

January 25, 2017

**VIA U.S. CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

Chrysler Corporation  
c/o FCA US LLC  
The Corporation Company  
40600 Ann Arbor Rd, E. Suite 201  
Plymouth, Michigan 48170

RE: City of Manitowoc/Former Town of Newton Gravel Pit, 3130 Hecker Road,  
Manitowoc, WI - WDNR BRRTS Activity # 02-36-000268 (the "Site")

Dear Sir or Madam:

Pursuant to Wis. Stat. § 292.35(2g)(b) (copy enclosed), the City of Manitowoc (the "City") hereby requests that Chrysler Corporation provide access to or delivery of any records or documents in its custody, possession or control that relate to all of the following:

1. The type and quantity of any wastes containing hazardous substances that Chrysler Corporation or the party the City believes to be its corporate predecessor in interest, Manitowoc Products, (collectively, "Chrysler") disposed of or discharged at the above-referenced Site and the dates of the disposal or discharge.
2. The identity of any person who may be a "responsible party" for contamination at the above-referenced Site under Wis. Stat. § 292.35(1).
3. The identity of subsidiary or parent corporations, as defined in Wis. Stat. § 292.31(8)(a)3, of any person who may be a responsible party. Section 292.31(8)(a)3 defines a "subsidiary or parent corporation" as "any business entity, including a subsidiary, parent corporation, or other business arrangement which has elements of common ownership or control or uses a long-term contractual arrangement with any person to avoid direct responsibility for conditions at a site or facility."

For context, I am attaching correspondence that includes a 1996 settlement agreement between the City and certain parties, including Chrysler, as well as a January 11, 1993 City memorandum (based on a 1968 Manitowoc Department of Public Works document) that identifies certain parties, including Manitowoc Products, that arranged for disposal of waste at the Site.

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It is requested that Chrysler provide delivery or access within thirty (30) days of your receipt of this request. The City intends to assemble all the available information in advance of the public hearing on the City's Draft Remedial Action Plan for the Site, which is currently planned for Monday, March 13, 2017 (details to follow).

Finally, as a preliminary request, please refrain from destroying any documents and/or any electronic information which may be in any way related to the Site or Chrysler's/Manitowoc Products' operations or activities during the 1960's and 1970's, when the Site was operating.

Thank you for your cooperation in this matter. If you have any questions or concerns, please contact me.

Very truly yours,

GODFREY & KAHN, S.C.



Edward B. Witte

Enclosure

cc: Molly E. Schmidt, Wisconsin Department of Natural Resources (via E-mail w/enclosure)  
Kathleen M. McDaniel, City of Manitowoc (via E-mail w/enclosure)

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CHAPTER 292  
REMEDIAL ACTION

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SUBCHAPTER I  
DEFINITIONS

**292.01 Definitions.** In this chapter:

(1) “Approved facility” has the meaning given in s. 289.01 (3).

(1m) “Approved mining facility” has the meaning given in s. 289.01 (4) and includes a mining waste site, as defined in s. 295.41 (31).

(1s) “Contaminated sediment” means sediment that contains a hazardous substance.

(2) “Department” means the department of natural resources.

(3) “Discharge” means, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying or dumping.

(3m) “Engineering control” means an object or action designed and implemented to contain contamination or to minimize the spread of contamination, including a cap, soil cover, or in-place stabilization, but not including a sediment cover.

(4) “Environmental pollution” means the contaminating or rendering unclean or impure the air, land or waters of the state, or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to fish, bird, animal or plant life.

(5) “Hazardous substance” means any substance or combination of substances including any waste of a solid, semisolid, liquid or gaseous form which may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or which may pose a substantial present or potential hazard to human health or the environment because of its quantity, concentration or physical, chemical or infectious characteristics. This term includes, but is not limited to, substances which are toxic, corrosive, flammable, irritants, strong sensitizers or explosives as determined by the department.

(6) “Hazardous waste” means any solid waste identified by the department as hazardous under s. 291.05.

(7) “Landfill” means a solid waste facility for solid waste disposal.

(8) “Lender” means a bank, credit union, savings bank, savings and loan association, mortgage banker or similar financial institution, the primary business of which is to engage in lending

activities or an insurance company, pension fund or government agency engaged in secured lending.

(9) “Lending activities” means advancing funds or credit to and collecting funds from another person; entering into security agreements, including executing mortgages, liens, factoring agreements, accounts receivable financing arrangements, conditional sales, sale and leaseback arrangements and installment sales contracts; conducting inspections of or monitoring a borrower’s business and collateral; providing financial assistance; restructuring or renegotiating the terms of a loan obligation; requiring payment of additional interest; extending the payment period of a loan obligation; initiating foreclosure or other proceedings to enforce a security interest in property before obtaining title; requesting and obtaining the appointment of a receiver; and making decisions related to extending or refusing to extend credit.

(10) “Long-term care” means the routine care, maintenance and monitoring of a solid or hazardous waste facility following closing of the facility.

(11) “Municipality” means any city, town, village, county, county utility district, town sanitary district, public inland lake protection and rehabilitation district or metropolitan sewage district.

(12) “Nonapproved facility” has the meaning given in s. 289.01 (24).

(13) “Person” means an individual, owner, operator, corporation, limited liability company, partnership, association, municipality, interstate agency, state agency or federal agency.

(15) “Preventive measures” mean the installation or testing of equipment or devices, a designated way of performing a specified operation or the preparation of an emergency response plan.

(16) “Representative” means any person acting in the capacity of a conservator, guardian, court-appointed receiver, personal representative, testamentary trustee of a deceased person, trustee of a living trust, or fiduciary of real or personal property.

(17) “Secretary” means the secretary of natural resources.

(17g) “Sediment” means particles in the bed of a navigable water up to the ordinary high-water mark that are derived from the erosion of rock, minerals, soil, and biological materials and from chemical precipitation from the water column and that are transported or deposited by water.

**292.33 Local government cost recovery cause of action.** (1) **DEFINITION.** In this section “local governmental unit” has the meaning given in s. 292.11 (9) (c) 1.

(2) **CAUSE OF ACTION.** Except as provided in sub. (6), a local governmental unit may recover costs as provided in sub. (4) from a responsible person described in sub. (3) if the costs are incurred in connection with a property acquired as provided in s. 292.11 (9) (c) 1m. on which a hazardous substance has been discharged.

(3) **RESPONSIBLE PERSONS.** (a) Except as provided in par. (b), a local governmental unit may recover costs in an action under this section from any of the following:

1. A person who, at the time that the local governmental unit acquired the property, possessed or controlled the hazardous substance that was discharged on the property.

2. A person who caused the discharge of the hazardous substance on the property.

(b) A local governmental unit may not recover costs in an action under sub. (2) from a person listed in par. (a) if any of the following applies:

1. The person is exempt from liability under s. 292.11 (9) (e), 292.13, 292.15, 292.16, 292.19 or 292.21 with respect to the discharge that is the subject of the action.

2. The person has entered into a consent order under this chapter or ch. 289 or 291 or an agreement under s. 292.11 (7) (d) or 292.31 (8) (h) with respect to the discharge that is the subject of the action and the person is in compliance with the consent order or agreement.

3. The person is exempt from liability under s. 292.35 (9) (e) with respect to the discharge that is the subject of the action.

4. The discharge that was caused by the person and that is the subject of the action was in compliance with a permit, license, approval, special order, waiver or variance issued under ch. 283 or 285 or under corresponding federal statutes or regulations.

(4) **RECOVERABLE COSTS.** (a) Except as provided in par. (b), in an action under this section a local governmental unit may recover the reasonable and necessary costs that it incurs for all of the following:

1. Investigating environmental contamination on the property and planning remedial activities described in subd. 2.

2. Conducting remedial activities to restore the property for its intended future use.

3. Administering the activities under subds. 1. and 2. and bringing the action under this section, including costs, disbursements and engineering fees but excluding attorney fees.

(b) The costs determined under par. (a) shall be reduced by the fair market value of the property after completion of the activities under par. (a) 2.

(c) Recoverable costs under this subsection may not be reduced by the amount of any state or federal moneys received by the local governmental unit for any of the activities under par. (a).

(d) 1. In an action under this section, the liability of a responsible person described in sub. (3) (a) 2. is limited to the amount that bears the same proportion to the total costs under par. (a), adjusted as provided in par. (b), as the amount of the environmental pollution on the property from the discharge caused by the responsible person bears to all of the environmental pollution on the property from discharges of hazardous substances.

2. In an action under this section, the liability of a responsible person described in sub. (3) (a) 1. is limited to the amount of the total costs under par. (a), adjusted as provided in par. (b), that the local governmental unit is unable to recover from responsible parties described in sub. (3) (a) 2. less the amount that the local governmental unit is unable to recover because of the exemptions in sub. (3) (b) 3. and 4.

(5) **REPAYING STATE ASSISTANCE.** If a local governmental unit that recovers costs under this section received money from this state, other than under s. 292.11 (7) or 292.31 (1), (3) or (7), for any of the activities under sub. (4) (a), the local governmental unit

shall reimburse to the state an amount that bears the same proportion to the total amount recovered under this section as the amount received from the state, other than under s. 292.11 (7) or 292.31 (1), (3) or (7), bears to the total costs under sub. (4) (a) adjusted as provided in sub. (4) (b).

(6) **EXCEPTION.** A local governmental unit may not recover costs under this section for remedial activities conducted on a property or portion of a property with respect to a discharge after the department of natural resources, the department of safety and professional services, or the department of agriculture, trade and consumer protection has indicated that no further remedial activities are necessary on the property or portion of the property with respect to the discharge.

(7) **LIMITATION OF ACTION.** An action under this section shall be commenced within 6 years after the date that the local governmental unit completes the activities under sub. (4) (a) 2. or be barred.

**History:** 1999 a. 9; 2011 a. 32.

**292.35 Local governmental unit negotiation and cost recovery.** (1) **DEFINITIONS.** In this section:

(am) “Financial assistance” means money, other than a loan, provided by a governmental unit that is not a responsible party to pay a portion of the cost of investigation and remedial action for a site or facility.

(b) “Generator” means a person who, by contract, agreement or otherwise, either arranges or arranged for disposal or treatment, or arranges or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by the person, if the disposal or treatment is done by another person at a site or facility owned and operated by another person and the site or facility contains the hazardous substance.

(bm) “Local governmental unit” means a municipality, a redevelopment authority created under s. 66.1333 or a public body designated by a municipality under s. 66.1337 (4).

(c) “Owner or operator” means any of the following:

1. If the property is taken for tax delinquency, a person who owns or operates a site or facility at the time that the site or facility is taken for tax delinquency.

2. A person who owns or operates a site or facility at the time that the disposal or discharge of a hazardous substance at the site or facility occurs.

(e) “Responsible party” means a generator, an owner or operator, a transporter or a person who possesses or controls a hazardous substance that is discharged or disposed of or who causes the discharge or disposal of a hazardous substance.

(f) “Site or facility” means an approved facility, an approved mining facility, a nonapproved facility, a waste site or any site where a hazardous substance is discharged on or after May 21, 1978.

(g) “Transporter” means a person who accepts or accepted a hazardous substance for transport to a site or facility.

(2) **APPLICABILITY.** This section only applies to a site or facility if one of the following criteria is satisfied:

(a) The site or facility is owned by a local governmental unit.

(b) A local governmental unit that owns a portion of the site or facility commits itself, by resolution of its governing body, to paying more than 50 percent of the amount equal to the difference between the cost of investigation and remedial action for the site or facility and any financial assistance received for the site or facility.

(2g) **IDENTIFICATION OF RESPONSIBLE PARTIES.** (a) A local governmental unit that intends to use the cost recovery procedures in this section shall attempt to identify all responsible parties. All information obtained by the local governmental unit regarding responsible parties is a public record and may be inspected and copied under s. 19.35.

(b) Upon the request of an employee or authorized representative of the local governmental unit, or pursuant to a special inspec-

tion warrant under s. 66.0119, any person who generated, transported, treated, stored or disposed of a hazardous substance that may have been disposed of or discharged at the site or facility or who is or was an owner or operator shall provide the employee or authorized representative access to any records or documents in that person's custody, possession or control that relate to all of the following:

1. The type and quantity of hazardous substance that was disposed of or discharged at the site or facility and the dates of the disposal or discharge.
2. The identity of any person who may be a responsible party.
3. The identity of subsidiary or parent corporations, as defined in s. 292.31 (8) (a) 3., of any person who may be a responsible party.

(c) The local governmental unit shall maintain a single repository that is readily accessible to the public for all documents related to responsible parties, the investigation, the remedial action and plans for redevelopment of the property.

**(2r) PRELIMINARY REMEDIAL ACTION PLAN.** (a) The local governmental unit shall, in consultation with the department, prepare a draft remedial action plan.

(b) Upon completion of the draft remedial action plan, the local governmental unit shall send written notice to all responsible parties identified by the local governmental unit, provide public notice and conduct a public hearing on the draft remedial action plan. The notice to responsible parties shall offer the person receiving the notice an opportunity to provide information regarding the status of that person or any other person as a responsible party, notice and a description of the public hearing and a description of the procedures in this section. At the public hearing, the local governmental unit shall solicit testimony on whether the draft remedial action plan is the least costly method of meeting the standards for remedial action promulgated by the department by rule. The local governmental unit shall accept written comments for at least 30 days after the close of the public hearing.

(c) Upon the conclusion of the period for written comment, the local governmental unit shall prepare a preliminary remedial action plan, taking into account the written comments and comments received at the public hearing and shall submit the preliminary remedial action plan to the department for approval. The department may approve the preliminary remedial action plan as submitted or require modifications.

**(3) OFFER TO SETTLE; SELECTION OF UMPIRE.** (a) Upon receiving the department's approval of the preliminary remedial action plan, the local governmental unit shall serve an offer to settle regarding the contribution of funds for investigation and remedial action at the site or facility on each of the responsible parties identified by the local governmental unit, using the procedure for service of a summons under s. 801.11 and shall notify the department that the offer to settle has been served. The local governmental unit shall include in the offer to settle all of the following information:

1. The amount of the offer and a rationale for the amount.
2. The names, addresses and contact persons, to the extent known, for all of the responsible parties identified by the local governmental unit.
3. The location and availability of documents that support the claim of the local governmental unit against the responsible party.
4. The location of the public repository where documents relating to the site or facility are maintained, the times during which the repository is open and the name and telephone number of the contact person at the repository.
5. A description of the procedures under this section.

(b) The department shall maintain a list of competent and disinterested umpires qualified to perform the duties under subs. (4) to (6). None of the umpires may be employees of the department. Upon receiving notice from a local governmental unit under par. (a), the secretary or his or her designee shall select an umpire from

the list and inform the local governmental unit and responsible parties of the person selected.

(c) Within 10 days after receiving notice of the umpire selected by the department under par. (b), the local governmental unit may notify the department that the umpire selected is unacceptable. Within 10 days after receiving notice of the umpire selected by the department under par. (b), a responsible party may notify the department that the umpire selected is unacceptable or that the responsible party does not intend to participate in the negotiation. Failure to notify the department that the umpire is unacceptable shall be considered acceptance. If all responsible parties identified by the local governmental unit indicate that they do not intend to participate in the negotiation, the department shall inform the local governmental unit and the local governmental unit shall cease further action under this section.

(d) Upon receiving notice under par. (c) that the selected umpire is unacceptable, the secretary or his or her designee shall select 5 additional umpires from the list and inform the local governmental unit and responsible parties of the persons selected.

(e) Within 10 days after receiving notice of the umpires selected by the department under par. (d), the local governmental unit or a responsible party may notify the department that one or more of the umpires selected are unacceptable. Failure to notify the department shall be considered acceptance. The secretary or his or her designee shall select an umpire from among those umpires not identified as unacceptable by the local governmental unit or a responsible party or, if all umpires are identified as unacceptable, the secretary or his or her designee shall designate a person to be umpire for the negotiation.

**(4) NEGOTIATION PROCESS.** (a) The umpire, immediately upon being appointed, shall contact the department, the local governmental unit and the responsible parties that received the offer to settle and shall schedule the negotiating sessions. The umpire shall schedule the first negotiating session no later than 20 days after being appointed. The umpire may meet with all parties to the negotiation, individual parties or groups of parties. The umpire shall facilitate a discussion between the local governmental unit and the responsible parties to attempt to reach an agreement on the design and implementation of the remedial action plan and the contribution of funds by the local governmental unit and responsible parties.

(b) The umpire shall permit the addition to the negotiation, at any time, of any responsible party or any other person who wishes to be a party to the negotiated agreement.

(c) Negotiations may not continue for more than 60 days after the first negotiating session, unless an extension is approved by the department for cause, at the request of any party to the negotiation. The department shall approve an extension if necessary to settle insurance claims.

(d) The local governmental unit and the responsible parties that participate in negotiations shall pay for the costs of the umpire, whether or not an agreement among the parties is reached under sub. (5) or the parties accept the recommendation of the umpire under sub. (6). The umpire shall determine an equitable manner of paying for the costs of the umpire, which is binding.

**(5) AGREEMENT IN NEGOTIATION.** The local governmental unit and any of the responsible parties may enter into any agreement in negotiation regarding the design and implementation of the remedial action plan and the contribution of funds by the local governmental unit and responsible parties for the investigation and remedial action. The portion of the agreement containing the design and implementation of the remedial action plan shall be submitted to the department for approval. The department may approve that portion of the agreement as submitted or require modifications.

**(6) FAILURE TO REACH AGREEMENT IN NEGOTIATION.** (a) If the local governmental unit and any responsible parties are unable to reach an agreement under sub. (5) by the end of the period of negotiation, the umpire shall make a recommendation regarding the

design and implementation of the remedial action plan and the contribution of funds for investigation and remedial action by the local governmental unit and all responsible parties that were identified by the local governmental unit and that did not reach an agreement under sub. (5), whether or not the responsible parties participated in negotiations under sub. (4). The umpire shall submit the recommendation to the department for its approval within 20 days after the end of the period of negotiation under sub. (4) (c). The department may approve the recommendation as submitted or require modifications. The umpire shall distribute a copy of the approved recommendation to the local governmental unit and all responsible parties identified by the local governmental unit.

(b) The local governmental unit and the responsible parties that did not reach an agreement under sub. (5) shall accept or reject the umpire's recommendation within 60 days after receiving it. Failure to accept or reject the recommendation within 60 days shall be considered rejection of the recommendation. If the local governmental unit rejects the recommendation with respect to any responsible party, the recommendation does not apply to that responsible party. If a responsible party rejects the recommendation, it does not apply to that responsible party.

(7) **RESPONSIBLE PARTIES SUBJECT TO AN AGREEMENT OR RECOMMENDATION.** A responsible party that enters into an agreement under sub. (5) with a local governmental unit or that accepts the umpire's recommendation under sub. (6), if the local governmental unit does not reject the recommendation, is required to comply with the agreement or recommendation. When the responsible party has complied with the agreement or recommendation, the responsible party is not liable to the state, including under s. 292.11 (7) (b) or 292.31 (8), or to the local governmental unit for any additional costs of the investigation or remedial action; the responsible party is not liable to any other responsible party for contribution to costs incurred by any other responsible party for the investigation or remedial action; and the responsible party is not subject to an order under s. 292.11 (7) (c) for the discharge that is the subject of the agreement or recommendation.

(8) **RESPONSIBLE PARTIES NOT SUBJECT TO OR NOT COMPLYING WITH AN AGREEMENT OR RECOMMENDATION.** (a) In this subsection:

1. "Interest" means interest at the annual rate of 12 percent, commencing on the date of the umpire's recommendation under sub. (6) or, if there is no umpire's recommendation, on the date of the agreement under sub. (5).

2. "Litigation expenses" means the sum of the costs, disbursements and expenses, including engineering fees and, notwithstanding s. 814.04 (1), reasonable attorney fees necessary to prepare for or participate in proceedings before any court.

(b) A local governmental unit is entitled to recover litigation expenses and interest on the judgment against a responsible party if any of the following occurs:

1. The local governmental unit accepts the recommendation of an umpire under sub. (6), the responsible party rejects it and the local governmental unit recovers a judgment under sub. (9) against that responsible party that equals or exceeds the amount of the umpire's recommendation.

2. The local governmental unit and the responsible party enter into an agreement under sub. (5) or accept the umpire's recommendation under sub. (6), the responsible party does not comply with the requirements of the agreement or recommendation and the local governmental unit recovers a judgment against that responsible party based on the agreement or recommendation.

(c) A responsible party is entitled to recover litigation expenses from a local governmental unit if the responsible party accepts the recommendation of an umpire under sub. (6), the local governmental unit rejects the recommendation of the umpire under sub. (6) with respect to the responsible party, the local governmental unit institutes an action under sub. (9) against the responsible party and the local governmental unit recovers a judgment under sub. (9) against the responsible party that is equal to or less than the amount of the umpire's recommendation.

(9) **LIABILITY FOR REMEDIAL ACTION COSTS.** (a) This subsection applies only to a site or facility that satisfies the applicability provisions of sub. (2) and for which the remedial action specified in an agreement under sub. (5) or a recommendation under sub. (6) is completed.

(b) Except as provided in pars. (bm), (br) and (c), sub. (7) and s. 292.21, a responsible party is liable for a portion of the costs, as determined under pars. (c) to (e), incurred by a local governmental unit for remedial action in an agreement under sub. (5) or a recommendation under sub. (6) and for any related investigation. A right of action shall accrue to a local governmental unit against the responsible party for costs listed in this paragraph.

(bm) Paragraph (b) does not apply with respect to a discharge if the discharge was in compliance with a permit license, approval, special order, waiver or variance issued under ch. 283 or 285 or under corresponding federal statutes or regulations.

(br) Paragraph (b) applies with respect to a transporter only if the transporter does any of the following:

1. Selects the site or facility where the hazardous substance is disposed of without direction from the generator.

2. Violates an applicable statute, rule, plan approval or special order in effect at the time the disposal occurred and the violation causes or contributes to the condition at the site or facility.

3. Causes or contributes to the condition at the site or facility by an action related to the disposal that would result in liability under common law in effect at the time the disposal occurred, based on standards of conduct for the transporter at the time the disposal occurred.

(c) The liability of each party to the action to recover costs under par. (b) is limited to a percentage of the cost of the remedial action that is determined by dividing the percentage of that party's contribution to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility by the percentage of contribution of all responsible parties to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility. Section 895.045 does not apply to this paragraph.

(cm) Notwithstanding par. (c), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for the total contribution of all parties involved in the common scheme or plan.

(d) The finder of fact shall apportion the contribution of each responsible party to the environmental pollution resulting from the disposal or discharge of hazardous substances at the site or facility for the purposes of par. (c), using the following criteria, and any other appropriate criteria:

1. The ability of the responsible parties to demonstrate that their contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances can be distinguished from the contribution of other responsible parties.

2. The amount of hazardous substances involved.

3. The degree of toxicity of the hazardous substances involved.

4. The degree of involvement by the responsible parties in the generation, transportation, treatment, storage, disposal or discharge of the hazardous substances.

5. The degree of cooperation by the responsible parties with federal, state or local officials to prevent or minimize harm to the public health or the environment.

6. The degree of care exercised by the parties with respect to the hazardous substance, taking into account the characteristics of the hazardous substance.

(e) A responsible party is not liable under par. (b) if the responsible party establishes by a preponderance of the evidence that the responsible party's contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances was caused solely by any of the following:

1. An act of God.

2. An act of war.

3. An act or omission of a 3rd party, other than an officer, director, employee or agent of the responsible party, or other than a person whose act or omission occurs in connection with a direct or indirect contractual relationship with the responsible party if all of the following apply:

a. The responsible party establishes by a preponderance of the evidence that the responsible party exercised due care with respect to the hazardous substances that caused environmental pollution.

b. In exercising due care under subd. 3. a., the responsible party took into consideration the characteristics of the hazardous substances, in light of all relevant facts and circumstances.

c. The responsible party took precautions against foreseeable acts or omissions of the 3rd party and the consequences that could foreseeably result from those acts or omissions.

(f) Any responsible party may seek contribution from any other responsible party. Such a contribution claim may be brought as a separate action or may be brought in the action commenced against the responsible party under this section.

(10) TECHNICAL ASSISTANCE. The department shall provide technical assistance to an umpire at the request of the umpire. The department may limit the amount of staff time allocated to each negotiation.

(11) LIABILITY. Except as provided in sub. (7), no common law liability, and no statutory liability that is provided in other statutes, for damages resulting from a site or facility is affected in any manner by this section. The authority, power and remedies provided in this section are in addition to any authority, power or remedy provided in any other statutes or provided at common law.

(13) FEES. The department may, by rule, assess and collect fees to offset the cost of the department's activities under this section. The fees may include an advance deposit, from which the department shall return the amount in excess of the cost of the department's activities under this section.

**History:** 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150 s. 672; 2001 a. 16, 103.  
**Cross-reference:** See also ch. NR 749, Wis. adm. code.

**292.37 Confidentiality of records.** (1) RECORDS. Except as provided under sub. (2), any records or other information furnished to or obtained by the department in the administration of ss. 292.31 and 292.35 are public records subject to s. 19.21.

(2) CONFIDENTIAL RECORDS. (a) *Application.* An owner or operator of a solid waste facility may seek confidential treatment of any records or other information furnished to or obtained by the department in the administration of ss. 292.31 and 292.35.

(b) *Standards for granting confidential status.* Except as provided under par. (c), the department shall grant confidential status for any records or information received by the department and certified by the owner or operator of the solid waste facility as relating to production or sales figures or to processes or production unique to the owner or operator of the solid waste facility or which would tend to adversely affect the competitive position of the owner or operator if made public.

(c) *Emission data; analyses and summaries.* The department may not grant confidential status for emission data. Nothing in this subsection prevents the department from using records and other information in compiling or publishing analyses or summaries relating to the general condition of the environment if the analyses or summaries do not identify a specific owner or operator or the analyses or summaries do not reveal records or other information granted confidential status.

(d) *Use of confidential records.* Except as provided under par. (c) and this paragraph, the department or the department of justice may use records and other information granted confidential status under this subsection only in the administration and enforcement of ss. 292.31 and 292.35. The department or the department of justice may release for general distribution records and other information granted confidential status under this subsection if the owner or operator expressly agrees to the release. The department

or the department of justice may release on a limited basis records and other information granted confidential status under this subsection if the department or the department of justice is directed to take this action by a judge or hearing examiner under an order which protects the confidentiality of the records or other information. The department or the department of justice may release to the U.S. environmental protection agency, or its authorized representative, records and other information granted confidential status under this subsection if the department or the department of justice includes in each release of records or other information a request to the U.S. environmental protection agency, or its authorized representative, to protect the confidentiality of the records or other information.

**History:** 1995 a. 227 s. 993.

**292.41 Abandoned containers.** (1) DEFINITION. In this section, "abandoned container" means any container which contains a hazardous substance and is not being monitored and maintained.

(2) APPLICABILITY. (a) This section does not apply to abandoned containers which are located in an approved facility or a nonapproved facility.

(b) Action by the department under this section is not subject to s. 292.31.

(3) CONTINGENCY PLAN. (a) After consultation with other affected federal, state and local agencies and private organizations, the department shall establish by rule criteria and procedures for the development, establishment and amendment of a contingency plan for the taking of emergency actions in relation to abandoned containers.

(b) The contingency plan shall establish procedures and techniques for locating, identifying, removing and disposing of abandoned containers.

(4) REMOVAL OR OTHER EMERGENCY ACTION. The department or its authorized representative may contain, remove or dispose of abandoned containers or take any other emergency action which it deems appropriate under the circumstances.

(5) ACCESS TO PROPERTY AND RECORDS. Any officer, employee or authorized representative of the department, upon notice to the owner or occupant, may enter onto any property, premises or place at any time for the purposes of sub. (3) if the entry is necessary to prevent increased damage to the air, land or waters of the state, or may inspect any record relating to abandoned container management for the purpose of ascertaining the state of compliance with this section and the rules promulgated under this section. Notice to the owner or occupant is not required if the delay in providing the notice is likely to result in imminent risk to public health or welfare or the environment.

(6) ABANDONED CONTAINERS: APPROPRIATIONS. (a) The department may utilize moneys appropriated under s. 20.370 (2) (dv) and (my) in taking action under sub. (4). The department shall utilize these moneys to provide for the procurement, maintenance and storage of necessary equipment and supplies, personnel training and expenses incurred in locating, identifying, removing and disposing of abandoned containers.

(b) No more than 25 percent of the total of all moneys available under the appropriation under s. 20.370 (2) (dv) and (my) may be used annually for the procurement and maintenance of necessary equipment during that fiscal year.

(c) The department is entitled to recover moneys expended under this section from any person who caused the containers to be abandoned or is responsible for the containers. The funds recovered under this paragraph shall be deposited into the environmental fund for environmental management.

**History:** 1983 a. 410; 1985 a. 29 ss. 1957, 3202 (39); 1987 a. 27, 384; 1989 a. 31; 1991 a. 39; 1993 a. 453; 1995 a. 27; 1995 a. 227 s. 716; Stats. 1995 s. 292.41; 1995 a. 378 s. 46; 1997 a. 27.

**Cross-reference:** See also ch. NR 714, Wis. adm. code.

**292.51 Cooperative remedial action.** (1) In this section, "costs of remedying environmental contamination" means costs

May 24, 1996



Ms. Diane Tesinsky  
Wausau Insurance Companies  
901 Warrenville Road  
Suite 500  
Lisle, IL 60532-4344

Mr. Richard Ventura  
CIGNA Property & Casualty  
160 Chestnut Street  
P.O. Box 7716  
Philadelphia, PA 19192

Ms. Brenda L. DuPree  
General Casualty Ins. Co.  
One General Drive  
Sun Prairie, WI 53596

Ms. Elva McMullin  
Crum & Forster Comm. Inc.  
1700 West 82nd Street  
Suite 200  
Bloomington, MN 55431-1440

Mr. L.J. DacQuisto  
AETNA  
P.O. Box 2940  
Milwaukee, WI 53201-2940

Ms. Janis Severson  
Risk Enterprise Management  
Limited  
4940 Viking Drive  
Suite 530  
P.O. Box 39827  
Minneapolis, MN 55439-0954



Re: Town of Newton Gravel Pit

Dear Insurer Representatives:

OFFICE OF CITY ATTORNEY

The City of Manitowoc has entered into an agreement with waste generators at the Town of Newton Gravel Pit site to facilitate the clean up of environmental damage. I'm enclosing a copy of that Agreement for your records.

Our consultant, RUST Environment and Infrastructure is in the process of submitting their Remedial Action Plan to the Wisconsin Department of Natural Resources. The cost of the recommended remedial action is approximately \$460,000. In addition, the City has spent approximately \$425,000 in engineering fees to this point.

Very truly yours,

Patrick L. Willis  
City Attorney

PLW:es

Enc.

Patrick L. Willis  
City Attorney

CITY HALL  
817 Franklin Street  
P.O. Box 159  
Manitowoc, WI 54221-0159  
Phone: (414) 683-4418  
FAX: (414) 683-4331

\\PDTLES\CORR\NWTNGRVL.INS





**AGREEMENT BETWEEN THE CITY OF MANITOWOC AND  
PARTICIPATING GENERATORS FOR THE TOWN OF NEWTON  
GRAVEL PIT SITE**

This Agreement is entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 1996 between the City of Manitowoc (the "City") and those Parties listed in Appendix A (the "Participating Generators") (with the City and the Participating Generators collectively referred to as the "Parties") and each, individually, as a "Party").

**FACTUAL BACKGROUND**

1. The Town of Newton Gravel Pit Site (the "Site") has been identified as requiring remediation. The required remediation is proposed to be carried out according to the Remedial Option #5 of the Site Investigation and Remedial Options Report (the "Remedial Plan") prepared by Rust Environment and Infrastructure ("Rust") dated January 19, 1995. Part of the Remedial Plan includes non-aqueous phase liquid removal at a cost not to exceed \$69,800 (the "Removal"). The Remedial Plan will be submitted to the Wisconsin Department of Natural Resources ("WDNR") by the City.
2. The Participating Generators are alleged to have generated waste during the relevant time period that may have been disposed of at the Site.
3. The City was the owner of the Site during the relevant time period.
4. The Parties have met on numerous occasions to discuss a privately financed investigation and remediation of the Site.
5. Consequently, in order to accomplish an expeditious remediation of the Site, the Participating Generators and the City have reached this Agreement to jointly fund the remediation at this Site.

**PURPOSE OF THIS AGREEMENT**

6. The purpose of this Agreement is to set forth the terms under which the Parties will jointly fund the remediation work and the manner in which the remediation will be accomplished.

## SCOPE OF THIS AGREEMENT

7. The terms and conditions of this Agreement between the City and the Participating Generators apply only to the funding and conducting of the Remedial Plan, identified as Remedial Option #5 in the Rust Report dated January 19, 1995, and to the partial payment by the Participating Generators of past costs incurred by the City for site investigation services, as provided in Appendix B ("Past Costs").

8. This Agreement is contingent in part upon WDNR approval of the cleanup proposed for the Site in substantial compliance with the Remedial Plan (hereinafter the "WDNR Approval"). If WDNR fails to approve the cleanup proposed for the Site in substantial compliance with the Remedial Plan on or before December 31, 1996 (hereinafter the "Non-Approval"), this Agreement shall be declared to be null and void for all purposes except for those portions of this Agreement that relate to the Removal. Rust shall estimate the cost of implementing the cleanup for the site approved by the WDNR within 30 days after the date of the approval issued by the WDNR (hereinafter the "Rust Estimate"). The Rust Estimate shall be for total site costs including the cost of the Removal and Past Costs incurred by the City ("Total Site Costs"). As used in this Agreement, the term "substantial compliance" shall mean that Rust Estimate is not greater than \$1,000,000 for Total Site Costs.

9. In the event following WDNR Approval it is later determined that the actual costs of implementing the WDNR Approval exceed \$1,000,000 for Total Site Costs, the Participating Generators shall have no obligation under this Agreement to fund the portion of the costs in excess of \$1,000,000, provided, however, that the City and the other Parties shall retain any and all rights not specifically waived in this Agreement to seek contribution from other Parties to this Agreement as well as from any third parties for any such excess cost.

10. The Parties agree to waive consistency with the National Contingency Plan ("NCP") as to all work performed before or after the date of this Agreement.

11. The Parties agree that no portion of the tolling period beginning from January 1, 1995 up to the date that any Party to this Agreement mails written notification to all other Parties of its intent to terminate the tolling period shall be used for purposes of calculating the passage of time under an applicable statute of limitations for any claim that a Party may have against another Party relating to contamination at the Site.

12. The obligations of the Parties under this Agreement are limited solely to this Agreement and have no effect outside the terms of this Agreement. Nothing in this Agreement shall be an admission of law or fact or evidence of any liability or responsibility with respect to the Site. Nothing in this Agreement is intended to release, discharge, or in

any way affect any claim, cause of action, or demand in law or equity which the Parties may have against any other person or entity who is not a Party relating to the generation, storage, treatment, transportation, release, or disposal of any hazardous substances at, to, or from the Site.

13. The Parties do not admit or concede, and reserve the right to contest any determination, allegation, finding or conclusion regarding the Site in any action other than one brought by any of the Parties to enforce this Agreement.

14. This Agreement shall not create any private right, other than a right by any of the Parties to enforce this Agreement.

#### ALLOCATION OF COSTS

15. The Parties agree to fund jointly the cost of implementing the WDNR Approval and, in the event of Non-Approval, the Removal.

16. The Participating Generators shall pay the City \$69,800 for the Removal within 30 days of the execution of this Agreement. In the event of Non-Approval, this shall constitute the sole payment for which the Participating Generators are obligated under this Agreement.

17. In the event of WDNR Approval, the Participating Generators shall pay the City the balance of 67.5% of the Rust Estimate remaining after the payment made under paragraph 16, within 30 days of the date of mailing of the Rust Estimate. In the event of WDNR Approval, the City agrees to pay 32.5 percent of the Rust Estimate.

18. The City shall maintain the payments received from the Participating Generators in a separate account which shall not be commingled with monies from any source not covered by this Agreement (hereinafter the "Account"). The City is authorized to utilize the Account for the payment of costs incurred for the implementation of the WDNR Approval or, in the event of Non-Approval, the Removal.

19. The Parties agree that the City of Manitowoc, to date, has expended \$421,609 in project costs paid to Rust for cleanup activities at the Site. In the event of WDNR Approval and within 30 days of the date of the mailing of the Rust Estimate, the Participating Generators agree to reimburse the City an amount calculated in accordance with the following formula:  $\$421,609 - (\text{Rust Estimate} \times 32.5\%)$ . As a result of this reimbursement, the City is deemed to have contributed its 32.5 percent share of the Rust Estimate in accordance with paragraph 17 of this Agreement in the event of WDNR Approval.

20. If the total actual costs for the WDNR Approval exceed the Rust Estimate, the Participating Generators shall pay the City 67.5% of such excess costs within 45 days of the date of mailing by the City to the Participating Generators of notification of such excess costs provided, however, that the Participating Generators shall have no obligation for any portion of the total costs for the WDNR Approval in excess of \$1,000,000 Total Site Costs. In the event the total actual costs for the WDNR Approval are less than the Rust Estimate, the City shall distribute to the Participating Generators the balance in the Fund within 45 days of the date that WDNR has approved the completion of the WDNR Approval.

#### **ACTIONS TO BE PERFORMED BY THE CITY OF MANITOWOC**

21. Upon execution of this Agreement, the City shall direct its consultant, Rust, to conduct the Removal immediately or as promptly as site and weather conditions allow. Conduct of the Removal shall not be postponed until WDNR Approval or Non-Approval.

22. The Parties agree that the City of Manitowoc will continue to act as the primary representative dealing with the WDNR. The City of Manitowoc further agrees that it will not inform WDNR of the terms of this Agreement between the Participating Generators and the City unless prohibited by applicable law as defined in paragraph 29 of this Agreement.

23. The Parties agree that the City is the party responsible for entering into and overseeing all contracts for work performed at this Site under the WDNR Approval or the Removal. The City will use reasonable efforts, as determined solely in the exercise of the City's discretion, to perform tasks covered by the WDNR Approval or the Removal with City personnel.

24. The Parties agree that the City is responsible for monitoring the total costs for the WDNR Approval and for providing notification to the Participating Generators in the event that total costs of the WDNR Approval exceed the Rust Estimate. The Parties further agree that the City will provide a final accounting of all costs for the WDNR Approval upon its completion and make distributions, if any are required, in accordance with paragraph 20 of this Agreement.

#### **ACTIONS TO BE PERFORMED BY THE PARTICIPATING GENERATORS**

25. The Participating Generators will agree among themselves how to fund the Participating Generators' allocated share of the costs of the WDNR Approval or the Removal as required by this Agreement.

26. The Participating Generators shall designate one or more representatives to coordinate the work to be performed with the City and for the receipt of any notices or payments made by the City or Rust under this Agreement.

#### COVENANT NOT TO SUE

27. In the event WDNR approves the completion of the WDNR Approval for the Site in accordance with applicable law and the Parties have fulfilled all of their obligations under this Agreement, and the clean up is accomplished at a cost of not more than \$1,000,000.00 Total Site Costs, the Parties agree not to sue each other for costs associated with the WDNR Approval; provided, however, that nothing herein shall preclude or bar the Parties from any available legal remedies directed against anyone who is not a Party for such costs, nor shall anything herein preclude or bar any of the Parties from any available legal remedies against any other Party in the event of a suit or claim against any Party from any party who is not a signatory to this Agreement.

#### INDEMNIFICATION

28. Each Party agrees to indemnify, defend and hold harmless any Party and its representative(s) from and against any claim, demand, liability, cost, expense, legal fee, penalty, loss or judgment (collectively "Liability") which in any way relates to the good faith performance of any duties under this Agreement by any Party or its representative(s) on behalf of the Parties, including, but not limited to, any liability arising from any contract or agreement required to implement the WDNR Approval or the Removal. This indemnification shall not apply to any liability arising from a criminal conviction, unless the Party or its representative(s) demonstrates to the satisfaction of the Parties that the Party or its representative(s) had reasonable cause to believe that the conduct in question was lawful. However, nothing in this paragraph shall constitute a waiver or release of any claim or potential claim by any Party which is reserved within this Agreement. In addition, if assertion of any remedies against anyone who was not a Party which are specifically reserved in paragraph 27 of this Agreement results in claims being asserted by anyone who is not a Party against a Party who does not elect to assert such a claim ("Non-Claimant") or results in any person or entity asserting an indemnity claim against a Non-Claimant, then the claimants who are also Parties jointly and severally agree to defend, indemnify and hold harmless such Non-Claimants from such litigation costs, attorneys' fees, money damages, judgments and/or settlements relating to such contribution or indemnity claim.

