Wisconsin Municipal Cost Recovery and Umpire Process
Wis. Stats. 292.35

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Umpire Process Wis. Stats. 292.35

• Introduction
• Overview of “umpire” process
• Case studies
• Best Practices

Introduction

• LGU “Toolbox”
  - Liability protection/exemption
  - Access to funding/grants from WDNR, WEDC and U.S. EPA
  - Cost recovery authorities
    • for property acquired via 292.11(9)(e)1m, under 292.33
    • or
    • for property that an LGU owns under 292.35
Overview of “umpire” process

• Wis. Stats. §292.35
  “Local Government Unit Negotiation and Cost Recovery”
  - Applies to:
    • A “Site” or “Facility” owned by an LGU
    • For a non owned Site or Facility, the LGU commits to paying >50% of non funded costs of investigation and remediation

Overview of “umpire” process

• LGU must:
  - Identify “Responsible Parties” (292.11 plus generators, transporters, owner/operators)
  - Develop Remedial Action Plan
  - Notify RPs, providing public hearing for RAP
  - Allow RP and public comment for 30 days
  - Submit RAP plus any comments to WDNR
  - Upon receiving WDNR approval, serve “offer to settle” on RPs re contribution of investigation and remedial costs

Overview of “umpire” process

• WDNR then proposes/appoints an “umpire”
  - Procedures for objection and for “tiebreaker”
• After approval, umpire presides over expedited negotiation
  - 60 days for negotiation between LGU and RPs
  - Umpire makes recommendation, 20 days after negotiation session ends, on:
    • design and implementation of the remedial action plan
    • contribution of funds for investigation and remedial action
Overview of “umpire” process

• Outcomes:
  - Agreement in negotiation (LGU plus one or more parties)
  - Umpire recommended allocation
    • LGU may reject umpire recommendation as to any one RP
  - Contribution protection (WDNR/USEPA MOU)

Overview of “umpire” process

• Outcomes - Litigation/Cost Recovery:
  - 292.35 empowers LGUs to use cost recovery litigation
  - LGU can recover litigation expenses and interest if:
    • LGU accepts/RP rejects umpire’s allocation and LGU secures judgment greater than umpire’s allocation, or
    • LGU/RP reach agreement in negotiation or accept allocation, RP breaches commitment and LGU secures judgment
  - RP can recover litigation expenses (not interest) if RP accepts/LGU rejects allocation and RP secures judgment for its liability less than umpire’s allocation

Case studies

• Ashwaubenon High School/Klipstine Park
  - Site of high school constructed in early 1960’s
  - Ashwaubenon School District/Village of Ashwaubenon (LGU) recovered ~$1.9 million from RP
  - Total costs were approximately $3.3 million
  - Pre-1963 disposal of paper sludge containing PCBs
  - Two umpired negotiation sessions
  - Settled via “agreement in negotiation” (early 2017)
Case studies

- Ashwaubenon High School/Klipstine Park
Case studies

• City of Manitowoc – Former Newton Gravel Pit
  - City owned gravel pit used by nine local businesses for disposal between 1962 and 1974
  - 1996 Settlement on ~$70,000 remedial costs
  - 1968 memo on waste materials hauled to site
  - 2015-18: City of Manitowoc (LGU) plus ~4 RPs
  - Two umpired negotiation sessions (late 2017)
  - Three settlements via “agreement”
  - Umpire recommendation addresses one RP
  - Total costs: ~$4.1 million, to date
  - Total costs recovered: ~$683,000, with $3.4 million outstanding
  - City conceptually agreed to 32.5% share/$1.3 million
Case studies

- City of Manitowoc – Former Newton Gravel Pit

Lessons learned

- §292.35 provides substantial leverage to LGU
- Potential conflict/awkward context if LGU is pursuing current local RPs/employers
- Development of historical evidence is challenging
- “Public Hearing” creates favorable presumption
- Absence of NCP compliance is a benefit
- O/O share for LGU must be addressed
- Once umpire is approved, process moves very quickly

Thank You