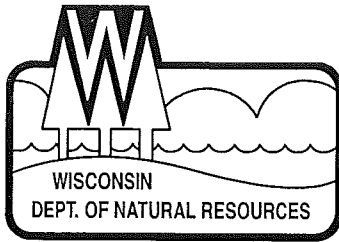


*General Property*  
*Chenoweth*



**State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES**

Jim Doyle, Governor  
Scott Hassett, Secretary  
Ronald W. Kazmierczak, Regional Director

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June 24, 2003

TIMOTHY ASCHER  
FARMERS & MERCHANTS BANK & TRUST  
1644 LUDINGTON STREET  
MARINETTE WI 54143-0347

SUBJECT: **General Liability Clarification** for a portion of the former American Graphics, Inc. Property, 610 Main Street, Goodman, Wisconsin 54125 WDNR BRRTS #02-38-000498  
**WDNR BRRTS #07-38-231425**

Dear Mr. Ascher:

On March 12, 2003, the Department of Natural Resources (the Department) received a request for a general liability clarification for the former American Graphics, Inc. (AGI) property, 610 East Main Street, Goodman, Wisconsin (hereafter referred to as the "Property"). The legal description of the Property is provided in the attached Exhibit A as "Description B". You submitted the request on behalf of Farmers & Merchants Bank & Trust, ("Bank"), the lender who may acquire a portion of the Property from Gialdini Rentals, LLC by foreclosure or by deed in lieu of foreclosure.

AGI owned the Property from 1973 to 1998. Marinette County took title to the Property on October 16, 1999 through tax delinquency procedures. Thereafter, Cynthia Webb acquired title to the Property through a quit claim deed from the County on August 11, 1999. Ms. Webb, on September 2, 1999, sold a portion of the Property to Thomas Gialdini, who then transferred ownership of this parcel of property to Gialdini Rentals, LLC. (hereafter this parcel will be referred to as the "Gialdini Rentals Property"). The legal description of the Gialdini Rentals Property is provided in Exhibit A, as "Description A". It is the Department's understanding that it is this portion of the Property that the Bank has questions about concerning liability under s. 292.11, Wis. Stats., (the "Spill Law").

**I. Purpose:**

The purpose of this letter is to provide the Bank, as a lender with a security interest in the Gialdini Rentals Property, with clarifications as to the present environmental status of the entire Property, including the Gialdini Rentals Property, and the Bank's potential environmental liability should it acquire the Gialdini Rentals Property through foreclosure of it's security interest. Also addressed is the potential liability of any future owner of the Gialdini Rentals Property.



## **II. Request:**

This letter contains a summary of background information concerning the Property, a determination of liability for the Property and the Gialdini Rentals Property, and answers to the following questions presented by the Bank:

- (1) A summary of investigative and remedial activities that have been performed at the Property.*
- (2) A summary of activities, if any, that will need to be performed at the Property.*
- (3) What will be the liability of Farmers & Merchants Bank and Trust should it acquire the Gialdini Rentals Property?*
- (4) What will be the liability of a potential buyer who may purchase the Gialdini Rentals Property?*
- (5) Who is responsible to pay for additional remedial work at the Property?*
- (6) What type of restrictions does the Department have with respect to expansion or additional construction on the Property?*

## **III. Property Background:**

American Graphics, Inc. operated the Property from 1979 to 1993, and was engaged in the business of printing labels for food, household and beverage items. A release of ethyl acetate from a 3000-gallon underground storage tank (UST) and two associated above grade storage drums at the Property was reported to the Department in August 1991. The release to the environment occurred when an opening in a UST allowed surface water to infiltrate into the 3000 gallon tank. The ethyl acetate stored in this tank and the infiltrated water overflowed from the UST into the soil and eventually the groundwater at the Property. The above ground storage drums were used by AGI staff to store some of the overflow product. Soil contamination at the Property was confirmed by sampling performed in 1992; subsequently, investigative work was conducted to define the degree and extent of the contamination in both soil and groundwater (1992-1999).

The depth to groundwater at the Property ranges from 27 to 41 feet below ground surface and generally flows to the east/northeast. Based on the investigation activities performed, a contaminant plume was detected on and off the Property, at one time extending to approximately 1020 feet off the Property in an east/northeast direction. The contaminants identified in the groundwater both on and off Property consisted of benzene, toluene, chloroform, tetrachloroethene (PCE), trichloroethene (TCE), 1,1-dichloroethene (1,1-DCE), 1,1-dichloroethane (1,1-DCA), 1,1,1-trichloroethane (1,1,1-TCA), and 1,2-dichloroethane (1,2-DCA).