### **CONFIDENTIALITY**

29. The City will maintain the confidentiality of this Agreement unless prohibited by applicable law, including, but not limited to, the Wisconsin Public Records law, Wis. Stats. §19.31 et. seq.

### **SUCCESSORS AND ASSIGNS**

30. This Agreement shall be binding upon the successors and assigns of the Parties. No assignment or delegation of the obligation to make any payment or reimbursement hereunder will release the assigning Party without the prior written consent of the remaining Parties.

### **MAILING**

31. Any reference to mail or mailing in this Agreement shall be accomplished by mailing a notification by certified mail, return receipt requested to the intended recipient(s).

### **APPLICABLE LAW**

32. For purposes of enforcement or interpretation of the provisions of this Agreement, the Parties agree that the laws of the State of Wisconsin shall be applicable, except to the extent federal law shall apply to questions arising under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, or the NCP promulgated thereunder, and further agree not to contest personal jurisdiction in the state or federal courts of Wisconsin with respect to litigation brought for such purposes.

### **NATURE OF AGREEMENT**

33. Nothing herein shall be deemed to create a partnership or joint venture and/or principal and agent relationship between or among the Parties.

### **COUNTERPARTS**

34. This Agreement may be executed in any number of counterparts, each of which shall be deemed a duplicate original, but all of which together shall constitute one and the same instrument and shall become effective as to each Party when the counterpart executed by such Party as of the date the last Party signs the Agreement provided all counterparts have been delivered to Susan H. Martin, Foley & Lardner.

APPENDIX A

Participating Generators

A & P

Heresite

Imperial Eastman

Invincible

Manitowoc Co.  
(Manitowoc Engineering)  
(Manitowoc Shipbuilding)

Manitowoc Products Co.  
(Chrysler Corporation)  
(White Consolidated)

Newell  
(Aluminum Spec.)  
(Mirro)

APPENDIX B

RECEIVED  
JAN 16 1996  
CITY ATTORNEY



January 16, 1996

MEMO TO: CITY ATTORNEY PAT WILLIS  
FROM: MICHAEL E. HAWLEY, P.E. *MEH*  
Director of Public Works & City Engineer  
SUBJECT: Gravel Pit Investigation

Pursuant to your request for information on costs incurred in the Gravel Pit Investigation, we have paid the following to date.



OFFICE OF DEPARTMENT  
OF PUBLIC WORKS  
ENGINEERING

RUST ENVIRONMENT & INFRASTRUCTURE

Contract 1 - Site Investigation Services  
from December, 1992 thru  
December 10, 1993 \$166,072.00  
(Final Payment 1/14/94)

Contract 2 - Continuing Site Investigation  
January, 1994 thru  
December 8, 1995 \$255,536.69  
(\$626.91 Paid 1/12/96)

MEH:ca  
Revised 1/16/96  
(450-353130-529900)

Michael E. Hawley  
Director of Public Works  
and City Engineer

CITY HALL  
817 Franklin Street  
P.O. Box 1697  
Manitowoc, WI 54221-1697  
Phone: (414) 683-4410  
FAX: (414) 683-4424



MODIFICATION

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

4-16-96  
Date of Execution

INVINCIBLE METAL FURNITURE CO.

Name of Party

By:

  
(Signature)

Name:

JOHN A. SCHUETTE

(Typed Name)

Title:

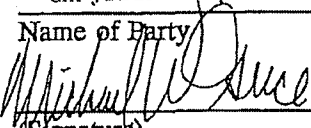
PRESIDENT

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3-12-96  
Date of Execution

Chrysler Corporation  
Name of Party  
By:   
(Signature)

Name: Michael W. Grice ✓  
(Typed Name)

Title: Senior Staff Counsel

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

April 15, 1996  
Date of Execution

City of Manitowoc  
Name of Party

By: *Patrick L. Willis*  
(Signature)

Name: Patrick L. Willis  
(Typed Name)

Title: City Attorney


**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 29, 1996  
Date of Execution

The Manitowoc Company, Inc.  
Name of Party

By:   
(Signature)

Name: E. Dean Flynn  
(Typed Name)

Title: Secretary & Manager - Corp. Insurance

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3/22/96  
Date of Execution

Great Atlantic & Pacific Tea Co., Inc.  
Name of Party

By: *Alfred Limbrick*  
(Signature)

Name: Alfred Limbrick ✓  
(Typed Name)

Title: Group Vice-President

**MODIFICATION**


35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 8, 1996  
Date of Execution

Gould Electronics Inc.  
Name of Party

By:

  
(Signature)

Name:

Lawrence W. Mitchell  
(Typed Name)

Title:

Associate Counsel


**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3-11-96  
Date of Execution

HERESITE PROTECTIVE COATINGS, INC.  
Name of Party

By:   
(Signature)

Name: GEOFFREY C. LIBAN  
(Typed Name)

Title: C.E.O.

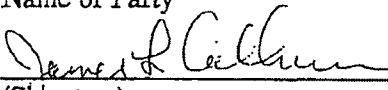
**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 12, 1996  
Date of Execution

White Consolidated Industries, Inc  
Name of Party

By:   
(Signature)

Name: James L. Calhoun  
(Typed Name)

Title: Vice President - Regulatory Affairs



**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 7, 1996  
Date of Execution

Newell Co.  
Name of Party

By: [Signature]  
(Signature)

Name: Richard H. Wolff  
(Typed Name)

Title: Secretary

Mike



January 11, 1993

MEMO TO: CITY ATTORNEY PAT WILLIS

FROM: MICHAEL E. HAWLEY, P. E. *MEH*  
 Director of Public Works and City Engineer

SUBJECT: Gravel Pit

File Search

Jean Campbell and Carol Adler searched the Engineering Department files for any material on the Gravel Pit, and couldn't find anything pertaining to industrial dumping. Mostly found old yearly crushing reports.

Tony Scherer searched the files at the Street Department, and found the attached report dated March 4, 1968, outlining materials and companies hauling to the Gravel Pit.

Company Drivers

We have only been able to come up with names of three drivers, one of whom we haven't been able to locate.

<u>Name</u>	<u>Name of Company</u>	<u>Address</u>	<u>Phone</u>
Erwin C. Musial	Manitowoc Company	2115 Madison	684-3274
Earl A. Mueller	Mirro Aluminum	944 So.26th	684-3727
Richard Budnik	Invincible	Unable to Locate	
(Mrs. Gladys Budnik might be his mother)		922 So.30th	682-2643

OFFICE OF DEPARTMENT  
OF PUBLIC WORKS,  
ENGINEERING

Michael E. Hawley  
 Director of Public Works  
 and City Engineer

OFFICE HALL  
 7 Franklin Street  
 P. Box 1597  
 Manitowoc, WI 54221-1597  
 Phone: (414) 683-4410  
 Fax: (414) 683-4424

MEH:ca  
Attached

March 4, 1968

WASTE MATERIALS HAULED TO CITY GRAVEL PIT  
BY VARIOUS INDUSTRIAL PLANTS

MANITOWOC ENGINEERING CO.

CLEANING SOLVENT WATER SOLUBLE -- 600 Gal. @ week  
(noninflammable)

CUTTING and DRAIN OILS -- 200 Gal. @ week (inflammable).

MANITOWOC SHIPBUILDING INC.

WASTE FUEL OIL -- 1000 Gal. about four times a year Fall & Winter.  
(inflammable).

MIRRO ALUMINUM CO.

12,000 Gal. each two months of a 95% water, 5%  
soluble oil solution.

500 Gal. @ month of various combustibile oils.

500 Gal. @ year of used gear box oils.

2,700 Gal. each six weeks of 80% water, 20%  
Sulphuric acid solution.

1,000 Gal. of naptha on very rare occasions

(Obtained from D.P.W. Street Dept. files)

March 4, 1968

WASTE MATERIALS HAULED TO CITY GRAVEL PIT  
BY VARIOUS INDUSTRIAL PLANTS

INVINCIBLE METAL FURNITURE CO.

PAINT SLUDGE--- 55 Gal. @ week and 550 Gal. every third week.  
(inflammable)

MANITOWOC PRODUCTS CO.

PAINT SLUDGE -- 5 Cu. Yds. @ week (inflammable).

HERESITE & CHEMICAL CO.

WASTE ALCOHOL -- 25 Gal. to 30 Gal. @ week (inflammable).

IMPERIAL EASTMAN CORP.

WASTE OIL --- 200 Gal. @ week (inflammable).

WATER SOLUBLE COOLANT -- 100 Gal. @ week (noninflammable).

WHITE HOUSE MILK DIV.

CLEANING SOLVENT -- 20 Gal. @ Week (inflammable).

ALUMINUM SPECIALTY CO.

DRAIN OIL -- 110 Gal. @ week (inflammable).

PAINT STRIPPER -- 55 Gal. @ week (inflammable).

PAINT THINNER -- 55 Gal. @ week (inflammable).

(Obtained from D.P.W. Street Dept. files)

AFFIDAVIT RICHARD WHITE

STATE OF WISCONSIN )  
                                  ) ss  
MANITOWOC COUNTY )

I, Richard White, being duly sworn on oath, depose and state as follows:

1. I was the Department of Public Works Accountant for the City of Manitowoc from 1967 until approximately June of 1981.

2. That in my role as Accountant for the Public Works Department, I was familiar with the operation costs of the Newton Gravel Pit.

3. That I have a distinct memory that the industrial waste dumping at the Newton Gravel Pit ended some time in 1972 when the Department of Public Works shop moved from the 14<sup>th</sup> and Clark Street location to the 35<sup>th</sup> and Viebahn location.

4. I believe the above statements to be true and correct to the best of my recollection of the facts, and I make this affidavit on behalf of the City of Manitowoc.

Dated this 20<sup>th</sup> day of December 2010.

Richard White  
Richard White

Subscribed and sworn to before me this 20<sup>th</sup> day of December 2010.

Jane M. Rhode  
Notary Public Jane M. Rhode  
My commission expires 6-3-2012

January 25, 2017

**VIA U.S. CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

Gould Electronics Inc.  
CT Corporation System  
1300 East 9<sup>th</sup> Street  
Cleveland, OH 44114

RE: City of Manitowoc/Former Town of Newton Gravel Pit, 3130 Hecker Road,  
Manitowoc, WI - WDNR BRRTS Activity # 02-36-000268 (the "Site")

Dear Sir or Madam:

Pursuant to Wis. Stat. § 292.35(2g)(b) (copy enclosed), the City of Manitowoc (the "City") hereby requests that Gould Electronics Inc. provide access to or delivery of any records or documents in its custody, possession or control that relate to all of the following:

1. The type and quantity of any wastes containing hazardous substances that Gould Electronics Inc. disposed of or discharged at the above-referenced Site and the dates of the disposal or discharge.
2. The identity of any person who may be a "responsible party" for contamination at the above-referenced Site under Wis. Stat. § 292.35(1).
3. The identity of subsidiary or parent corporations, as defined in Wis. Stat. § 292.31(8)(a)3, of any person who may be a responsible party. Section 292.31(8)(a)3 defines a "subsidiary or parent corporation" as "any business entity, including a subsidiary, parent corporation, or other business arrangement which has elements of common ownership or control or uses a long-term contractual arrangement with any person to avoid direct responsibility for conditions at a site or facility."

For context, I am attaching correspondence that includes a 1996 settlement agreement between the City and certain parties, including Gould Electronics Inc., as well as a January 11, 1993 City memorandum (based on a 1968 Manitowoc Department of Public Works document) that identifies certain parties that arranged for disposal of waste at the Site.

It is requested that Gould Electronics Inc. provide delivery or access within thirty (30) days of your receipt of this request. The City intends to assemble all the available information in advance of the public hearing on the City's Draft Remedial Action Plan for the Site, which is currently planned for Monday, March 13, 2017 (details to follow).

Gould Electronics Inc.

January 25, 2017

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Finally, as a preliminary request, please refrain from destroying any documents and/or any electronic information which may be in any way related to the Site or Gould Electronics, Inc.'s operations or activities during the 1960's and 1970's, when the Site was operating.

Thank you for your cooperation in this matter. If you have any questions or concerns, please contact me.

Very truly yours,

GODFREY & KAHN, S.C.



Edward B. Witte

Enclosure

cc: Molly E. Schmidt, Wisconsin Department of Natural Resources (via E-mail w/enclosure)  
Kathleen M. McDaniel, City of Manitowoc (via E-mail w/enclosure)

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CHAPTER 292  
REMEDIAL ACTION

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SUBCHAPTER I

DEFINITIONS

**292.01 Definitions.** In this chapter:

(1) “Approved facility” has the meaning given in s. 289.01 (3).

(1m) “Approved mining facility” has the meaning given in s. 289.01 (4) and includes a mining waste site, as defined in s. 295.41 (31).

(1s) “Contaminated sediment” means sediment that contains a hazardous substance.

(2) “Department” means the department of natural resources.

(3) “Discharge” means, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying or dumping.

(3m) “Engineering control” means an object or action designed and implemented to contain contamination or to minimize the spread of contamination, including a cap, soil cover, or in-place stabilization, but not including a sediment cover.

(4) “Environmental pollution” means the contaminating or rendering unclean or impure the air, land or waters of the state, or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to fish, bird, animal or plant life.

(5) “Hazardous substance” means any substance or combination of substances including any waste of a solid, semisolid, liquid or gaseous form which may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or which may pose a substantial present or potential hazard to human health or the environment because of its quantity, concentration or physical, chemical or infectious characteristics. This term includes, but is not limited to, substances which are toxic, corrosive, flammable, irritants, strong sensitizers or explosives as determined by the department.

(6) “Hazardous waste” means any solid waste identified by the department as hazardous under s. 291.05.

(7) “Landfill” means a solid waste facility for solid waste disposal.

(8) “Lender” means a bank, credit union, savings bank, savings and loan association, mortgage banker or similar financial institution, the primary business of which is to engage in lending

activities or an insurance company, pension fund or government agency engaged in secured lending.

(9) “Lending activities” means advancing funds or credit to and collecting funds from another person; entering into security agreements, including executing mortgages, liens, factoring agreements, accounts receivable financing arrangements, conditional sales, sale and leaseback arrangements and installment sales contracts; conducting inspections of or monitoring a borrower’s business and collateral; providing financial assistance; restructuring or renegotiating the terms of a loan obligation; requiring payment of additional interest; extending the payment period of a loan obligation; initiating foreclosure or other proceedings to enforce a security interest in property before obtaining title; requesting and obtaining the appointment of a receiver; and making decisions related to extending or refusing to extend credit.

(10) “Long-term care” means the routine care, maintenance and monitoring of a solid or hazardous waste facility following closing of the facility.

(11) “Municipality” means any city, town, village, county, county utility district, town sanitary district, public inland lake protection and rehabilitation district or metropolitan sewage district.

(12) “Nonapproved facility” has the meaning given in s. 289.01 (24).

(13) “Person” means an individual, owner, operator, corporation, limited liability company, partnership, association, municipality, interstate agency, state agency or federal agency.

(15) “Preventive measures” mean the installation or testing of equipment or devices, a designated way of performing a specified operation or the preparation of an emergency response plan.

(16) “Representative” means any person acting in the capacity of a conservator, guardian, court-appointed receiver, personal representative, testamentary trustee of a deceased person, trustee of a living trust, or fiduciary of real or personal property.

(17) “Secretary” means the secretary of natural resources.

(17g) “Sediment” means particles in the bed of a navigable water up to the ordinary high-water mark that are derived from the erosion of rock, minerals, soil, and biological materials and from chemical precipitation from the water column and that are transported or deposited by water.



**292.33 Local government cost recovery cause of action.** (1) **DEFINITION.** In this section “local governmental unit” has the meaning given in s. 292.11 (9) (c) 1.

(2) **CAUSE OF ACTION.** Except as provided in sub. (6), a local governmental unit may recover costs as provided in sub. (4) from a responsible person described in sub. (3) if the costs are incurred in connection with a property acquired as provided in s. 292.11 (9) (c) 1m. on which a hazardous substance has been discharged.

(3) **RESPONSIBLE PERSONS.** (a) Except as provided in par. (b), a local governmental unit may recover costs in an action under this section from any of the following:

1. A person who, at the time that the local governmental unit acquired the property, possessed or controlled the hazardous substance that was discharged on the property.

2. A person who caused the discharge of the hazardous substance on the property.

(b) A local governmental unit may not recover costs in an action under sub. (2) from a person listed in par. (a) if any of the following applies:

1. The person is exempt from liability under s. 292.11 (9) (e), 292.13, 292.15, 292.16, 292.19 or 292.21 with respect to the discharge that is the subject of the action.

2. The person has entered into a consent order under this chapter or ch. 289 or 291 or an agreement under s. 292.11 (7) (d) or 292.31 (8) (h) with respect to the discharge that is the subject of the action and the person is in compliance with the consent order or agreement.

3. The person is exempt from liability under s. 292.35 (9) (e) with respect to the discharge that is the subject of the action.

4. The discharge that was caused by the person and that is the subject of the action was in compliance with a permit, license, approval, special order, waiver or variance issued under ch. 283 or 285 or under corresponding federal statutes or regulations.

(4) **RECOVERABLE COSTS.** (a) Except as provided in par. (b), in an action under this section a local governmental unit may recover the reasonable and necessary costs that it incurs for all of the following:

1. Investigating environmental contamination on the property and planning remedial activities described in subd. 2.

2. Conducting remedial activities to restore the property for its intended future use.

3. Administering the activities under subds. 1. and 2. and bringing the action under this section, including costs, disbursements and engineering fees but excluding attorney fees.

(b) The costs determined under par. (a) shall be reduced by the fair market value of the property after completion of the activities under par. (a) 2.

(c) Recoverable costs under this subsection may not be reduced by the amount of any state or federal moneys received by the local governmental unit for any of the activities under par. (a).

(d) 1. In an action under this section, the liability of a responsible person described in sub. (3) (a) 2. is limited to the amount that bears the same proportion to the total costs under par. (a), adjusted as provided in par. (b), as the amount of the environmental pollution on the property from the discharge caused by the responsible person bears to all of the environmental pollution on the property from discharges of hazardous substances.

2. In an action under this section, the liability of a responsible person described in sub. (3) (a) 1. is limited to the amount of the total costs under par. (a), adjusted as provided in par. (b), that the local governmental unit is unable to recover from responsible parties described in sub. (3) (a) 2. less the amount that the local governmental unit is unable to recover because of the exemptions in sub. (3) (b) 3. and 4.

(5) **REPAYING STATE ASSISTANCE.** If a local governmental unit that recovers costs under this section received money from this state, other than under s. 292.11 (7) or 292.31 (1), (3) or (7), for any of the activities under sub. (4) (a), the local governmental unit

shall reimburse to the state an amount that bears the same proportion to the total amount recovered under this section as the amount received from the state, other than under s. 292.11 (7) or 292.31 (1), (3) or (7), bears to the total costs under sub. (4) (a) adjusted as provided in sub. (4) (b).

(6) **EXCEPTION.** A local governmental unit may not recover costs under this section for remedial activities conducted on a property or portion of a property with respect to a discharge after the department of natural resources, the department of safety and professional services, or the department of agriculture, trade and consumer protection has indicated that no further remedial activities are necessary on the property or portion of the property with respect to the discharge.

(7) **LIMITATION OF ACTION.** An action under this section shall be commenced within 6 years after the date that the local governmental unit completes the activities under sub. (4) (a) 2. or be barred.

**History:** 1999 a. 9; 2011 a. 32.

**292.35 Local governmental unit negotiation and cost recovery.** (1) **DEFINITIONS.** In this section:

(am) “Financial assistance” means money, other than a loan, provided by a governmental unit that is not a responsible party to pay a portion of the cost of investigation and remedial action for a site or facility.

(b) “Generator” means a person who, by contract, agreement or otherwise, either arranges or arranged for disposal or treatment, or arranges or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by the person, if the disposal or treatment is done by another person at a site or facility owned and operated by another person and the site or facility contains the hazardous substance.

(bm) “Local governmental unit” means a municipality, a redevelopment authority created under s. 66.1333 or a public body designated by a municipality under s. 66.1337 (4).

(c) “Owner or operator” means any of the following:

1. If the property is taken for tax delinquency, a person who owns or operates a site or facility at the time that the site or facility is taken for tax delinquency.

2. A person who owns or operates a site or facility at the time that the disposal or discharge of a hazardous substance at the site or facility occurs.

(e) “Responsible party” means a generator, an owner or operator, a transporter or a person who possesses or controls a hazardous substance that is discharged or disposed of or who causes the discharge or disposal of a hazardous substance.

(f) “Site or facility” means an approved facility, an approved mining facility, a nonapproved facility, a waste site or any site where a hazardous substance is discharged on or after May 21, 1978.

(g) “Transporter” means a person who accepts or accepted a hazardous substance for transport to a site or facility.

(2) **APPLICABILITY.** This section only applies to a site or facility if one of the following criteria is satisfied:

(a) The site or facility is owned by a local governmental unit.

(b) A local governmental unit that owns a portion of the site or facility commits itself, by resolution of its governing body, to paying more than 50 percent of the amount equal to the difference between the cost of investigation and remedial action for the site or facility and any financial assistance received for the site or facility.

(2g) **IDENTIFICATION OF RESPONSIBLE PARTIES.** (a) A local governmental unit that intends to use the cost recovery procedures in this section shall attempt to identify all responsible parties. All information obtained by the local governmental unit regarding responsible parties is a public record and may be inspected and copied under s. 19.35.

(b) Upon the request of an employee or authorized representative of the local governmental unit, or pursuant to a special inspec-

tion warrant under s. 66.0119, any person who generated, transported, treated, stored or disposed of a hazardous substance that may have been disposed of or discharged at the site or facility or who is or was an owner or operator shall provide the employee or authorized representative access to any records or documents in that person's custody, possession or control that relate to all of the following:

1. The type and quantity of hazardous substance that was disposed of or discharged at the site or facility and the dates of the disposal or discharge.
2. The identity of any person who may be a responsible party.
3. The identity of subsidiary or parent corporations, as defined in s. 292.31 (8) (a) 3., of any person who may be a responsible party.

(c) The local governmental unit shall maintain a single repository that is readily accessible to the public for all documents related to responsible parties, the investigation, the remedial action and plans for redevelopment of the property.

**(2r) PRELIMINARY REMEDIAL ACTION PLAN.** (a) The local governmental unit shall, in consultation with the department, prepare a draft remedial action plan.

(b) Upon completion of the draft remedial action plan, the local governmental unit shall send written notice to all responsible parties identified by the local governmental unit, provide public notice and conduct a public hearing on the draft remedial action plan. The notice to responsible parties shall offer the person receiving the notice an opportunity to provide information regarding the status of that person or any other person as a responsible party, notice and a description of the public hearing and a description of the procedures in this section. At the public hearing, the local governmental unit shall solicit testimony on whether the draft remedial action plan is the least costly method of meeting the standards for remedial action promulgated by the department by rule. The local governmental unit shall accept written comments for at least 30 days after the close of the public hearing.

(c) Upon the conclusion of the period for written comment, the local governmental unit shall prepare a preliminary remedial action plan, taking into account the written comments and comments received at the public hearing and shall submit the preliminary remedial action plan to the department for approval. The department may approve the preliminary remedial action plan as submitted or require modifications.

**(3) OFFER TO SETTLE; SELECTION OF UMPIRE.** (a) Upon receiving the department's approval of the preliminary remedial action plan, the local governmental unit shall serve an offer to settle regarding the contribution of funds for investigation and remedial action at the site or facility on each of the responsible parties identified by the local governmental unit, using the procedure for service of a summons under s. 801.11 and shall notify the department that the offer to settle has been served. The local governmental unit shall include in the offer to settle all of the following information:

1. The amount of the offer and a rationale for the amount.
2. The names, addresses and contact persons, to the extent known, for all of the responsible parties identified by the local governmental unit.
3. The location and availability of documents that support the claim of the local governmental unit against the responsible party.
4. The location of the public repository where documents relating to the site or facility are maintained, the times during which the repository is open and the name and telephone number of the contact person at the repository.
5. A description of the procedures under this section.

(b) The department shall maintain a list of competent and disinterested umpires qualified to perform the duties under subs. (4) to (6). None of the umpires may be employees of the department. Upon receiving notice from a local governmental unit under par. (a), the secretary or his or her designee shall select an umpire from

the list and inform the local governmental unit and responsible parties of the person selected.

(c) Within 10 days after receiving notice of the umpire selected by the department under par. (b), the local governmental unit may notify the department that the umpire selected is unacceptable. Within 10 days after receiving notice of the umpire selected by the department under par. (b), a responsible party may notify the department that the umpire selected is unacceptable or that the responsible party does not intend to participate in the negotiation. Failure to notify the department that the umpire is unacceptable shall be considered acceptance. If all responsible parties identified by the local governmental unit indicate that they do not intend to participate in the negotiation, the department shall inform the local governmental unit and the local governmental unit shall cease further action under this section.

(d) Upon receiving notice under par. (c) that the selected umpire is unacceptable, the secretary or his or her designee shall select 5 additional umpires from the list and inform the local governmental unit and responsible parties of the persons selected.

(e) Within 10 days after receiving notice of the umpires selected by the department under par. (d), the local governmental unit or a responsible party may notify the department that one or more of the umpires selected are unacceptable. Failure to notify the department shall be considered acceptance. The secretary or his or her designee shall select an umpire from among those umpires not identified as unacceptable by the local governmental unit or a responsible party or, if all umpires are identified as unacceptable, the secretary or his or her designee shall designate a person to be umpire for the negotiation.

**(4) NEGOTIATION PROCESS.** (a) The umpire, immediately upon being appointed, shall contact the department, the local governmental unit and the responsible parties that received the offer to settle and shall schedule the negotiating sessions. The umpire shall schedule the first negotiating session no later than 20 days after being appointed. The umpire may meet with all parties to the negotiation, individual parties or groups of parties. The umpire shall facilitate a discussion between the local governmental unit and the responsible parties to attempt to reach an agreement on the design and implementation of the remedial action plan and the contribution of funds by the local governmental unit and responsible parties.

(b) The umpire shall permit the addition to the negotiation, at any time, of any responsible party or any other person who wishes to be a party to the negotiated agreement.

(c) Negotiations may not continue for more than 60 days after the first negotiating session, unless an extension is approved by the department for cause, at the request of any party to the negotiation. The department shall approve an extension if necessary to settle insurance claims.

(d) The local governmental unit and the responsible parties that participate in negotiations shall pay for the costs of the umpire, whether or not an agreement among the parties is reached under sub. (5) or the parties accept the recommendation of the umpire under sub. (6). The umpire shall determine an equitable manner of paying for the costs of the umpire, which is binding.

**(5) AGREEMENT IN NEGOTIATION.** The local governmental unit and any of the responsible parties may enter into any agreement in negotiation regarding the design and implementation of the remedial action plan and the contribution of funds by the local governmental unit and responsible parties for the investigation and remedial action. The portion of the agreement containing the design and implementation of the remedial action plan shall be submitted to the department for approval. The department may approve that portion of the agreement as submitted or require modifications.

**(6) FAILURE TO REACH AGREEMENT IN NEGOTIATION.** (a) If the local governmental unit and any responsible parties are unable to reach an agreement under sub. (5) by the end of the period of negotiation, the umpire shall make a recommendation regarding the

design and implementation of the remedial action plan and the contribution of funds for investigation and remedial action by the local governmental unit and all responsible parties that were identified by the local governmental unit and that did not reach an agreement under sub. (5), whether or not the responsible parties participated in negotiations under sub. (4). The umpire shall submit the recommendation to the department for its approval within 20 days after the end of the period of negotiation under sub. (4) (c). The department may approve the recommendation as submitted or require modifications. The umpire shall distribute a copy of the approved recommendation to the local governmental unit and all responsible parties identified by the local governmental unit.

(b) The local governmental unit and the responsible parties that did not reach an agreement under sub. (5) shall accept or reject the umpire's recommendation within 60 days after receiving it. Failure to accept or reject the recommendation within 60 days shall be considered rejection of the recommendation. If the local governmental unit rejects the recommendation with respect to any responsible party, the recommendation does not apply to that responsible party. If a responsible party rejects the recommendation, it does not apply to that responsible party.

(7) **RESPONSIBLE PARTIES SUBJECT TO AN AGREEMENT OR RECOMMENDATION.** A responsible party that enters into an agreement under sub. (5) with a local governmental unit or that accepts the umpire's recommendation under sub. (6), if the local governmental unit does not reject the recommendation, is required to comply with the agreement or recommendation. When the responsible party has complied with the agreement or recommendation, the responsible party is not liable to the state, including under s. 292.11 (7) (b) or 292.31 (8), or to the local governmental unit for any additional costs of the investigation or remedial action; the responsible party is not liable to any other responsible party for contribution to costs incurred by any other responsible party for the investigation or remedial action; and the responsible party is not subject to an order under s. 292.11 (7) (c) for the discharge that is the subject of the agreement or recommendation.

(8) **RESPONSIBLE PARTIES NOT SUBJECT TO OR NOT COMPLYING WITH AN AGREEMENT OR RECOMMENDATION.** (a) In this subsection:

1. "Interest" means interest at the annual rate of 12 percent, commencing on the date of the umpire's recommendation under sub. (6) or, if there is no umpire's recommendation, on the date of the agreement under sub. (5).

2. "Litigation expenses" means the sum of the costs, disbursements and expenses, including engineering fees and, notwithstanding s. 814.04 (1), reasonable attorney fees necessary to prepare for or participate in proceedings before any court.

(b) A local governmental unit is entitled to recover litigation expenses and interest on the judgment against a responsible party if any of the following occurs:

1. The local governmental unit accepts the recommendation of an umpire under sub. (6), the responsible party rejects it and the local governmental unit recovers a judgment under sub. (9) against that responsible party that equals or exceeds the amount of the umpire's recommendation.

2. The local governmental unit and the responsible party enter into an agreement under sub. (5) or accept the umpire's recommendation under sub. (6), the responsible party does not comply with the requirements of the agreement or recommendation and the local governmental unit recovers a judgment against that responsible party based on the agreement or recommendation.

(c) A responsible party is entitled to recover litigation expenses from a local governmental unit if the responsible party accepts the recommendation of an umpire under sub. (6), the local governmental unit rejects the recommendation of the umpire under sub. (6) with respect to the responsible party, the local governmental unit institutes an action under sub. (9) against the responsible party and the local governmental unit recovers a judgment under sub. (9) against the responsible party that is equal to or less than the amount of the umpire's recommendation.

(9) **LIABILITY FOR REMEDIAL ACTION COSTS.** (a) This subsection applies only to a site or facility that satisfies the applicability provisions of sub. (2) and for which the remedial action specified in an agreement under sub. (5) or a recommendation under sub. (6) is completed.

(b) Except as provided in pars. (bm), (br) and (c), sub. (7) and s. 292.21, a responsible party is liable for a portion of the costs, as determined under pars. (c) to (e), incurred by a local governmental unit for remedial action in an agreement under sub. (5) or a recommendation under sub. (6) and for any related investigation. A right of action shall accrue to a local governmental unit against the responsible party for costs listed in this paragraph.

(bm) Paragraph (b) does not apply with respect to a discharge if the discharge was in compliance with a permit license, approval, special order, waiver or variance issued under ch. 283 or 285 or under corresponding federal statutes or regulations.

(br) Paragraph (b) applies with respect to a transporter only if the transporter does any of the following:

1. Selects the site or facility where the hazardous substance is disposed of without direction from the generator.

2. Violates an applicable statute, rule, plan approval or special order in effect at the time the disposal occurred and the violation causes or contributes to the condition at the site or facility.

3. Causes or contributes to the condition at the site or facility by an action related to the disposal that would result in liability under common law in effect at the time the disposal occurred, based on standards of conduct for the transporter at the time the disposal occurred.

(c) The liability of each party to the action to recover costs under par. (b) is limited to a percentage of the cost of the remedial action that is determined by dividing the percentage of that party's contribution to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility by the percentage of contribution of all responsible parties to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility. Section 895.045 does not apply to this paragraph.

(cm) Notwithstanding par. (c), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for the total contribution of all parties involved in the common scheme or plan.

(d) The finder of fact shall apportion the contribution of each responsible party to the environmental pollution resulting from the disposal or discharge of hazardous substances at the site or facility for the purposes of par. (c), using the following criteria, and any other appropriate criteria:

1. The ability of the responsible parties to demonstrate that their contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances can be distinguished from the contribution of other responsible parties.

2. The amount of hazardous substances involved.

3. The degree of toxicity of the hazardous substances involved.

4. The degree of involvement by the responsible parties in the generation, transportation, treatment, storage, disposal or discharge of the hazardous substances.

5. The degree of cooperation by the responsible parties with federal, state or local officials to prevent or minimize harm to the public health or the environment.

6. The degree of care exercised by the parties with respect to the hazardous substance, taking into account the characteristics of the hazardous substance.

(e) A responsible party is not liable under par. (b) if the responsible party establishes by a preponderance of the evidence that the responsible party's contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances was caused solely by any of the following:

1. An act of God.

2. An act of war.

3. An act or omission of a 3rd party, other than an officer, director, employee or agent of the responsible party, or other than a person whose act or omission occurs in connection with a direct or indirect contractual relationship with the responsible party if all of the following apply:

a. The responsible party establishes by a preponderance of the evidence that the responsible party exercised due care with respect to the hazardous substances that caused environmental pollution.

b. In exercising due care under subd. 3. a., the responsible party took into consideration the characteristics of the hazardous substances, in light of all relevant facts and circumstances.

c. The responsible party took precautions against foreseeable acts or omissions of the 3rd party and the consequences that could foreseeably result from those acts or omissions.

(f) Any responsible party may seek contribution from any other responsible party. Such a contribution claim may be brought as a separate action or may be brought in the action commenced against the responsible party under this section.

(10) TECHNICAL ASSISTANCE. The department shall provide technical assistance to an umpire at the request of the umpire. The department may limit the amount of staff time allocated to each negotiation.

(11) LIABILITY. Except as provided in sub. (7), no common law liability, and no statutory liability that is provided in other statutes, for damages resulting from a site or facility is affected in any manner by this section. The authority, power and remedies provided in this section are in addition to any authority, power or remedy provided in any other statutes or provided at common law.

(13) FEES. The department may, by rule, assess and collect fees to offset the cost of the department's activities under this section. The fees may include an advance deposit, from which the department shall return the amount in excess of the cost of the department's activities under this section.

**History:** 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150 s. 672; 2001 a. 16, 103.  
**Cross-reference:** See also ch. NR 749, Wis. adm. code.

**292.37 Confidentiality of records.** (1) RECORDS. Except as provided under sub. (2), any records or other information furnished to or obtained by the department in the administration of ss. 292.31 and 292.35 are public records subject to s. 19.21.

(2) CONFIDENTIAL RECORDS. (a) *Application.* An owner or operator of a solid waste facility may seek confidential treatment of any records or other information furnished to or obtained by the department in the administration of ss. 292.31 and 292.35.

(b) *Standards for granting confidential status.* Except as provided under par. (c), the department shall grant confidential status for any records or information received by the department and certified by the owner or operator of the solid waste facility as relating to production or sales figures or to processes or production unique to the owner or operator of the solid waste facility or which would tend to adversely affect the competitive position of the owner or operator if made public.

(c) *Emission data; analyses and summaries.* The department may not grant confidential status for emission data. Nothing in this subsection prevents the department from using records and other information in compiling or publishing analyses or summaries relating to the general condition of the environment if the analyses or summaries do not identify a specific owner or operator or the analyses or summaries do not reveal records or other information granted confidential status.

(d) *Use of confidential records.* Except as provided under par. (c) and this paragraph, the department or the department of justice may use records and other information granted confidential status under this subsection only in the administration and enforcement of ss. 292.31 and 292.35. The department or the department of justice may release for general distribution records and other information granted confidential status under this subsection if the owner or operator expressly agrees to the release. The department

or the department of justice may release on a limited basis records and other information granted confidential status under this subsection if the department or the department of justice is directed to take this action by a judge or hearing examiner under an order which protects the confidentiality of the records or other information. The department or the department of justice may release to the U.S. environmental protection agency, or its authorized representative, records and other information granted confidential status under this subsection if the department or the department of justice includes in each release of records or other information a request to the U.S. environmental protection agency, or its authorized representative, to protect the confidentiality of the records or other information.

**History:** 1995 a. 227 s. 993.

**292.41 Abandoned containers.** (1) DEFINITION. In this section, "abandoned container" means any container which contains a hazardous substance and is not being monitored and maintained.

(2) APPLICABILITY. (a) This section does not apply to abandoned containers which are located in an approved facility or a nonapproved facility.

(b) Action by the department under this section is not subject to s. 292.31.

(3) CONTINGENCY PLAN. (a) After consultation with other affected federal, state and local agencies and private organizations, the department shall establish by rule criteria and procedures for the development, establishment and amendment of a contingency plan for the taking of emergency actions in relation to abandoned containers.

(b) The contingency plan shall establish procedures and techniques for locating, identifying, removing and disposing of abandoned containers.

(4) REMOVAL OR OTHER EMERGENCY ACTION. The department or its authorized representative may contain, remove or dispose of abandoned containers or take any other emergency action which it deems appropriate under the circumstances.

(5) ACCESS TO PROPERTY AND RECORDS. Any officer, employee or authorized representative of the department, upon notice to the owner or occupant, may enter onto any property, premises or place at any time for the purposes of sub. (3) if the entry is necessary to prevent increased damage to the air, land or waters of the state, or may inspect any record relating to abandoned container management for the purpose of ascertaining the state of compliance with this section and the rules promulgated under this section. Notice to the owner or occupant is not required if the delay in providing the notice is likely to result in imminent risk to public health or welfare or the environment.

(6) ABANDONED CONTAINERS: APPROPRIATIONS. (a) The department may utilize moneys appropriated under s. 20.370 (2) (dv) and (my) in taking action under sub. (4). The department shall utilize these moneys to provide for the procurement, maintenance and storage of necessary equipment and supplies, personnel training and expenses incurred in locating, identifying, removing and disposing of abandoned containers.

(b) No more than 25 percent of the total of all moneys available under the appropriation under s. 20.370 (2) (dv) and (my) may be used annually for the procurement and maintenance of necessary equipment during that fiscal year.

(c) The department is entitled to recover moneys expended under this section from any person who caused the containers to be abandoned or is responsible for the containers. The funds recovered under this paragraph shall be deposited into the environmental fund for environmental management.

**History:** 1983 a. 410; 1985 a. 29 ss. 1957, 3202 (39); 1987 a. 27, 384; 1989 a. 31; 1991 a. 39; 1993 a. 453; 1995 a. 27; 1995 a. 227 s. 716; Stats. 1995 s. 292.41; 1995 a. 378 s. 46; 1997 a. 27.

**Cross-reference:** See also ch. NR 714, Wis. adm. code.

**292.51 Cooperative remedial action.** (1) In this section, "costs of remedying environmental contamination" means costs

May 24, 1996



Ms. Diane Tesinsky  
Wausau Insurance Companies  
901 Warrenville Road  
Suite 500  
Lisle, IL 60532-4344

Mr. Richard Ventura  
CIGNA Property & Casualty  
160 Chestnut Street  
P.O. Box 7716  
Philadelphia, PA 19192

Ms. Brenda L. DuPree  
General Casualty Ins. Co.  
One General Drive  
Sun Prairie, WI 53596

Ms. Elva McMullin  
Crum & Forster Comm. Inc.  
1700 West 82nd Street  
Suite 200  
Bloomington, MN 55431-1440

Mr. L.J. DacQuisto  
AETNA  
P.O. Box 2940  
Milwaukee, WI 53201-2940

Ms. Janis Severson  
Risk Enterprise Management  
Limited  
4940 Viking Drive  
Suite 530  
P.O. Box 39827  
Minneapolis, MN 55439-0954



Re: Town of Newton Gravel Pit

OFFICE OF CITY ATTORNEY

Dear Insurer Representatives:

The City of Manitowoc has entered into an agreement with waste generators at the Town of Newton Gravel Pit site to facilitate the clean up of environmental damage. I'm enclosing a copy of that Agreement for your records.

Our consultant, RUST Environment and Infrastructure is in the process of submitting their Remedial Action Plan to the Wisconsin Department of Natural Resources. The cost of the recommended remedial action is approximately \$460,000. In addition, the City has spent approximately \$425,000 in engineering fees to this point.

Very truly yours,

Patrick L. Willis  
City Attorney

PLW:es

Enc.

