction of a water supply well.

After WDNR has approved a cleanup, the agency sends a final letter to affected property owners that were not the responsible party explaining that:

- The ICs are now in place,
- How the ICs must be inspected and maintained, and
- How to contact WDNR if proposed property changes would affect the IC at any time.

In addition, the audit program discussed below is another method by which WDNR contacts property owners with ICs as time passes.

- State audits of institutional controls

WDNR has used its s. 128(a) funds to conduct institutional control audits each year. For each of the past several years WDNR conducted 50 audits at cleanup approvals that are at least two years old. To date, the results of the IC audits have indicated that up to 20% of the sites may require some follow up, but most of the problems are record-keeping issues. WDNR plans to continue looking at its audit data to refine its IC program. In addition, WDNR has recently refocused audit priorities on those properties where WDNR has limited the property owner's liability through its [Voluntary Party Liability Exemption](#) option.

D. Grant funds utilized and remaining

At the beginning of January 2010 WDNR had spent \$81,000 of the \$100,000 IC grant. At the current rate of expenditure, WDNR expects to fully earn the grant by the end of March 31, 2010. The remaining expenditures will be used for continued implementation of the tasks described in Accomplishment 3 above, ensuring that WNDR's IC data system is complete and comprehensive.