Four private potable wells are located to the east/southeast of the Property. Results of water samples collected from the private wells indicated no impacts from the 1993 AGI solvent release. Two municipal wells are located approximately 1000 and 1200 feet downgradient of the Property, and results of sampling efforts indicated that the public water supply wells had not been impacted by the 1993 AGI solvent release. Chemical Creek separates the Property from the municipal wells, and appears to have acted as a barrier with contaminants discharging into the creek rather than spreading further downgradient.

AGI, the party responsible for the solvent release at the Property, was unable to complete the work necessary to investigate and remediate the Property. Therefore, the Department utilized state environmental cleanup funds to perform the remainder of the cleanup activities at the Property. The Department plans to continue sampling existing groundwater monitoring wells, and to remove the three solvent tanks still remaining at the Gialdini Rentals Property.

A separate hazardous substance discharge of petroleum was identified in September 2001, when Environmental Assessments excavated a 1000-gallon fuel oil tank from the Gialdini Rentals Property on behalf of Thomas Machine. Contaminated soil was excavated from the tank bed as part of an immediate action, and remains on the Gialdini Rentals Property awaiting analysis to determine the appropriate disposal option.

#### **IV. Lender Liability Determinations:**

The Bank requested that the Department respond to six specific questions regarding environmental liability. Following are the Department's responses.

*(1) Summary of Investigative and Remedial Activities that have been performed at the Property.*

See previous discussion under Section III.

*(2) A summary of activities, if any, that will need to be performed at the Property.*

As discussed in Section III., two separate areas of contamination (petroleum and solvent) have been identified on the Property. Investigative and remedial response activities respective to each release are discussed below.

#### **Solvent Release: WDNR BRRS #02-38-000498**

Three underground solvent tanks are still present at the Property, but based on information from former Department contractors, there is no measurable liquid remaining in any of the solvent tanks. These USTs have been addressed as a source of the solvent contamination; however, the USTs are apparently not being used and should be properly abandoned. The Department will propose the future removal of the three remaining solvent tanks at the Property using state environmental cleanup funds.

Based on the investigative activities performed by the Department and other consultants up to 1999, it appears that the degree and extent of contamination from the solvent release at the Property has been defined. However, no groundwater monitoring has been conducted since 1999. The Department is proposing to conduct a minimum of one round of sampling at all Property monitoring wells, piezometers, nearby private wells, and the two Goodman Sanitary District municipal water supply wells, to determine the current groundwater conditions for the Property. Groundwater will be analyzed for volatile organic compounds ("VOCs"). Additional rounds of groundwater sampling may be needed to determine if remedial action is necessary or to justify closure for the solvent case. Based on the current information available, the Department cannot make a recommendation on what future remedial actions, if any, might be needed at the Property to address any remaining solvent contamination. Regardless, any further investigative or remedial actions for the solvent release will be proposed relying on state environmental cleanup funds.

**Petroleum Release: WDNR BRRTS #03-38-443242:**

Excavated soil associated with the removal of the 1000-gallon fuel oil UST located on the Gialdini Rentals Property in September 2001 remains on the Gialdini Rentals Property. The person who possesses or controls the Gialdini Rentals Property is responsible for taking action to complete the remedial activities associated with the petroleum tank case, unless that person has an exemption from Spill Law liability. The Department will not complete the necessary work for the petroleum-related contamination that exists on this parcel. Additional sampling of the soil should be conducted to determine proper handling and disposal options.

*(3) What is the liability of Farmers & Merchants Bank and Trust should it acquire the Gialdini Rentals Property?*

As you are aware, Wisconsin state law provides a liability exemption from certain state environmental laws if a lender, trustee or representative meets the specific exemption conditions established in s. 292.21, Wis. Stats. Lenders are provided with a release from environmental liability under s. 292.11(3), (4) and (7)(b) and (c) and chs. 281, 285, 289, 291 and 293 to 299, Wis. Stats., if the lender acquires title to, or possession or control of, real property through enforcement of a security interest and meets all of the conditions under s. 292.21(1)(c), Wis. Stats. Also, subject to certain conditions, lender are not considered to be in possession or control of a hazardous substance or to have caused the discharge of a hazardous substance if the lender engages in the following activities associated with a contaminated property:

- (1) engages in normal lending activities, such as executing mortgages, providing financial assistance, or advancing funds;
- (2) inspects the property for compliance with environmental laws before acquiring it; or
- (3) enforces a security interest in personal property or fixtures at a property.