Patrick L. Willis  
City Attorney

CITY HALL  
817 Franklin Street  
P.O. Box 159  
Manitowoc, WI 54221-0159  
Phone: (414) 683-4418  
FAX: (414) 683-4331

\\PFILES\CORR\NWTNGRVL.INS



**AGREEMENT BETWEEN THE CITY OF MANITOWOC AND  
PARTICIPATING GENERATORS FOR THE TOWN OF NEWTON  
GRAVEL PIT SITE**

This Agreement is entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 1996 between the City of Manitowoc (the "City") and those Parties listed in Appendix A (the "Participating Generators") (with the City and the Participating Generators collectively referred to as the "Parties") and each, individually, as a "Party").

**FACTUAL BACKGROUND**

1. The Town of Newton Gravel Pit Site (the "Site") has been identified as requiring remediation. The required remediation is proposed to be carried out according to the Remedial Option #5 of the Site Investigation and Remedial Options Report (the "Remedial Plan") prepared by Rust Environment and Infrastructure ("Rust") dated January 19, 1995. Part of the Remedial Plan includes non-aqueous phase liquid removal at a cost not to exceed \$69,800 (the "Removal"). The Remedial Plan will be submitted to the Wisconsin Department of Natural Resources ("WDNR") by the City.
2. The Participating Generators are alleged to have generated waste during the relevant time period that may have been disposed of at the Site.
3. The City was the owner of the Site during the relevant time period.
4. The Parties have met on numerous occasions to discuss a privately financed investigation and remediation of the Site.
5. Consequently, in order to accomplish an expeditious remediation of the Site, the Participating Generators and the City have reached this Agreement to jointly fund the remediation at this Site.

**PURPOSE OF THIS AGREEMENT**

6. The purpose of this Agreement is to set forth the terms under which the Parties will jointly fund the remediation work and the manner in which the remediation will be accomplished.

## SCOPE OF THIS AGREEMENT

7. The terms and conditions of this Agreement between the City and the Participating Generators apply only to the funding and conducting of the Remedial Plan, identified as Remedial Option #5 in the Rust Report dated January 19, 1995, and to the partial payment by the Participating Generators of past costs incurred by the City for site investigation services, as provided in Appendix B ("Past Costs").

8. This Agreement is contingent in part upon WDNR approval of the cleanup proposed for the Site in substantial compliance with the Remedial Plan (hereinafter the "WDNR Approval"). If WDNR fails to approve the cleanup proposed for the Site in substantial compliance with the Remedial Plan on or before December 31, 1996 (hereinafter the "Non-Approval"), this Agreement shall be declared to be null and void for all purposes except for those portions of this Agreement that relate to the Removal. Rust shall estimate the cost of implementing the cleanup for the site approved by the WDNR within 30 days after the date of the approval issued by the WDNR (hereinafter the "Rust Estimate"). The Rust Estimate shall be for total site costs including the cost of the Removal and Past Costs incurred by the City ("Total Site Costs"). As used in this Agreement, the term "substantial compliance" shall mean that Rust Estimate is not greater than \$1,000,000 for Total Site Costs.

9. In the event following WDNR Approval it is later determined that the actual costs of implementing the WDNR Approval exceed \$1,000,000 for Total Site Costs, the Participating Generators shall have no obligation under this Agreement to fund the portion of the costs in excess of \$1,000,000, provided, however, that the City and the other Parties shall retain any and all rights not specifically waived in this Agreement to seek contribution from other Parties to this Agreement as well as from any third parties for any such excess cost.

10. The Parties agree to waive consistency with the National Contingency Plan ("NCP") as to all work performed before or after the date of this Agreement.

11. The Parties agree that no portion of the tolling period beginning from January 1, 1995 up to the date that any Party to this Agreement mails written notification to all other Parties of its intent to terminate the tolling period shall be used for purposes of calculating the passage of time under an applicable statute of limitations for any claim that a Party may have against another Party relating to contamination at the Site.

12. The obligations of the Parties under this Agreement are limited solely to this Agreement and have no effect outside the terms of this Agreement. Nothing in this Agreement shall be an admission of law or fact or evidence of any liability or responsibility with respect to the Site. Nothing in this Agreement is intended to release, discharge, or in

any way affect any claim, cause of action, or demand in law or equity which the Parties may have against any other person or entity who is not a Party relating to the generation, storage, treatment, transportation, release, or disposal of any hazardous substances at, to, or from the Site.

13. The Parties do not admit or concede, and reserve the right to contest any determination, allegation, finding or conclusion regarding the Site in any action other than one brought by any of the Parties to enforce this Agreement.

14. This Agreement shall not create any private right, other than a right by any of the Parties to enforce this Agreement.

#### ALLOCATION OF COSTS

15. The Parties agree to fund jointly the cost of implementing the WDNR Approval and, in the event of Non-Approval, the Removal.

16. The Participating Generators shall pay the City \$69,800 for the Removal within 30 days of the execution of this Agreement. In the event of Non-Approval, this shall constitute the sole payment for which the Participating Generators are obligated under this Agreement.

17. In the event of WDNR Approval, the Participating Generators shall pay the City the balance of 67.5% of the Rust Estimate remaining after the payment made under paragraph 16, within 30 days of the date of mailing of the Rust Estimate. In the event of WDNR Approval, the City agrees to pay 32.5 percent of the Rust Estimate.

18. The City shall maintain the payments received from the Participating Generators in a separate account which shall not be commingled with monies from any source not covered by this Agreement (hereinafter the "Account"). The City is authorized to utilize the Account for the payment of costs incurred for the implementation of the WDNR Approval or, in the event of Non-Approval, the Removal.

19. The Parties agree that the City of Manitowoc, to date, has expended \$421,609 in project costs paid to Rust for cleanup activities at the Site. In the event of WDNR Approval and within 30 days of the date of the mailing of the Rust Estimate, the Participating Generators agree to reimburse the City an amount calculated in accordance with the following formula:  $\$421,609 - (\text{Rust Estimate} \times 32.5\%)$ . As a result of this reimbursement, the City is deemed to have contributed its 32.5 percent share of the Rust Estimate in accordance with paragraph 17 of this Agreement in the event of WDNR Approval.



20. If the total actual costs for the WDNR Approval exceed the Rust Estimate, the Participating Generators shall pay the City 67.5% of such excess costs within 45 days of the date of mailing by the City to the Participating Generators of notification of such excess costs provided, however, that the Participating Generators shall have no obligation for any portion of the total costs for the WDNR Approval in excess of \$1,000,000 Total Site Costs. In the event the total actual costs for the WDNR Approval are less than the Rust Estimate, the City shall distribute to the Participating Generators the balance in the Fund within 45 days of the date that WDNR has approved the completion of the WDNR Approval.

#### **ACTIONS TO BE PERFORMED BY THE CITY OF MANITOWOC**

21. Upon execution of this Agreement, the City shall direct its consultant, Rust, to conduct the Removal immediately or as promptly as site and weather conditions allow. Conduct of the Removal shall not be postponed until WDNR Approval or Non-Approval.

22. The Parties agree that the City of Manitowoc will continue to act as the primary representative dealing with the WDNR. The City of Manitowoc further agrees that it will not inform WDNR of the terms of this Agreement between the Participating Generators and the City unless prohibited by applicable law as defined in paragraph 29 of this Agreement.

23. The Parties agree that the City is the party responsible for entering into and overseeing all contracts for work performed at this Site under the WDNR Approval or the Removal. The City will use reasonable efforts, as determined solely in the exercise of the City's discretion, to perform tasks covered by the WDNR Approval or the Removal with City personnel.

24. The Parties agree that the City is responsible for monitoring the total costs for the WDNR Approval and for providing notification to the Participating Generators in the event that total costs of the WDNR Approval exceed the Rust Estimate. The Parties further agree that the City will provide a final accounting of all costs for the WDNR Approval upon its completion and make distributions, if any are required, in accordance with paragraph 20 of this Agreement.

#### **ACTIONS TO BE PERFORMED BY THE PARTICIPATING GENERATORS**

25. The Participating Generators will agree among themselves how to fund the Participating Generators' allocated share of the costs of the WDNR Approval or the Removal as required by this Agreement.

26. The Participating Generators shall designate one or more representatives to coordinate the work to be performed with the City and for the receipt of any notices or payments made by the City or Rust under this Agreement.

#### COVENANT NOT TO SUE

27. In the event WDNR approves the completion of the WDNR Approval for the Site in accordance with applicable law and the Parties have fulfilled all of their obligations under this Agreement, and the clean up is accomplished at a cost of not more than \$1,000,000.00 Total Site Costs, the Parties agree not to sue each other for costs associated with the WDNR Approval; provided, however, that nothing herein shall preclude or bar the Parties from any available legal remedies directed against anyone who is not a Party for such costs, nor shall anything herein preclude or bar any of the Parties from any available legal remedies against any other Party in the event of a suit or claim against any Party from any party who is not a signatory to this Agreement.

#### INDEMNIFICATION

28. Each Party agrees to indemnify, defend and hold harmless any Party and its representative(s) from and against any claim, demand, liability, cost, expense, legal fee, penalty, loss or judgment (collectively "Liability") which in any way relates to the good faith performance of any duties under this Agreement by any Party or its representative(s) on behalf of the Parties, including, but not limited to, any liability arising from any contract or agreement required to implement the WDNR Approval or the Removal. This indemnification shall not apply to any liability arising from a criminal conviction, unless the Party or its representative(s) demonstrates to the satisfaction of the Parties that the Party or its representative(s) had reasonable cause to believe that the conduct in question was lawful. However, nothing in this paragraph shall constitute a waiver or release of any claim or potential claim by any Party which is reserved within this Agreement. In addition, if assertion of any remedies against anyone who was not a Party which are specifically reserved in paragraph 27 of this Agreement results in claims being asserted by anyone who is not a Party against a Party who does not elect to assert such a claim ("Non-Claimant") or results in any person or entity asserting an indemnity claim against a Non-Claimant, then the claimants who are also Parties jointly and severally agree to defend, indemnify and hold harmless such Non-Claimants from such litigation costs, attorneys' fees, money damages, judgments and/or settlements relating to such contribution or indemnity claim.

### **CONFIDENTIALITY**

29. The City will maintain the confidentiality of this Agreement unless prohibited by applicable law, including, but not limited to, the Wisconsin Public Records law, Wis. Stats. §19.31 et. seq.

### **SUCCESSORS AND ASSIGNS**

30. This Agreement shall be binding upon the successors and assigns of the Parties. No assignment or delegation of the obligation to make any payment or reimbursement hereunder will release the assigning Party without the prior written consent of the remaining Parties.

### **MAILING**

31. Any reference to mail or mailing in this Agreement shall be accomplished by mailing a notification by certified mail, return receipt requested to the intended recipient(s).

### **APPLICABLE LAW**

32. For purposes of enforcement or interpretation of the provisions of this Agreement, the Parties agree that the laws of the State of Wisconsin shall be applicable, except to the extent federal law shall apply to questions arising under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, or the NCP promulgated thereunder, and further agree not to contest personal jurisdiction in the state or federal courts of Wisconsin with respect to litigation brought for such purposes.

### **NATURE OF AGREEMENT**

33. Nothing herein shall be deemed to create a partnership or joint venture and/or principal and agent relationship between or among the Parties.

### **COUNTERPARTS**

34. This Agreement may be executed in any number of counterparts, each of which shall be deemed a duplicate original, but all of which together shall constitute one and the same instrument and shall become effective as to each Party when the counterpart executed by such Party as of the date the last Party signs the Agreement provided all counterparts have been delivered to Susan H. Martin, Foley & Lardner.

APPENDIX A

Participating Generators

A & P

Heresite

Imperial Eastman

Invincible

Manitowoc Co.  
(Manitowoc Engineering)  
(Manitowoc Shipbuilding)

Manitowoc Products Co.  
(Chrysler Corporation)  
(White Consolidated)

Newell  
(Aluminum Spec.)  
(Mirro)

APPENDIX B

RECEIVED  
JAN 16 1996  
CITY ATTORNEY



January 16, 1996

MEMO TO: CITY ATTORNEY PAT WILLIS  
FROM: MICHAEL E. HAWLEY, P.E. *MEH*  
Director of Public Works & City Engineer  
SUBJECT: Gravel Pit Investigation

Pursuant to your request for information on costs incurred in the Gravel Pit Investigation, we have paid the following to date.



OFFICE OF DEPARTMENT  
OF PUBLIC WORKS  
ENGINEERING

RUST ENVIRONMENT & INFRASTRUCTURE

Contract 1 - Site Investigation Services  
from December, 1992 thru  
December 10, 1993 \$166,072.00  
(Final Payment 1/14/94)

Contract 2 - Continuing Site Investigation  
January, 1994 thru  
December 8, 1995 \$255,536.69  
(\$626.91 Paid 1/12/96)

MEH:ca  
Revised 1/16/96  
(450-353130-529900)

Michael E. Hawley  
Director of Public Works  
and City Engineer

CITY HALL  
817 Franklin Street  
P.O. Box 1697  
Manitowoc, WI 54221-1697  
Phone: (414) 683-4410  
FAX: (414) 683-4424

MODIFICATION

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

4-16-96  
Date of Execution

INVINCIBLE METAL FURNITURE CO.

Name of Party

By:

  
(Signature)

Name:

JOHN A. SCHUETTE

(Typed Name)

Title:

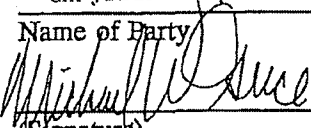
PRESIDENT

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3-12-96  
Date of Execution

Chrysler Corporation  
Name of Party  
By:   
(Signature)

Name: Michael W. Grice  
(Typed Name) ✓

Title: Senior Staff Counsel

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

April 15, 1996  
Date of Execution

City of Manitowoc  
Name of Party

By: *Patrick L. Willis*  
(Signature)

Name: Patrick L. Willis  
(Typed Name)

Title: City Attorney




**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 29, 1996  
Date of Execution

The Manitowoc Company, Inc.  
Name of Party

By:   
(Signature)

Name: E. Dean Flynn  
(Typed Name)

Title: Secretary & Manager - Corp. Insurance

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3/22/96  
Date of Execution

Great Atlantic & Pacific Tea Co., Inc.  
Name of Party

By: *Alfred Limbrick*  
(Signature)

Name: Alfred Limbrick ✓  
(Typed Name)

Title: Group Vice-President

**MODIFICATION**


35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 8, 1996  
Date of Execution

Gould Electronics Inc.  
Name of Party

By:

  
(Signature)

Name:

Lawrence W. Mitchell  
(Typed Name)

Title:

Associate Counsel


**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3-11-96  
Date of Execution

HERESITE PROTECTIVE COATINGS, INC.  
Name of Party

By:   
(Signature)

Name: GEOFFREY C. LIBAN  
(Typed Name)

Title: C.E.O.

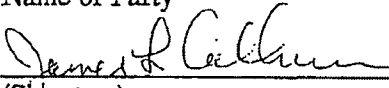
**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 12, 1996  
Date of Execution

White Consolidated Industries, Inc  
Name of Party

By:   
(Signature)

Name: James L. Calhoun  
(Typed Name)

Title: Vice President - Regulatory Affairs

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 7, 1996  
Date of Execution

Newell Co.  
Name of Party

By: [Signature]  
(Signature)

Name: Richard H. Wolff  
(Typed Name)

Title: Secretary

Mike



January 11, 1993

MEMO TO: CITY ATTORNEY PAT WILLIS

FROM: MICHAEL E. HAWLEY, P. E. *MEH*  
 Director of Public Works and City Engineer

SUBJECT: Gravel Pit

File Search

Jean Campbell and Carol Adler searched the Engineering Department files for any material on the Gravel Pit, and couldn't find anything pertaining to industrial dumping. Mostly found old yearly crushing reports.

Tony Scherer searched the files at the Street Department, and found the attached report dated March 4, 1968, outlining materials and companies hauling to the Gravel Pit.

Company Drivers

We have only been able to come up with names of three drivers, one of whom we haven't been able to locate.

<u>Name</u>	<u>Name of Company</u>	<u>Address</u>	<u>Phone</u>
Erwin C. Musial	Manitowoc Company	2115 Madison	684-3274
Earl A. Mueller	Mirro Aluminum	944 So.26th	684-3727
Richard Budnik	Invincible	Unable to Locate	
(Mrs. Gladys Budnik might be his mother)		922 So.30th	682-2643

OFFICE OF DEPARTMENT  
OF PUBLIC WORKS,  
ENGINEERING

Michael E. Hawley  
 Director of Public Works  
 and City Engineer

OFFICE HALL  
 7 Franklin Street  
 P. Box 1597  
 Manitowoc, WI 54221-1597  
 Phone: (414) 683-4410  
 Fax: (414) 683-4424

MEH:ca  
Attached

March 4, 1968

WASTE MATERIALS HAULED TO CITY GRAVEL PIT  
BY VARIOUS INDUSTRIAL PLANTS

MANITOWOC ENGINEERING CO.

CLEANING SOLVENT WATER SOLUBLE -- 600 Gal. @ week  
(noninflammable)

CUTTING and DRAIN OILS -- 200 Gal. @ week (inflammable).

MANITOWOC SHIPBUILDING INC.

WASTE FUEL OIL -- 1000 Gal. about four times a year Fall & Winter.  
(inflammable).

MIRRO ALUMINUM CO.

12,000 Gal. each two months of a 95% water, 5%  
soluble oil solution.

500 Gal. @ month of various combustibile oils.

500 Gal. @ year of used gear box oils.

2,700 Gal. each six weeks of 80% water, 20%  
Sulphuric acid solution.

1,000 Gal. of naptha on very rare occasions

(Obtained from D.P.W. Street Dept. files)



March 4, 1968

WASTE MATERIALS HAULED TO CITY GRAVEL PIT  
BY VARIOUS INDUSTRIAL PLANTS

INVINCIBLE METAL FURNITURE CO.

PAINT SLUDGE--- 55 Gal. @ week and 550 Gal. every third week.  
(inflammable)

MANITOWOC PRODUCTS CO.

PAINT SLUDGE -- 5 Cu. Yds. @ week (inflammable).

HERESITE & CHEMICAL CO.

WASTE ALCOHOL -- 25 Gal. to 30 Gal. @ week (inflammable).

IMPERIAL EASTMAN CORP.

WASTE OIL --- 200 Gal. @ week (inflammable).

WATER SOLUBLE COOLANT -- 100 Gal. @ week (noninflammable).

WHITE HOUSE MILK DIV.

CLEANING SOLVENT -- 20 Gal. @ Week (inflammable).

ALUMINUM SPECIALTY CO.

DRAIN OIL -- 110 Gal. @ week (inflammable).

PAINT STRIPPER -- 55 Gal. @ week (inflammable).

PAINT THINNER -- 55 Gal. @ week (inflammable).

(Obtained from D.P.W. Street Dept. files)

AFFIDAVIT RICHARD WHITE

STATE OF WISCONSIN )  
                                  ) ss  
MANITOWOC COUNTY )

I, Richard White, being duly sworn on oath, depose and state as follows:

1. I was the Department of Public Works Accountant for the City of Manitowoc from 1967 until approximately June of 1981.
2. That in my role as Accountant for the Public Works Department, I was familiar with the operation costs of the Newton Gravel Pit.
3. That I have a distinct memory that the industrial waste dumping at the Newton Gravel Pit ended some time in 1972 when the Department of Public Works shop moved from the 14<sup>th</sup> and Clark Street location to the 35<sup>th</sup> and Viebahn location.
4. I believe the above statements to be true and correct to the best of my recollection of the facts, and I make this affidavit on behalf of the City of Manitowoc.

Dated this 20<sup>th</sup> day of December 2010.

Richard White  
Richard White

Subscribed and sworn to before me this 20<sup>th</sup> day of December 2010.

Jane M. Rhode  
Notary Public     Jane M. Rhode  
My commission expires 6-3-2012

January 25, 2017

**VIA U.S. CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

The Great Atlantic & Pacific Tea Company, Inc.  
2 Paragon Drive  
Montvale, New Jersey 07645

RE: City of Manitowoc/Former Town of Newton Gravel Pit, 3130 Hecker Road,  
Manitowoc, WI - WDNR BRRTS Activity # 02-36-000268 (the "Site")

Dear Sir or Madam:

Pursuant to Wis. Stat. § 292.35(2g)(b) (copy enclosed), the City of Manitowoc (the "City") hereby requests that The Great Atlantic & Pacific Tea Company, Inc. provide access to or delivery of any records or documents in its custody, possession or control that relate to all of the following:

1. The type and quantity of any wastes containing hazardous substances that The Great Atlantic & Pacific Tea Company, Inc. or the parties the City believes to be its corporate predecessors in interest, A&P, and White House Milk Division (collectively, "A&P") disposed of or discharged at the above-referenced Site and the dates of the disposal or discharge.
2. The identity of any person who may be a "responsible party" for contamination at the above-referenced Site under Wis. Stat. § 292.35(1).
3. The identity of subsidiary or parent corporations, as defined in Wis. Stat. § 292.31(8)(a)3, of any person who may be a responsible party. Section 292.31(8)(a)3 defines a "subsidiary or parent corporation" as "any business entity, including a subsidiary, parent corporation, or other business arrangement which has elements of common ownership or control or uses a long-term contractual arrangement with any person to avoid direct responsibility for conditions at a site or facility."

For context, I am attaching correspondence that includes a 1996 settlement agreement between the City and certain parties, including A&P, as well as a January 11, 1993 City memorandum (based on a 1968 Manitowoc Department of Public Works document) that identifies certain parties, including White House Milk Division, that arranged for disposal of waste at the Site.

The Great Atlantic & Pacific Tea Company, Inc.

January 25, 2017

Page 2

It is requested that A&P provide delivery or access within thirty (30) days of your receipt of this request. The City intends to assemble all the available information in advance of the public hearing on the City's Draft Remedial Action Plan for the Site, which is currently planned for Monday, March 13, 2017 (details to follow).

Finally, as a preliminary request, please refrain from destroying any documents and/or any electronic information which may be in any way related to the Site or A&P's/White House Milk Division's operations or activities during the 1960's and 1970's, when the Site was operating.

Thank you for your cooperation in this matter. If you have any questions or concerns, please contact me.

Very truly yours,

GODFREY & KAHN, S.C.



Edward B. Witte

Enclosure

cc: Molly E. Schmidt, Wisconsin Department of Natural Resources (via E-mail w/enclosure)  
Kathleen M. McDaniel, City of Manitowoc (via E-mail w/enclosure)

16705781.1

CHAPTER 292  
REMEDIAL ACTION

	SUBCHAPTER I		
	DEFINITIONS		
292.01	Definitions.		292.37 Confidentiality of records.
	SUBCHAPTER II		292.41 Abandoned containers.
	REMEDIAL ACTION		292.51 Cooperative remedial action.
292.11	Hazardous substance spills.		292.53 Availability of environmental insurance.
292.12	Sites with residual contamination.		292.55 Requests for liability clarification and technical assistance.
292.13	Property affected by off-site discharge.		292.57 Database of properties with residual contamination.
292.15	Voluntary party remediation and exemption from liability.		292.63 Petroleum storage remedial action; financial assistance.
292.16	Responsibility of certain municipalities acquiring closed landfills.		292.64 Removal of abandoned underground petroleum storage tanks.
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SUBCHAPTER I  
DEFINITIONS

**292.01 Definitions.** In this chapter:

(1) “Approved facility” has the meaning given in s. 289.01 (3).

(1m) “Approved mining facility” has the meaning given in s. 289.01 (4) and includes a mining waste site, as defined in s. 295.41 (31).

(1s) “Contaminated sediment” means sediment that contains a hazardous substance.

(2) “Department” means the department of natural resources.

(3) “Discharge” means, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying or dumping.

(3m) “Engineering control” means an object or action designed and implemented to contain contamination or to minimize the spread of contamination, including a cap, soil cover, or in-place stabilization, but not including a sediment cover.

(4) “Environmental pollution” means the contaminating or rendering unclean or impure the air, land or waters of the state, or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to fish, bird, animal or plant life.

(5) “Hazardous substance” means any substance or combination of substances including any waste of a solid, semisolid, liquid or gaseous form which may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or which may pose a substantial present or potential hazard to human health or the environment because of its quantity, concentration or physical, chemical or infectious characteristics. This term includes, but is not limited to, substances which are toxic, corrosive, flammable, irritants, strong sensitizers or explosives as determined by the department.

(6) “Hazardous waste” means any solid waste identified by the department as hazardous under s. 291.05.

(7) “Landfill” means a solid waste facility for solid waste disposal.

(8) “Lender” means a bank, credit union, savings bank, savings and loan association, mortgage banker or similar financial institution, the primary business of which is to engage in lending

activities or an insurance company, pension fund or government agency engaged in secured lending.

(9) “Lending activities” means advancing funds or credit to and collecting funds from another person; entering into security agreements, including executing mortgages, liens, factoring agreements, accounts receivable financing arrangements, conditional sales, sale and leaseback arrangements and installment sales contracts; conducting inspections of or monitoring a borrower’s business and collateral; providing financial assistance; restructuring or renegotiating the terms of a loan obligation; requiring payment of additional interest; extending the payment period of a loan obligation; initiating foreclosure or other proceedings to enforce a security interest in property before obtaining title; requesting and obtaining the appointment of a receiver; and making decisions related to extending or refusing to extend credit.

(10) “Long-term care” means the routine care, maintenance and monitoring of a solid or hazardous waste facility following closing of the facility.

(11) “Municipality” means any city, town, village, county, county utility district, town sanitary district, public inland lake protection and rehabilitation district or metropolitan sewage district.

(12) “Nonapproved facility” has the meaning given in s. 289.01 (24).

(13) “Person” means an individual, owner, operator, corporation, limited liability company, partnership, association, municipality, interstate agency, state agency or federal agency.

(15) “Preventive measures” mean the installation or testing of equipment or devices, a designated way of performing a specified operation or the preparation of an emergency response plan.

(16) “Representative” means any person acting in the capacity of a conservator, guardian, court-appointed receiver, personal representative, testamentary trustee of a deceased person, trustee of a living trust, or fiduciary of real or personal property.

(17) “Secretary” means the secretary of natural resources.

(17g) “Sediment” means particles in the bed of a navigable water up to the ordinary high-water mark that are derived from the erosion of rock, minerals, soil, and biological materials and from chemical precipitation from the water column and that are transported or deposited by water.

**292.33 Local government cost recovery cause of action.** (1) **DEFINITION.** In this section “local governmental unit” has the meaning given in s. 292.11 (9) (c) 1.

(2) **CAUSE OF ACTION.** Except as provided in sub. (6), a local governmental unit may recover costs as provided in sub. (4) from a responsible person described in sub. (3) if the costs are incurred in connection with a property acquired as provided in s. 292.11 (9) (c) 1m. on which a hazardous substance has been discharged.

(3) **RESPONSIBLE PERSONS.** (a) Except as provided in par. (b), a local governmental unit may recover costs in an action under this section from any of the following:

1. A person who, at the time that the local governmental unit acquired the property, possessed or controlled the hazardous substance that was discharged on the property.

2. A person who caused the discharge of the hazardous substance on the property.

(b) A local governmental unit may not recover costs in an action under sub. (2) from a person listed in par. (a) if any of the following applies:

1. The person is exempt from liability under s. 292.11 (9) (e), 292.13, 292.15, 292.16, 292.19 or 292.21 with respect to the discharge that is the subject of the action.

2. The person has entered into a consent order under this chapter or ch. 289 or 291 or an agreement under s. 292.11 (7) (d) or 292.31 (8) (h) with respect to the discharge that is the subject of the action and the person is in compliance with the consent order or agreement.

3. The person is exempt from liability under s. 292.35 (9) (e) with respect to the discharge that is the subject of the action.

4. The discharge that was caused by the person and that is the subject of the action was in compliance with a permit, license, approval, special order, waiver or variance issued under ch. 283 or 285 or under corresponding federal statutes or regulations.

(4) **RECOVERABLE COSTS.** (a) Except as provided in par. (b), in an action under this section a local governmental unit may recover the reasonable and necessary costs that it incurs for all of the following:

1. Investigating environmental contamination on the property and planning remedial activities described in subd. 2.

2. Conducting remedial activities to restore the property for its intended future use.

3. Administering the activities under subds. 1. and 2. and bringing the action under this section, including costs, disbursements and engineering fees but excluding attorney fees.

(b) The costs determined under par. (a) shall be reduced by the fair market value of the property after completion of the activities under par. (a) 2.

(c) Recoverable costs under this subsection may not be reduced by the amount of any state or federal moneys received by the local governmental unit for any of the activities under par. (a).

(d) 1. In an action under this section, the liability of a responsible person described in sub. (3) (a) 2. is limited to the amount that bears the same proportion to the total costs under par. (a), adjusted as provided in par. (b), as the amount of the environmental pollution on the property from the discharge caused by the responsible person bears to all of the environmental pollution on the property from discharges of hazardous substances.

2. In an action under this section, the liability of a responsible person described in sub. (3) (a) 1. is limited to the amount of the total costs under par. (a), adjusted as provided in par. (b), that the local governmental unit is unable to recover from responsible parties described in sub. (3) (a) 2. less the amount that the local governmental unit is unable to recover because of the exemptions in sub. (3) (b) 3. and 4.

(5) **REPAYING STATE ASSISTANCE.** If a local governmental unit that recovers costs under this section received money from this state, other than under s. 292.11 (7) or 292.31 (1), (3) or (7), for any of the activities under sub. (4) (a), the local governmental unit

shall reimburse to the state an amount that bears the same proportion to the total amount recovered under this section as the amount received from the state, other than under s. 292.11 (7) or 292.31 (1), (3) or (7), bears to the total costs under sub. (4) (a) adjusted as provided in sub. (4) (b).

(6) **EXCEPTION.** A local governmental unit may not recover costs under this section for remedial activities conducted on a property or portion of a property with respect to a discharge after the department of natural resources, the department of safety and professional services, or the department of agriculture, trade and consumer protection has indicated that no further remedial activities are necessary on the property or portion of the property with respect to the discharge.

(7) **LIMITATION OF ACTION.** An action under this section shall be commenced within 6 years after the date that the local governmental unit completes the activities under sub. (4) (a) 2. or be barred.

**History:** 1999 a. 9; 2011 a. 32.

**292.35 Local governmental unit negotiation and cost recovery.** (1) **DEFINITIONS.** In this section:

(am) “Financial assistance” means money, other than a loan, provided by a governmental unit that is not a responsible party to pay a portion of the cost of investigation and remedial action for a site or facility.

(b) “Generator” means a person who, by contract, agreement or otherwise, either arranges or arranged for disposal or treatment, or arranges or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by the person, if the disposal or treatment is done by another person at a site or facility owned and operated by another person and the site or facility contains the hazardous substance.

(bm) “Local governmental unit” means a municipality, a redevelopment authority created under s. 66.1333 or a public body designated by a municipality under s. 66.1337 (4).

(c) “Owner or operator” means any of the following:

1. If the property is taken for tax delinquency, a person who owns or operates a site or facility at the time that the site or facility is taken for tax delinquency.

2. A person who owns or operates a site or facility at the time that the disposal or discharge of a hazardous substance at the site or facility occurs.

(e) “Responsible party” means a generator, an owner or operator, a transporter or a person who possesses or controls a hazardous substance that is discharged or disposed of or who causes the discharge or disposal of a hazardous substance.

(f) “Site or facility” means an approved facility, an approved mining facility, a nonapproved facility, a waste site or any site where a hazardous substance is discharged on or after May 21, 1978.

(g) “Transporter” means a person who accepts or accepted a hazardous substance for transport to a site or facility.

(2) **APPLICABILITY.** This section only applies to a site or facility if one of the following criteria is satisfied:

(a) The site or facility is owned by a local governmental unit.

(b) A local governmental unit that owns a portion of the site or facility commits itself, by resolution of its governing body, to paying more than 50 percent of the amount equal to the difference between the cost of investigation and remedial action for the site or facility and any financial assistance received for the site or facility.

(2g) **IDENTIFICATION OF RESPONSIBLE PARTIES.** (a) A local governmental unit that intends to use the cost recovery procedures in this section shall attempt to identify all responsible parties. All information obtained by the local governmental unit regarding responsible parties is a public record and may be inspected and copied under s. 19.35.

(b) Upon the request of an employee or authorized representative of the local governmental unit, or pursuant to a special inspec-

tion warrant under s. 66.0119, any person who generated, transported, treated, stored or disposed of a hazardous substance that may have been disposed of or discharged at the site or facility or who is or was an owner or operator shall provide the employee or authorized representative access to any records or documents in that person's custody, possession or control that relate to all of the following:

1. The type and quantity of hazardous substance that was disposed of or discharged at the site or facility and the dates of the disposal or discharge.
2. The identity of any person who may be a responsible party.
3. The identity of subsidiary or parent corporations, as defined in s. 292.31 (8) (a) 3., of any person who may be a responsible party.

(c) The local governmental unit shall maintain a single repository that is readily accessible to the public for all documents related to responsible parties, the investigation, the remedial action and plans for redevelopment of the property.

**(2r) PRELIMINARY REMEDIAL ACTION PLAN.** (a) The local governmental unit shall, in consultation with the department, prepare a draft remedial action plan.

(b) Upon completion of the draft remedial action plan, the local governmental unit shall send written notice to all responsible parties identified by the local governmental unit, provide public notice and conduct a public hearing on the draft remedial action plan. The notice to responsible parties shall offer the person receiving the notice an opportunity to provide information regarding the status of that person or any other person as a responsible party, notice and a description of the public hearing and a description of the procedures in this section. At the public hearing, the local governmental unit shall solicit testimony on whether the draft remedial action plan is the least costly method of meeting the standards for remedial action promulgated by the department by rule. The local governmental unit shall accept written comments for at least 30 days after the close of the public hearing.

(c) Upon the conclusion of the period for written comment, the local governmental unit shall prepare a preliminary remedial action plan, taking into account the written comments and comments received at the public hearing and shall submit the preliminary remedial action plan to the department for approval. The department may approve the preliminary remedial action plan as submitted or require modifications.

**(3) OFFER TO SETTLE; SELECTION OF UMPIRE.** (a) Upon receiving the department's approval of the preliminary remedial action plan, the local governmental unit shall serve an offer to settle regarding the contribution of funds for investigation and remedial action at the site or facility on each of the responsible parties identified by the local governmental unit, using the procedure for service of a summons under s. 801.11 and shall notify the department that the offer to settle has been served. The local governmental unit shall include in the offer to settle all of the following information:

1. The amount of the offer and a rationale for the amount.
2. The names, addresses and contact persons, to the extent known, for all of the responsible parties identified by the local governmental unit.
3. The location and availability of documents that support the claim of the local governmental unit against the responsible party.
4. The location of the public repository where documents relating to the site or facility are maintained, the times during which the repository is open and the name and telephone number of the contact person at the repository.
5. A description of the procedures under this section.

(b) The department shall maintain a list of competent and disinterested umpires qualified to perform the duties under subs. (4) to (6). None of the umpires may be employees of the department. Upon receiving notice from a local governmental unit under par. (a), the secretary or his or her designee shall select an umpire from

the list and inform the local governmental unit and responsible parties of the person selected.

(c) Within 10 days after receiving notice of the umpire selected by the department under par. (b), the local governmental unit may notify the department that the umpire selected is unacceptable. Within 10 days after receiving notice of the umpire selected by the department under par. (b), a responsible party may notify the department that the umpire selected is unacceptable or that the responsible party does not intend to participate in the negotiation. Failure to notify the department that the umpire is unacceptable shall be considered acceptance. If all responsible parties identified by the local governmental unit indicate that they do not intend to participate in the negotiation, the department shall inform the local governmental unit and the local governmental unit shall cease further action under this section.

(d) Upon receiving notice under par. (c) that the selected umpire is unacceptable, the secretary or his or her designee shall select 5 additional umpires from the list and inform the local governmental unit and responsible parties of the persons selected.

(e) Within 10 days after receiving notice of the umpires selected by the department under par. (d), the local governmental unit or a responsible party may notify the department that one or more of the umpires selected are unacceptable. Failure to notify the department shall be considered acceptance. The secretary or his or her designee shall select an umpire from among those umpires not identified as unacceptable by the local governmental unit or a responsible party or, if all umpires are identified as unacceptable, the secretary or his or her designee shall designate a person to be umpire for the negotiation.

**(4) NEGOTIATION PROCESS.** (a) The umpire, immediately upon being appointed, shall contact the department, the local governmental unit and the responsible parties that received the offer to settle and shall schedule the negotiating sessions. The umpire shall schedule the first negotiating session no later than 20 days after being appointed. The umpire may meet with all parties to the negotiation, individual parties or groups of parties. The umpire shall facilitate a discussion between the local governmental unit and the responsible parties to attempt to reach an agreement on the design and implementation of the remedial action plan and the contribution of funds by the local governmental unit and responsible parties.

(b) The umpire shall permit the addition to the negotiation, at any time, of any responsible party or any other person who wishes to be a party to the negotiated agreement.

(c) Negotiations may not continue for more than 60 days after the first negotiating session, unless an extension is approved by the department for cause, at the request of any party to the negotiation. The department shall approve an extension if necessary to settle insurance claims.

(d) The local governmental unit and the responsible parties that participate in negotiations shall pay for the costs of the umpire, whether or not an agreement among the parties is reached under sub. (5) or the parties accept the recommendation of the umpire under sub. (6). The umpire shall determine an equitable manner of paying for the costs of the umpire, which is binding.

**(5) AGREEMENT IN NEGOTIATION.** The local governmental unit and any of the responsible parties may enter into any agreement in negotiation regarding the design and implementation of the remedial action plan and the contribution of funds by the local governmental unit and responsible parties for the investigation and remedial action. The portion of the agreement containing the design and implementation of the remedial action plan shall be submitted to the department for approval. The department may approve that portion of the agreement as submitted or require modifications.

**(6) FAILURE TO REACH AGREEMENT IN NEGOTIATION.** (a) If the local governmental unit and any responsible parties are unable to reach an agreement under sub. (5) by the end of the period of negotiation, the umpire shall make a recommendation regarding the

design and implementation of the remedial action plan and the contribution of funds for investigation and remedial action by the local governmental unit and all responsible parties that were identified by the local governmental unit and that did not reach an agreement under sub. (5), whether or not the responsible parties participated in negotiations under sub. (4). The umpire shall submit the recommendation to the department for its approval within 20 days after the end of the period of negotiation under sub. (4) (c). The department may approve the recommendation as submitted or require modifications. The umpire shall distribute a copy of the approved recommendation to the local governmental unit and all responsible parties identified by the local governmental unit.

(b) The local governmental unit and the responsible parties that did not reach an agreement under sub. (5) shall accept or reject the umpire's recommendation within 60 days after receiving it. Failure to accept or reject the recommendation within 60 days shall be considered rejection of the recommendation. If the local governmental unit rejects the recommendation with respect to any responsible party, the recommendation does not apply to that responsible party. If a responsible party rejects the recommendation, it does not apply to that responsible party.

(7) **RESPONSIBLE PARTIES SUBJECT TO AN AGREEMENT OR RECOMMENDATION.** A responsible party that enters into an agreement under sub. (5) with a local governmental unit or that accepts the umpire's recommendation under sub. (6), if the local governmental unit does not reject the recommendation, is required to comply with the agreement or recommendation. When the responsible party has complied with the agreement or recommendation, the responsible party is not liable to the state, including under s. 292.11 (7) (b) or 292.31 (8), or to the local governmental unit for any additional costs of the investigation or remedial action; the responsible party is not liable to any other responsible party for contribution to costs incurred by any other responsible party for the investigation or remedial action; and the responsible party is not subject to an order under s. 292.11 (7) (c) for the discharge that is the subject of the agreement or recommendation.

(8) **RESPONSIBLE PARTIES NOT SUBJECT TO OR NOT COMPLYING WITH AN AGREEMENT OR RECOMMENDATION.** (a) In this subsection:

1. "Interest" means interest at the annual rate of 12 percent, commencing on the date of the umpire's recommendation under sub. (6) or, if there is no umpire's recommendation, on the date of the agreement under sub. (5).

2. "Litigation expenses" means the sum of the costs, disbursements and expenses, including engineering fees and, notwithstanding s. 814.04 (1), reasonable attorney fees necessary to prepare for or participate in proceedings before any court.

(b) A local governmental unit is entitled to recover litigation expenses and interest on the judgment against a responsible party if any of the following occurs:

1. The local governmental unit accepts the recommendation of an umpire under sub. (6), the responsible party rejects it and the local governmental unit recovers a judgment under sub. (9) against that responsible party that equals or exceeds the amount of the umpire's recommendation.

2. The local governmental unit and the responsible party enter into an agreement under sub. (5) or accept the umpire's recommendation under sub. (6), the responsible party does not comply with the requirements of the agreement or recommendation and the local governmental unit recovers a judgment against that responsible party based on the agreement or recommendation.

(c) A responsible party is entitled to recover litigation expenses from a local governmental unit if the responsible party accepts the recommendation of an umpire under sub. (6), the local governmental unit rejects the recommendation of the umpire under sub. (6) with respect to the responsible party, the local governmental unit institutes an action under sub. (9) against the responsible party and the local governmental unit recovers a judgment under sub. (9) against the responsible party that is equal to or less than the amount of the umpire's recommendation.

(9) **LIABILITY FOR REMEDIAL ACTION COSTS.** (a) This subsection applies only to a site or facility that satisfies the applicability provisions of sub. (2) and for which the remedial action specified in an agreement under sub. (5) or a recommendation under sub. (6) is completed.

(b) Except as provided in pars. (bm), (br) and (c), sub. (7) and s. 292.21, a responsible party is liable for a portion of the costs, as determined under pars. (c) to (e), incurred by a local governmental unit for remedial action in an agreement under sub. (5) or a recommendation under sub. (6) and for any related investigation. A right of action shall accrue to a local governmental unit against the responsible party for costs listed in this paragraph.

(bm) Paragraph (b) does not apply with respect to a discharge if the discharge was in compliance with a permit license, approval, special order, waiver or variance issued under ch. 283 or 285 or under corresponding federal statutes or regulations.

(br) Paragraph (b) applies with respect to a transporter only if the transporter does any of the following:

1. Selects the site or facility where the hazardous substance is disposed of without direction from the generator.

2. Violates an applicable statute, rule, plan approval or special order in effect at the time the disposal occurred and the violation causes or contributes to the condition at the site or facility.

3. Causes or contributes to the condition at the site or facility by an action related to the disposal that would result in liability under common law in effect at the time the disposal occurred, based on standards of conduct for the transporter at the time the disposal occurred.

(c) The liability of each party to the action to recover costs under par. (b) is limited to a percentage of the cost of the remedial action that is determined by dividing the percentage of that party's contribution to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility by the percentage of contribution of all responsible parties to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility. Section 895.045 does not apply to this paragraph.

(cm) Notwithstanding par. (c), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for the total contribution of all parties involved in the common scheme or plan.

(d) The finder of fact shall apportion the contribution of each responsible party to the environmental pollution resulting from the disposal or discharge of hazardous substances at the site or facility for the purposes of par. (c), using the following criteria, and any other appropriate criteria:

1. The ability of the responsible parties to demonstrate that their contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances can be distinguished from the contribution of other responsible parties.

2. The amount of hazardous substances involved.

3. The degree of toxicity of the hazardous substances involved.

4. The degree of involvement by the responsible parties in the generation, transportation, treatment, storage, disposal or discharge of the hazardous substances.

5. The degree of cooperation by the responsible parties with federal, state or local officials to prevent or minimize harm to the public health or the environment.

6. The degree of care exercised by the parties with respect to the hazardous substance, taking into account the characteristics of the hazardous substance.

(e) A responsible party is not liable under par. (b) if the responsible party establishes by a preponderance of the evidence that the responsible party's contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances was caused solely by any of the following:

1. An act of God.



2. An act of war.

3. An act or omission of a 3rd party, other than an officer, director, employee or agent of the responsible party, or other than a person whose act or omission occurs in connection with a direct or indirect contractual relationship with the responsible party if all of the following apply:

a. The responsible party establishes by a preponderance of the evidence that the responsible party exercised due care with respect to the hazardous substances that caused environmental pollution.

b. In exercising due care under subd. 3. a., the responsible party took into consideration the characteristics of the hazardous substances, in light of all relevant facts and circumstances.

c. The responsible party took precautions against foreseeable acts or omissions of the 3rd party and the consequences that could foreseeably result from those acts or omissions.

(f) Any responsible party may seek contribution from any other responsible party. Such a contribution claim may be brought as a separate action or may be brought in the action commenced against the responsible party under this section.

(10) TECHNICAL ASSISTANCE. The department shall provide technical assistance to an umpire at the request of the umpire. The department may limit the amount of staff time allocated to each negotiation.

(11) LIABILITY. Except as provided in sub. (7), no common law liability, and no statutory liability that is provided in other statutes, for damages resulting from a site or facility is affected in any manner by this section. The authority, power and remedies provided in this section are in addition to any authority, power or remedy provided in any other statutes or provided at common law.

(13) FEES. The department may, by rule, assess and collect fees to offset the cost of the department's activities under this section. The fees may include an advance deposit, from which the department shall return the amount in excess of the cost of the department's activities under this section.

**History:** 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150 s. 672; 2001 a. 16, 103.  
**Cross-reference:** See also ch. NR 749, Wis. adm. code.

**292.37 Confidentiality of records.** (1) RECORDS. Except as provided under sub. (2), any records or other information furnished to or obtained by the department in the administration of ss. 292.31 and 292.35 are public records subject to s. 19.21.

(2) CONFIDENTIAL RECORDS. (a) *Application.* An owner or operator of a solid waste facility may seek confidential treatment of any records or other information furnished to or obtained by the department in the administration of ss. 292.31 and 292.35.

(b) *Standards for granting confidential status.* Except as provided under par. (c), the department shall grant confidential status for any records or information received by the department and certified by the owner or operator of the solid waste facility as relating to production or sales figures or to processes or production unique to the owner or operator of the solid waste facility or which would tend to adversely affect the competitive position of the owner or operator if made public.

(c) *Emission data; analyses and summaries.* The department may not grant confidential status for emission data. Nothing in this subsection prevents the department from using records and other information in compiling or publishing analyses or summaries relating to the general condition of the environment if the analyses or summaries do not identify a specific owner or operator or the analyses or summaries do not reveal records or other information granted confidential status.

(d) *Use of confidential records.* Except as provided under par. (c) and this paragraph, the department or the department of justice may use records and other information granted confidential status under this subsection only in the administration and enforcement of ss. 292.31 and 292.35. The department or the department of justice may release for general distribution records and other information granted confidential status under this subsection if the owner or operator expressly agrees to the release. The department

or the department of justice may release on a limited basis records and other information granted confidential status under this subsection if the department or the department of justice is directed to take this action by a judge or hearing examiner under an order which protects the confidentiality of the records or other information. The department or the department of justice may release to the U.S. environmental protection agency, or its authorized representative, records and other information granted confidential status under this subsection if the department or the department of justice includes in each release of records or other information a request to the U.S. environmental protection agency, or its authorized representative, to protect the confidentiality of the records or other information.

**History:** 1995 a. 227 s. 993.

**292.41 Abandoned containers.** (1) DEFINITION. In this section, "abandoned container" means any container which contains a hazardous substance and is not being monitored and maintained.

(2) APPLICABILITY. (a) This section does not apply to abandoned containers which are located in an approved facility or a nonapproved facility.

(b) Action by the department under this section is not subject to s. 292.31.

(3) CONTINGENCY PLAN. (a) After consultation with other affected federal, state and local agencies and private organizations, the department shall establish by rule criteria and procedures for the development, establishment and amendment of a contingency plan for the taking of emergency actions in relation to abandoned containers.

(b) The contingency plan shall establish procedures and techniques for locating, identifying, removing and disposing of abandoned containers.

(4) REMOVAL OR OTHER EMERGENCY ACTION. The department or its authorized representative may contain, remove or dispose of abandoned containers or take any other emergency action which it deems appropriate under the circumstances.

(5) ACCESS TO PROPERTY AND RECORDS. Any officer, employee or authorized representative of the department, upon notice to the owner or occupant, may enter onto any property, premises or place at any time for the purposes of sub. (3) if the entry is necessary to prevent increased damage to the air, land or waters of the state, or may inspect any record relating to abandoned container management for the purpose of ascertaining the state of compliance with this section and the rules promulgated under this section. Notice to the owner or occupant is not required if the delay in providing the notice is likely to result in imminent risk to public health or welfare or the environment.

(6) ABANDONED CONTAINERS: APPROPRIATIONS. (a) The department may utilize moneys appropriated under s. 20.370 (2) (dv) and (my) in taking action under sub. (4). The department shall utilize these moneys to provide for the procurement, maintenance and storage of necessary equipment and supplies, personnel training and expenses incurred in locating, identifying, removing and disposing of abandoned containers.

(b) No more than 25 percent of the total of all moneys available under the appropriation under s. 20.370 (2) (dv) and (my) may be used annually for the procurement and maintenance of necessary equipment during that fiscal year.

(c) The department is entitled to recover moneys expended under this section from any person who caused the containers to be abandoned or is responsible for the containers. The funds recovered under this paragraph shall be deposited into the environmental fund for environmental management.

**History:** 1983 a. 410; 1985 a. 29 ss. 1957, 3202 (39); 1987 a. 27, 384; 1989 a. 31; 1991 a. 39; 1993 a. 453; 1995 a. 27; 1995 a. 227 s. 716; Stats. 1995 s. 292.41; 1995 a. 378 s. 46; 1997 a. 27.

**Cross-reference:** See also ch. NR 714, Wis. adm. code.

**292.51 Cooperative remedial action.** (1) In this section, "costs of remedying environmental contamination" means costs

May 24, 1996



Ms. Diane Tesinsky  
Wausau Insurance Companies  
901 Warrenville Road  
Suite 500  
Lisle, IL 60532-4344

Mr. Richard Ventura  
CIGNA Property & Casualty  
160 Chestnut Street  
P.O. Box 7716  
Philadelphia, PA 19192

Ms. Brenda L. DuPree  
General Casualty Ins. Co.  
One General Drive  
Sun Prairie, WI 53596

Ms. Elva McMullin  
Crum & Forster Comm. Inc.  
1700 West 82nd Street  
Suite 200  
Bloomington, MN 55431-1440

Mr. L.J. DacQuisto  
AETNA  
P.O. Box 2940  
Milwaukee, WI 53201-2940

Ms. Janis Severson  
Risk Enterprise Management  
Limited  
4940 Viking Drive  
Suite 530  
P.O. Box 39827  
Minneapolis, MN 55439-0954



Re: Town of Newton Gravel Pit

OFFICE OF CITY ATTORNEY

Dear Insurer Representatives:

The City of Manitowoc has entered into an agreement with waste generators at the Town of Newton Gravel Pit site to facilitate the clean up of environmental damage. I'm enclosing a copy of that Agreement for your records.

Our consultant, RUST Environment and Infrastructure is in the process of submitting their Remedial Action Plan to the Wisconsin Department of Natural Resources. The cost of the recommended remedial action is approximately \$460,000. In addition, the City has spent approximately \$425,000 in engineering fees to this point.

Very truly yours,

Patrick L. Willis  
City Attorney

PLW:es

Enc.

Patrick L. Willis  
City Attorney

CITY HALL  
817 Franklin Street  
P.O. Box 159  
Manitowoc, WI 54221-0159  
Phone: (414) 683-4418  
FAX: (414) 683-4331



**AGREEMENT BETWEEN THE CITY OF MANITOWOC AND  
PARTICIPATING GENERATORS FOR THE TOWN OF NEWTON  
GRAVEL PIT SITE**

This Agreement is entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 1996 between the City of Manitowoc (the "City") and those Parties listed in Appendix A (the "Participating Generators") (with the City and the Participating Generators collectively referred to as the "Parties") and each, individually, as a "Party").

**FACTUAL BACKGROUND**

1. The Town of Newton Gravel Pit Site (the "Site") has been identified as requiring remediation. The required remediation is proposed to be carried out according to the Remedial Option #5 of the Site Investigation and Remedial Options Report (the "Remedial Plan") prepared by Rust Environment and Infrastructure ("Rust") dated January 19, 1995. Part of the Remedial Plan includes non-aqueous phase liquid removal at a cost not to exceed \$69,800 (the "Removal"). The Remedial Plan will be submitted to the Wisconsin Department of Natural Resources ("WDNR") by the City.
2. The Participating Generators are alleged to have generated waste during the relevant time period that may have been disposed of at the Site.
3. The City was the owner of the Site during the relevant time period.
4. The Parties have met on numerous occasions to discuss a privately financed investigation and remediation of the Site.
5. Consequently, in order to accomplish an expeditious remediation of the Site, the Participating Generators and the City have reached this Agreement to jointly fund the remediation at this Site.

**PURPOSE OF THIS AGREEMENT**

6. The purpose of this Agreement is to set forth the terms under which the Parties will jointly fund the remediation work and the manner in which the remediation will be accomplished.

## SCOPE OF THIS AGREEMENT

7. The terms and conditions of this Agreement between the City and the Participating Generators apply only to the funding and conducting of the Remedial Plan, identified as Remedial Option #5 in the Rust Report dated January 19, 1995, and to the partial payment by the Participating Generators of past costs incurred by the City for site investigation services, as provided in Appendix B ("Past Costs").

8. This Agreement is contingent in part upon WDNR approval of the cleanup proposed for the Site in substantial compliance with the Remedial Plan (hereinafter the "WDNR Approval"). If WDNR fails to approve the cleanup proposed for the Site in substantial compliance with the Remedial Plan on or before December 31, 1996 (hereinafter the "Non-Approval"), this Agreement shall be declared to be null and void for all purposes except for those portions of this Agreement that relate to the Removal. Rust shall estimate the cost of implementing the cleanup for the site approved by the WDNR within 30 days after the date of the approval issued by the WDNR (hereinafter the "Rust Estimate"). The Rust Estimate shall be for total site costs including the cost of the Removal and Past Costs incurred by the City ("Total Site Costs"). As used in this Agreement, the term "substantial compliance" shall mean that Rust Estimate is not greater than \$1,000,000 for Total Site Costs.

9. In the event following WDNR Approval it is later determined that the actual costs of implementing the WDNR Approval exceed \$1,000,000 for Total Site Costs, the Participating Generators shall have no obligation under this Agreement to fund the portion of the costs in excess of \$1,000,000, provided, however, that the City and the other Parties shall retain any and all rights not specifically waived in this Agreement to seek contribution from other Parties to this Agreement as well as from any third parties for any such excess cost.

10. The Parties agree to waive consistency with the National Contingency Plan ("NCP") as to all work performed before or after the date of this Agreement.

11. The Parties agree that no portion of the tolling period beginning from January 1, 1995 up to the date that any Party to this Agreement mails written notification to all other Parties of its intent to terminate the tolling period shall be used for purposes of calculating the passage of time under an applicable statute of limitations for any claim that a Party may have against another Party relating to contamination at the Site.

12. The obligations of the Parties under this Agreement are limited solely to this Agreement and have no effect outside the terms of this Agreement. Nothing in this Agreement shall be an admission of law or fact or evidence of any liability or responsibility with respect to the Site. Nothing in this Agreement is intended to release, discharge, or in

any way affect any claim, cause of action, or demand in law or equity which the Parties may have against any other person or entity who is not a Party relating to the generation, storage, treatment, transportation, release, or disposal of any hazardous substances at, to, or from the Site.

13. The Parties do not admit or concede, and reserve the right to contest any determination, allegation, finding or conclusion regarding the Site in any action other than one brought by any of the Parties to enforce this Agreement.

14. This Agreement shall not create any private right, other than a right by any of the Parties to enforce this Agreement.

#### ALLOCATION OF COSTS

15. The Parties agree to fund jointly the cost of implementing the WDNR Approval and, in the event of Non-Approval, the Removal.

16. The Participating Generators shall pay the City \$69,800 for the Removal within 30 days of the execution of this Agreement. In the event of Non-Approval, this shall constitute the sole payment for which the Participating Generators are obligated under this Agreement.

17. In the event of WDNR Approval, the Participating Generators shall pay the City the balance of 67.5% of the Rust Estimate remaining after the payment made under paragraph 16, within 30 days of the date of mailing of the Rust Estimate. In the event of WDNR Approval, the City agrees to pay 32.5 percent of the Rust Estimate.

18. The City shall maintain the payments received from the Participating Generators in a separate account which shall not be commingled with monies from any source not covered by this Agreement (hereinafter the "Account"). The City is authorized to utilize the Account for the payment of costs incurred for the implementation of the WDNR Approval or, in the event of Non-Approval, the Removal.

19. The Parties agree that the City of Manitowoc, to date, has expended \$421,609 in project costs paid to Rust for cleanup activities at the Site. In the event of WDNR Approval and within 30 days of the date of the mailing of the Rust Estimate, the Participating Generators agree to reimburse the City an amount calculated in accordance with the following formula:  $\$421,609 - (\text{Rust Estimate} \times 32.5\%)$ . As a result of this reimbursement, the City is deemed to have contributed its 32.5 percent share of the Rust Estimate in accordance with paragraph 17 of this Agreement in the event of WDNR Approval.

20. If the total actual costs for the WDNR Approval exceed the Rust Estimate, the Participating Generators shall pay the City 67.5% of such excess costs within 45 days of the date of mailing by the City to the Participating Generators of notification of such excess costs provided, however, that the Participating Generators shall have no obligation for any portion of the total costs for the WDNR Approval in excess of \$1,000,000 Total Site Costs. In the event the total actual costs for the WDNR Approval are less than the Rust Estimate, the City shall distribute to the Participating Generators the balance in the Fund within 45 days of the date that WDNR has approved the completion of the WDNR Approval.

#### **ACTIONS TO BE PERFORMED BY THE CITY OF MANITOWOC**

21. Upon execution of this Agreement, the City shall direct its consultant, Rust, to conduct the Removal immediately or as promptly as site and weather conditions allow. Conduct of the Removal shall not be postponed until WDNR Approval or Non-Approval.

22. The Parties agree that the City of Manitowoc will continue to act as the primary representative dealing with the WDNR. The City of Manitowoc further agrees that it will not inform WDNR of the terms of this Agreement between the Participating Generators and the City unless prohibited by applicable law as defined in paragraph 29 of this Agreement.

23. The Parties agree that the City is the party responsible for entering into and overseeing all contracts for work performed at this Site under the WDNR Approval or the Removal. The City will use reasonable efforts, as determined solely in the exercise of the City's discretion, to perform tasks covered by the WDNR Approval or the Removal with City personnel.

24. The Parties agree that the City is responsible for monitoring the total costs for the WDNR Approval and for providing notification to the Participating Generators in the event that total costs of the WDNR Approval exceed the Rust Estimate. The Parties further agree that the City will provide a final accounting of all costs for the WDNR Approval upon its completion and make distributions, if any are required, in accordance with paragraph 20 of this Agreement.

#### **ACTIONS TO BE PERFORMED BY THE PARTICIPATING GENERATORS**

25. The Participating Generators will agree among themselves how to fund the Participating Generators' allocated share of the costs of the WDNR Approval or the Removal as required by this Agreement.

26. The Participating Generators shall designate one or more representatives to coordinate the work to be performed with the City and for the receipt of any notices or payments made by the City or Rust under this Agreement.

#### COVENANT NOT TO SUE

27. In the event WDNR approves the completion of the WDNR Approval for the Site in accordance with applicable law and the Parties have fulfilled all of their obligations under this Agreement, and the clean up is accomplished at a cost of not more than \$1,000,000.00 Total Site Costs, the Parties agree not to sue each other for costs associated with the WDNR Approval; provided, however, that nothing herein shall preclude or bar the Parties from any available legal remedies directed against anyone who is not a Party for such costs, nor shall anything herein preclude or bar any of the Parties from any available legal remedies against any other Party in the event of a suit or claim against any Party from any party who is not a signatory to this Agreement.

#### INDEMNIFICATION

28. Each Party agrees to indemnify, defend and hold harmless any Party and its representative(s) from and against any claim, demand, liability, cost, expense, legal fee, penalty, loss or judgment (collectively "Liability") which in any way relates to the good faith performance of any duties under this Agreement by any Party or its representative(s) on behalf of the Parties, including, but not limited to, any liability arising from any contract or agreement required to implement the WDNR Approval or the Removal. This indemnification shall not apply to any liability arising from a criminal conviction, unless the Party or its representative(s) demonstrates to the satisfaction of the Parties that the Party or its representative(s) had reasonable cause to believe that the conduct in question was lawful. However, nothing in this paragraph shall constitute a waiver or release of any claim or potential claim by any Party which is reserved within this Agreement. In addition, if assertion of any remedies against anyone who was not a Party which are specifically reserved in paragraph 27 of this Agreement results in claims being asserted by anyone who is not a Party against a Party who does not elect to assert such a claim ("Non-Claimant") or results in any person or entity asserting an indemnity claim against a Non-Claimant, then the claimants who are also Parties jointly and severally agree to defend, indemnify and hold harmless such Non-Claimants from such litigation costs, attorneys' fees, money damages, judgments and/or settlements relating to such contribution or indemnity claim.

### **CONFIDENTIALITY**

29. The City will maintain the confidentiality of this Agreement unless prohibited by applicable law, including, but not limited to, the Wisconsin Public Records law, Wis. Stats. §19.31 et. seq.

### **SUCCESSORS AND ASSIGNS**

30. This Agreement shall be binding upon the successors and assigns of the Parties. No assignment or delegation of the obligation to make any payment or reimbursement hereunder will release the assigning Party without the prior written consent of the remaining Parties.

### **MAILING**

31. Any reference to mail or mailing in this Agreement shall be accomplished by mailing a notification by certified mail, return receipt requested to the intended recipient(s).

### **APPLICABLE LAW**

32. For purposes of enforcement or interpretation of the provisions of this Agreement, the Parties agree that the laws of the State of Wisconsin shall be applicable, except to the extent federal law shall apply to questions arising under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, or the NCP promulgated thereunder, and further agree not to contest personal jurisdiction in the state or federal courts of Wisconsin with respect to litigation brought for such purposes.

### **NATURE OF AGREEMENT**

33. Nothing herein shall be deemed to create a partnership or joint venture and/or principal and agent relationship between or among the Parties.

### **COUNTERPARTS**

34. This Agreement may be executed in any number of counterparts, each of which shall be deemed a duplicate original, but all of which together shall constitute one and the same instrument and shall become effective as to each Party when the counterpart executed by such Party as of the date the last Party signs the Agreement provided all counterparts have been delivered to Susan H. Martin, Foley & Lardner.



APPENDIX A

Participating Generators

A & P

Heresite

Imperial Eastman

Invincible

Manitowoc Co.  
(Manitowoc Engineering)  
(Manitowoc Shipbuilding)

Manitowoc Products Co.  
(Chrysler Corporation)  
(White Consolidated)

Newell  
(Aluminum Spec.)  
(Mirro)

APPENDIX B

RECEIVED  
JAN 16 1996  
CITY ATTORNEY



January 16, 1996

MEMO TO: CITY ATTORNEY PAT WILLIS  
FROM: MICHAEL E. HAWLEY, P.E. *MEH*  
Director of Public Works & City Engineer  
SUBJECT: Gravel Pit Investigation

Pursuant to your request for information on costs incurred in the Gravel Pit Investigation, we have paid the following to date.



OFFICE OF DEPARTMENT  
OF PUBLIC WORKS  
ENGINEERING

RUST ENVIRONMENT & INFRASTRUCTURE

Contract 1 - Site Investigation Services  
from December, 1992 thru  
December 10, 1993 \$166,072.00  
(Final Payment 1/14/94)

Contract 2 - Continuing Site Investigation  
January, 1994 thru  
December 8, 1995 \$255,536.69  
(\$626.91 Paid 1/12/96)

MEH:ca  
Revised 1/16/96  
(450-353130-529900)

Michael E. Hawley  
Director of Public Works  
and City Engineer

CITY HALL  
817 Franklin Street  
P.O. Box 1697  
Manitowoc, WI 54221-1697  
Phone: (414) 683-4410  
FAX: (414) 683-4424

MODIFICATION

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

4-16-96  
Date of Execution

INVINCIBLE METAL FURNITURE CO.

Name of Party

By:

  
(Signature)

Name:

JOHN A. SCHUETTE

(Typed Name)

Title:

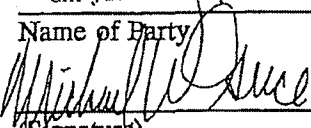
PRESIDENT

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3-12-96  
Date of Execution

Chrysler Corporation  
\_\_\_\_\_  
Name of Party  
By:   
\_\_\_\_\_  
(Signature)

Name: Michael W. Grice ✓  
(Typed Name)

Title: Senior Staff Counsel

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

April 15, 1996  
Date of Execution

City of Manitowoc  
Name of Party

By: *Patrick L. Willis*  
(Signature)

Name: Patrick L. Willis  
(Typed Name)

Title: City Attorney


**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 29, 1996  
Date of Execution

The Manitowoc Company, Inc.  
Name of Party

By:   
(Signature)

Name: E. Dean Flynn  
(Typed Name)

Title: Secretary & Manager - Corp. Insurance

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3/22/96  
Date of Execution

Great Atlantic & Pacific Tea Co., Inc.  
Name of Party

By: *Alfred Limbrick*  
(Signature)

Name: Alfred Limbrick ✓  
(Typed Name)

Title: Group Vice-President

**MODIFICATION**


35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 8, 1996  
Date of Execution

Gould Electronics Inc.  
Name of Party

By:

  
(Signature)

Name:

Lawrence W. Mitchell  
(Typed Name)

Title:

Associate Counsel




**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3-11-96  
Date of Execution

HERESITE PROTECTIVE COATINGS, INC.  
Name of Party

By:   
(Signature)

Name: GEOFFREY C. LIBAN  
(Typed Name)

Title: C.E.O.

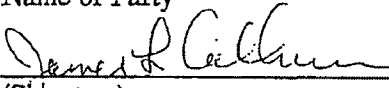
**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 12, 1996  
Date of Execution

White Consolidated Industries, Inc  
Name of Party

By:   
(Signature)

Name: James L. Calhoun  
(Typed Name)

Title: Vice President - Regulatory Affairs

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 7, 1996  
Date of Execution

Newell Co.  
Name of Party

By: [Signature]  
(Signature)

Name: Richard H. Wolff  
(Typed Name)

Title: Secretary

Mike



January 11, 1993

MEMO TO: CITY ATTORNEY PAT WILLIS

FROM: MICHAEL E. HAWLEY, P. E. *MEH*  
 Director of Public Works and City Engineer

SUBJECT: Gravel Pit

File Search

Jean Campbell and Carol Adler searched the Engineering Department files for any material on the Gravel Pit, and couldn't find anything pertaining to industrial dumping. Mostly found old yearly crushing reports.

Tony Scherer searched the files at the Street Department, and found the attached report dated March 4, 1968, outlining materials and companies hauling to the Gravel Pit.

Company Drivers

We have only been able to come up with names of three drivers, one of whom we haven't been able to locate.

<u>Name</u>	<u>Name of Company</u>	<u>Address</u>	<u>Phone</u>
Erwin C. Musial	Manitowoc Company	2115 Madison	684-3274
Earl A. Mueller	Mirro Aluminum	944 So.26th	684-3727
Richard Budnik	Invincible	Unable to Locate	
(Mrs. Gladys Budnik might be his mother)		922 So.30th	682-2643

OFFICE OF DEPARTMENT  
OF PUBLIC WORKS,  
ENGINEERING

Michael E. Hawley  
 Director of Public Works  
 and City Engineer

OFFICE HALL  
 7 Franklin Street  
 P. Box 1597  
 Manitowoc, WI 54221-1597  
 Phone: (414) 683-4410  
 Fax: (414) 683-4424

MEH:ca  
Attached

March 4, 1968

WASTE MATERIALS HAULED TO CITY GRAVEL PIT  
BY VARIOUS INDUSTRIAL PLANTS

MANITOWOC ENGINEERING CO.

CLEANING SOLVENT WATER SOLUBLE -- 600 Gal. @ week  
(noninflammable)

CUTTING and DRAIN OILS -- 200 Gal. @ week (inflammable).

MANITOWOC SHIPBUILDING INC.

WASTE FUEL OIL -- 1000 Gal. about four times a year Fall & Winter.  
(inflammable).

MIRRO ALUMINUM CO.

12,000 Gal. each two months of a 95% water, 5%  
soluble oil solution.

500 Gal. @ month of various combustibile oils.

500 Gal. @ year of used gear box oils.

2,700 Gal. each six weeks of 80% water, 20%  
Sulphuric acid solution.

1,000 Gal. of naptha on very rare occasions

(Obtained from D.P.W. Street Dept. files)

March 4, 1968

WASTE MATERIALS HAULED TO CITY GRAVEL PIT  
BY VARIOUS INDUSTRIAL PLANTS

INVINCIBLE METAL FURNITURE CO.

PAINT SLUDGE--- 55 Gal. @ week and 550 Gal. every third week.  
(inflammable)

MANITOWOC PRODUCTS CO.

PAINT SLUDGE -- 5 Cu. Yds. @ week (inflammable).

HERESITE & CHEMICAL CO.

WASTE ALCOHOL -- 25 Gal. to 30 Gal. @ week (inflammable).

IMPERIAL EASTMAN CORP.

WASTE OIL --- 200 Gal. @ week (inflammable).

WATER SOLUBLE COOLANT -- 100 Gal. @ week (noninflammable).

WHITE HOUSE MILK DIV.

CLEANING SOLVENT -- 20 Gal. @ Week (inflammable).

ALUMINUM SPECIALTY CO.

DRAIN OIL -- 110 Gal. @ week (inflammable).

PAINT STRIPPER -- 55 Gal. @ week (inflammable).

PAINT THINNER -- 55 Gal. @ week (inflammable).

(Obtained from D.P.W. Street Dept. files)

AFFIDAVIT RICHARD WHITE

STATE OF WISCONSIN )  
                                  ) ss  
MANITOWOC COUNTY )

I, Richard White, being duly sworn on oath, depose and state as follows:

1. I was the Department of Public Works Accountant for the City of Manitowoc from 1967 until approximately June of 1981.

2. That in my role as Accountant for the Public Works Department, I was familiar with the operation costs of the Newton Gravel Pit.

3. That I have a distinct memory that the industrial waste dumping at the Newton Gravel Pit ended some time in 1972 when the Department of Public Works shop moved from the 14<sup>th</sup> and Clark Street location to the 35<sup>th</sup> and Viebahn location.

4. I believe the above statements to be true and correct to the best of my recollection of the facts, and I make this affidavit on behalf of the City of Manitowoc.

Dated this 20<sup>th</sup> day of December 2010.

Richard White  
Richard White

Subscribed and sworn to before me this 20<sup>th</sup> day of December 2010.

Jane M. Rhode  
Notary Public Jane M. Rhode  
My commission expires 6-3-2012

January 25, 2017

**VIA U.S. CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

Peter Hellman  
General Manager  
Heresite Protective Coatings, LLC  
822 South 14<sup>th</sup> Street  
Manitowoc, Wisconsin 54220

RE: City of Manitowoc/Former Town of Newton Gravel Pit, 3130 Hecker Road,  
Manitowoc, WI - WDNR BRRTS Activity # 02-36-000268 (the "Site")

Dear Mr. Hellman:

Pursuant to Wis. Stat. § 292.35(2g)(b) (copy enclosed), the City of Manitowoc (the "City") hereby requests that Heresite Protective Coatings, LLC provide access to or delivery of any records or documents in its custody, possession or control that relate to all of the following:

1. The type and quantity of any wastes containing hazardous substances that Heresite Protective Coatings, LLC or the party the City believes to be its corporate predecessor in interest, Heresite Chemical, (collectively, "Heresite") disposed of or discharged at the above-referenced Site and the dates of the disposal or discharge.
2. The identity of any person who may be a "responsible party" for contamination at the above-referenced Site under Wis. Stat. § 292.35(1).
3. The identity of subsidiary or parent corporations, as defined in Wis. Stat. § 292.31(8)(a)3, of any person who may be a responsible party. Section 292.31(8)(a)3 defines a "subsidiary or parent corporation" as "any business entity, including a subsidiary, parent corporation, or other business arrangement which has elements of common ownership or control or uses a long-term contractual arrangement with any person to avoid direct responsibility for conditions at a site or facility."

For context, I am attaching correspondence that includes a 1996 settlement agreement between the City and certain parties, including Heresite, as well as a January 11, 1993 City memorandum (based on a 1968 Manitowoc Department of Public Works document) that identifies certain parties, including Heresite, that arranged for disposal of waste at the Site.



Peter Hellman  
January 25, 2017  
Page 2

It is requested that Heresite provide delivery or access within thirty (30) days of your receipt of this request. The City intends to assemble all the available information in advance of the public hearing on the City's Draft Remedial Action Plan for the Site, which is currently planned for Monday, March 13, 2017 (details to follow).

Finally, as a preliminary request, please refrain from destroying any documents and/or any electronic information which may be in any way related to the Site or Heresite's operations or activities during the 1960's and 1970's, when the Site was operating.

Thank you for your cooperation in this matter. If you have any questions or concerns, please contact me.

Very truly yours,

GODFREY & KAHN, S.C.



Edward B. Witte

Enclosure

cc: Molly E. Schmidt, Wisconsin Department of Natural Resources (via E-mail w/enclosure)  
Kathleen M. McDaniel, City of Manitowoc (via E-mail w/enclosure)

16631139.1

CHAPTER 292  
REMEDIAL ACTION

	SUBCHAPTER I		
	DEFINITIONS		
292.01	Definitions.		292.37 Confidentiality of records.
	SUBCHAPTER II		292.41 Abandoned containers.
	REMEDIAL ACTION		292.51 Cooperative remedial action.
292.11	Hazardous substance spills.		292.53 Availability of environmental insurance.
292.12	Sites with residual contamination.		292.55 Requests for liability clarification and technical assistance.
292.13	Property affected by off-site discharge.		292.57 Database of properties with residual contamination.
292.15	Voluntary party remediation and exemption from liability.		292.63 Petroleum storage remedial action; financial assistance.
292.16	Responsibility of certain municipalities acquiring closed landfills.		292.64 Removal of abandoned underground petroleum storage tanks.
292.19	Responsibility of persons conducting investigations.		292.65 Dry cleaner environmental response program.
292.21	Responsibility of lenders and representatives.		292.68 Reimbursement for disposal of PCB contaminated sediment.
292.23	Responsibility of local governmental units; solid waste.		292.70 Indemnification for disposal of polychlorinated biphenyls.
292.24	Responsibility of local governmental units; hazardous waste.		292.72 Brownfields revolving loan program.
292.25	Report on impact of exemptions from liability.		292.81 Notice; lien.
292.255	Report on brownfield efforts.		
292.26	Civil immunity; local governmental units.		SUBCHAPTER III
292.31	Environmental repair.		ENFORCEMENT; PENALTIES
292.33	Local government cost recovery cause of action.	292.93	Orders.
292.35	Local governmental unit negotiation and cost recovery.	292.94	Fees related to enforcement actions.
		292.95	Review of alleged violations; environmental repair and cost recovery.
		292.98	Violations and enforcement; environmental repair and cost recovery.
		292.99	Penalties.

SUBCHAPTER I  
DEFINITIONS

**292.01 Definitions.** In this chapter:

(1) “Approved facility” has the meaning given in s. 289.01 (3).

(1m) “Approved mining facility” has the meaning given in s. 289.01 (4) and includes a mining waste site, as defined in s. 295.41 (31).

(1s) “Contaminated sediment” means sediment that contains a hazardous substance.

(2) “Department” means the department of natural resources.

(3) “Discharge” means, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying or dumping.

(3m) “Engineering control” means an object or action designed and implemented to contain contamination or to minimize the spread of contamination, including a cap, soil cover, or in-place stabilization, but not including a sediment cover.

(4) “Environmental pollution” means the contaminating or rendering unclean or impure the air, land or waters of the state, or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to fish, bird, animal or plant life.

(5) “Hazardous substance” means any substance or combination of substances including any waste of a solid, semisolid, liquid or gaseous form which may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or which may pose a substantial present or potential hazard to human health or the environment because of its quantity, concentration or physical, chemical or infectious characteristics. This term includes, but is not limited to, substances which are toxic, corrosive, flammable, irritants, strong sensitizers or explosives as determined by the department.

(6) “Hazardous waste” means any solid waste identified by the department as hazardous under s. 291.05.

(7) “Landfill” means a solid waste facility for solid waste disposal.

(8) “Lender” means a bank, credit union, savings bank, savings and loan association, mortgage banker or similar financial institution, the primary business of which is to engage in lending

activities or an insurance company, pension fund or government agency engaged in secured lending.

(9) “Lending activities” means advancing funds or credit to and collecting funds from another person; entering into security agreements, including executing mortgages, liens, factoring agreements, accounts receivable financing arrangements, conditional sales, sale and leaseback arrangements and installment sales contracts; conducting inspections of or monitoring a borrower’s business and collateral; providing financial assistance; restructuring or renegotiating the terms of a loan obligation; requiring payment of additional interest; extending the payment period of a loan obligation; initiating foreclosure or other proceedings to enforce a security interest in property before obtaining title; requesting and obtaining the appointment of a receiver; and making decisions related to extending or refusing to extend credit.

(10) “Long-term care” means the routine care, maintenance and monitoring of a solid or hazardous waste facility following closing of the facility.

(11) “Municipality” means any city, town, village, county, county utility district, town sanitary district, public inland lake protection and rehabilitation district or metropolitan sewage district.

(12) “Nonapproved facility” has the meaning given in s. 289.01 (24).

(13) “Person” means an individual, owner, operator, corporation, limited liability company, partnership, association, municipality, interstate agency, state agency or federal agency.

(15) “Preventive measures” mean the installation or testing of equipment or devices, a designated way of performing a specified operation or the preparation of an emergency response plan.

(16) “Representative” means any person acting in the capacity of a conservator, guardian, court-appointed receiver, personal representative, testamentary trustee of a deceased person, trustee of a living trust, or fiduciary of real or personal property.

(17) “Secretary” means the secretary of natural resources.

(17g) “Sediment” means particles in the bed of a navigable water up to the ordinary high-water mark that are derived from the erosion of rock, minerals, soil, and biological materials and from chemical precipitation from the water column and that are transported or deposited by water.

**292.33 Local government cost recovery cause of action.** (1) **DEFINITION.** In this section “local governmental unit” has the meaning given in s. 292.11 (9) (e) 1.

(2) **CAUSE OF ACTION.** Except as provided in sub. (6), a local governmental unit may recover costs as provided in sub. (4) from a responsible person described in sub. (3) if the costs are incurred in connection with a property acquired as provided in s. 292.11 (9) (e) 1m. on which a hazardous substance has been discharged.

(3) **RESPONSIBLE PERSONS.** (a) Except as provided in par. (b), a local governmental unit may recover costs in an action under this section from any of the following:

1. A person who, at the time that the local governmental unit acquired the property, possessed or controlled the hazardous substance that was discharged on the property.

2. A person who caused the discharge of the hazardous substance on the property.

(b) A local governmental unit may not recover costs in an action under sub. (2) from a person listed in par. (a) if any of the following applies:

1. The person is exempt from liability under s. 292.11 (9) (e), 292.13, 292.15, 292.16, 292.19 or 292.21 with respect to the discharge that is the subject of the action.

2. The person has entered into a consent order under this chapter or ch. 289 or 291 or an agreement under s. 292.11 (7) (d) or 292.31 (8) (h) with respect to the discharge that is the subject of the action and the person is in compliance with the consent order or agreement.

3. The person is exempt from liability under s. 292.35 (9) (e) with respect to the discharge that is the subject of the action.

4. The discharge that was caused by the person and that is the subject of the action was in compliance with a permit, license, approval, special order, waiver or variance issued under ch. 283 or 285 or under corresponding federal statutes or regulations.

(4) **RECOVERABLE COSTS.** (a) Except as provided in par. (b), in an action under this section a local governmental unit may recover the reasonable and necessary costs that it incurs for all of the following:

1. Investigating environmental contamination on the property and planning remedial activities described in subd. 2.

2. Conducting remedial activities to restore the property for its intended future use.

3. Administering the activities under subds. 1. and 2. and bringing the action under this section, including costs, disbursements and engineering fees but excluding attorney fees.

(b) The costs determined under par. (a) shall be reduced by the fair market value of the property after completion of the activities under par. (a) 2.

(c) Recoverable costs under this subsection may not be reduced by the amount of any state or federal moneys received by the local governmental unit for any of the activities under par. (a).

(d) 1. In an action under this section, the liability of a responsible person described in sub. (3) (a) 2. is limited to the amount that bears the same proportion to the total costs under par. (a), adjusted as provided in par. (b), as the amount of the environmental pollution on the property from the discharge caused by the responsible person bears to all of the environmental pollution on the property from discharges of hazardous substances.

2. In an action under this section, the liability of a responsible person described in sub. (3) (a) 1. is limited to the amount of the total costs under par. (a), adjusted as provided in par. (b), that the local governmental unit is unable to recover from responsible parties described in sub. (3) (a) 2. less the amount that the local governmental unit is unable to recover because of the exemptions in sub. (3) (b) 3. and 4.