In general, the Department cannot hold a lender responsible for the investigation or cleanup at a property if the lender satisfies the exemption conditions, unless the lender directly or indirectly (i.e., through tortious conduct) causes a discharge of a hazardous substance at the property. It is the Department's understanding that Farmers & Merchants Bank & Trust will be taking ownership of the Gialdini Rentals Property by foreclosure or by deed in lieu of foreclosure. Under the lender exemption in the Spills Law, this method of acquiring the Gialdini Rentals Property would provide a liability exemption to Farmers & Merchants Bank & Trust.

A lender that acquires title to, possession of, or control of real property through the enforcement of a security interest (i.e., foreclosure) is not liable under the state Spill law, or other specific state environmental laws as specified in s. 292.21, Wis. Stats., for a hazardous substance discharge on the Property if all the following conditions are met.

- The lender does not intentionally or negligently cause a discharge of a hazardous substance, or exacerbate an existing discharge.
- The lender immediately notifies the DNR of any known discharge, as required by s. 292.11(2), Wis. Stats. and ch. NR 706, Wis. Adm. Code. (A submittal of an environmental assessment does not satisfy the reporting requirements).

- The lender conducts an environmental assessment of the property which meets all the requirements of s. 292.21 (1)(c)2, Wis. Stats. Please note that this assessment must be completed not more than 90 days after the date the lender acquires title to, possession or control of the property. The environmental assessment report must be filed with the Department not more than 180 days after the date the lender acquired title to, possession, or control of the property. The assessment requirements are described in more detail on pages 6 and 7 of attached Fact Sheet # 5.
- If a discharge occurs on or after the date on which the lender acquires title to, or possession or control of the property, the lender is not managing or operating a business on the property and is not conducting the conclusion of the borrower's business.
- The lender conducts an emergency response action in response to any discharge that occurs on or after the date the lender acquires title to, possession or control of the property.
- The lender agrees to allow the Department, or the responsible party, access to the property to take response actions, and agrees to avoid interference with actions taken to respond to the discharge.

Additionally, when conducting an environmental assessment to comply with the requirements for the lender liability exemption, you must fill out and submit the Lender Liability Environmental Assessment Tracking Form, #4400-196, along with the assessment. A copy of this form is attached for your convenience.

To determine what specific actions would satisfy the federal lender liability requirements under the Comprehensive Environmental Response, Compensation and Liability Cleanup Act ("CERCLA"), we advise that you contact Eileen L. Furey, USEPA REGION 5 in Chicago, IL (312-886-7950 or [furey.eileen@epa.gov](mailto:furey.eileen@epa.gov)). The US EPA should be able to provide you with guidance on whether your current and proposed actions concerning the Gialdini Rentals Property are consistent with the federal CERCLA lender liability requirements.

*(4) What will be the liability of a potential buyer who may purchase the Gialdini Rentals Property?*

The lender liability exemption is not transferable to other parties or subsequent property owners. Another future lender could apply for and receive a separate liability determination from the Department. A new owner who purchases the Gialdini Rentals Property from the Bank would not be exempt under the lender liability exemption to the Spills Law.

However, as the Department has committed to addressing the solvent contamination present on the Property and the Gialdini Rentals Property, the Department does not intend to require a new owner of the Gialdini Rentals Property to assume the costs for investigation and clean up of the remaining solvent contamination. The Department's current plan is to continue using state funds to complete remaining work on the solvent contamination on the Property, including the Gialdini Rentals Property.

**Solvent Release** - The Department remains committed to the investigation and cleanup of the solvent-related contamination, on the Property and any contaminated off Property areas resulting from the 1993 solvent release. Additional groundwater monitoring is being proposed by the Department to confirm a stable or decreasing trend in the concentrations of contaminants in groundwater monitoring wells associated with the Property. A potential

buyer of the Gialdini Rentals Property would most likely be held liable for future investigative and cleanup activities related to the solvent contamination only if that buyer conducted activities that exacerbated the existing contaminant discharge, or created a new discharge.

**Petroleum Release** – The owner of the Gialdini Rentals Property (current and future), unless the person is protected by one of the Spill Law exemptions, is responsible for taking action to complete the remedial activities associated with the petroleum tank case. The Department will not carry out the necessary work for any petroleum-related contamination that exists on the Gialdini Rentals Property.

*(5) Who is responsible to pay for additional work at the Gialdini Rentals Property?*

See previous responses to Questions 2, 3, and 4.