(5) **REPAYING STATE ASSISTANCE.** If a local governmental unit that recovers costs under this section received money from this state, other than under s. 292.11 (7) or 292.31 (1), (3) or (7), for any of the activities under sub. (4) (a), the local governmental unit

shall reimburse to the state an amount that bears the same proportion to the total amount recovered under this section as the amount received from the state, other than under s. 292.11 (7) or 292.31 (1), (3) or (7), bears to the total costs under sub. (4) (a) adjusted as provided in sub. (4) (b).

(6) **EXCEPTION.** A local governmental unit may not recover costs under this section for remedial activities conducted on a property or portion of a property with respect to a discharge after the department of natural resources, the department of safety and professional services, or the department of agriculture, trade and consumer protection has indicated that no further remedial activities are necessary on the property or portion of the property with respect to the discharge.

(7) **LIMITATION OF ACTION.** An action under this section shall be commenced within 6 years after the date that the local governmental unit completes the activities under sub. (4) (a) 2. or be barred.

**History:** 1999 a. 9; 2011 a. 32.

**292.35 Local governmental unit negotiation and cost recovery.** (1) **DEFINITIONS.** In this section:

(am) “Financial assistance” means money, other than a loan, provided by a governmental unit that is not a responsible party to pay a portion of the cost of investigation and remedial action for a site or facility.

(b) “Generator” means a person who, by contract, agreement or otherwise, either arranges or arranged for disposal or treatment, or arranges or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by the person, if the disposal or treatment is done by another person at a site or facility owned and operated by another person and the site or facility contains the hazardous substance.

(bm) “Local governmental unit” means a municipality, a redevelopment authority created under s. 66.1333 or a public body designated by a municipality under s. 66.1337 (4).

(c) “Owner or operator” means any of the following:

1. If the property is taken for tax delinquency, a person who owns or operates a site or facility at the time that the site or facility is taken for tax delinquency.

2. A person who owns or operates a site or facility at the time that the disposal or discharge of a hazardous substance at the site or facility occurs.

(e) “Responsible party” means a generator, an owner or operator, a transporter or a person who possesses or controls a hazardous substance that is discharged or disposed of or who causes the discharge or disposal of a hazardous substance.

(f) “Site or facility” means an approved facility, an approved mining facility, a nonapproved facility, a waste site or any site where a hazardous substance is discharged on or after May 21, 1978.

(g) “Transporter” means a person who accepts or accepted a hazardous substance for transport to a site or facility.

(2) **APPLICABILITY.** This section only applies to a site or facility if one of the following criteria is satisfied:

(a) The site or facility is owned by a local governmental unit.

(b) A local governmental unit that owns a portion of the site or facility commits itself, by resolution of its governing body, to paying more than 50 percent of the amount equal to the difference between the cost of investigation and remedial action for the site or facility and any financial assistance received for the site or facility.

(2g) **IDENTIFICATION OF RESPONSIBLE PARTIES.** (a) A local governmental unit that intends to use the cost recovery procedures in this section shall attempt to identify all responsible parties. All information obtained by the local governmental unit regarding responsible parties is a public record and may be inspected and copied under s. 19.35.

(b) Upon the request of an employee or authorized representative of the local governmental unit, or pursuant to a special inspec-

tion warrant under s. 66.0119, any person who generated, transported, treated, stored or disposed of a hazardous substance that may have been disposed of or discharged at the site or facility or who is or was an owner or operator shall provide the employee or authorized representative access to any records or documents in that person's custody, possession or control that relate to all of the following:

1. The type and quantity of hazardous substance that was disposed of or discharged at the site or facility and the dates of the disposal or discharge.
2. The identity of any person who may be a responsible party.
3. The identity of subsidiary or parent corporations, as defined in s. 292.31 (8) (a) 3., of any person who may be a responsible party.

(c) The local governmental unit shall maintain a single repository that is readily accessible to the public for all documents related to responsible parties, the investigation, the remedial action and plans for redevelopment of the property.

**(2r) PRELIMINARY REMEDIAL ACTION PLAN.** (a) The local governmental unit shall, in consultation with the department, prepare a draft remedial action plan.

(b) Upon completion of the draft remedial action plan, the local governmental unit shall send written notice to all responsible parties identified by the local governmental unit, provide public notice and conduct a public hearing on the draft remedial action plan. The notice to responsible parties shall offer the person receiving the notice an opportunity to provide information regarding the status of that person or any other person as a responsible party, notice and a description of the public hearing and a description of the procedures in this section. At the public hearing, the local governmental unit shall solicit testimony on whether the draft remedial action plan is the least costly method of meeting the standards for remedial action promulgated by the department by rule. The local governmental unit shall accept written comments for at least 30 days after the close of the public hearing.

(c) Upon the conclusion of the period for written comment, the local governmental unit shall prepare a preliminary remedial action plan, taking into account the written comments and comments received at the public hearing and shall submit the preliminary remedial action plan to the department for approval. The department may approve the preliminary remedial action plan as submitted or require modifications.

**(3) OFFER TO SETTLE; SELECTION OF UMPIRE.** (a) Upon receiving the department's approval of the preliminary remedial action plan, the local governmental unit shall serve an offer to settle regarding the contribution of funds for investigation and remedial action at the site or facility on each of the responsible parties identified by the local governmental unit, using the procedure for service of a summons under s. 801.11 and shall notify the department that the offer to settle has been served. The local governmental unit shall include in the offer to settle all of the following information:

1. The amount of the offer and a rationale for the amount.
2. The names, addresses and contact persons, to the extent known, for all of the responsible parties identified by the local governmental unit.
3. The location and availability of documents that support the claim of the local governmental unit against the responsible party.
4. The location of the public repository where documents relating to the site or facility are maintained, the times during which the repository is open and the name and telephone number of the contact person at the repository.
5. A description of the procedures under this section.

(b) The department shall maintain a list of competent and disinterested umpires qualified to perform the duties under subs. (4) to (6). None of the umpires may be employees of the department. Upon receiving notice from a local governmental unit under par. (a), the secretary or his or her designee shall select an umpire from

the list and inform the local governmental unit and responsible parties of the person selected.

(c) Within 10 days after receiving notice of the umpire selected by the department under par. (b), the local governmental unit may notify the department that the umpire selected is unacceptable. Within 10 days after receiving notice of the umpire selected by the department under par. (b), a responsible party may notify the department that the umpire selected is unacceptable or that the responsible party does not intend to participate in the negotiation. Failure to notify the department that the umpire is unacceptable shall be considered acceptance. If all responsible parties identified by the local governmental unit indicate that they do not intend to participate in the negotiation, the department shall inform the local governmental unit and the local governmental unit shall cease further action under this section.

(d) Upon receiving notice under par. (c) that the selected umpire is unacceptable, the secretary or his or her designee shall select 5 additional umpires from the list and inform the local governmental unit and responsible parties of the persons selected.

(e) Within 10 days after receiving notice of the umpires selected by the department under par. (d), the local governmental unit or a responsible party may notify the department that one or more of the umpires selected are unacceptable. Failure to notify the department shall be considered acceptance. The secretary or his or her designee shall select an umpire from among those umpires not identified as unacceptable by the local governmental unit or a responsible party or, if all umpires are identified as unacceptable, the secretary or his or her designee shall designate a person to be umpire for the negotiation.

**(4) NEGOTIATION PROCESS.** (a) The umpire, immediately upon being appointed, shall contact the department, the local governmental unit and the responsible parties that received the offer to settle and shall schedule the negotiating sessions. The umpire shall schedule the first negotiating session no later than 20 days after being appointed. The umpire may meet with all parties to the negotiation, individual parties or groups of parties. The umpire shall facilitate a discussion between the local governmental unit and the responsible parties to attempt to reach an agreement on the design and implementation of the remedial action plan and the contribution of funds by the local governmental unit and responsible parties.

(b) The umpire shall permit the addition to the negotiation, at any time, of any responsible party or any other person who wishes to be a party to the negotiated agreement.

(c) Negotiations may not continue for more than 60 days after the first negotiating session, unless an extension is approved by the department for cause, at the request of any party to the negotiation. The department shall approve an extension if necessary to settle insurance claims.

(d) The local governmental unit and the responsible parties that participate in negotiations shall pay for the costs of the umpire, whether or not an agreement among the parties is reached under sub. (5) or the parties accept the recommendation of the umpire under sub. (6). The umpire shall determine an equitable manner of paying for the costs of the umpire, which is binding.

**(5) AGREEMENT IN NEGOTIATION.** The local governmental unit and any of the responsible parties may enter into any agreement in negotiation regarding the design and implementation of the remedial action plan and the contribution of funds by the local governmental unit and responsible parties for the investigation and remedial action. The portion of the agreement containing the design and implementation of the remedial action plan shall be submitted to the department for approval. The department may approve that portion of the agreement as submitted or require modifications.

**(6) FAILURE TO REACH AGREEMENT IN NEGOTIATION.** (a) If the local governmental unit and any responsible parties are unable to reach an agreement under sub. (5) by the end of the period of negotiation, the umpire shall make a recommendation regarding the

design and implementation of the remedial action plan and the contribution of funds for investigation and remedial action by the local governmental unit and all responsible parties that were identified by the local governmental unit and that did not reach an agreement under sub. (5), whether or not the responsible parties participated in negotiations under sub. (4). The umpire shall submit the recommendation to the department for its approval within 20 days after the end of the period of negotiation under sub. (4) (c). The department may approve the recommendation as submitted or require modifications. The umpire shall distribute a copy of the approved recommendation to the local governmental unit and all responsible parties identified by the local governmental unit.

(b) The local governmental unit and the responsible parties that did not reach an agreement under sub. (5) shall accept or reject the umpire's recommendation within 60 days after receiving it. Failure to accept or reject the recommendation within 60 days shall be considered rejection of the recommendation. If the local governmental unit rejects the recommendation with respect to any responsible party, the recommendation does not apply to that responsible party. If a responsible party rejects the recommendation, it does not apply to that responsible party.

(7) **RESPONSIBLE PARTIES SUBJECT TO AN AGREEMENT OR RECOMMENDATION.** A responsible party that enters into an agreement under sub. (5) with a local governmental unit or that accepts the umpire's recommendation under sub. (6), if the local governmental unit does not reject the recommendation, is required to comply with the agreement or recommendation. When the responsible party has complied with the agreement or recommendation, the responsible party is not liable to the state, including under s. 292.11 (7) (b) or 292.31 (8), or to the local governmental unit for any additional costs of the investigation or remedial action; the responsible party is not liable to any other responsible party for contribution to costs incurred by any other responsible party for the investigation or remedial action; and the responsible party is not subject to an order under s. 292.11 (7) (c) for the discharge that is the subject of the agreement or recommendation.

(8) **RESPONSIBLE PARTIES NOT SUBJECT TO OR NOT COMPLYING WITH AN AGREEMENT OR RECOMMENDATION.** (a) In this subsection:

1. "Interest" means interest at the annual rate of 12 percent, commencing on the date of the umpire's recommendation under sub. (6) or, if there is no umpire's recommendation, on the date of the agreement under sub. (5).

2. "Litigation expenses" means the sum of the costs, disbursements and expenses, including engineering fees and, notwithstanding s. 814.04 (1), reasonable attorney fees necessary to prepare for or participate in proceedings before any court.

(b) A local governmental unit is entitled to recover litigation expenses and interest on the judgment against a responsible party if any of the following occurs:

1. The local governmental unit accepts the recommendation of an umpire under sub. (6), the responsible party rejects it and the local governmental unit recovers a judgment under sub. (9) against that responsible party that equals or exceeds the amount of the umpire's recommendation.

2. The local governmental unit and the responsible party enter into an agreement under sub. (5) or accept the umpire's recommendation under sub. (6), the responsible party does not comply with the requirements of the agreement or recommendation and the local governmental unit recovers a judgment against that responsible party based on the agreement or recommendation.

(c) A responsible party is entitled to recover litigation expenses from a local governmental unit if the responsible party accepts the recommendation of an umpire under sub. (6), the local governmental unit rejects the recommendation of the umpire under sub. (6) with respect to the responsible party, the local governmental unit institutes an action under sub. (9) against the responsible party and the local governmental unit recovers a judgment under sub. (9) against the responsible party that is equal to or less than the amount of the umpire's recommendation.

(9) **LIABILITY FOR REMEDIAL ACTION COSTS.** (a) This subsection applies only to a site or facility that satisfies the applicability provisions of sub. (2) and for which the remedial action specified in an agreement under sub. (5) or a recommendation under sub. (6) is completed.

(b) Except as provided in pars. (bm), (br) and (c), sub. (7) and s. 292.21, a responsible party is liable for a portion of the costs, as determined under pars. (c) to (e), incurred by a local governmental unit for remedial action in an agreement under sub. (5) or a recommendation under sub. (6) and for any related investigation. A right of action shall accrue to a local governmental unit against the responsible party for costs listed in this paragraph.

(bm) Paragraph (b) does not apply with respect to a discharge if the discharge was in compliance with a permit license, approval, special order, waiver or variance issued under ch. 283 or 285 or under corresponding federal statutes or regulations.

(br) Paragraph (b) applies with respect to a transporter only if the transporter does any of the following:

1. Selects the site or facility where the hazardous substance is disposed of without direction from the generator.

2. Violates an applicable statute, rule, plan approval or special order in effect at the time the disposal occurred and the violation causes or contributes to the condition at the site or facility.

3. Causes or contributes to the condition at the site or facility by an action related to the disposal that would result in liability under common law in effect at the time the disposal occurred, based on standards of conduct for the transporter at the time the disposal occurred.

(c) The liability of each party to the action to recover costs under par. (b) is limited to a percentage of the cost of the remedial action that is determined by dividing the percentage of that party's contribution to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility by the percentage of contribution of all responsible parties to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility. Section 895.045 does not apply to this paragraph.

(cm) Notwithstanding par. (c), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for the total contribution of all parties involved in the common scheme or plan.

(d) The finder of fact shall apportion the contribution of each responsible party to the environmental pollution resulting from the disposal or discharge of hazardous substances at the site or facility for the purposes of par. (c), using the following criteria, and any other appropriate criteria:

1. The ability of the responsible parties to demonstrate that their contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances can be distinguished from the contribution of other responsible parties.

2. The amount of hazardous substances involved.

3. The degree of toxicity of the hazardous substances involved.

4. The degree of involvement by the responsible parties in the generation, transportation, treatment, storage, disposal or discharge of the hazardous substances.

5. The degree of cooperation by the responsible parties with federal, state or local officials to prevent or minimize harm to the public health or the environment.

6. The degree of care exercised by the parties with respect to the hazardous substance, taking into account the characteristics of the hazardous substance.

(e) A responsible party is not liable under par. (b) if the responsible party establishes by a preponderance of the evidence that the responsible party's contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances was caused solely by any of the following:

1. An act of God.

2. An act of war.

3. An act or omission of a 3rd party, other than an officer, director, employee or agent of the responsible party, or other than a person whose act or omission occurs in connection with a direct or indirect contractual relationship with the responsible party if all of the following apply:

a. The responsible party establishes by a preponderance of the evidence that the responsible party exercised due care with respect to the hazardous substances that caused environmental pollution.

b. In exercising due care under subd. 3. a., the responsible party took into consideration the characteristics of the hazardous substances, in light of all relevant facts and circumstances.

c. The responsible party took precautions against foreseeable acts or omissions of the 3rd party and the consequences that could foreseeably result from those acts or omissions.

(f) Any responsible party may seek contribution from any other responsible party. Such a contribution claim may be brought as a separate action or may be brought in the action commenced against the responsible party under this section.

(10) TECHNICAL ASSISTANCE. The department shall provide technical assistance to an umpire at the request of the umpire. The department may limit the amount of staff time allocated to each negotiation.

(11) LIABILITY. Except as provided in sub. (7), no common law liability, and no statutory liability that is provided in other statutes, for damages resulting from a site or facility is affected in any manner by this section. The authority, power and remedies provided in this section are in addition to any authority, power or remedy provided in any other statutes or provided at common law.

(13) FEES. The department may, by rule, assess and collect fees to offset the cost of the department's activities under this section. The fees may include an advance deposit, from which the department shall return the amount in excess of the cost of the department's activities under this section.

**History:** 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150 s. 672; 2001 a. 16, 103.  
**Cross-reference:** See also ch. NR 749, Wis. adm. code.

**292.37 Confidentiality of records.** (1) RECORDS. Except as provided under sub. (2), any records or other information furnished to or obtained by the department in the administration of ss. 292.31 and 292.35 are public records subject to s. 19.21.

(2) CONFIDENTIAL RECORDS. (a) *Application.* An owner or operator of a solid waste facility may seek confidential treatment of any records or other information furnished to or obtained by the department in the administration of ss. 292.31 and 292.35.

(b) *Standards for granting confidential status.* Except as provided under par. (c), the department shall grant confidential status for any records or information received by the department and certified by the owner or operator of the solid waste facility as relating to production or sales figures or to processes or production unique to the owner or operator of the solid waste facility or which would tend to adversely affect the competitive position of the owner or operator if made public.

(c) *Emission data; analyses and summaries.* The department may not grant confidential status for emission data. Nothing in this subsection prevents the department from using records and other information in compiling or publishing analyses or summaries relating to the general condition of the environment if the analyses or summaries do not identify a specific owner or operator or the analyses or summaries do not reveal records or other information granted confidential status.

(d) *Use of confidential records.* Except as provided under par. (c) and this paragraph, the department or the department of justice may use records and other information granted confidential status under this subsection only in the administration and enforcement of ss. 292.31 and 292.35. The department or the department of justice may release for general distribution records and other information granted confidential status under this subsection if the owner or operator expressly agrees to the release. The department

or the department of justice may release on a limited basis records and other information granted confidential status under this subsection if the department or the department of justice is directed to take this action by a judge or hearing examiner under an order which protects the confidentiality of the records or other information. The department or the department of justice may release to the U.S. environmental protection agency, or its authorized representative, records and other information granted confidential status under this subsection if the department or the department of justice includes in each release of records or other information a request to the U.S. environmental protection agency, or its authorized representative, to protect the confidentiality of the records or other information.

**History:** 1995 a. 227 s. 993.

**292.41 Abandoned containers.** (1) DEFINITION. In this section, "abandoned container" means any container which contains a hazardous substance and is not being monitored and maintained.

(2) APPLICABILITY. (a) This section does not apply to abandoned containers which are located in an approved facility or a nonapproved facility.

(b) Action by the department under this section is not subject to s. 292.31.

(3) CONTINGENCY PLAN. (a) After consultation with other affected federal, state and local agencies and private organizations, the department shall establish by rule criteria and procedures for the development, establishment and amendment of a contingency plan for the taking of emergency actions in relation to abandoned containers.

(b) The contingency plan shall establish procedures and techniques for locating, identifying, removing and disposing of abandoned containers.

(4) REMOVAL OR OTHER EMERGENCY ACTION. The department or its authorized representative may contain, remove or dispose of abandoned containers or take any other emergency action which it deems appropriate under the circumstances.

(5) ACCESS TO PROPERTY AND RECORDS. Any officer, employee or authorized representative of the department, upon notice to the owner or occupant, may enter onto any property, premises or place at any time for the purposes of sub. (3) if the entry is necessary to prevent increased damage to the air, land or waters of the state, or may inspect any record relating to abandoned container management for the purpose of ascertaining the state of compliance with this section and the rules promulgated under this section. Notice to the owner or occupant is not required if the delay in providing the notice is likely to result in imminent risk to public health or welfare or the environment.

(6) ABANDONED CONTAINERS: APPROPRIATIONS. (a) The department may utilize moneys appropriated under s. 20.370 (2) (dv) and (my) in taking action under sub. (4). The department shall utilize these moneys to provide for the procurement, maintenance and storage of necessary equipment and supplies, personnel training and expenses incurred in locating, identifying, removing and disposing of abandoned containers.

(b) No more than 25 percent of the total of all moneys available under the appropriation under s. 20.370 (2) (dv) and (my) may be used annually for the procurement and maintenance of necessary equipment during that fiscal year.

(c) The department is entitled to recover moneys expended under this section from any person who caused the containers to be abandoned or is responsible for the containers. The funds recovered under this paragraph shall be deposited into the environmental fund for environmental management.

**History:** 1983 a. 410; 1985 a. 29 ss. 1957, 3202 (39); 1987 a. 27, 384; 1989 a. 31; 1991 a. 39; 1993 a. 453; 1995 a. 27; 1995 a. 227 s. 716; Stats. 1995 s. 292.41; 1995 a. 378 s. 46; 1997 a. 27.

**Cross-reference:** See also ch. NR 714, Wis. adm. code.

**292.51 Cooperative remedial action.** (1) In this section, "costs of remedying environmental contamination" means costs

May 24, 1996



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Re: Town of Newton Gravel Pit

OFFICE OF CITY ATTORNEY

Dear Insurer Representatives:

The City of Manitowoc has entered into an agreement with waste generators at the Town of Newton Gravel Pit site to facilitate the clean up of environmental damage. I'm enclosing a copy of that Agreement for your records.

Our consultant, RUST Environment and Infrastructure is in the process of submitting their Remedial Action Plan to the Wisconsin Department of Natural Resources. The cost of the recommended remedial action is approximately \$460,000. In addition, the City has spent approximately \$425,000 in engineering fees to this point.

Very truly yours,

Patrick L. Willis  
City Attorney

PLW:es

Enc.

Patrick L. Willis  
City Attorney

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FAX: (414) 683-4331



**AGREEMENT BETWEEN THE CITY OF MANITOWOC AND  
PARTICIPATING GENERATORS FOR THE TOWN OF NEWTON  
GRAVEL PIT SITE**

This Agreement is entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 1996 between the City of Manitowoc (the "City") and those Parties listed in Appendix A (the "Participating Generators") (with the City and the Participating Generators collectively referred to as the "Parties") and each, individually, as a "Party").

**FACTUAL BACKGROUND**

1. The Town of Newton Gravel Pit Site (the "Site") has been identified as requiring remediation. The required remediation is proposed to be carried out according to the Remedial Option #5 of the Site Investigation and Remedial Options Report (the "Remedial Plan") prepared by Rust Environment and Infrastructure ("Rust") dated January 19, 1995. Part of the Remedial Plan includes non-aqueous phase liquid removal at a cost not to exceed \$69,800 (the "Removal"). The Remedial Plan will be submitted to the Wisconsin Department of Natural Resources ("WDNR") by the City.
2. The Participating Generators are alleged to have generated waste during the relevant time period that may have been disposed of at the Site.
3. The City was the owner of the Site during the relevant time period.
4. The Parties have met on numerous occasions to discuss a privately financed investigation and remediation of the Site.
5. Consequently, in order to accomplish an expeditious remediation of the Site, the Participating Generators and the City have reached this Agreement to jointly fund the remediation at this Site.

**PURPOSE OF THIS AGREEMENT**

6. The purpose of this Agreement is to set forth the terms under which the Parties will jointly fund the remediation work and the manner in which the remediation will be accomplished.



## SCOPE OF THIS AGREEMENT

7. The terms and conditions of this Agreement between the City and the Participating Generators apply only to the funding and conducting of the Remedial Plan, identified as Remedial Option #5 in the Rust Report dated January 19, 1995, and to the partial payment by the Participating Generators of past costs incurred by the City for site investigation services, as provided in Appendix B ("Past Costs").

8. This Agreement is contingent in part upon WDNR approval of the cleanup proposed for the Site in substantial compliance with the Remedial Plan (hereinafter the "WDNR Approval"). If WDNR fails to approve the cleanup proposed for the Site in substantial compliance with the Remedial Plan on or before December 31, 1996 (hereinafter the "Non-Approval"), this Agreement shall be declared to be null and void for all purposes except for those portions of this Agreement that relate to the Removal. Rust shall estimate the cost of implementing the cleanup for the site approved by the WDNR within 30 days after the date of the approval issued by the WDNR (hereinafter the "Rust Estimate"). The Rust Estimate shall be for total site costs including the cost of the Removal and Past Costs incurred by the City ("Total Site Costs"). As used in this Agreement, the term "substantial compliance" shall mean that Rust Estimate is not greater than \$1,000,000 for Total Site Costs.

9. In the event following WDNR Approval it is later determined that the actual costs of implementing the WDNR Approval exceed \$1,000,000 for Total Site Costs, the Participating Generators shall have no obligation under this Agreement to fund the portion of the costs in excess of \$1,000,000, provided, however, that the City and the other Parties shall retain any and all rights not specifically waived in this Agreement to seek contribution from other Parties to this Agreement as well as from any third parties for any such excess cost.

10. The Parties agree to waive consistency with the National Contingency Plan ("NCP") as to all work performed before or after the date of this Agreement.

11. The Parties agree that no portion of the tolling period beginning from January 1, 1995 up to the date that any Party to this Agreement mails written notification to all other Parties of its intent to terminate the tolling period shall be used for purposes of calculating the passage of time under an applicable statute of limitations for any claim that a Party may have against another Party relating to contamination at the Site.

12. The obligations of the Parties under this Agreement are limited solely to this Agreement and have no effect outside the terms of this Agreement. Nothing in this Agreement shall be an admission of law or fact or evidence of any liability or responsibility with respect to the Site. Nothing in this Agreement is intended to release, discharge, or in

any way affect any claim, cause of action, or demand in law or equity which the Parties may have against any other person or entity who is not a Party relating to the generation, storage, treatment, transportation, release, or disposal of any hazardous substances at, to, or from the Site.

13. The Parties do not admit or concede, and reserve the right to contest any determination, allegation, finding or conclusion regarding the Site in any action other than one brought by any of the Parties to enforce this Agreement.

14. This Agreement shall not create any private right, other than a right by any of the Parties to enforce this Agreement.

#### ALLOCATION OF COSTS

15. The Parties agree to fund jointly the cost of implementing the WDNR Approval and, in the event of Non-Approval, the Removal.

16. The Participating Generators shall pay the City \$69,800 for the Removal within 30 days of the execution of this Agreement. In the event of Non-Approval, this shall constitute the sole payment for which the Participating Generators are obligated under this Agreement.

17. In the event of WDNR Approval, the Participating Generators shall pay the City the balance of 67.5% of the Rust Estimate remaining after the payment made under paragraph 16, within 30 days of the date of mailing of the Rust Estimate. In the event of WDNR Approval, the City agrees to pay 32.5 percent of the Rust Estimate.

18. The City shall maintain the payments received from the Participating Generators in a separate account which shall not be commingled with monies from any source not covered by this Agreement (hereinafter the "Account"). The City is authorized to utilize the Account for the payment of costs incurred for the implementation of the WDNR Approval or, in the event of Non-Approval, the Removal.

19. The Parties agree that the City of Manitowoc, to date, has expended \$421,609 in project costs paid to Rust for cleanup activities at the Site. In the event of WDNR Approval and within 30 days of the date of the mailing of the Rust Estimate, the Participating Generators agree to reimburse the City an amount calculated in accordance with the following formula:  $\$421,609 - (\text{Rust Estimate} \times 32.5\%)$ . As a result of this reimbursement, the City is deemed to have contributed its 32.5 percent share of the Rust Estimate in accordance with paragraph 17 of this Agreement in the event of WDNR Approval.

20. If the total actual costs for the WDNR Approval exceed the Rust Estimate, the Participating Generators shall pay the City 67.5% of such excess costs within 45 days of the date of mailing by the City to the Participating Generators of notification of such excess costs provided, however, that the Participating Generators shall have no obligation for any portion of the total costs for the WDNR Approval in excess of \$1,000,000 Total Site Costs. In the event the total actual costs for the WDNR Approval are less than the Rust Estimate, the City shall distribute to the Participating Generators the balance in the Fund within 45 days of the date that WDNR has approved the completion of the WDNR Approval.

#### **ACTIONS TO BE PERFORMED BY THE CITY OF MANITOWOC**

21. Upon execution of this Agreement, the City shall direct its consultant, Rust, to conduct the Removal immediately or as promptly as site and weather conditions allow. Conduct of the Removal shall not be postponed until WDNR Approval or Non-Approval.

22. The Parties agree that the City of Manitowoc will continue to act as the primary representative dealing with the WDNR. The City of Manitowoc further agrees that it will not inform WDNR of the terms of this Agreement between the Participating Generators and the City unless prohibited by applicable law as defined in paragraph 29 of this Agreement.

23. The Parties agree that the City is the party responsible for entering into and overseeing all contracts for work performed at this Site under the WDNR Approval or the Removal. The City will use reasonable efforts, as determined solely in the exercise of the City's discretion, to perform tasks covered by the WDNR Approval or the Removal with City personnel.

24. The Parties agree that the City is responsible for monitoring the total costs for the WDNR Approval and for providing notification to the Participating Generators in the event that total costs of the WDNR Approval exceed the Rust Estimate. The Parties further agree that the City will provide a final accounting of all costs for the WDNR Approval upon its completion and make distributions, if any are required, in accordance with paragraph 20 of this Agreement.

#### **ACTIONS TO BE PERFORMED BY THE PARTICIPATING GENERATORS**

25. The Participating Generators will agree among themselves how to fund the Participating Generators' allocated share of the costs of the WDNR Approval or the Removal as required by this Agreement.

26. The Participating Generators shall designate one or more representatives to coordinate the work to be performed with the City and for the receipt of any notices or payments made by the City or Rust under this Agreement.

#### COVENANT NOT TO SUE

27. In the event WDNR approves the completion of the WDNR Approval for the Site in accordance with applicable law and the Parties have fulfilled all of their obligations under this Agreement, and the clean up is accomplished at a cost of not more than \$1,000,000.00 Total Site Costs, the Parties agree not to sue each other for costs associated with the WDNR Approval; provided, however, that nothing herein shall preclude or bar the Parties from any available legal remedies directed against anyone who is not a Party for such costs, nor shall anything herein preclude or bar any of the Parties from any available legal remedies against any other Party in the event of a suit or claim against any Party from any party who is not a signatory to this Agreement.

#### INDEMNIFICATION

28. Each Party agrees to indemnify, defend and hold harmless any Party and its representative(s) from and against any claim, demand, liability, cost, expense, legal fee, penalty, loss or judgment (collectively "Liability") which in any way relates to the good faith performance of any duties under this Agreement by any Party or its representative(s) on behalf of the Parties, including, but not limited to, any liability arising from any contract or agreement required to implement the WDNR Approval or the Removal. This indemnification shall not apply to any liability arising from a criminal conviction, unless the Party or its representative(s) demonstrates to the satisfaction of the Parties that the Party or its representative(s) had reasonable cause to believe that the conduct in question was lawful. However, nothing in this paragraph shall constitute a waiver or release of any claim or potential claim by any Party which is reserved within this Agreement. In addition, if assertion of any remedies against anyone who was not a Party which are specifically reserved in paragraph 27 of this Agreement results in claims being asserted by anyone who is not a Party against a Party who does not elect to assert such a claim ("Non-Claimant") or results in any person or entity asserting an indemnity claim against a Non-Claimant, then the claimants who are also Parties jointly and severally agree to defend, indemnify and hold harmless such Non-Claimants from such litigation costs, attorneys' fees, money damages, judgments and/or settlements relating to such contribution or indemnity claim.

### **CONFIDENTIALITY**

29. The City will maintain the confidentiality of this Agreement unless prohibited by applicable law, including, but not limited to, the Wisconsin Public Records law, Wis. Stats. §19.31 et. seq.

### **SUCCESSORS AND ASSIGNS**

30. This Agreement shall be binding upon the successors and assigns of the Parties. No assignment or delegation of the obligation to make any payment or reimbursement hereunder will release the assigning Party without the prior written consent of the remaining Parties.

### **MAILING**

31. Any reference to mail or mailing in this Agreement shall be accomplished by mailing a notification by certified mail, return receipt requested to the intended recipient(s).

### **APPLICABLE LAW**

32. For purposes of enforcement or interpretation of the provisions of this Agreement, the Parties agree that the laws of the State of Wisconsin shall be applicable, except to the extent federal law shall apply to questions arising under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, or the NCP promulgated thereunder, and further agree not to contest personal jurisdiction in the state or federal courts of Wisconsin with respect to litigation brought for such purposes.

### **NATURE OF AGREEMENT**

33. Nothing herein shall be deemed to create a partnership or joint venture and/or principal and agent relationship between or among the Parties.

### **COUNTERPARTS**

34. This Agreement may be executed in any number of counterparts, each of which shall be deemed a duplicate original, but all of which together shall constitute one and the same instrument and shall become effective as to each Party when the counterpart executed by such Party as of the date the last Party signs the Agreement provided all counterparts have been delivered to Susan H. Martin, Foley & Lardner.

APPENDIX A

Participating Generators

A & P

Heresite

Imperial Eastman

Invincible

Manitowoc Co.  
(Manitowoc Engineering)  
(Manitowoc Shipbuilding)

Manitowoc Products Co.  
(Chrysler Corporation)  
(White Consolidated)

Newell  
(Aluminum Spec.)  
(Mirro)

APPENDIX B

RECEIVED  
JAN 16 1996  
CITY ATTORNEY



January 16, 1996

MEMO TO: CITY ATTORNEY PAT WILLIS  
FROM: MICHAEL E. HAWLEY, P.E. *MEH*  
Director of Public Works & City Engineer  
SUBJECT: Gravel Pit Investigation

Pursuant to your request for information on costs incurred in the Gravel Pit Investigation, we have paid the following to date.



OFFICE OF DEPARTMENT  
OF PUBLIC WORKS  
ENGINEERING

RUST ENVIRONMENT & INFRASTRUCTURE

Contract 1 - Site Investigation Services  
from December, 1992 thru  
December 10, 1993 \$166,072.00  
(Final Payment 1/14/94)

Contract 2 - Continuing Site Investigation  
January, 1994 thru  
December 8, 1995 \$255,536.69  
(\$626.91 Paid 1/12/96)

MEH:ca  
Revised 1/16/96  
(450-353130-529900)

Michael E. Hawley  
Director of Public Works  
and City Engineer

CITY HALL  
817 Franklin Street  
P.O. Box 1697  
Manitowoc, WI 54221-1697  
Phone: (414) 683-4410  
FAX: (414) 683-4424

MODIFICATION

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

4-16-96  
Date of Execution

INVINCIBLE METAL FURNITURE CO.

Name of Party

By:

  
(Signature)

Name:

JOHN A. SCHUETTE

(Typed Name)

Title:

PRESIDENT

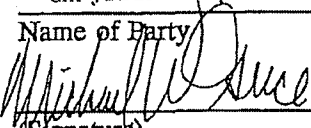


**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3-12-96  
Date of Execution

Chrysler Corporation  
Name of Party  
By:   
(Signature)

Name: Michael W. Grice ✓  
(Typed Name)

Title: Senior Staff Counsel

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

April 15, 1996  
Date of Execution

City of Manitowoc  
Name of Party

By: *Patrick L. Willis*  
(Signature)

Name: Patrick L. Willis  
(Typed Name)

Title: City Attorney


**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 29, 1996  
Date of Execution

The Manitowoc Company, Inc.  
Name of Party

By:   
(Signature)

Name: E. Dean Flynn  
(Typed Name)

Title: Secretary & Manager - Corp. Insurance

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3/22/96  
Date of Execution

Great Atlantic & Pacific Tea Co., Inc.  
Name of Party

By: *Alfred Limbrick*  
(Signature)

Name: Alfred Limbrick ✓  
(Typed Name)

Title: Group Vice-President

**MODIFICATION**


35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 8, 1996  
Date of Execution

Gould Electronics Inc.  
Name of Party

By:

  
(Signature)

Name:

Lawrence W. Mitchell  
(Typed Name)

Title:

Associate Counsel


**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3-11-96  
Date of Execution

HERESITE PROTECTIVE COATINGS, INC.  
Name of Party

By:   
(Signature)

Name: GEOFFREY C. LIBAN  
(Typed Name)

Title: C.E.O.

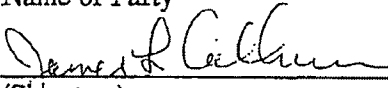
**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 12, 1996  
Date of Execution

White Consolidated Industries, Inc  
Name of Party

By:   
(Signature)

Name: James L. Calhoun  
(Typed Name)

Title: Vice President - Regulatory Affairs

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 7, 1996  
Date of Execution

Newell Co.  
Name of Party

By: [Signature]  
(Signature)

Name: Richard H. Wolff  
(Typed Name)

Title: Secretary



Mike



January 11, 1993

MEMO TO: CITY ATTORNEY PAT WILLIS  
FROM: MICHAEL E. HAWLEY, P. E. *MEH*  
Director of Public Works and City Engineer  
SUBJECT: Gravel Pit

File Search

Jean Campbell and Carol Adler searched the Engineering Department files for any material on the Gravel Pit, and couldn't find anything pertaining to industrial dumping. Mostly found old yearly crushing reports.

Tony Scherer searched the files at the Street Department, and found the attached report dated March 4, 1968, outlining materials and companies hauling to the Gravel Pit.

Company Drivers

We have only been able to come up with names of three drivers, one of whom we haven't been able to locate.

<u>Name</u>	<u>Name of Company</u>	<u>Address</u>	<u>Phone</u>
Erwin C. Musial	Manitowoc Company	2115 Madison	684-3274
Earl A. Mueller	Mirro Aluminum	944 So.26th	684-3727
Richard Budnik	Invincible	Unable to Locate	
(Mrs. Gladys Budnik might be his mother)		922 So.30th	682-2643



OFFICE OF DEPARTMENT  
OF PUBLIC WORKS,  
ENGINEERING

Michael E. Hawley  
Director of Public Works  
and City Engineer

MEH:ca  
Attached

CITY HALL  
7 Franklin Street  
P. Box 1597  
Manitowoc, WI 54221-1597  
Phone: (414) 683-4410  
Fax: (414) 683-4424

March 4, 1968

WASTE MATERIALS HAULED TO CITY GRAVEL PIT  
BY VARIOUS INDUSTRIAL PLANTS

MANITOWOC ENGINEERING CO.

CLEANING SOLVENT WATER SOLUBLE -- 600 Gal. @ week  
(noninflammable)

CUTTING and DRAIN OILS -- 200 Gal. @ week (inflammable).

MANITOWOC SHIPBUILDING INC.

WASTE FUEL OIL -- 1000 Gal. about four times a year Fall & Winter.  
(inflammable).

MIRRO ALUMINUM CO.

12,000 Gal. each two months of a 95% water, 5%  
soluble oil solution.

500 Gal. @ month of various combustibile oils.

500 Gal. @ year of used gear box oils.

2,700 Gal. each six weeks of 80% water, 20%  
Sulphuric acid solution.

1,000 Gal. of naptha on very rare occasions

(Obtained from D.P.W. Street Dept. files)

March 4, 1968

WASTE MATERIALS HAULED TO CITY GRAVEL PIT  
BY VARIOUS INDUSTRIAL PLANTS

INVINCIBLE METAL FURNITURE CO.

PAINT SLUDGE--- 55 Gal. @ week and 550 Gal. every third week.  
(inflammable)

MANITOWOC PRODUCTS CO.

PAINT SLUDGE -- 5 Cu. Yds. @ week (inflammable).

HERESITE & CHEMICAL CO.

WASTE ALCOHOL -- 25 Gal. to 30 Gal. @ week (inflammable).

IMPERIAL EASTMAN CORP.

WASTE OIL --- 200 Gal. @ week (inflammable).

WATER SOLUBLE COOLANT -- 100 Gal. @ week (noninflammable).

WHITE HOUSE MILK DIV.

CLEANING SOLVENT -- 20 Gal. @ Week (inflammable).

ALUMINUM SPECIALTY CO.

DRAIN OIL -- 110 Gal. @ week (inflammable).

PAINT STRIPPER -- 55 Gal. @ week (inflammable).

PAINT THINNER -- 55 Gal. @ week (inflammable).

(Obtained from D.P.W. Street Dept. files)

AFFIDAVIT RICHARD WHITE

STATE OF WISCONSIN )  
                                  ) ss  
MANITOWOC COUNTY )

I, Richard White, being duly sworn on oath, depose and state as follows:

1. I was the Department of Public Works Accountant for the City of Manitowoc from 1967 until approximately June of 1981.

2. That in my role as Accountant for the Public Works Department, I was familiar with the operation costs of the Newton Gravel Pit.

3. That I have a distinct memory that the industrial waste dumping at the Newton Gravel Pit ended some time in 1972 when the Department of Public Works shop moved from the 14<sup>th</sup> and Clark Street location to the 35<sup>th</sup> and Viebahn location.

4. I believe the above statements to be true and correct to the best of my recollection of the facts, and I make this affidavit on behalf of the City of Manitowoc.

Dated this 20<sup>th</sup> day of December 2010.

Richard White  
Richard White

Subscribed and sworn to before me this 20<sup>th</sup> day of December 2010.

Jane M. Rhode  
Notary Public Jane M. Rhode  
My commission expires 6-3-2012

January 25, 2017

**VIA U.S. CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

IMF Solutions, LLC  
Steven Schenian  
500 American Drive  
P.O. Box 249  
Francis Creek, Wisconsin 54214-0249

RE: City of Manitowoc/Former Town of Newton Gravel Pit, 3130 Hecker Road,  
Manitowoc, WI - WDNR BRRTS Activity # 02-36-000268 (the "Site")

Dear Mr. Schenian:

Pursuant to Wis. Stat. § 292.35(2g)(b) (copy enclosed), the City of Manitowoc (the "City") hereby requests that IMF Solutions, LLC provide access to or delivery of any records or documents in its custody, possession or control that relate to all of the following:

1. The type and quantity of any wastes containing hazardous substances that IMF Solutions, LLC or the party the City believes to be its corporate predecessor in interest, Invincible Metal Furniture, Inc., (collectively, "IMF") disposed of or discharged at the above-referenced Site and the dates of the disposal or discharge.
2. The identity of any person who may be a "responsible party" for contamination at the above-referenced Site under Wis. Stat. § 292.35(1).
3. The identity of subsidiary or parent corporations, as defined in Wis. Stat. § 292.31(8)(a)3, of any person who may be a responsible party. Section 292.31(8)(a)3 defines a "subsidiary or parent corporation" as "any business entity, including a subsidiary, parent corporation, or other business arrangement which has elements of common ownership or control or uses a long-term contractual arrangement with any person to avoid direct responsibility for conditions at a site or facility."

For context, I am attaching correspondence that includes a 1996 settlement agreement between the City and certain parties, including Invincible Metal Furniture as well as a January 11, 1993 City memorandum (based on a 1968 Manitowoc Department of Public Works document) that identifies certain parties, including Invincible Metal Furniture, that arranged for disposal of waste at the Site.

IMF Solutions, LLC  
Steven Schenian  
January 25, 2017  
Page 2

It is requested that Invincible Metal Furniture provide delivery or access within thirty (30) days of your receipt of this request. The City intends to assemble all the available information in advance of the public hearing on the City's Draft Remedial Action Plan for the Site, which is currently planned for Monday, March 13, 2017 (details to follow).

Finally, as a preliminary request, please refrain from destroying any documents and/or any electronic information which may be in any way related to the Site or Invincible Metal Furniture's operations or activities during the 1960's and 1970's, when the Site was operating.

Thank you for your cooperation in this matter. If you have any questions or concerns, please contact me.

Very truly yours,

GODFREY & KAHN, S.C.



Edward B. Witte

Enclosure

cc: Molly E. Schmidt, Wisconsin Department of Natural Resources (via E-mail w/enclosure)  
Kathleen M. McDaniel, City of Manitowoc (via E-mail w/enclosure)

16705475.1

CHAPTER 292  
REMEDIAL ACTION

	SUBCHAPTER I		
	DEFINITIONS		
292.01	Definitions.		
	SUBCHAPTER II		
	REMEDIAL ACTION		
292.11	Hazardous substance spills.	292.37	Confidentiality of records.
292.12	Sites with residual contamination.	292.41	Abandoned containers.
292.13	Property affected by off-site discharge.	292.51	Cooperative remedial action.
292.15	Voluntary party remediation and exemption from liability.	292.53	Availability of environmental insurance.
292.16	Responsibility of certain municipalities acquiring closed landfills.	292.55	Requests for liability clarification and technical assistance.
292.19	Responsibility of persons conducting investigations.	292.57	Database of properties with residual contamination.
292.21	Responsibility of lenders and representatives.	292.63	Petroleum storage remedial action; financial assistance.
292.23	Responsibility of local governmental units; solid waste.	292.64	Removal of abandoned underground petroleum storage tanks.
292.24	Responsibility of local governmental units; hazardous waste.	292.65	Dry cleaner environmental response program.
292.25	Report on impact of exemptions from liability.	292.68	Reimbursement for disposal of PCB contaminated sediment.
292.255	Report on brownfield efforts.	292.70	Indemnification for disposal of polychlorinated biphenyls.
292.26	Civil immunity; local governmental units.	292.72	Brownfields revolving loan program.
292.31	Environmental repair.	292.81	Notice; lien.
292.33	Local government cost recovery cause of action.		SUBCHAPTER III
292.35	Local governmental unit negotiation and cost recovery.		ENFORCEMENT; PENALTIES
		292.93	Orders.
		292.94	Fees related to enforcement actions.
		292.95	Review of alleged violations; environmental repair and cost recovery.
		292.98	Violations and enforcement; environmental repair and cost recovery.
		292.99	Penalties.

SUBCHAPTER I  
DEFINITIONS

**292.01 Definitions.** In this chapter:

(1) “Approved facility” has the meaning given in s. 289.01 (3).

(1m) “Approved mining facility” has the meaning given in s. 289.01 (4) and includes a mining waste site, as defined in s. 295.41 (31).

(1s) “Contaminated sediment” means sediment that contains a hazardous substance.

(2) “Department” means the department of natural resources.

(3) “Discharge” means, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying or dumping.

(3m) “Engineering control” means an object or action designed and implemented to contain contamination or to minimize the spread of contamination, including a cap, soil cover, or in-place stabilization, but not including a sediment cover.

(4) “Environmental pollution” means the contaminating or rendering unclean or impure the air, land or waters of the state, or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to fish, bird, animal or plant life.

(5) “Hazardous substance” means any substance or combination of substances including any waste of a solid, semisolid, liquid or gaseous form which may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or which may pose a substantial present or potential hazard to human health or the environment because of its quantity, concentration or physical, chemical or infectious characteristics. This term includes, but is not limited to, substances which are toxic, corrosive, flammable, irritants, strong sensitizers or explosives as determined by the department.

(6) “Hazardous waste” means any solid waste identified by the department as hazardous under s. 291.05.

(7) “Landfill” means a solid waste facility for solid waste disposal.

(8) “Lender” means a bank, credit union, savings bank, savings and loan association, mortgage banker or similar financial institution, the primary business of which is to engage in lending

activities or an insurance company, pension fund or government agency engaged in secured lending.

(9) “Lending activities” means advancing funds or credit to and collecting funds from another person; entering into security agreements, including executing mortgages, liens, factoring agreements, accounts receivable financing arrangements, conditional sales, sale and leaseback arrangements and installment sales contracts; conducting inspections of or monitoring a borrower’s business and collateral; providing financial assistance; restructuring or renegotiating the terms of a loan obligation; requiring payment of additional interest; extending the payment period of a loan obligation; initiating foreclosure or other proceedings to enforce a security interest in property before obtaining title; requesting and obtaining the appointment of a receiver; and making decisions related to extending or refusing to extend credit.

(10) “Long-term care” means the routine care, maintenance and monitoring of a solid or hazardous waste facility following closing of the facility.

(11) “Municipality” means any city, town, village, county, county utility district, town sanitary district, public inland lake protection and rehabilitation district or metropolitan sewage district.

(12) “Nonapproved facility” has the meaning given in s. 289.01 (24).

(13) “Person” means an individual, owner, operator, corporation, limited liability company, partnership, association, municipality, interstate agency, state agency or federal agency.

(15) “Preventive measures” mean the installation or testing of equipment or devices, a designated way of performing a specified operation or the preparation of an emergency response plan.

(16) “Representative” means any person acting in the capacity of a conservator, guardian, court-appointed receiver, personal representative, testamentary trustee of a deceased person, trustee of a living trust, or fiduciary of real or personal property.

(17) “Secretary” means the secretary of natural resources.

(17g) “Sediment” means particles in the bed of a navigable water up to the ordinary high-water mark that are derived from the erosion of rock, minerals, soil, and biological materials and from chemical precipitation from the water column and that are transported or deposited by water.

**292.33 Local government cost recovery cause of action.** (1) **DEFINITION.** In this section “local governmental unit” has the meaning given in s. 292.11 (9) (c) 1.

(2) **CAUSE OF ACTION.** Except as provided in sub. (6), a local governmental unit may recover costs as provided in sub. (4) from a responsible person described in sub. (3) if the costs are incurred in connection with a property acquired as provided in s. 292.11 (9) (c) 1m. on which a hazardous substance has been discharged.

(3) **RESPONSIBLE PERSONS.** (a) Except as provided in par. (b), a local governmental unit may recover costs in an action under this section from any of the following:

1. A person who, at the time that the local governmental unit acquired the property, possessed or controlled the hazardous substance that was discharged on the property.

2. A person who caused the discharge of the hazardous substance on the property.

(b) A local governmental unit may not recover costs in an action under sub. (2) from a person listed in par. (a) if any of the following applies:

1. The person is exempt from liability under s. 292.11 (9) (e), 292.13, 292.15, 292.16, 292.19 or 292.21 with respect to the discharge that is the subject of the action.

2. The person has entered into a consent order under this chapter or ch. 289 or 291 or an agreement under s. 292.11 (7) (d) or 292.31 (8) (h) with respect to the discharge that is the subject of the action and the person is in compliance with the consent order or agreement.

3. The person is exempt from liability under s. 292.35 (9) (e) with respect to the discharge that is the subject of the action.

4. The discharge that was caused by the person and that is the subject of the action was in compliance with a permit, license, approval, special order, waiver or variance issued under ch. 283 or 285 or under corresponding federal statutes or regulations.

(4) **RECOVERABLE COSTS.** (a) Except as provided in par. (b), in an action under this section a local governmental unit may recover the reasonable and necessary costs that it incurs for all of the following:

1. Investigating environmental contamination on the property and planning remedial activities described in subd. 2.

2. Conducting remedial activities to restore the property for its intended future use.

3. Administering the activities under subds. 1. and 2. and bringing the action under this section, including costs, disbursements and engineering fees but excluding attorney fees.

(b) The costs determined under par. (a) shall be reduced by the fair market value of the property after completion of the activities under par. (a) 2.

(c) Recoverable costs under this subsection may not be reduced by the amount of any state or federal moneys received by the local governmental unit for any of the activities under par. (a).

(d) 1. In an action under this section, the liability of a responsible person described in sub. (3) (a) 2. is limited to the amount that bears the same proportion to the total costs under par. (a), adjusted as provided in par. (b), as the amount of the environmental pollution on the property from the discharge caused by the responsible person bears to all of the environmental pollution on the property from discharges of hazardous substances.

2. In an action under this section, the liability of a responsible person described in sub. (3) (a) 1. is limited to the amount of the total costs under par. (a), adjusted as provided in par. (b), that the local governmental unit is unable to recover from responsible parties described in sub. (3) (a) 2. less the amount that the local governmental unit is unable to recover because of the exemptions in sub. (3) (b) 3. and 4.

(5) **REPAYING STATE ASSISTANCE.** If a local governmental unit that recovers costs under this section received money from this state, other than under s. 292.11 (7) or 292.31 (1), (3) or (7), for any of the activities under sub. (4) (a), the local governmental unit

shall reimburse to the state an amount that bears the same proportion to the total amount recovered under this section as the amount received from the state, other than under s. 292.11 (7) or 292.31 (1), (3) or (7), bears to the total costs under sub. (4) (a) adjusted as provided in sub. (4) (b).

(6) **EXCEPTION.** A local governmental unit may not recover costs under this section for remedial activities conducted on a property or portion of a property with respect to a discharge after the department of natural resources, the department of safety and professional services, or the department of agriculture, trade and consumer protection has indicated that no further remedial activities are necessary on the property or portion of the property with respect to the discharge.

(7) **LIMITATION OF ACTION.** An action under this section shall be commenced within 6 years after the date that the local governmental unit completes the activities under sub. (4) (a) 2. or be barred.

**History:** 1999 a. 9; 2011 a. 32.

**292.35 Local governmental unit negotiation and cost recovery.** (1) **DEFINITIONS.** In this section:

(am) “Financial assistance” means money, other than a loan, provided by a governmental unit that is not a responsible party to pay a portion of the cost of investigation and remedial action for a site or facility.

(b) “Generator” means a person who, by contract, agreement or otherwise, either arranges or arranged for disposal or treatment, or arranges or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by the person, if the disposal or treatment is done by another person at a site or facility owned and operated by another person and the site or facility contains the hazardous substance.

(bm) “Local governmental unit” means a municipality, a redevelopment authority created under s. 66.1333 or a public body designated by a municipality under s. 66.1337 (4).

(c) “Owner or operator” means any of the following:

1. If the property is taken for tax delinquency, a person who owns or operates a site or facility at the time that the site or facility is taken for tax delinquency.

2. A person who owns or operates a site or facility at the time that the disposal or discharge of a hazardous substance at the site or facility occurs.

(e) “Responsible party” means a generator, an owner or operator, a transporter or a person who possesses or controls a hazardous substance that is discharged or disposed of or who causes the discharge or disposal of a hazardous substance.

(f) “Site or facility” means an approved facility, an approved mining facility, a nonapproved facility, a waste site or any site where a hazardous substance is discharged on or after May 21, 1978.

(g) “Transporter” means a person who accepts or accepted a hazardous substance for transport to a site or facility.

(2) **APPLICABILITY.** This section only applies to a site or facility if one of the following criteria is satisfied:

(a) The site or facility is owned by a local governmental unit.

(b) A local governmental unit that owns a portion of the site or facility commits itself, by resolution of its governing body, to paying more than 50 percent of the amount equal to the difference between the cost of investigation and remedial action for the site or facility and any financial assistance received for the site or facility.

(2g) **IDENTIFICATION OF RESPONSIBLE PARTIES.** (a) A local governmental unit that intends to use the cost recovery procedures in this section shall attempt to identify all responsible parties. All information obtained by the local governmental unit regarding responsible parties is a public record and may be inspected and copied under s. 19.35.

(b) Upon the request of an employee or authorized representative of the local governmental unit, or pursuant to a special inspec-



tion warrant under s. 66.0119, any person who generated, transported, treated, stored or disposed of a hazardous substance that may have been disposed of or discharged at the site or facility or who is or was an owner or operator shall provide the employee or authorized representative access to any records or documents in that person's custody, possession or control that relate to all of the following:

1. The type and quantity of hazardous substance that was disposed of or discharged at the site or facility and the dates of the disposal or discharge.
2. The identity of any person who may be a responsible party.
3. The identity of subsidiary or parent corporations, as defined in s. 292.31 (8) (a) 3., of any person who may be a responsible party.

(c) The local governmental unit shall maintain a single repository that is readily accessible to the public for all documents related to responsible parties, the investigation, the remedial action and plans for redevelopment of the property.

**(2r) PRELIMINARY REMEDIAL ACTION PLAN.** (a) The local governmental unit shall, in consultation with the department, prepare a draft remedial action plan.

(b) Upon completion of the draft remedial action plan, the local governmental unit shall send written notice to all responsible parties identified by the local governmental unit, provide public notice and conduct a public hearing on the draft remedial action plan. The notice to responsible parties shall offer the person receiving the notice an opportunity to provide information regarding the status of that person or any other person as a responsible party, notice and a description of the public hearing and a description of the procedures in this section. At the public hearing, the local governmental unit shall solicit testimony on whether the draft remedial action plan is the least costly method of meeting the standards for remedial action promulgated by the department by rule. The local governmental unit shall accept written comments for at least 30 days after the close of the public hearing.

(c) Upon the conclusion of the period for written comment, the local governmental unit shall prepare a preliminary remedial action plan, taking into account the written comments and comments received at the public hearing and shall submit the preliminary remedial action plan to the department for approval. The department may approve the preliminary remedial action plan as submitted or require modifications.

**(3) OFFER TO SETTLE; SELECTION OF UMPIRE.** (a) Upon receiving the department's approval of the preliminary remedial action plan, the local governmental unit shall serve an offer to settle regarding the contribution of funds for investigation and remedial action at the site or facility on each of the responsible parties identified by the local governmental unit, using the procedure for service of a summons under s. 801.11 and shall notify the department that the offer to settle has been served. The local governmental unit shall include in the offer to settle all of the following information:

1. The amount of the offer and a rationale for the amount.
2. The names, addresses and contact persons, to the extent known, for all of the responsible parties identified by the local governmental unit.
3. The location and availability of documents that support the claim of the local governmental unit against the responsible party.
4. The location of the public repository where documents relating to the site or facility are maintained, the times during which the repository is open and the name and telephone number of the contact person at the repository.
5. A description of the procedures under this section.

(b) The department shall maintain a list of competent and disinterested umpires qualified to perform the duties under subs. (4) to (6). None of the umpires may be employees of the department. Upon receiving notice from a local governmental unit under par. (a), the secretary or his or her designee shall select an umpire from

the list and inform the local governmental unit and responsible parties of the person selected.

(c) Within 10 days after receiving notice of the umpire selected by the department under par. (b), the local governmental unit may notify the department that the umpire selected is unacceptable. Within 10 days after receiving notice of the umpire selected by the department under par. (b), a responsible party may notify the department that the umpire selected is unacceptable or that the responsible party does not intend to participate in the negotiation. Failure to notify the department that the umpire is unacceptable shall be considered acceptance. If all responsible parties identified by the local governmental unit indicate that they do not intend to participate in the negotiation, the department shall inform the local governmental unit and the local governmental unit shall cease further action under this section.

(d) Upon receiving notice under par. (c) that the selected umpire is unacceptable, the secretary or his or her designee shall select 5 additional umpires from the list and inform the local governmental unit and responsible parties of the persons selected.

(e) Within 10 days after receiving notice of the umpires selected by the department under par. (d), the local governmental unit or a responsible party may notify the department that one or more of the umpires selected are unacceptable. Failure to notify the department shall be considered acceptance. The secretary or his or her designee shall select an umpire from among those umpires not identified as unacceptable by the local governmental unit or a responsible party or, if all umpires are identified as unacceptable, the secretary or his or her designee shall designate a person to be umpire for the negotiation.

**(4) NEGOTIATION PROCESS.** (a) The umpire, immediately upon being appointed, shall contact the department, the local governmental unit and the responsible parties that received the offer to settle and shall schedule the negotiating sessions. The umpire shall schedule the first negotiating session no later than 20 days after being appointed. The umpire may meet with all parties to the negotiation, individual parties or groups of parties. The umpire shall facilitate a discussion between the local governmental unit and the responsible parties to attempt to reach an agreement on the design and implementation of the remedial action plan and the contribution of funds by the local governmental unit and responsible parties.

(b) The umpire shall permit the addition to the negotiation, at any time, of any responsible party or any other person who wishes to be a party to the negotiated agreement.

(c) Negotiations may not continue for more than 60 days after the first negotiating session, unless an extension is approved by the department for cause, at the request of any party to the negotiation. The department shall approve an extension if necessary to settle insurance claims.

(d) The local governmental unit and the responsible parties that participate in negotiations shall pay for the costs of the umpire, whether or not an agreement among the parties is reached under sub. (5) or the parties accept the recommendation of the umpire under sub. (6). The umpire shall determine an equitable manner of paying for the costs of the umpire, which is binding.

**(5) AGREEMENT IN NEGOTIATION.** The local governmental unit and any of the responsible parties may enter into any agreement in negotiation regarding the design and implementation of the remedial action plan and the contribution of funds by the local governmental unit and responsible parties for the investigation and remedial action. The portion of the agreement containing the design and implementation of the remedial action plan shall be submitted to the department for approval. The department may approve that portion of the agreement as submitted or require modifications.

**(6) FAILURE TO REACH AGREEMENT IN NEGOTIATION.** (a) If the local governmental unit and any responsible parties are unable to reach an agreement under sub. (5) by the end of the period of negotiation, the umpire shall make a recommendation regarding the

design and implementation of the remedial action plan and the contribution of funds for investigation and remedial action by the local governmental unit and all responsible parties that were identified by the local governmental unit and that did not reach an agreement under sub. (5), whether or not the responsible parties participated in negotiations under sub. (4). The umpire shall submit the recommendation to the department for its approval within 20 days after the end of the period of negotiation under sub. (4) (c). The department may approve the recommendation as submitted or require modifications. The umpire shall distribute a copy of the approved recommendation to the local governmental unit and all responsible parties identified by the local governmental unit.

(b) The local governmental unit and the responsible parties that did not reach an agreement under sub. (5) shall accept or reject the umpire's recommendation within 60 days after receiving it. Failure to accept or reject the recommendation within 60 days shall be considered rejection of the recommendation. If the local governmental unit rejects the recommendation with respect to any responsible party, the recommendation does not apply to that responsible party. If a responsible party rejects the recommendation, it does not apply to that responsible party.

(7) **RESPONSIBLE PARTIES SUBJECT TO AN AGREEMENT OR RECOMMENDATION.** A responsible party that enters into an agreement under sub. (5) with a local governmental unit or that accepts the umpire's recommendation under sub. (6), if the local governmental unit does not reject the recommendation, is required to comply with the agreement or recommendation. When the responsible party has complied with the agreement or recommendation, the responsible party is not liable to the state, including under s. 292.11 (7) (b) or 292.31 (8), or to the local governmental unit for any additional costs of the investigation or remedial action; the responsible party is not liable to any other responsible party for contribution to costs incurred by any other responsible party for the investigation or remedial action; and the responsible party is not subject to an order under s. 292.11 (7) (c) for the discharge that is the subject of the agreement or recommendation.

(8) **RESPONSIBLE PARTIES NOT SUBJECT TO OR NOT COMPLYING WITH AN AGREEMENT OR RECOMMENDATION.** (a) In this subsection:

1. "Interest" means interest at the annual rate of 12 percent, commencing on the date of the umpire's recommendation under sub. (6) or, if there is no umpire's recommendation, on the date of the agreement under sub. (5).

2. "Litigation expenses" means the sum of the costs, disbursements and expenses, including engineering fees and, notwithstanding s. 814.04 (1), reasonable attorney fees necessary to prepare for or participate in proceedings before any court.

(b) A local governmental unit is entitled to recover litigation expenses and interest on the judgment against a responsible party if any of the following occurs:

1. The local governmental unit accepts the recommendation of an umpire under sub. (6), the responsible party rejects it and the local governmental unit recovers a judgment under sub. (9) against that responsible party that equals or exceeds the amount of the umpire's recommendation.

2. The local governmental unit and the responsible party enter into an agreement under sub. (5) or accept the umpire's recommendation under sub. (6), the responsible party does not comply with the requirements of the agreement or recommendation and the local governmental unit recovers a judgment against that responsible party based on the agreement or recommendation.

(c) A responsible party is entitled to recover litigation expenses from a local governmental unit if the responsible party accepts the recommendation of an umpire under sub. (6), the local governmental unit rejects the recommendation of the umpire under sub. (6) with respect to the responsible party, the local governmental unit institutes an action under sub. (9) against the responsible party and the local governmental unit recovers a judgment under sub. (9) against the responsible party that is equal to or less than the amount of the umpire's recommendation.

(9) **LIABILITY FOR REMEDIAL ACTION COSTS.** (a) This subsection applies only to a site or facility that satisfies the applicability provisions of sub. (2) and for which the remedial action specified in an agreement under sub. (5) or a recommendation under sub. (6) is completed.

(b) Except as provided in pars. (bm), (br) and (c), sub. (7) and s. 292.21, a responsible party is liable for a portion of the costs, as determined under pars. (c) to (e), incurred by a local governmental unit for remedial action in an agreement under sub. (5) or a recommendation under sub. (6) and for any related investigation. A right of action shall accrue to a local governmental unit against the responsible party for costs listed in this paragraph.

(bm) Paragraph (b) does not apply with respect to a discharge if the discharge was in compliance with a permit license, approval, special order, waiver or variance issued under ch. 283 or 285 or under corresponding federal statutes or regulations.

(br) Paragraph (b) applies with respect to a transporter only if the transporter does any of the following:

1. Selects the site or facility where the hazardous substance is disposed of without direction from the generator.

2. Violates an applicable statute, rule, plan approval or special order in effect at the time the disposal occurred and the violation causes or contributes to the condition at the site or facility.

3. Causes or contributes to the condition at the site or facility by an action related to the disposal that would result in liability under common law in effect at the time the disposal occurred, based on standards of conduct for the transporter at the time the disposal occurred.

(c) The liability of each party to the action to recover costs under par. (b) is limited to a percentage of the cost of the remedial action that is determined by dividing the percentage of that party's contribution to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility by the percentage of contribution of all responsible parties to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility. Section 895.045 does not apply to this paragraph.

(cm) Notwithstanding par. (c), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for the total contribution of all parties involved in the common scheme or plan.

(d) The finder of fact shall apportion the contribution of each responsible party to the environmental pollution resulting from the disposal or discharge of hazardous substances at the site or facility for the purposes of par. (c), using the following criteria, and any other appropriate criteria:

1. The ability of the responsible parties to demonstrate that their contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances can be distinguished from the contribution of other responsible parties.

2. The amount of hazardous substances involved.

3. The degree of toxicity of the hazardous substances involved.

4. The degree of involvement by the responsible parties in the generation, transportation, treatment, storage, disposal or discharge of the hazardous substances.

5. The degree of cooperation by the responsible parties with federal, state or local officials to prevent or minimize harm to the public health or the environment.

6. The degree of care exercised by the parties with respect to the hazardous substance, taking into account the characteristics of the hazardous substance.

(e) A responsible party is not liable under par. (b) if the responsible party establishes by a preponderance of the evidence that the responsible party's contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances was caused solely by any of the following:

1. An act of God.

2. An act of war.

3. An act or omission of a 3rd party, other than an officer, director, employee or agent of the responsible party, or other than a person whose act or omission occurs in connection with a direct or indirect contractual relationship with the responsible party if all of the following apply:

a. The responsible party establishes by a preponderance of the evidence that the responsible party exercised due care with respect to the hazardous substances that caused environmental pollution.

b. In exercising due care under subd. 3. a., the responsible party took into consideration the characteristics of the hazardous substances, in light of all relevant facts and circumstances.

c. The responsible party took precautions against foreseeable acts or omissions of the 3rd party and the consequences that could foreseeably result from those acts or omissions.

(f) Any responsible party may seek contribution from any other responsible party. Such a contribution claim may be brought as a separate action or may be brought in the action commenced against the responsible party under this section.

(10) TECHNICAL ASSISTANCE. The department shall provide technical assistance to an umpire at the request of the umpire. The department may limit the amount of staff time allocated to each negotiation.

(11) LIABILITY. Except as provided in sub. (7), no common law liability, and no statutory liability that is provided in other statutes, for damages resulting from a site or facility is affected in any manner by this section. The authority, power and remedies provided in this section are in addition to any authority, power or remedy provided in any other statutes or provided at common law.

(13) FEES. The department may, by rule, assess and collect fees to offset the cost of the department's activities under this section. The fees may include an advance deposit, from which the department shall return the amount in excess of the cost of the department's activities under this section.

**History:** 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150 s. 672; 2001 a. 16, 103.  
**Cross-reference:** See also ch. NR 749, Wis. adm. code.

**292.37 Confidentiality of records.** (1) RECORDS. Except as provided under sub. (2), any records or other information furnished to or obtained by the department in the administration of ss. 292.31 and 292.35 are public records subject to s. 19.21.

(2) CONFIDENTIAL RECORDS. (a) *Application.* An owner or operator of a solid waste facility may seek confidential treatment of any records or other information furnished to or obtained by the department in the administration of ss. 292.31 and 292.35.

(b) *Standards for granting confidential status.* Except as provided under par. (c), the department shall grant confidential status for any records or information received by the department and certified by the owner or operator of the solid waste facility as relating to production or sales figures or to processes or production unique to the owner or operator of the solid waste facility or which would tend to adversely affect the competitive position of the owner or operator if made public.

(c) *Emission data; analyses and summaries.* The department may not grant confidential status for emission data. Nothing in this subsection prevents the department from using records and other information in compiling or publishing analyses or summaries relating to the general condition of the environment if the analyses or summaries do not identify a specific owner or operator or the analyses or summaries do not reveal records or other information granted confidential status.

(d) *Use of confidential records.* Except as provided under par. (c) and this paragraph, the department or the department of justice may use records and other information granted confidential status under this subsection only in the administration and enforcement of ss. 292.31 and 292.35. The department or the department of justice may release for general distribution records and other information granted confidential status under this subsection if the owner or operator expressly agrees to the release. The department

or the department of justice may release on a limited basis records and other information granted confidential status under this subsection if the department or the department of justice is directed to take this action by a judge or hearing examiner under an order which protects the confidentiality of the records or other information. The department or the department of justice may release to the U.S. environmental protection agency, or its authorized representative, records and other information granted confidential status under this subsection if the department or the department of justice includes in each release of records or other information a request to the U.S. environmental protection agency, or its authorized representative, to protect the confidentiality of the records or other information.

**History:** 1995 a. 227 s. 993.

**292.41 Abandoned containers.** (1) DEFINITION. In this section, "abandoned container" means any container which contains a hazardous substance and is not being monitored and maintained.

(2) APPLICABILITY. (a) This section does not apply to abandoned containers which are located in an approved facility or a nonapproved facility.

(b) Action by the department under this section is not subject to s. 292.31.

(3) CONTINGENCY PLAN. (a) After consultation with other affected federal, state and local agencies and private organizations, the department shall establish by rule criteria and procedures for the development, establishment and amendment of a contingency plan for the taking of emergency actions in relation to abandoned containers.

(b) The contingency plan shall establish procedures and techniques for locating, identifying, removing and disposing of abandoned containers.

(4) REMOVAL OR OTHER EMERGENCY ACTION. The department or its authorized representative may contain, remove or dispose of abandoned containers or take any other emergency action which it deems appropriate under the circumstances.

(5) ACCESS TO PROPERTY AND RECORDS. Any officer, employee or authorized representative of the department, upon notice to the owner or occupant, may enter onto any property, premises or place at any time for the purposes of sub. (3) if the entry is necessary to prevent increased damage to the air, land or waters of the state, or may inspect any record relating to abandoned container management for the purpose of ascertaining the state of compliance with this section and the rules promulgated under this section. Notice to the owner or occupant is not required if the delay in providing the notice is likely to result in imminent risk to public health or welfare or the environment.

(6) ABANDONED CONTAINERS: APPROPRIATIONS. (a) The department may utilize moneys appropriated under s. 20.370 (2) (dv) and (my) in taking action under sub. (4). The department shall utilize these moneys to provide for the procurement, maintenance and storage of necessary equipment and supplies, personnel training and expenses incurred in locating, identifying, removing and disposing of abandoned containers.

(b) No more than 25 percent of the total of all moneys available under the appropriation under s. 20.370 (2) (dv) and (my) may be used annually for the procurement and maintenance of necessary equipment during that fiscal year.

(c) The department is entitled to recover moneys expended under this section from any person who caused the containers to be abandoned or is responsible for the containers. The funds recovered under this paragraph shall be deposited into the environmental fund for environmental management.

**History:** 1983 a. 410; 1985 a. 29 ss. 1957, 3202 (39); 1987 a. 27, 384; 1989 a. 31; 1991 a. 39; 1993 a. 453; 1995 a. 27; 1995 a. 227 s. 716; Stats. 1995 s. 292.41; 1995 a. 378 s. 46; 1997 a. 27.

**Cross-reference:** See also ch. NR 714, Wis. adm. code.

**292.51 Cooperative remedial action.** (1) In this section, "costs of remedying environmental contamination" means costs

May 24, 1996



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Mr. Richard Ventura  
CIGNA Property & Casualty  
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Re: Town of Newton Gravel Pit

OFFICE OF CITY ATTORNEY

Dear Insurer Representatives:

The City of Manitowoc has entered into an agreement with waste generators at the Town of Newton Gravel Pit site to facilitate the clean up of environmental damage. I'm enclosing a copy of that Agreement for your records.

Our consultant, RUST Environment and Infrastructure is in the process of submitting their Remedial Action Plan to the Wisconsin Department of Natural Resources. The cost of the recommended remedial action is approximately \$460,000. In addition, the City has spent approximately \$425,000 in engineering fees to this point.

Very truly yours,

Patrick L. Willis  
City Attorney

PLW:es

Enc.

Patrick L. Willis  
City Attorney

CITY HALL  
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**AGREEMENT BETWEEN THE CITY OF MANITOWOC AND  
PARTICIPATING GENERATORS FOR THE TOWN OF NEWTON  
GRAVEL PIT SITE**

This Agreement is entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 1996 between the City of Manitowoc (the "City") and those Parties listed in Appendix A (the "Participating Generators") (with the City and the Participating Generators collectively referred to as the "Parties") and each, individually, as a "Party").

**FACTUAL BACKGROUND**

1. The Town of Newton Gravel Pit Site (the "Site") has been identified as requiring remediation. The required remediation is proposed to be carried out according to the Remedial Option #5 of the Site Investigation and Remedial Options Report (the "Remedial Plan") prepared by Rust Environment and Infrastructure ("Rust") dated January 19, 1995. Part of the Remedial Plan includes non-aqueous phase liquid removal at a cost not to exceed \$69,800 (the "Removal"). The Remedial Plan will be submitted to the Wisconsin Department of Natural Resources ("WDNR") by the City.

2. The Participating Generators are alleged to have generated waste during the relevant time period that may have been disposed of at the Site.

3. The City was the owner of the Site during the relevant time period.

4. The Parties have met on numerous occasions to discuss a privately financed investigation and remediation of the Site.

5. Consequently, in order to accomplish an expeditious remediation of the Site, the Participating Generators and the City have reached this Agreement to jointly fund the remediation at this Site.

**PURPOSE OF THIS AGREEMENT**

6. The purpose of this Agreement is to set forth the terms under which the Parties will jointly fund the remediation work and the manner in which the remediation will be accomplished.

## SCOPE OF THIS AGREEMENT

7. The terms and conditions of this Agreement between the City and the Participating Generators apply only to the funding and conducting of the Remedial Plan, identified as Remedial Option #5 in the Rust Report dated January 19, 1995, and to the partial payment by the Participating Generators of past costs incurred by the City for site investigation services, as provided in Appendix B ("Past Costs").

8. This Agreement is contingent in part upon WDNR approval of the cleanup proposed for the Site in substantial compliance with the Remedial Plan (hereinafter the "WDNR Approval"). If WDNR fails to approve the cleanup proposed for the Site in substantial compliance with the Remedial Plan on or before December 31, 1996 (hereinafter the "Non-Approval"), this Agreement shall be declared to be null and void for all purposes except for those portions of this Agreement that relate to the Removal. Rust shall estimate the cost of implementing the cleanup for the site approved by the WDNR within 30 days after the date of the approval issued by the WDNR (hereinafter the "Rust Estimate"). The Rust Estimate shall be for total site costs including the cost of the Removal and Past Costs incurred by the City ("Total Site Costs"). As used in this Agreement, the term "substantial compliance" shall mean that Rust Estimate is not greater than \$1,000,000 for Total Site Costs.

9. In the event following WDNR Approval it is later determined that the actual costs of implementing the WDNR Approval exceed \$1,000,000 for Total Site Costs, the Participating Generators shall have no obligation under this Agreement to fund the portion of the costs in excess of \$1,000,000, provided, however, that the City and the other Parties shall retain any and all rights not specifically waived in this Agreement to seek contribution from other Parties to this Agreement as well as from any third parties for any such excess cost.

10. The Parties agree to waive consistency with the National Contingency Plan ("NCP") as to all work performed before or after the date of this Agreement.

11. The Parties agree that no portion of the tolling period beginning from January 1, 1995 up to the date that any Party to this Agreement mails written notification to all other Parties of its intent to terminate the tolling period shall be used for purposes of calculating the passage of time under an applicable statute of limitations for any claim that a Party may have against another Party relating to contamination at the Site.

12. The obligations of the Parties under this Agreement are limited solely to this Agreement and have no effect outside the terms of this Agreement. Nothing in this Agreement shall be an admission of law or fact or evidence of any liability or responsibility with respect to the Site. Nothing in this Agreement is intended to release, discharge, or in

any way affect any claim, cause of action, or demand in law or equity which the Parties may have against any other person or entity who is not a Party relating to the generation, storage, treatment, transportation, release, or disposal of any hazardous substances at, to, or from the Site.

13. The Parties do not admit or concede, and reserve the right to contest any determination, allegation, finding or conclusion regarding the Site in any action other than one brought by any of the Parties to enforce this Agreement.

14. This Agreement shall not create any private right, other than a right by any of the Parties to enforce this Agreement.

#### ALLOCATION OF COSTS

15. The Parties agree to fund jointly the cost of implementing the WDNR Approval and, in the event of Non-Approval, the Removal.

16. The Participating Generators shall pay the City \$69,800 for the Removal within 30 days of the execution of this Agreement. In the event of Non-Approval, this shall constitute the sole payment for which the Participating Generators are obligated under this Agreement.

17. In the event of WDNR Approval, the Participating Generators shall pay the City the balance of 67.5% of the Rust Estimate remaining after the payment made under paragraph 16, within 30 days of the date of mailing of the Rust Estimate. In the event of WDNR Approval, the City agrees to pay 32.5 percent of the Rust Estimate.

18. The City shall maintain the payments received from the Participating Generators in a separate account which shall not be commingled with monies from any source not covered by this Agreement (hereinafter the "Account"). The City is authorized to utilize the Account for the payment of costs incurred for the implementation of the WDNR Approval or, in the event of Non-Approval, the Removal.

19. The Parties agree that the City of Manitowoc, to date, has expended \$421,609 in project costs paid to Rust for cleanup activities at the Site. In the event of WDNR Approval and within 30 days of the date of the mailing of the Rust Estimate, the Participating Generators agree to reimburse the City an amount calculated in accordance with the following formula:  $\$421,609 - (\text{Rust Estimate} \times 32.5\%)$ . As a result of this reimbursement, the City is deemed to have contributed its 32.5 percent share of the Rust Estimate in accordance with paragraph 17 of this Agreement in the event of WDNR Approval.

20. If the total actual costs for the WDNR Approval exceed the Rust Estimate, the Participating Generators shall pay the City 67.5% of such excess costs within 45 days of the date of mailing by the City to the Participating Generators of notification of such excess costs provided, however, that the Participating Generators shall have no obligation for any portion of the total costs for the WDNR Approval in excess of \$1,000,000 Total Site Costs. In the event the total actual costs for the WDNR Approval are less than the Rust Estimate, the City shall distribute to the Participating Generators the balance in the Fund within 45 days of the date that WDNR has approved the completion of the WDNR Approval.

#### **ACTIONS TO BE PERFORMED BY THE CITY OF MANITOWOC**

21. Upon execution of this Agreement, the City shall direct its consultant, Rust, to conduct the Removal immediately or as promptly as site and weather conditions allow. Conduct of the Removal shall not be postponed until WDNR Approval or Non-Approval.

22. The Parties agree that the City of Manitowoc will continue to act as the primary representative dealing with the WDNR. The City of Manitowoc further agrees that it will not inform WDNR of the terms of this Agreement between the Participating Generators and the City unless prohibited by applicable law as defined in paragraph 29 of this Agreement.

23. The Parties agree that the City is the party responsible for entering into and overseeing all contracts for work performed at this Site under the WDNR Approval or the Removal. The City will use reasonable efforts, as determined solely in the exercise of the City's discretion, to perform tasks covered by the WDNR Approval or the Removal with City personnel.

24. The Parties agree that the City is responsible for monitoring the total costs for the WDNR Approval and for providing notification to the Participating Generators in the event that total costs of the WDNR Approval exceed the Rust Estimate. The Parties further agree that the City will provide a final accounting of all costs for the WDNR Approval upon its completion and make distributions, if any are required, in accordance with paragraph 20 of this Agreement.

#### **ACTIONS TO BE PERFORMED BY THE PARTICIPATING GENERATORS**

25. The Participating Generators will agree among themselves how to fund the Participating Generators' allocated share of the costs of the WDNR Approval or the Removal as required by this Agreement.



26. The Participating Generators shall designate one or more representatives to coordinate the work to be performed with the City and for the receipt of any notices or payments made by the City or Rust under this Agreement.

#### COVENANT NOT TO SUE

27. In the event WDNR approves the completion of the WDNR Approval for the Site in accordance with applicable law and the Parties have fulfilled all of their obligations under this Agreement, and the clean up is accomplished at a cost of not more than \$1,000,000.00 Total Site Costs, the Parties agree not to sue each other for costs associated with the WDNR Approval; provided, however, that nothing herein shall preclude or bar the Parties from any available legal remedies directed against anyone who is not a Party for such costs, nor shall anything herein preclude or bar any of the Parties from any available legal remedies against any other Party in the event of a suit or claim against any Party from any party who is not a signatory to this Agreement.