**Solvent Release** - Again, the Department remains committed to completing the solvent investigation and cleanup of the Property and contaminated off Property areas until the case is approved for closure. The Department project manager for the case will propose additional groundwater monitoring, and removal of the remaining solvent tanks at the Property as part of state-funded response actions.

**Petroleum Release** - As previously mentioned, the person who is in possession or control of the Gialdini Rentals Property is responsible for taking action to complete the remedial activities associated with the petroleum tank case, as the Department will not carry out the necessary work for any petroleum-related contamination on the Gialdini Rentals Property. The petroleum tank investigation and remediation may be eligible for reimbursement from the Petroleum Environmental Cleanup Fund Act (PECFA), a program administered by the Department of Commerce. Please contact the Department of Commerce for more information on PECFA eligibility.

*(6) Restrictions as to what type of expansion can happen at the Property or limits on additional construction in place from the Department:*

The Department does not generally require any formal restrictions to be placed on a property until after the site is reviewed for closure. Generally, a site requiring a restriction is approved for conditional closure and will receive final closure once all conditions are met, including the placement of any deed restrictions on the property. Until that time, the Department recommends that owners/developers discuss proposed actions and construction plans with the Department, to avoid causing a discharge to the environment or the creation of a hazard to public health, safety, and the environment. The Spill Law contains specific requirements for reporting new discharges and taking corrective actions if new discharges are caused, or existing conditions are exacerbated. Depending on the amount and type of contamination remaining at a site when conditional closure is granted, closure approval for the Property may require the implementation of a groundwater use restriction, a deed restriction, or a cap on the Property for protection of human health or groundwater resources.

The Department cannot advise you which restrictions may be required at the Property until after monitoring is completed, and after closure requests for the two cases, both the solvent and petroleum contamination, have been submitted. Potential actions

that may be needed at the property, to comply with this provision include, but are not limited to:

- Providing access for investigation and monitoring activities.
- Clearing future construction or demolition activities with the Department before proceeding with such work.
- Avoiding any intrusive excavation or other activities that could exacerbate existing contamination risks, except in the case of Department approved investigative or remedial actions.
- Other activities of similar natures that would interface between Department and Presidio Square interests.

The Department would keep the lenders informed of needs and schedules regarding any such activities, for mutual planning and scheduling purposes. Please be advised that all other state or local regulations related to expansion or construction activities will still apply.

In summary, if the Bank forecloses on the Gialdini Rentals Property, they will need to satisfy the exemption conditions in state and federal laws. It should be noted that while these protections accrue to the Bank, this exemption is not transferable. If the Bank transfers title of the Gialdini Rentals Property, the new owner would be responsible under Wisconsin's Spill Law to conduct the necessary environmental response actions at the Gialdini Rentals Property in accordance with the ch. NR 700 series.

The Department has determined that any future property owner will not be required to address the existing solvent contamination at the Gialdini Rentals Property related to the release of solvents in 1992. In addition, the Department will not seek cost recovery for the expenses incurred at the Property, and will not place a lien on the Property or the Gialdini Rentals Property, for the solvent-related investigation and cleanup costs. The Department plans to continue the investigation and any necessary cleanup of the solvent contamination using state environmental cleanup funds in order to bring the Property to closure. Any future owner will be responsible for addressing any contamination remaining on the Gialdini Rentals Property related to the petroleum release discovered in September 2001.

Thank you for your questions and concerns regarding the former American Graphics Property in Goodman. If you have any questions regarding the contents of this letter or wish to discuss the matter any further, please contact Cathy Rodda at the Peshtigo Service Center at 715-582-5048.

Sincerely,



Bruce Urban  
Program Manager  
NER Remediation & Redevelopment Program

Enclosure: Exhibit A: Quit Claim Deed  
Factsheet #5 – *Environmental Liability Exemptions for Lenders and Representatives*

Farmers & Merchants Bank & Trust

June 24, 2003

Page 8 of 7

Property Map from Report of Additional Property Investigation for the Former  
American Graphics Property – Natural Resource Technology:

February 3, 1998

Groundwater Sampling for the Former American Graphics Property – Northern  
Environmental: December 17, 1999

Lender Liability Environmental Assessment Tracking Form, #4400-196

Cc: Cathy Rodda – NER/Peshtigo  
Kathy Erdmann – NER/Green Bay  
Joe Renville – LS/5  
Michael Prager – RR/3  
Darsi Foss – RR/3  
Dan Kolberg – RR/3