#### INDEMNIFICATION

28. Each Party agrees to indemnify, defend and hold harmless any Party and its representative(s) from and against any claim, demand, liability, cost, expense, legal fee, penalty, loss or judgment (collectively "Liability") which in any way relates to the good faith performance of any duties under this Agreement by any Party or its representative(s) on behalf of the Parties, including, but not limited to, any liability arising from any contract or agreement required to implement the WDNR Approval or the Removal. This indemnification shall not apply to any liability arising from a criminal conviction, unless the Party or its representative(s) demonstrates to the satisfaction of the Parties that the Party or its representative(s) had reasonable cause to believe that the conduct in question was lawful. However, nothing in this paragraph shall constitute a waiver or release of any claim or potential claim by any Party which is reserved within this Agreement. In addition, if assertion of any remedies against anyone who was not a Party which are specifically reserved in paragraph 27 of this Agreement results in claims being asserted by anyone who is not a Party against a Party who does not elect to assert such a claim ("Non-Claimant") or results in any person or entity asserting an indemnity claim against a Non-Claimant, then the claimants who are also Parties jointly and severally agree to defend, indemnify and hold harmless such Non-Claimants from such litigation costs, attorneys' fees, money damages, judgments and/or settlements relating to such contribution or indemnity claim.

### **CONFIDENTIALITY**

29. The City will maintain the confidentiality of this Agreement unless prohibited by applicable law, including, but not limited to, the Wisconsin Public Records law, Wis. Stats. §19.31 et. seq.

### **SUCCESSORS AND ASSIGNS**

30. This Agreement shall be binding upon the successors and assigns of the Parties. No assignment or delegation of the obligation to make any payment or reimbursement hereunder will release the assigning Party without the prior written consent of the remaining Parties.

### **MAILING**

31. Any reference to mail or mailing in this Agreement shall be accomplished by mailing a notification by certified mail, return receipt requested to the intended recipient(s).

### **APPLICABLE LAW**

32. For purposes of enforcement or interpretation of the provisions of this Agreement, the Parties agree that the laws of the State of Wisconsin shall be applicable, except to the extent federal law shall apply to questions arising under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, or the NCP promulgated thereunder, and further agree not to contest personal jurisdiction in the state or federal courts of Wisconsin with respect to litigation brought for such purposes.

### **NATURE OF AGREEMENT**

33. Nothing herein shall be deemed to create a partnership or joint venture and/or principal and agent relationship between or among the Parties.

### **COUNTERPARTS**

34. This Agreement may be executed in any number of counterparts, each of which shall be deemed a duplicate original, but all of which together shall constitute one and the same instrument and shall become effective as to each Party when the counterpart executed by such Party as of the date the last Party signs the Agreement provided all counterparts have been delivered to Susan H. Martin, Foley & Lardner.

APPENDIX A

Participating Generators

A & P

Heresite

Imperial Eastman

Invincible

Manitowoc Co.  
(Manitowoc Engineering)  
(Manitowoc Shipbuilding)

Manitowoc Products Co.  
(Chrysler Corporation)  
(White Consolidated)

Newell  
(Aluminum Spec.)  
(Mirro)

APPENDIX B

RECEIVED  
JAN 16 1996  
CITY ATTORNEY



January 16, 1996

MEMO TO: CITY ATTORNEY PAT WILLIS  
FROM: MICHAEL E. HAWLEY, P.E. *MEH*  
Director of Public Works & City Engineer  
SUBJECT: Gravel Pit Investigation

Pursuant to your request for information on costs incurred in the Gravel Pit Investigation, we have paid the following to date.



OFFICE OF DEPARTMENT  
OF PUBLIC WORKS  
ENGINEERING

RUST ENVIRONMENT & INFRASTRUCTURE

Contract 1 - Site Investigation Services  
from December, 1992 thru  
December 10, 1993 \$166,072.00  
(Final Payment 1/14/94)

Contract 2 - Continuing Site Investigation  
January, 1994 thru  
December 8, 1995 \$255,536.69  
(\$626.91 Paid 1/12/96)

MEH:ca  
Revised 1/16/96  
(450-353130-529900)

Michael E. Hawley  
Director of Public Works  
and City Engineer

CITY HALL  
817 Franklin Street  
P.O. Box 1697  
Manitowoc, WI 54221-1697  
Phone: (414) 683-4410  
FAX: (414) 683-4424

MODIFICATION

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

4-16-96  
Date of Execution

INVINCIBLE METAL FURNITURE CO.

Name of Party

By:

  
(Signature)

Name:

JOHN A. SCHUETTE

(Typed Name)

Title:

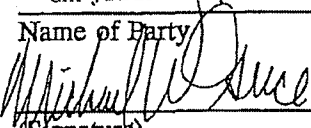
PRESIDENT

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3-12-96  
Date of Execution

Chrysler Corporation  
Name of Party  
By:   
(Signature)

Name: Michael W. Grice ✓  
(Typed Name)

Title: Senior Staff Counsel

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

April 15, 1996  
Date of Execution

City of Manitowoc  
Name of Party

By: *Patrick L. Willis*  
(Signature)

Name: Patrick L. Willis  
(Typed Name)

Title: City Attorney


**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 29, 1996  
Date of Execution

The Manitowoc Company, Inc.  
Name of Party

By:   
(Signature)

Name: E. Dean Flynn  
(Typed Name)

Title: Secretary & Manager - Corp. Insurance



**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3/22/96  
Date of Execution

Great Atlantic & Pacific Tea Co., Inc.  
Name of Party

By: *Alfred Limbrick*  
(Signature)

Name: Alfred Limbrick ✓  
(Typed Name)

Title: Group Vice-President

**MODIFICATION**


35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 8, 1996  
Date of Execution

Gould Electronics Inc.  
Name of Party

By:

  
(Signature)

Name:

Lawrence W. Mitchell  
(Typed Name)

Title:

Associate Counsel


**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3-11-96  
Date of Execution

HERESITE PROTECTIVE COATINGS, INC.  
Name of Party

By:   
(Signature)

Name: GEOFFREY C. LIBAN  
(Typed Name)

Title: C.E.O.

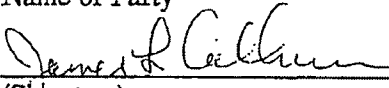
**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 12, 1996  
Date of Execution

White Consolidated Industries, Inc  
Name of Party

By:   
(Signature)

Name: James L. Calhoun  
(Typed Name)

Title: Vice President - Regulatory Affairs

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 7, 1996  
Date of Execution

Newell Co.  
Name of Party

By: [Signature]  
(Signature)

Name: Richard H. Wolff  
(Typed Name)

Title: Secretary

Mike



January 11, 1993

MEMO TO: CITY ATTORNEY PAT WILLIS  
FROM: MICHAEL E. HAWLEY, P. E. *MEH*  
Director of Public Works and City Engineer  
SUBJECT: Gravel Pit

File Search

Jean Campbell and Carol Adler searched the Engineering Department files for any material on the Gravel Pit, and couldn't find anything pertaining to industrial dumping. Mostly found old yearly crushing reports.

Tony Scherer searched the files at the Street Department, and found the attached report dated March 4, 1968, outlining materials and companies hauling to the Gravel Pit.

Company Drivers

We have only been able to come up with names of three drivers, one of whom we haven't been able to locate.

<u>Name</u>	<u>Name of Company</u>	<u>Address</u>	<u>Phone</u>
Erwin C. Musial	Manitowoc Company	2115 Madison	684-3274
Earl A. Mueller	Mirro Aluminum	944 So.26th	684-3727
Richard Budnik	Invincible	Unable to Locate	
(Mrs. Gladys Budnik might be his mother)		922 So.30th	682-2643

OFFICE OF DEPARTMENT  
OF PUBLIC WORKS,  
ENGINEERING

Michael E. Hawley  
Director of Public Works  
and City Engineer  
  
CITY HALL  
7 Franklin Street  
P. Box 1597  
Manitowoc, WI 54221-1597  
Phone: (414) 683-4410  
Fax: (414) 683-4424

MEH:ca  
Attached

March 4, 1968

WASTE MATERIALS HAULED TO CITY GRAVEL PIT  
BY VARIOUS INDUSTRIAL PLANTS

MANITOWOC ENGINEERING CO.

CLEANING SOLVENT WATER SOLUBLE -- 600 Gal. @ week  
(noninflammable)

CUTTING and DRAIN OILS -- 200 Gal. @ week (inflammable).

MANITOWOC SHIPBUILDING INC.

WASTE FUEL OIL -- 1000 Gal. about four times a year Fall & Winter.  
(inflammable).

MIRRO ALUMINUM CO.

12,000 Gal. each two months of a 95% water, 5%  
soluble oil solution.

500 Gal. @ month of various combustibile oils.

500 Gal. @ year of used gear box oils.

2,700 Gal. each six weeks of 80% water, 20%  
Sulphuric acid solution.

1,000 Gal. of naptha on very rare occasions

(Obtained from D.P.W. Street Dept. files)

March 4, 1968

WASTE MATERIALS HAULED TO CITY GRAVEL PIT  
BY VARIOUS INDUSTRIAL PLANTS

INVINCIBLE METAL FURNITURE CO.

PAINT SLUDGE--- 55 Gal. @ week and 550 Gal. every third week.  
(inflammable)

MANITOWOC PRODUCTS CO.

PAINT SLUDGE -- 5 Cu. Yds. @ week (inflammable).

HERESITE & CHEMICAL CO.

WASTE ALCOHOL -- 25 Gal. to 30 Gal. @ week (inflammable).

IMPERIAL EASTMAN CORP.

WASTE OIL --- 200 Gal. @ week (inflammable).

WATER SOLUBLE COOLANT -- 100 Gal. @ week (noninflammable).

WHITE HOUSE MILK DIV.

CLEANING SOLVENT -- 20 Gal. @ Week (inflammable).

ALUMINUM SPECIALTY CO.

DRAIN OIL -- 110 Gal. @ week (inflammable).

PAINT STRIPPER -- 55 Gal. @ week (inflammable).

PAINT THINNER -- 55 Gal. @ week (inflammable).

(Obtained from D.P.W. Street Dept. files)



AFFIDAVIT RICHARD WHITE

STATE OF WISCONSIN )  
                                  ) ss  
MANITOWOC COUNTY )

I, Richard White, being duly sworn on oath, depose and state as follows:

1. I was the Department of Public Works Accountant for the City of Manitowoc from 1967 until approximately June of 1981.
2. That in my role as Accountant for the Public Works Department, I was familiar with the operation costs of the Newton Gravel Pit.
3. That I have a distinct memory that the industrial waste dumping at the Newton Gravel Pit ended some time in 1972 when the Department of Public Works shop moved from the 14<sup>th</sup> and Clark Street location to the 35<sup>th</sup> and Viebahn location.
4. I believe the above statements to be true and correct to the best of my recollection of the facts, and I make this affidavit on behalf of the City of Manitowoc.

Dated this 20<sup>th</sup> day of December 2010.

Richard White  
Richard White

Subscribed and sworn to before me this 20<sup>th</sup> day of December 2010.

Jane M. Rhode  
Notary Public     Jane M. Rhode  
My commission expires 6-3-2012

January 25, 2017

**VIA U.S. CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

Newell Brands Inc.  
Corporation Service Company  
40 Technology Parkway South  
Suite 300, Gwinnett  
Norcross, GA 30092

RE: City of Manitowoc/Former Town of Newton Gravel Pit, 3130 Hecker Road,  
Manitowoc, WI - WDNR BRRTS Activity # 02-36-000268 (the "Site")

Dear Sir or Madam:

Pursuant to Wis. Stat. § 292.35(2g)(b) (copy enclosed), the City of Manitowoc (the "City") hereby requests that Newell Brands Inc. provide access to or delivery of any records or documents in its custody, possession or control that relate to all of the following:

1. The type and quantity of any wastes containing hazardous substances that Newell Brands Inc. or the parties the City believes to be its corporate predecessors in interest, Mirro Aluminum Corp. and Aluminum Speciality Co., (collectively, "Newell") disposed of or discharged at the above-referenced Site and the dates of the disposal or discharge.
2. The identity of any person who may be a "responsible party" for contamination at the above-referenced Site under Wis. Stat. § 292.35(1).
3. The identity of subsidiary or parent corporations, as defined in Wis. Stat. § 292.31(8)(a)3, of any person who may be a responsible party. Section 292.31(8)(a)3 defines a "subsidiary or parent corporation" as "any business entity, including a subsidiary, parent corporation, or other business arrangement which has elements of common ownership or control or uses a long-term contractual arrangement with any person to avoid direct responsibility for conditions at a site or facility."

For context, I am attaching correspondence that includes a 1996 settlement agreement between the City and certain parties, including Newell, as well as a January 11, 1993 City memorandum (based on a 1968 Manitowoc Department of Public Works document) that identifies certain parties, including Mirro and Aluminum Specialty, that arranged for disposal of waste at the Site.

Newell Brands Inc.

January 25, 2017

Page 2

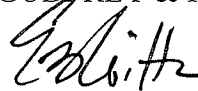
It is requested that Newell provide delivery or access within thirty (30) days of your receipt of this request. The City intends to assemble all the available information in advance of the public hearing on the City's Draft Remedial Action Plan for the Site, which is currently planned for Monday, March 13, 2017 (details to follow).

Finally, as a preliminary request, please refrain from destroying any documents and/or any electronic information which may be in any way related to the Site or Newell's/Mirro's/ Aluminum Specialties' operations or activities during the 1960's and 1970's, when the Site was operating.

Thank you for your cooperation in this matter. If you have any questions or concerns, please contact me.

Very truly yours,

GODFREY & KAHN, S.C.



Edward B. Witte

Enclosure

cc: Molly E. Schmidt, Wisconsin Department of Natural Resources (via E-mail w/enclosure)  
Kathleen M. McDaniel, City of Manitowoc (via E-mail w/enclosure)

16706049.1

CHAPTER 292  
REMEDIAL ACTION

	SUBCHAPTER I		
	DEFINITIONS		
292.01	Definitions.		292.37 Confidentiality of records.
	SUBCHAPTER II		292.41 Abandoned containers.
	REMEDIAL ACTION		292.51 Cooperative remedial action.
292.11	Hazardous substance spills.		292.53 Availability of environmental insurance.
292.12	Sites with residual contamination.		292.55 Requests for liability clarification and technical assistance.
292.13	Property affected by off-site discharge.		292.57 Database of properties with residual contamination.
292.15	Voluntary party remediation and exemption from liability.		292.63 Petroleum storage remedial action; financial assistance.
292.16	Responsibility of certain municipalities acquiring closed landfills.		292.64 Removal of abandoned underground petroleum storage tanks.
292.19	Responsibility of persons conducting investigations.		292.65 Dry cleaner environmental response program.
292.21	Responsibility of lenders and representatives.		292.68 Reimbursement for disposal of PCB contaminated sediment.
292.23	Responsibility of local governmental units; solid waste.		292.70 Indemnification for disposal of polychlorinated biphenyls.
292.24	Responsibility of local governmental units; hazardous waste.		292.72 Brownfields revolving loan program.
292.25	Report on impact of exemptions from liability.		292.81 Notice; lien.
292.255	Report on brownfield efforts.		
292.26	Civil immunity; local governmental units.		SUBCHAPTER III
292.31	Environmental repair.		ENFORCEMENT; PENALTIES
292.33	Local government cost recovery cause of action.	292.93	Orders.
292.35	Local governmental unit negotiation and cost recovery.	292.94	Fees related to enforcement actions.
		292.95	Review of alleged violations; environmental repair and cost recovery.
		292.98	Violations and enforcement; environmental repair and cost recovery.
		292.99	Penalties.

SUBCHAPTER I

DEFINITIONS

**292.01 Definitions.** In this chapter:

(1) “Approved facility” has the meaning given in s. 289.01 (3).

(1m) “Approved mining facility” has the meaning given in s. 289.01 (4) and includes a mining waste site, as defined in s. 295.41 (31).

(1s) “Contaminated sediment” means sediment that contains a hazardous substance.

(2) “Department” means the department of natural resources.

(3) “Discharge” means, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying or dumping.

(3m) “Engineering control” means an object or action designed and implemented to contain contamination or to minimize the spread of contamination, including a cap, soil cover, or in-place stabilization, but not including a sediment cover.

(4) “Environmental pollution” means the contaminating or rendering unclean or impure the air, land or waters of the state, or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to fish, bird, animal or plant life.

(5) “Hazardous substance” means any substance or combination of substances including any waste of a solid, semisolid, liquid or gaseous form which may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or which may pose a substantial present or potential hazard to human health or the environment because of its quantity, concentration or physical, chemical or infectious characteristics. This term includes, but is not limited to, substances which are toxic, corrosive, flammable, irritants, strong sensitizers or explosives as determined by the department.

(6) “Hazardous waste” means any solid waste identified by the department as hazardous under s. 291.05.

(7) “Landfill” means a solid waste facility for solid waste disposal.

(8) “Lender” means a bank, credit union, savings bank, savings and loan association, mortgage banker or similar financial institution, the primary business of which is to engage in lending

activities or an insurance company, pension fund or government agency engaged in secured lending.

(9) “Lending activities” means advancing funds or credit to and collecting funds from another person; entering into security agreements, including executing mortgages, liens, factoring agreements, accounts receivable financing arrangements, conditional sales, sale and leaseback arrangements and installment sales contracts; conducting inspections of or monitoring a borrower’s business and collateral; providing financial assistance; restructuring or renegotiating the terms of a loan obligation; requiring payment of additional interest; extending the payment period of a loan obligation; initiating foreclosure or other proceedings to enforce a security interest in property before obtaining title; requesting and obtaining the appointment of a receiver; and making decisions related to extending or refusing to extend credit.

(10) “Long-term care” means the routine care, maintenance and monitoring of a solid or hazardous waste facility following closing of the facility.

(11) “Municipality” means any city, town, village, county, county utility district, town sanitary district, public inland lake protection and rehabilitation district or metropolitan sewage district.

(12) “Nonapproved facility” has the meaning given in s. 289.01 (24).

(13) “Person” means an individual, owner, operator, corporation, limited liability company, partnership, association, municipality, interstate agency, state agency or federal agency.

(15) “Preventive measures” mean the installation or testing of equipment or devices, a designated way of performing a specified operation or the preparation of an emergency response plan.

(16) “Representative” means any person acting in the capacity of a conservator, guardian, court-appointed receiver, personal representative, testamentary trustee of a deceased person, trustee of a living trust, or fiduciary of real or personal property.

(17) “Secretary” means the secretary of natural resources.

(17g) “Sediment” means particles in the bed of a navigable water up to the ordinary high-water mark that are derived from the erosion of rock, minerals, soil, and biological materials and from chemical precipitation from the water column and that are transported or deposited by water.

**292.33 Local government cost recovery cause of action.** (1) **DEFINITION.** In this section “local governmental unit” has the meaning given in s. 292.11 (9) (c) 1.

(2) **CAUSE OF ACTION.** Except as provided in sub. (6), a local governmental unit may recover costs as provided in sub. (4) from a responsible person described in sub. (3) if the costs are incurred in connection with a property acquired as provided in s. 292.11 (9) (c) 1m. on which a hazardous substance has been discharged.

(3) **RESPONSIBLE PERSONS.** (a) Except as provided in par. (b), a local governmental unit may recover costs in an action under this section from any of the following:

1. A person who, at the time that the local governmental unit acquired the property, possessed or controlled the hazardous substance that was discharged on the property.

2. A person who caused the discharge of the hazardous substance on the property.

(b) A local governmental unit may not recover costs in an action under sub. (2) from a person listed in par. (a) if any of the following applies:

1. The person is exempt from liability under s. 292.11 (9) (e), 292.13, 292.15, 292.16, 292.19 or 292.21 with respect to the discharge that is the subject of the action.

2. The person has entered into a consent order under this chapter or ch. 289 or 291 or an agreement under s. 292.11 (7) (d) or 292.31 (8) (h) with respect to the discharge that is the subject of the action and the person is in compliance with the consent order or agreement.

3. The person is exempt from liability under s. 292.35 (9) (e) with respect to the discharge that is the subject of the action.

4. The discharge that was caused by the person and that is the subject of the action was in compliance with a permit, license, approval, special order, waiver or variance issued under ch. 283 or 285 or under corresponding federal statutes or regulations.

(4) **RECOVERABLE COSTS.** (a) Except as provided in par. (b), in an action under this section a local governmental unit may recover the reasonable and necessary costs that it incurs for all of the following:

1. Investigating environmental contamination on the property and planning remedial activities described in subd. 2.

2. Conducting remedial activities to restore the property for its intended future use.

3. Administering the activities under subds. 1. and 2. and bringing the action under this section, including costs, disbursements and engineering fees but excluding attorney fees.

(b) The costs determined under par. (a) shall be reduced by the fair market value of the property after completion of the activities under par. (a) 2.

(c) Recoverable costs under this subsection may not be reduced by the amount of any state or federal moneys received by the local governmental unit for any of the activities under par. (a).

(d) 1. In an action under this section, the liability of a responsible person described in sub. (3) (a) 2. is limited to the amount that bears the same proportion to the total costs under par. (a), adjusted as provided in par. (b), as the amount of the environmental pollution on the property from the discharge caused by the responsible person bears to all of the environmental pollution on the property from discharges of hazardous substances.

2. In an action under this section, the liability of a responsible person described in sub. (3) (a) 1. is limited to the amount of the total costs under par. (a), adjusted as provided in par. (b), that the local governmental unit is unable to recover from responsible parties described in sub. (3) (a) 2. less the amount that the local governmental unit is unable to recover because of the exemptions in sub. (3) (b) 3. and 4.

(5) **REPAYING STATE ASSISTANCE.** If a local governmental unit that recovers costs under this section received money from this state, other than under s. 292.11 (7) or 292.31 (1), (3) or (7), for any of the activities under sub. (4) (a), the local governmental unit

shall reimburse to the state an amount that bears the same proportion to the total amount recovered under this section as the amount received from the state, other than under s. 292.11 (7) or 292.31 (1), (3) or (7), bears to the total costs under sub. (4) (a) adjusted as provided in sub. (4) (b).

(6) **EXCEPTION.** A local governmental unit may not recover costs under this section for remedial activities conducted on a property or portion of a property with respect to a discharge after the department of natural resources, the department of safety and professional services, or the department of agriculture, trade and consumer protection has indicated that no further remedial activities are necessary on the property or portion of the property with respect to the discharge.

(7) **LIMITATION OF ACTION.** An action under this section shall be commenced within 6 years after the date that the local governmental unit completes the activities under sub. (4) (a) 2. or be barred.

**History:** 1999 a. 9; 2011 a. 32.

**292.35 Local governmental unit negotiation and cost recovery.** (1) **DEFINITIONS.** In this section:

(am) “Financial assistance” means money, other than a loan, provided by a governmental unit that is not a responsible party to pay a portion of the cost of investigation and remedial action for a site or facility.

(b) “Generator” means a person who, by contract, agreement or otherwise, either arranges or arranged for disposal or treatment, or arranges or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by the person, if the disposal or treatment is done by another person at a site or facility owned and operated by another person and the site or facility contains the hazardous substance.

(bm) “Local governmental unit” means a municipality, a redevelopment authority created under s. 66.1333 or a public body designated by a municipality under s. 66.1337 (4).

(c) “Owner or operator” means any of the following:

1. If the property is taken for tax delinquency, a person who owns or operates a site or facility at the time that the site or facility is taken for tax delinquency.

2. A person who owns or operates a site or facility at the time that the disposal or discharge of a hazardous substance at the site or facility occurs.

(e) “Responsible party” means a generator, an owner or operator, a transporter or a person who possesses or controls a hazardous substance that is discharged or disposed of or who causes the discharge or disposal of a hazardous substance.

(f) “Site or facility” means an approved facility, an approved mining facility, a nonapproved facility, a waste site or any site where a hazardous substance is discharged on or after May 21, 1978.

(g) “Transporter” means a person who accepts or accepted a hazardous substance for transport to a site or facility.

(2) **APPLICABILITY.** This section only applies to a site or facility if one of the following criteria is satisfied:

(a) The site or facility is owned by a local governmental unit.

(b) A local governmental unit that owns a portion of the site or facility commits itself, by resolution of its governing body, to paying more than 50 percent of the amount equal to the difference between the cost of investigation and remedial action for the site or facility and any financial assistance received for the site or facility.

(2g) **IDENTIFICATION OF RESPONSIBLE PARTIES.** (a) A local governmental unit that intends to use the cost recovery procedures in this section shall attempt to identify all responsible parties. All information obtained by the local governmental unit regarding responsible parties is a public record and may be inspected and copied under s. 19.35.

(b) Upon the request of an employee or authorized representative of the local governmental unit, or pursuant to a special inspec-

tion warrant under s. 66.0119, any person who generated, transported, treated, stored or disposed of a hazardous substance that may have been disposed of or discharged at the site or facility or who is or was an owner or operator shall provide the employee or authorized representative access to any records or documents in that person's custody, possession or control that relate to all of the following:

1. The type and quantity of hazardous substance that was disposed of or discharged at the site or facility and the dates of the disposal or discharge.
2. The identity of any person who may be a responsible party.
3. The identity of subsidiary or parent corporations, as defined in s. 292.31 (8) (a) 3., of any person who may be a responsible party.

(c) The local governmental unit shall maintain a single repository that is readily accessible to the public for all documents related to responsible parties, the investigation, the remedial action and plans for redevelopment of the property.

**(2r) PRELIMINARY REMEDIAL ACTION PLAN.** (a) The local governmental unit shall, in consultation with the department, prepare a draft remedial action plan.

(b) Upon completion of the draft remedial action plan, the local governmental unit shall send written notice to all responsible parties identified by the local governmental unit, provide public notice and conduct a public hearing on the draft remedial action plan. The notice to responsible parties shall offer the person receiving the notice an opportunity to provide information regarding the status of that person or any other person as a responsible party, notice and a description of the public hearing and a description of the procedures in this section. At the public hearing, the local governmental unit shall solicit testimony on whether the draft remedial action plan is the least costly method of meeting the standards for remedial action promulgated by the department by rule. The local governmental unit shall accept written comments for at least 30 days after the close of the public hearing.

(c) Upon the conclusion of the period for written comment, the local governmental unit shall prepare a preliminary remedial action plan, taking into account the written comments and comments received at the public hearing and shall submit the preliminary remedial action plan to the department for approval. The department may approve the preliminary remedial action plan as submitted or require modifications.

**(3) OFFER TO SETTLE; SELECTION OF UMPIRE.** (a) Upon receiving the department's approval of the preliminary remedial action plan, the local governmental unit shall serve an offer to settle regarding the contribution of funds for investigation and remedial action at the site or facility on each of the responsible parties identified by the local governmental unit, using the procedure for service of a summons under s. 801.11 and shall notify the department that the offer to settle has been served. The local governmental unit shall include in the offer to settle all of the following information:

1. The amount of the offer and a rationale for the amount.
2. The names, addresses and contact persons, to the extent known, for all of the responsible parties identified by the local governmental unit.
3. The location and availability of documents that support the claim of the local governmental unit against the responsible party.
4. The location of the public repository where documents relating to the site or facility are maintained, the times during which the repository is open and the name and telephone number of the contact person at the repository.
5. A description of the procedures under this section.

(b) The department shall maintain a list of competent and disinterested umpires qualified to perform the duties under subs. (4) to (6). None of the umpires may be employees of the department. Upon receiving notice from a local governmental unit under par. (a), the secretary or his or her designee shall select an umpire from

the list and inform the local governmental unit and responsible parties of the person selected.

(c) Within 10 days after receiving notice of the umpire selected by the department under par. (b), the local governmental unit may notify the department that the umpire selected is unacceptable. Within 10 days after receiving notice of the umpire selected by the department under par. (b), a responsible party may notify the department that the umpire selected is unacceptable or that the responsible party does not intend to participate in the negotiation. Failure to notify the department that the umpire is unacceptable shall be considered acceptance. If all responsible parties identified by the local governmental unit indicate that they do not intend to participate in the negotiation, the department shall inform the local governmental unit and the local governmental unit shall cease further action under this section.

(d) Upon receiving notice under par. (c) that the selected umpire is unacceptable, the secretary or his or her designee shall select 5 additional umpires from the list and inform the local governmental unit and responsible parties of the persons selected.

(e) Within 10 days after receiving notice of the umpires selected by the department under par. (d), the local governmental unit or a responsible party may notify the department that one or more of the umpires selected are unacceptable. Failure to notify the department shall be considered acceptance. The secretary or his or her designee shall select an umpire from among those umpires not identified as unacceptable by the local governmental unit or a responsible party or, if all umpires are identified as unacceptable, the secretary or his or her designee shall designate a person to be umpire for the negotiation.

**(4) NEGOTIATION PROCESS.** (a) The umpire, immediately upon being appointed, shall contact the department, the local governmental unit and the responsible parties that received the offer to settle and shall schedule the negotiating sessions. The umpire shall schedule the first negotiating session no later than 20 days after being appointed. The umpire may meet with all parties to the negotiation, individual parties or groups of parties. The umpire shall facilitate a discussion between the local governmental unit and the responsible parties to attempt to reach an agreement on the design and implementation of the remedial action plan and the contribution of funds by the local governmental unit and responsible parties.

(b) The umpire shall permit the addition to the negotiation, at any time, of any responsible party or any other person who wishes to be a party to the negotiated agreement.

(c) Negotiations may not continue for more than 60 days after the first negotiating session, unless an extension is approved by the department for cause, at the request of any party to the negotiation. The department shall approve an extension if necessary to settle insurance claims.

(d) The local governmental unit and the responsible parties that participate in negotiations shall pay for the costs of the umpire, whether or not an agreement among the parties is reached under sub. (5) or the parties accept the recommendation of the umpire under sub. (6). The umpire shall determine an equitable manner of paying for the costs of the umpire, which is binding.

**(5) AGREEMENT IN NEGOTIATION.** The local governmental unit and any of the responsible parties may enter into any agreement in negotiation regarding the design and implementation of the remedial action plan and the contribution of funds by the local governmental unit and responsible parties for the investigation and remedial action. The portion of the agreement containing the design and implementation of the remedial action plan shall be submitted to the department for approval. The department may approve that portion of the agreement as submitted or require modifications.

**(6) FAILURE TO REACH AGREEMENT IN NEGOTIATION.** (a) If the local governmental unit and any responsible parties are unable to reach an agreement under sub. (5) by the end of the period of negotiation, the umpire shall make a recommendation regarding the

design and implementation of the remedial action plan and the contribution of funds for investigation and remedial action by the local governmental unit and all responsible parties that were identified by the local governmental unit and that did not reach an agreement under sub. (5), whether or not the responsible parties participated in negotiations under sub. (4). The umpire shall submit the recommendation to the department for its approval within 20 days after the end of the period of negotiation under sub. (4) (c). The department may approve the recommendation as submitted or require modifications. The umpire shall distribute a copy of the approved recommendation to the local governmental unit and all responsible parties identified by the local governmental unit.

(b) The local governmental unit and the responsible parties that did not reach an agreement under sub. (5) shall accept or reject the umpire's recommendation within 60 days after receiving it. Failure to accept or reject the recommendation within 60 days shall be considered rejection of the recommendation. If the local governmental unit rejects the recommendation with respect to any responsible party, the recommendation does not apply to that responsible party. If a responsible party rejects the recommendation, it does not apply to that responsible party.

(7) **RESPONSIBLE PARTIES SUBJECT TO AN AGREEMENT OR RECOMMENDATION.** A responsible party that enters into an agreement under sub. (5) with a local governmental unit or that accepts the umpire's recommendation under sub. (6), if the local governmental unit does not reject the recommendation, is required to comply with the agreement or recommendation. When the responsible party has complied with the agreement or recommendation, the responsible party is not liable to the state, including under s. 292.11 (7) (b) or 292.31 (8), or to the local governmental unit for any additional costs of the investigation or remedial action; the responsible party is not liable to any other responsible party for contribution to costs incurred by any other responsible party for the investigation or remedial action; and the responsible party is not subject to an order under s. 292.11 (7) (c) for the discharge that is the subject of the agreement or recommendation.

(8) **RESPONSIBLE PARTIES NOT SUBJECT TO OR NOT COMPLYING WITH AN AGREEMENT OR RECOMMENDATION.** (a) In this subsection:

1. "Interest" means interest at the annual rate of 12 percent, commencing on the date of the umpire's recommendation under sub. (6) or, if there is no umpire's recommendation, on the date of the agreement under sub. (5).

2. "Litigation expenses" means the sum of the costs, disbursements and expenses, including engineering fees and, notwithstanding s. 814.04 (1), reasonable attorney fees necessary to prepare for or participate in proceedings before any court.

(b) A local governmental unit is entitled to recover litigation expenses and interest on the judgment against a responsible party if any of the following occurs:

1. The local governmental unit accepts the recommendation of an umpire under sub. (6), the responsible party rejects it and the local governmental unit recovers a judgment under sub. (9) against that responsible party that equals or exceeds the amount of the umpire's recommendation.

2. The local governmental unit and the responsible party enter into an agreement under sub. (5) or accept the umpire's recommendation under sub. (6), the responsible party does not comply with the requirements of the agreement or recommendation and the local governmental unit recovers a judgment against that responsible party based on the agreement or recommendation.

(c) A responsible party is entitled to recover litigation expenses from a local governmental unit if the responsible party accepts the recommendation of an umpire under sub. (6), the local governmental unit rejects the recommendation of the umpire under sub. (6) with respect to the responsible party, the local governmental unit institutes an action under sub. (9) against the responsible party and the local governmental unit recovers a judgment under sub. (9) against the responsible party that is equal to or less than the amount of the umpire's recommendation.

(9) **LIABILITY FOR REMEDIAL ACTION COSTS.** (a) This subsection applies only to a site or facility that satisfies the applicability provisions of sub. (2) and for which the remedial action specified in an agreement under sub. (5) or a recommendation under sub. (6) is completed.

(b) Except as provided in pars. (bm), (br) and (c), sub. (7) and s. 292.21, a responsible party is liable for a portion of the costs, as determined under pars. (c) to (e), incurred by a local governmental unit for remedial action in an agreement under sub. (5) or a recommendation under sub. (6) and for any related investigation. A right of action shall accrue to a local governmental unit against the responsible party for costs listed in this paragraph.

(bm) Paragraph (b) does not apply with respect to a discharge if the discharge was in compliance with a permit license, approval, special order, waiver or variance issued under ch. 283 or 285 or under corresponding federal statutes or regulations.

(br) Paragraph (b) applies with respect to a transporter only if the transporter does any of the following:

1. Selects the site or facility where the hazardous substance is disposed of without direction from the generator.

2. Violates an applicable statute, rule, plan approval or special order in effect at the time the disposal occurred and the violation causes or contributes to the condition at the site or facility.

3. Causes or contributes to the condition at the site or facility by an action related to the disposal that would result in liability under common law in effect at the time the disposal occurred, based on standards of conduct for the transporter at the time the disposal occurred.

(c) The liability of each party to the action to recover costs under par. (b) is limited to a percentage of the cost of the remedial action that is determined by dividing the percentage of that party's contribution to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility by the percentage of contribution of all responsible parties to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility. Section 895.045 does not apply to this paragraph.

(cm) Notwithstanding par. (c), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for the total contribution of all parties involved in the common scheme or plan.

(d) The finder of fact shall apportion the contribution of each responsible party to the environmental pollution resulting from the disposal or discharge of hazardous substances at the site or facility for the purposes of par. (c), using the following criteria, and any other appropriate criteria:

1. The ability of the responsible parties to demonstrate that their contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances can be distinguished from the contribution of other responsible parties.

2. The amount of hazardous substances involved.

3. The degree of toxicity of the hazardous substances involved.

4. The degree of involvement by the responsible parties in the generation, transportation, treatment, storage, disposal or discharge of the hazardous substances.

5. The degree of cooperation by the responsible parties with federal, state or local officials to prevent or minimize harm to the public health or the environment.

6. The degree of care exercised by the parties with respect to the hazardous substance, taking into account the characteristics of the hazardous substance.

(e) A responsible party is not liable under par. (b) if the responsible party establishes by a preponderance of the evidence that the responsible party's contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances was caused solely by any of the following:

1. An act of God.

2. An act of war.

3. An act or omission of a 3rd party, other than an officer, director, employee or agent of the responsible party, or other than a person whose act or omission occurs in connection with a direct or indirect contractual relationship with the responsible party if all of the following apply:

a. The responsible party establishes by a preponderance of the evidence that the responsible party exercised due care with respect to the hazardous substances that caused environmental pollution.

b. In exercising due care under subd. 3. a., the responsible party took into consideration the characteristics of the hazardous substances, in light of all relevant facts and circumstances.

c. The responsible party took precautions against foreseeable acts or omissions of the 3rd party and the consequences that could foreseeably result from those acts or omissions.

(f) Any responsible party may seek contribution from any other responsible party. Such a contribution claim may be brought as a separate action or may be brought in the action commenced against the responsible party under this section.

(10) TECHNICAL ASSISTANCE. The department shall provide technical assistance to an umpire at the request of the umpire. The department may limit the amount of staff time allocated to each negotiation.

(11) LIABILITY. Except as provided in sub. (7), no common law liability, and no statutory liability that is provided in other statutes, for damages resulting from a site or facility is affected in any manner by this section. The authority, power and remedies provided in this section are in addition to any authority, power or remedy provided in any other statutes or provided at common law.

(13) FEES. The department may, by rule, assess and collect fees to offset the cost of the department's activities under this section. The fees may include an advance deposit, from which the department shall return the amount in excess of the cost of the department's activities under this section.

**History:** 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150 s. 672; 2001 a. 16, 103.  
**Cross-reference:** See also ch. NR 749, Wis. adm. code.

**292.37 Confidentiality of records.** (1) RECORDS. Except as provided under sub. (2), any records or other information furnished to or obtained by the department in the administration of ss. 292.31 and 292.35 are public records subject to s. 19.21.

(2) CONFIDENTIAL RECORDS. (a) *Application.* An owner or operator of a solid waste facility may seek confidential treatment of any records or other information furnished to or obtained by the department in the administration of ss. 292.31 and 292.35.

(b) *Standards for granting confidential status.* Except as provided under par. (c), the department shall grant confidential status for any records or information received by the department and certified by the owner or operator of the solid waste facility as relating to production or sales figures or to processes or production unique to the owner or operator of the solid waste facility or which would tend to adversely affect the competitive position of the owner or operator if made public.

(c) *Emission data; analyses and summaries.* The department may not grant confidential status for emission data. Nothing in this subsection prevents the department from using records and other information in compiling or publishing analyses or summaries relating to the general condition of the environment if the analyses or summaries do not identify a specific owner or operator or the analyses or summaries do not reveal records or other information granted confidential status.

(d) *Use of confidential records.* Except as provided under par. (c) and this paragraph, the department or the department of justice may use records and other information granted confidential status under this subsection only in the administration and enforcement of ss. 292.31 and 292.35. The department or the department of justice may release for general distribution records and other information granted confidential status under this subsection if the owner or operator expressly agrees to the release. The department

or the department of justice may release on a limited basis records and other information granted confidential status under this subsection if the department or the department of justice is directed to take this action by a judge or hearing examiner under an order which protects the confidentiality of the records or other information. The department or the department of justice may release to the U.S. environmental protection agency, or its authorized representative, records and other information granted confidential status under this subsection if the department or the department of justice includes in each release of records or other information a request to the U.S. environmental protection agency, or its authorized representative, to protect the confidentiality of the records or other information.

**History:** 1995 a. 227 s. 993.

**292.41 Abandoned containers.** (1) DEFINITION. In this section, "abandoned container" means any container which contains a hazardous substance and is not being monitored and maintained.

(2) APPLICABILITY. (a) This section does not apply to abandoned containers which are located in an approved facility or a nonapproved facility.

(b) Action by the department under this section is not subject to s. 292.31.

(3) CONTINGENCY PLAN. (a) After consultation with other affected federal, state and local agencies and private organizations, the department shall establish by rule criteria and procedures for the development, establishment and amendment of a contingency plan for the taking of emergency actions in relation to abandoned containers.

(b) The contingency plan shall establish procedures and techniques for locating, identifying, removing and disposing of abandoned containers.

(4) REMOVAL OR OTHER EMERGENCY ACTION. The department or its authorized representative may contain, remove or dispose of abandoned containers or take any other emergency action which it deems appropriate under the circumstances.

(5) ACCESS TO PROPERTY AND RECORDS. Any officer, employee or authorized representative of the department, upon notice to the owner or occupant, may enter onto any property, premises or place at any time for the purposes of sub. (3) if the entry is necessary to prevent increased damage to the air, land or waters of the state, or may inspect any record relating to abandoned container management for the purpose of ascertaining the state of compliance with this section and the rules promulgated under this section. Notice to the owner or occupant is not required if the delay in providing the notice is likely to result in imminent risk to public health or welfare or the environment.

(6) ABANDONED CONTAINERS: APPROPRIATIONS. (a) The department may utilize moneys appropriated under s. 20.370 (2) (dv) and (my) in taking action under sub. (4). The department shall utilize these moneys to provide for the procurement, maintenance and storage of necessary equipment and supplies, personnel training and expenses incurred in locating, identifying, removing and disposing of abandoned containers.

(b) No more than 25 percent of the total of all moneys available under the appropriation under s. 20.370 (2) (dv) and (my) may be used annually for the procurement and maintenance of necessary equipment during that fiscal year.

(c) The department is entitled to recover moneys expended under this section from any person who caused the containers to be abandoned or is responsible for the containers. The funds recovered under this paragraph shall be deposited into the environmental fund for environmental management.

**History:** 1983 a. 410; 1985 a. 29 ss. 1957, 3202 (39); 1987 a. 27, 384; 1989 a. 31; 1991 a. 39; 1993 a. 453; 1995 a. 27; 1995 a. 227 s. 716; Stats. 1995 s. 292.41; 1995 a. 378 s. 46; 1997 a. 27.

**Cross-reference:** See also ch. NR 714, Wis. adm. code.

**292.51 Cooperative remedial action.** (1) In this section, "costs of remedying environmental contamination" means costs



May 24, 1996



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Wausau Insurance Companies  
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Mr. Richard Ventura  
CIGNA Property & Casualty  
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Ms. Brenda L. DuPree  
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Re: Town of Newton Gravel Pit

OFFICE OF CITY ATTORNEY

Dear Insurer Representatives:

The City of Manitowoc has entered into an agreement with waste generators at the Town of Newton Gravel Pit site to facilitate the clean up of environmental damage. I'm enclosing a copy of that Agreement for your records.

Our consultant, RUST Environment and Infrastructure is in the process of submitting their Remedial Action Plan to the Wisconsin Department of Natural Resources. The cost of the recommended remedial action is approximately \$460,000. In addition, the City has spent approximately \$425,000 in engineering fees to this point.

Very truly yours,

Patrick L. Willis  
City Attorney

PLW:es

Enc.

Patrick L. Willis  
City Attorney

CITY HALL  
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**AGREEMENT BETWEEN THE CITY OF MANITOWOC AND  
PARTICIPATING GENERATORS FOR THE TOWN OF NEWTON  
GRAVEL PIT SITE**

This Agreement is entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 1996 between the City of Manitowoc (the "City") and those Parties listed in Appendix A (the "Participating Generators") (with the City and the Participating Generators collectively referred to as the "Parties") and each, individually, as a "Party").

**FACTUAL BACKGROUND**

1. The Town of Newton Gravel Pit Site (the "Site") has been identified as requiring remediation. The required remediation is proposed to be carried out according to the Remedial Option #5 of the Site Investigation and Remedial Options Report (the "Remedial Plan") prepared by Rust Environment and Infrastructure ("Rust") dated January 19, 1995. Part of the Remedial Plan includes non-aqueous phase liquid removal at a cost not to exceed \$69,800 (the "Removal"). The Remedial Plan will be submitted to the Wisconsin Department of Natural Resources ("WDNR") by the City.

2. The Participating Generators are alleged to have generated waste during the relevant time period that may have been disposed of at the Site.

3. The City was the owner of the Site during the relevant time period.

4. The Parties have met on numerous occasions to discuss a privately financed investigation and remediation of the Site.

5. Consequently, in order to accomplish an expeditious remediation of the Site, the Participating Generators and the City have reached this Agreement to jointly fund the remediation at this Site.

**PURPOSE OF THIS AGREEMENT**

6. The purpose of this Agreement is to set forth the terms under which the Parties will jointly fund the remediation work and the manner in which the remediation will be accomplished.

## SCOPE OF THIS AGREEMENT

7. The terms and conditions of this Agreement between the City and the Participating Generators apply only to the funding and conducting of the Remedial Plan, identified as Remedial Option #5 in the Rust Report dated January 19, 1995, and to the partial payment by the Participating Generators of past costs incurred by the City for site investigation services, as provided in Appendix B ("Past Costs").

8. This Agreement is contingent in part upon WDNR approval of the cleanup proposed for the Site in substantial compliance with the Remedial Plan (hereinafter the "WDNR Approval"). If WDNR fails to approve the cleanup proposed for the Site in substantial compliance with the Remedial Plan on or before December 31, 1996 (hereinafter the "Non-Approval"), this Agreement shall be declared to be null and void for all purposes except for those portions of this Agreement that relate to the Removal. Rust shall estimate the cost of implementing the cleanup for the site approved by the WDNR within 30 days after the date of the approval issued by the WDNR (hereinafter the "Rust Estimate"). The Rust Estimate shall be for total site costs including the cost of the Removal and Past Costs incurred by the City ("Total Site Costs"). As used in this Agreement, the term "substantial compliance" shall mean that Rust Estimate is not greater than \$1,000,000 for Total Site Costs.

9. In the event following WDNR Approval it is later determined that the actual costs of implementing the WDNR Approval exceed \$1,000,000 for Total Site Costs, the Participating Generators shall have no obligation under this Agreement to fund the portion of the costs in excess of \$1,000,000, provided, however, that the City and the other Parties shall retain any and all rights not specifically waived in this Agreement to seek contribution from other Parties to this Agreement as well as from any third parties for any such excess cost.

10. The Parties agree to waive consistency with the National Contingency Plan ("NCP") as to all work performed before or after the date of this Agreement.

11. The Parties agree that no portion of the tolling period beginning from January 1, 1995 up to the date that any Party to this Agreement mails written notification to all other Parties of its intent to terminate the tolling period shall be used for purposes of calculating the passage of time under an applicable statute of limitations for any claim that a Party may have against another Party relating to contamination at the Site.

12. The obligations of the Parties under this Agreement are limited solely to this Agreement and have no effect outside the terms of this Agreement. Nothing in this Agreement shall be an admission of law or fact or evidence of any liability or responsibility with respect to the Site. Nothing in this Agreement is intended to release, discharge, or in

any way affect any claim, cause of action, or demand in law or equity which the Parties may have against any other person or entity who is not a Party relating to the generation, storage, treatment, transportation, release, or disposal of any hazardous substances at, to, or from the Site.

13. The Parties do not admit or concede, and reserve the right to contest any determination, allegation, finding or conclusion regarding the Site in any action other than one brought by any of the Parties to enforce this Agreement.

14. This Agreement shall not create any private right, other than a right by any of the Parties to enforce this Agreement.

#### ALLOCATION OF COSTS

15. The Parties agree to fund jointly the cost of implementing the WDNR Approval and, in the event of Non-Approval, the Removal.

16. The Participating Generators shall pay the City \$69,800 for the Removal within 30 days of the execution of this Agreement. In the event of Non-Approval, this shall constitute the sole payment for which the Participating Generators are obligated under this Agreement.

17. In the event of WDNR Approval, the Participating Generators shall pay the City the balance of 67.5% of the Rust Estimate remaining after the payment made under paragraph 16, within 30 days of the date of mailing of the Rust Estimate. In the event of WDNR Approval, the City agrees to pay 32.5 percent of the Rust Estimate.

18. The City shall maintain the payments received from the Participating Generators in a separate account which shall not be commingled with monies from any source not covered by this Agreement (hereinafter the "Account"). The City is authorized to utilize the Account for the payment of costs incurred for the implementation of the WDNR Approval or, in the event of Non-Approval, the Removal.

19. The Parties agree that the City of Manitowoc, to date, has expended \$421,609 in project costs paid to Rust for cleanup activities at the Site. In the event of WDNR Approval and within 30 days of the date of the mailing of the Rust Estimate, the Participating Generators agree to reimburse the City an amount calculated in accordance with the following formula:  $\$421,609 - (\text{Rust Estimate} \times 32.5\%)$ . As a result of this reimbursement, the City is deemed to have contributed its 32.5 percent share of the Rust Estimate in accordance with paragraph 17 of this Agreement in the event of WDNR Approval.

20. If the total actual costs for the WDNR Approval exceed the Rust Estimate, the Participating Generators shall pay the City 67.5% of such excess costs within 45 days of the date of mailing by the City to the Participating Generators of notification of such excess costs provided, however, that the Participating Generators shall have no obligation for any portion of the total costs for the WDNR Approval in excess of \$1,000,000 Total Site Costs. In the event the total actual costs for the WDNR Approval are less than the Rust Estimate, the City shall distribute to the Participating Generators the balance in the Fund within 45 days of the date that WDNR has approved the completion of the WDNR Approval.

#### **ACTIONS TO BE PERFORMED BY THE CITY OF MANITOWOC**

21. Upon execution of this Agreement, the City shall direct its consultant, Rust, to conduct the Removal immediately or as promptly as site and weather conditions allow. Conduct of the Removal shall not be postponed until WDNR Approval or Non-Approval.

22. The Parties agree that the City of Manitowoc will continue to act as the primary representative dealing with the WDNR. The City of Manitowoc further agrees that it will not inform WDNR of the terms of this Agreement between the Participating Generators and the City unless prohibited by applicable law as defined in paragraph 29 of this Agreement.

23. The Parties agree that the City is the party responsible for entering into and overseeing all contracts for work performed at this Site under the WDNR Approval or the Removal. The City will use reasonable efforts, as determined solely in the exercise of the City's discretion, to perform tasks covered by the WDNR Approval or the Removal with City personnel.

24. The Parties agree that the City is responsible for monitoring the total costs for the WDNR Approval and for providing notification to the Participating Generators in the event that total costs of the WDNR Approval exceed the Rust Estimate. The Parties further agree that the City will provide a final accounting of all costs for the WDNR Approval upon its completion and make distributions, if any are required, in accordance with paragraph 20 of this Agreement.

#### **ACTIONS TO BE PERFORMED BY THE PARTICIPATING GENERATORS**

25. The Participating Generators will agree among themselves how to fund the Participating Generators' allocated share of the costs of the WDNR Approval or the Removal as required by this Agreement.

26. The Participating Generators shall designate one or more representatives to coordinate the work to be performed with the City and for the receipt of any notices or payments made by the City or Rust under this Agreement.

#### COVENANT NOT TO SUE

27. In the event WDNR approves the completion of the WDNR Approval for the Site in accordance with applicable law and the Parties have fulfilled all of their obligations under this Agreement, and the clean up is accomplished at a cost of not more than \$1,000,000.00 Total Site Costs, the Parties agree not to sue each other for costs associated with the WDNR Approval; provided, however, that nothing herein shall preclude or bar the Parties from any available legal remedies directed against anyone who is not a Party for such costs, nor shall anything herein preclude or bar any of the Parties from any available legal remedies against any other Party in the event of a suit or claim against any Party from any party who is not a signatory to this Agreement.

#### INDEMNIFICATION

28. Each Party agrees to indemnify, defend and hold harmless any Party and its representative(s) from and against any claim, demand, liability, cost, expense, legal fee, penalty, loss or judgment (collectively "Liability") which in any way relates to the good faith performance of any duties under this Agreement by any Party or its representative(s) on behalf of the Parties, including, but not limited to, any liability arising from any contract or agreement required to implement the WDNR Approval or the Removal. This indemnification shall not apply to any liability arising from a criminal conviction, unless the Party or its representative(s) demonstrates to the satisfaction of the Parties that the Party or its representative(s) had reasonable cause to believe that the conduct in question was lawful. However, nothing in this paragraph shall constitute a waiver or release of any claim or potential claim by any Party which is reserved within this Agreement. In addition, if assertion of any remedies against anyone who was not a Party which are specifically reserved in paragraph 27 of this Agreement results in claims being asserted by anyone who is not a Party against a Party who does not elect to assert such a claim ("Non-Claimant") or results in any person or entity asserting an indemnity claim against a Non-Claimant, then the claimants who are also Parties jointly and severally agree to defend, indemnify and hold harmless such Non-Claimants from such litigation costs, attorneys' fees, money damages, judgments and/or settlements relating to such contribution or indemnity claim.

### **CONFIDENTIALITY**

29. The City will maintain the confidentiality of this Agreement unless prohibited by applicable law, including, but not limited to, the Wisconsin Public Records law, Wis. Stats. §19.31 et. seq.

### **SUCCESSORS AND ASSIGNS**

30. This Agreement shall be binding upon the successors and assigns of the Parties. No assignment or delegation of the obligation to make any payment or reimbursement hereunder will release the assigning Party without the prior written consent of the remaining Parties.

### **MAILING**

31. Any reference to mail or mailing in this Agreement shall be accomplished by mailing a notification by certified mail, return receipt requested to the intended recipient(s).

### **APPLICABLE LAW**

32. For purposes of enforcement or interpretation of the provisions of this Agreement, the Parties agree that the laws of the State of Wisconsin shall be applicable, except to the extent federal law shall apply to questions arising under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, or the NCP promulgated thereunder, and further agree not to contest personal jurisdiction in the state or federal courts of Wisconsin with respect to litigation brought for such purposes.

### **NATURE OF AGREEMENT**

33. Nothing herein shall be deemed to create a partnership or joint venture and/or principal and agent relationship between or among the Parties.

### **COUNTERPARTS**

34. This Agreement may be executed in any number of counterparts, each of which shall be deemed a duplicate original, but all of which together shall constitute one and the same instrument and shall become effective as to each Party when the counterpart executed by such Party as of the date the last Party signs the Agreement provided all counterparts have been delivered to Susan H. Martin, Foley & Lardner.

APPENDIX A

Participating Generators

A & P

Heresite

Imperial Eastman

Invincible

Manitowoc Co.  
(Manitowoc Engineering)  
(Manitowoc Shipbuilding)

Manitowoc Products Co.  
(Chrysler Corporation)  
(White Consolidated)

Newell  
(Aluminum Spec.)  
(Mirro)



APPENDIX B

RECEIVED  
JAN 16 1996  
CITY ATTORNEY



January 16, 1996

MEMO TO: CITY ATTORNEY PAT WILLIS  
FROM: MICHAEL E. HAWLEY, P.E. *MEH*  
Director of Public Works & City Engineer  
SUBJECT: Gravel Pit Investigation

Pursuant to your request for information on costs incurred in the Gravel Pit Investigation, we have paid the following to date.



OFFICE OF DEPARTMENT  
OF PUBLIC WORKS  
ENGINEERING

RUST ENVIRONMENT & INFRASTRUCTURE

Contract 1 - Site Investigation Services  
from December, 1992 thru  
December 10, 1993 \$166,072.00  
(Final Payment 1/14/94)

Contract 2 - Continuing Site Investigation  
January, 1994 thru  
December 8, 1995 \$255,536.69  
(\$626.91 Paid 1/12/96)

MEH:ca  
Revised 1/16/96  
(450-353130-529900)

Michael E. Hawley  
Director of Public Works  
and City Engineer

CITY HALL  
817 Franklin Street  
P.O. Box 1697  
Manitowoc, WI 54221-1697  
Phone: (414) 683-4410  
FAX: (414) 683-4424

MODIFICATION

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

4-16-96  
Date of Execution

INVINCIBLE METAL FURNITURE CO.

Name of Party

By:

  
(Signature)

Name:

JOHN A. SCHUETTE

(Typed Name)

Title:

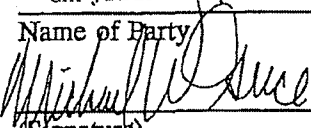
PRESIDENT

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3-12-96  
Date of Execution

Chrysler Corporation  
Name of Party  
By:   
(Signature)

Name: Michael W. Grice ✓  
(Typed Name)

Title: Senior Staff Counsel

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

April 15, 1996  
Date of Execution

City of Manitowoc  
Name of Party

By: *Patrick L. Willis*  
(Signature)

Name: Patrick L. Willis  
(Typed Name)

Title: City Attorney


**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 29, 1996  
Date of Execution

The Manitowoc Company, Inc.  
Name of Party

By:   
(Signature)

Name: E. Dean Flynn  
(Typed Name)

Title: Secretary & Manager - Corp. Insurance

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3/22/96  
Date of Execution

Great Atlantic & Pacific Tea Co., Inc.  
Name of Party

By: *Alfred Limbrick*  
(Signature)

Name: Alfred Limbrick ✓  
(Typed Name)

Title: Group Vice-President

**MODIFICATION**


35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 8, 1996  
Date of Execution

Gould Electronics Inc.  
Name of Party

By:

  
(Signature)

Name:

Lawrence W. Mitchell  
(Typed Name)

Title:

Associate Counsel


**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3-11-96  
Date of Execution

HERESITE PROTECTIVE COATINGS, INC.  
Name of Party

By:   
(Signature)

Name: GEOFFREY C. LIBAN  
(Typed Name)

Title: C.E.O.



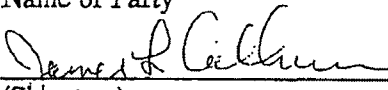
**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 12, 1996  
Date of Execution

White Consolidated Industries, Inc  
Name of Party

By:   
(Signature)

Name: James L. Calhoun  
(Typed Name)

Title: Vice President - Regulatory Affairs

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 7, 1996  
Date of Execution

Newell Co.  
Name of Party

By: [Signature]  
(Signature)

Name: Richard H. Wolff  
(Typed Name)

Title: Secretary

Mike



January 11, 1993

MEMO TO: CITY ATTORNEY PAT WILLIS  
FROM: MICHAEL E. HAWLEY, P. E. *MEH*  
Director of Public Works and City Engineer  
SUBJECT: Gravel Pit

File Search

Jean Campbell and Carol Adler searched the Engineering Department files for any material on the Gravel Pit, and couldn't find anything pertaining to industrial dumping. Mostly found old yearly crushing reports.

Tony Scherer searched the files at the Street Department, and found the attached report dated March 4, 1968, outlining materials and companies hauling to the Gravel Pit.

Company Drivers

We have only been able to come up with names of three drivers, one of whom we haven't been able to locate.

<u>Name</u>	<u>Name of Company</u>	<u>Address</u>	<u>Phone</u>
Erwin C. Musial	Manitowoc Company	2115 Madison	684-3274
Earl A. Mueller	Mirro Aluminum	944 So.26th	684-3727
Richard Budnik	Invincible	Unable to Locate	
(Mrs. Gladys Budnik might be his mother)		922 So.30th	682-2643

OFFICE OF DEPARTMENT  
OF PUBLIC WORKS,  
ENGINEERING

Michael E. Hawley  
Director of Public Works  
and City Engineer  
  
CITY HALL  
7 Franklin Street  
P. Box 1597  
Manitowoc, WI 54221-1597  
Phone: (414) 683-4410  
Fax: (414) 683-4424

MEH:ca  
Attached

March 4, 1968

WASTE MATERIALS HAULED TO CITY GRAVEL PIT  
BY VARIOUS INDUSTRIAL PLANTS

MANITOWOC ENGINEERING CO.

CLEANING SOLVENT WATER SOLUBLE -- 600 Gal. @ week  
(noninflammable)

CUTTING and DRAIN OILS -- 200 Gal. @ week (inflammable).

MANITOWOC SHIPBUILDING INC.

WASTE FUEL OIL -- 1000 Gal. about four times a year Fall & Winter.  
(inflammable).

MIRRO ALUMINUM CO.

12,000 Gal. each two months of a 95% water, 5%  
soluble oil solution.

500 Gal. @ month of various combustibile oils.

500 Gal. @ year of used gear box oils.

2,700 Gal. each six weeks of 80% water, 20%  
Sulphuric acid solution.

1,000 Gal. of naptha on very rare occasions

(Obtained from D.P.W. Street Dept. files)

March 4, 1968

WASTE MATERIALS HAULED TO CITY GRAVEL PIT  
BY VARIOUS INDUSTRIAL PLANTS

INVINCIBLE METAL FURNITURE CO.

PAINT SLUDGE--- 55 Gal. @ week and 550 Gal. every third week.  
(inflammable)

MANITOWOC PRODUCTS CO.

PAINT SLUDGE -- 5 Cu. Yds. @ week (inflammable).

HERESITE & CHEMICAL CO.

WASTE ALCOHOL -- 25 Gal. to 30 Gal. @ week (inflammable).

IMPERIAL EASTMAN CORP.

WASTE OIL --- 200 Gal. @ week (inflammable).

WATER SOLUBLE COOLANT -- 100 Gal. @ week (noninflammable).

WHITE HOUSE MILK DIV.

CLEANING SOLVENT -- 20 Gal. @ Week (inflammable).

ALUMINUM SPECIALTY CO.

DRAIN OIL -- 110 Gal. @ week (inflammable).

PAINT STRIPPER -- 55 Gal. @ week (inflammable).

PAINT THINNER -- 55 Gal. @ week (inflammable).

(Obtained from D.P.W. Street Dept. files)

AFFIDAVIT RICHARD WHITE

STATE OF WISCONSIN )  
                                  ) ss  
MANITOWOC COUNTY )

I, Richard White, being duly sworn on oath, depose and state as follows:

1. I was the Department of Public Works Accountant for the City of Manitowoc from 1967 until approximately June of 1981.

2. That in my role as Accountant for the Public Works Department, I was familiar with the operation costs of the Newton Gravel Pit.

3. That I have a distinct memory that the industrial waste dumping at the Newton Gravel Pit ended some time in 1972 when the Department of Public Works shop moved from the 14<sup>th</sup> and Clark Street location to the 35<sup>th</sup> and Viebahn location.

4. I believe the above statements to be true and correct to the best of my recollection of the facts, and I make this affidavit on behalf of the City of Manitowoc.

Dated this 20<sup>th</sup> day of December 2010.

Richard White  
Richard White

Subscribed and sworn to before me this 20<sup>th</sup> day of December 2010.

Jane M. Rhode  
Notary Public     Jane M. Rhode  
My commission expires 6-3-2012

January 25, 2017

**VIA U.S. CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

Parker Hannifin Corp.  
CT Corporation System  
8020 Excelsior Drive  
Suite 200  
Madison, Wisconsin 53715

RE: City of Manitowoc/Former Town of Newton Gravel Pit, 3130 Hecker Road,  
Manitowoc, WI - WDNR BRRTS Activity # 02-36-000268 (the "Site")

Dear Sir or Madam:

Pursuant to Wis. Stat. § 292.35(2g)(b) (copy enclosed), the City of Manitowoc (the "City") hereby requests that Parker Hannifin Corp. provide access to or delivery of any records or documents in its custody, possession or control that relate to all of the following:

1. The type and quantity of any wastes containing hazardous substances that Parker Hannifin Corp. or the party the City believes to be its corporate predecessor in interest, Imperial Eastman Corporation, (collectively, "Parker Hannifin") disposed of or discharged at the above-referenced Site and the dates of the disposal or discharge.
2. The identity of any person who may be a "responsible party" for contamination at the above-referenced Site under Wis. Stat. § 292.35(1).
3. The identity of subsidiary or parent corporations, as defined in Wis. Stat. § 292.31(8)(a)3, of any person who may be a responsible party. Section 292.31(8)(a)3 defines a "subsidiary or parent corporation" as "any business entity, including a subsidiary, parent corporation, or other business arrangement which has elements of common ownership or control or uses a long-term contractual arrangement with any person to avoid direct responsibility for conditions at a site or facility."

For context, I am attaching correspondence that includes a 1996 settlement agreement between the City and certain parties, including Imperial Eastman, as well as a January 11, 1993 City memorandum (based on a 1968 Manitowoc Department of Public Works document) that identifies certain parties, including Imperial Eastman, that arranged for disposal of waste at the Site.

Parker Hannifin Corp.  
January 25, 2017  
Page 2

It is requested that Parker Hannifin provide delivery or access within thirty (30) days of your receipt of this request. The City intends to assemble all the available information in advance of the public hearing on the City's Draft Remedial Action Plan for the Site, which is currently planned for Monday, March 13, 2017 (details to follow).

Finally, as a preliminary request, please refrain from destroying any documents and/or any electronic information which may be in any way related to the Site or Imperial Eastman's operations or activities during the 1960's and 1970's, when the Site was operating.

Thank you for your cooperation in this matter. If you have any questions or concerns, please contact me.

Very truly yours,

GODFREY & KAHN, S.C.



Edward B. Witte

Enclosure

cc: Molly E. Schmidt, Wisconsin Department of Natural Resources (via E-mail w/enclosure)  
Kathleen M. McDaniel, City of Manitowoc (via E-mail w/enclosure)

16705339.1



January 25, 2017

**VIA U.S. CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

The Manitowoc Company, Inc.  
2400 S. 44<sup>th</sup> Street  
P.O. Box 66  
Manitowoc, Wisconsin 54221

RE: City of Manitowoc/Former Town of Newton Gravel Pit, 3130 Hecker Road,  
Manitowoc, WI - WDNR BRRTS Activity # 02-36-000268 (the "Site")

Dear Sir or Madam:

Pursuant to Wis. Stat. § 292.35(2g)(b) (copy enclosed), the City of Manitowoc (the "City") hereby requests that The Manitowoc Company, Inc. provide access to or delivery of any records or documents in its custody, possession or control that relate to all of the following:

1. The type and quantity of any wastes containing hazardous substances that The Manitowoc Company, Inc. or the parties the City believes to be its corporate predecessors in interest, Manitowoc Engineering and Manitowoc Shipbuilding, (collectively, "Manitowoc Company") disposed of or discharged at the above-referenced Site and the dates of the disposal or discharge.
2. The identity of any person who may be a "responsible party" for contamination at the above-referenced Site under Wis. Stat. § 292.35(1).
3. The identity of subsidiary or parent corporations, as defined in Wis. Stat. § 292.31(8)(a)3, of any person who may be a responsible party. Section 292.31(8)(a)3 defines a "subsidiary or parent corporation" as "any business entity, including a subsidiary, parent corporation, or other business arrangement which has elements of common ownership or control or uses a long-term contractual arrangement with any person to avoid direct responsibility for conditions at a site or facility."

For context, I am attaching correspondence that includes a 1996 settlement agreement between the City and certain parties, including Manitowoc Company, as well as a January 11, 1993 City memorandum (based on a 1968 Manitowoc Department of Public Works document) that identifies certain parties, including Manitowoc Engineering and Manitowoc Shipbuilding, that arranged for disposal of waste at the Site.

The Manitowoc Company, Inc.

January 25, 2017

Page 2

It is requested that Manitowoc Company provide delivery or access within thirty (30) days of your receipt of this request. The City intends to assemble all the available information in advance of the public hearing on the City's Draft Remedial Action Plan for the Site, which is currently planned for Monday, March 13, 2017 (details to follow).

Finally, as a preliminary request, please refrain from destroying any documents and/or any electronic information which may be in any way related to the Site or Manitowoc Company's operations or activities during the 1960's and 1970's, when the Site was operating.

Thank you for your cooperation in this matter. If you have any questions or concerns, please contact me.

Very truly yours,

GODFREY & KAHN, S.C.



Edward B. Witte

Enclosure

cc: Molly E. Schmidt, Wisconsin Department of Natural Resources (via E-mail w/enclosure)  
Kathleen M. McDaniel, City of Manitowoc (via E-mail w/enclosure)

16705593.1

CHAPTER 292  
REMEDIAL ACTION

	SUBCHAPTER I		
	DEFINITIONS		
292.01	Definitions.		292.37 Confidentiality of records.
	SUBCHAPTER II		292.41 Abandoned containers.
	REMEDIAL ACTION		292.51 Cooperative remedial action.
292.11	Hazardous substance spills.		292.53 Availability of environmental insurance.
292.12	Sites with residual contamination.		292.55 Requests for liability clarification and technical assistance.
292.13	Property affected by off-site discharge.		292.57 Database of properties with residual contamination.
292.15	Voluntary party remediation and exemption from liability.		292.63 Petroleum storage remedial action; financial assistance.
292.16	Responsibility of certain municipalities acquiring closed landfills.		292.64 Removal of abandoned underground petroleum storage tanks.
292.19	Responsibility of persons conducting investigations.		292.65 Dry cleaner environmental response program.
292.21	Responsibility of lenders and representatives.		292.68 Reimbursement for disposal of PCB contaminated sediment.
292.23	Responsibility of local governmental units; solid waste.		292.70 Indemnification for disposal of polychlorinated biphenyls.
292.24	Responsibility of local governmental units; hazardous waste.		292.72 Brownfields revolving loan program.
292.25	Report on impact of exemptions from liability.		292.81 Notice; lien.
292.255	Report on brownfield efforts.		
292.26	Civil immunity; local governmental units.		SUBCHAPTER III
292.31	Environmental repair.		ENFORCEMENT; PENALTIES
292.33	Local government cost recovery cause of action.	292.93	Orders.
292.35	Local governmental unit negotiation and cost recovery.	292.94	Fees related to enforcement actions.
		292.95	Review of alleged violations; environmental repair and cost recovery.
		292.98	Violations and enforcement; environmental repair and cost recovery.
		292.99	Penalties.

SUBCHAPTER I  
DEFINITIONS

**292.01 Definitions.** In this chapter:

(1) “Approved facility” has the meaning given in s. 289.01 (3).

(1m) “Approved mining facility” has the meaning given in s. 289.01 (4) and includes a mining waste site, as defined in s. 295.41 (31).

(1s) “Contaminated sediment” means sediment that contains a hazardous substance.

(2) “Department” means the department of natural resources.

(3) “Discharge” means, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying or dumping.

(3m) “Engineering control” means an object or action designed and implemented to contain contamination or to minimize the spread of contamination, including a cap, soil cover, or in-place stabilization, but not including a sediment cover.

(4) “Environmental pollution” means the contaminating or rendering unclean or impure the air, land or waters of the state, or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to fish, bird, animal or plant life.

(5) “Hazardous substance” means any substance or combination of substances including any waste of a solid, semisolid, liquid or gaseous form which may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or which may pose a substantial present or potential hazard to human health or the environment because of its quantity, concentration or physical, chemical or infectious characteristics. This term includes, but is not limited to, substances which are toxic, corrosive, flammable, irritants, strong sensitizers or explosives as determined by the department.

(6) “Hazardous waste” means any solid waste identified by the department as hazardous under s. 291.05.

(7) “Landfill” means a solid waste facility for solid waste disposal.

(8) “Lender” means a bank, credit union, savings bank, savings and loan association, mortgage banker or similar financial institution, the primary business of which is to engage in lending

activities or an insurance company, pension fund or government agency engaged in secured lending.

(9) “Lending activities” means advancing funds or credit to and collecting funds from another person; entering into security agreements, including executing mortgages, liens, factoring agreements, accounts receivable financing arrangements, conditional sales, sale and leaseback arrangements and installment sales contracts; conducting inspections of or monitoring a borrower’s business and collateral; providing financial assistance; restructuring or renegotiating the terms of a loan obligation; requiring payment of additional interest; extending the payment period of a loan obligation; initiating foreclosure or other proceedings to enforce a security interest in property before obtaining title; requesting and obtaining the appointment of a receiver; and making decisions related to extending or refusing to extend credit.

(10) “Long-term care” means the routine care, maintenance and monitoring of a solid or hazardous waste facility following closing of the facility.

(11) “Municipality” means any city, town, village, county, county utility district, town sanitary district, public inland lake protection and rehabilitation district or metropolitan sewage district.

(12) “Nonapproved facility” has the meaning given in s. 289.01 (24).

(13) “Person” means an individual, owner, operator, corporation, limited liability company, partnership, association, municipality, interstate agency, state agency or federal agency.

(15) “Preventive measures” mean the installation or testing of equipment or devices, a designated way of performing a specified operation or the preparation of an emergency response plan.

(16) “Representative” means any person acting in the capacity of a conservator, guardian, court-appointed receiver, personal representative, testamentary trustee of a deceased person, trustee of a living trust, or fiduciary of real or personal property.

(17) “Secretary” means the secretary of natural resources.

(17g) “Sediment” means particles in the bed of a navigable water up to the ordinary high-water mark that are derived from the erosion of rock, minerals, soil, and biological materials and from chemical precipitation from the water column and that are transported or deposited by water.

**292.33 Local government cost recovery cause of action.** (1) **DEFINITION.** In this section “local governmental unit” has the meaning given in s. 292.11 (9) (c) 1.

(2) **CAUSE OF ACTION.** Except as provided in sub. (6), a local governmental unit may recover costs as provided in sub. (4) from a responsible person described in sub. (3) if the costs are incurred in connection with a property acquired as provided in s. 292.11 (9) (c) 1m. on which a hazardous substance has been discharged.

(3) **RESPONSIBLE PERSONS.** (a) Except as provided in par. (b), a local governmental unit may recover costs in an action under this section from any of the following:

1. A person who, at the time that the local governmental unit acquired the property, possessed or controlled the hazardous substance that was discharged on the property.

2. A person who caused the discharge of the hazardous substance on the property.

(b) A local governmental unit may not recover costs in an action under sub. (2) from a person listed in par. (a) if any of the following applies:

1. The person is exempt from liability under s. 292.11 (9) (e), 292.13, 292.15, 292.16, 292.19 or 292.21 with respect to the discharge that is the subject of the action.

2. The person has entered into a consent order under this chapter or ch. 289 or 291 or an agreement under s. 292.11 (7) (d) or 292.31 (8) (h) with respect to the discharge that is the subject of the action and the person is in compliance with the consent order or agreement.

3. The person is exempt from liability under s. 292.35 (9) (e) with respect to the discharge that is the subject of the action.

4. The discharge that was caused by the person and that is the subject of the action was in compliance with a permit, license, approval, special order, waiver or variance issued under ch. 283 or 285 or under corresponding federal statutes or regulations.

(4) **RECOVERABLE COSTS.** (a) Except as provided in par. (b), in an action under this section a local governmental unit may recover the reasonable and necessary costs that it incurs for all of the following:

1. Investigating environmental contamination on the property and planning remedial activities described in subd. 2.

2. Conducting remedial activities to restore the property for its intended future use.

3. Administering the activities under subds. 1. and 2. and bringing the action under this section, including costs, disbursements and engineering fees but excluding attorney fees.

(b) The costs determined under par. (a) shall be reduced by the fair market value of the property after completion of the activities under par. (a) 2.

(c) Recoverable costs under this subsection may not be reduced by the amount of any state or federal moneys received by the local governmental unit for any of the activities under par. (a).

(d) 1. In an action under this section, the liability of a responsible person described in sub. (3) (a) 2. is limited to the amount that bears the same proportion to the total costs under par. (a), adjusted as provided in par. (b), as the amount of the environmental pollution on the property from the discharge caused by the responsible person bears to all of the environmental pollution on the property from discharges of hazardous substances.

2. In an action under this section, the liability of a responsible person described in sub. (3) (a) 1. is limited to the amount of the total costs under par. (a), adjusted as provided in par. (b), that the local governmental unit is unable to recover from responsible parties described in sub. (3) (a) 2. less the amount that the local governmental unit is unable to recover because of the exemptions in sub. (3) (b) 3. and 4.

(5) **REPAYING STATE ASSISTANCE.** If a local governmental unit that recovers costs under this section received money from this state, other than under s. 292.11 (7) or 292.31 (1), (3) or (7), for any of the activities under sub. (4) (a), the local governmental unit

shall reimburse to the state an amount that bears the same proportion to the total amount recovered under this section as the amount received from the state, other than under s. 292.11 (7) or 292.31 (1), (3) or (7), bears to the total costs under sub. (4) (a) adjusted as provided in sub. (4) (b).

(6) **EXCEPTION.** A local governmental unit may not recover costs under this section for remedial activities conducted on a property or portion of a property with respect to a discharge after the department of natural resources, the department of safety and professional services, or the department of agriculture, trade and consumer protection has indicated that no further remedial activities are necessary on the property or portion of the property with respect to the discharge.

(7) **LIMITATION OF ACTION.** An action under this section shall be commenced within 6 years after the date that the local governmental unit completes the activities under sub. (4) (a) 2. or be barred.

**History:** 1999 a. 9; 2011 a. 32.

**292.35 Local governmental unit negotiation and cost recovery.** (1) **DEFINITIONS.** In this section:

(am) “Financial assistance” means money, other than a loan, provided by a governmental unit that is not a responsible party to pay a portion of the cost of investigation and remedial action for a site or facility.

(b) “Generator” means a person who, by contract, agreement or otherwise, either arranges or arranged for disposal or treatment, or arranges or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by the person, if the disposal or treatment is done by another person at a site or facility owned and operated by another person and the site or facility contains the hazardous substance.

(bm) “Local governmental unit” means a municipality, a redevelopment authority created under s. 66.1333 or a public body designated by a municipality under s. 66.1337 (4).

(c) “Owner or operator” means any of the following:

1. If the property is taken for tax delinquency, a person who owns or operates a site or facility at the time that the site or facility is taken for tax delinquency.

2. A person who owns or operates a site or facility at the time that the disposal or discharge of a hazardous substance at the site or facility occurs.

(e) “Responsible party” means a generator, an owner or operator, a transporter or a person who possesses or controls a hazardous substance that is discharged or disposed of or who causes the discharge or disposal of a hazardous substance.

(f) “Site or facility” means an approved facility, an approved mining facility, a nonapproved facility, a waste site or any site where a hazardous substance is discharged on or after May 21, 1978.

(g) “Transporter” means a person who accepts or accepted a hazardous substance for transport to a site or facility.

(2) **APPLICABILITY.** This section only applies to a site or facility if one of the following criteria is satisfied:

(a) The site or facility is owned by a local governmental unit.

(b) A local governmental unit that owns a portion of the site or facility commits itself, by resolution of its governing body, to paying more than 50 percent of the amount equal to the difference between the cost of investigation and remedial action for the site or facility and any financial assistance received for the site or facility.

(2g) **IDENTIFICATION OF RESPONSIBLE PARTIES.** (a) A local governmental unit that intends to use the cost recovery procedures in this section shall attempt to identify all responsible parties. All information obtained by the local governmental unit regarding responsible parties is a public record and may be inspected and copied under s. 19.35.

(b) Upon the request of an employee or authorized representative of the local governmental unit, or pursuant to a special inspec-

tion warrant under s. 66.0119, any person who generated, transported, treated, stored or disposed of a hazardous substance that may have been disposed of or discharged at the site or facility or who is or was an owner or operator shall provide the employee or authorized representative access to any records or documents in that person's custody, possession or control that relate to all of the following:

1. The type and quantity of hazardous substance that was disposed of or discharged at the site or facility and the dates of the disposal or discharge.
2. The identity of any person who may be a responsible party.
3. The identity of subsidiary or parent corporations, as defined in s. 292.31 (8) (a) 3., of any person who may be a responsible party.

(c) The local governmental unit shall maintain a single repository that is readily accessible to the public for all documents related to responsible parties, the investigation, the remedial action and plans for redevelopment of the property.

**(2r) PRELIMINARY REMEDIAL ACTION PLAN.** (a) The local governmental unit shall, in consultation with the department, prepare a draft remedial action plan.

(b) Upon completion of the draft remedial action plan, the local governmental unit shall send written notice to all responsible parties identified by the local governmental unit, provide public notice and conduct a public hearing on the draft remedial action plan. The notice to responsible parties shall offer the person receiving the notice an opportunity to provide information regarding the status of that person or any other person as a responsible party, notice and a description of the public hearing and a description of the procedures in this section. At the public hearing, the local governmental unit shall solicit testimony on whether the draft remedial action plan is the least costly method of meeting the standards for remedial action promulgated by the department by rule. The local governmental unit shall accept written comments for at least 30 days after the close of the public hearing.

(c) Upon the conclusion of the period for written comment, the local governmental unit shall prepare a preliminary remedial action plan, taking into account the written comments and comments received at the public hearing and shall submit the preliminary remedial action plan to the department for approval. The department may approve the preliminary remedial action plan as submitted or require modifications.

**(3) OFFER TO SETTLE; SELECTION OF UMPIRE.** (a) Upon receiving the department's approval of the preliminary remedial action plan, the local governmental unit shall serve an offer to settle regarding the contribution of funds for investigation and remedial action at the site or facility on each of the responsible parties identified by the local governmental unit, using the procedure for service of a summons under s. 801.11 and shall notify the department that the offer to settle has been served. The local governmental unit shall include in the offer to settle all of the following information:

1. The amount of the offer and a rationale for the amount.
2. The names, addresses and contact persons, to the extent known, for all of the responsible parties identified by the local governmental unit.
3. The location and availability of documents that support the claim of the local governmental unit against the responsible party.
4. The location of the public repository where documents relating to the site or facility are maintained, the times during which the repository is open and the name and telephone number of the contact person at the repository.
5. A description of the procedures under this section.

(b) The department shall maintain a list of competent and disinterested umpires qualified to perform the duties under subs. (4) to (6). None of the umpires may be employees of the department. Upon receiving notice from a local governmental unit under par. (a), the secretary or his or her designee shall select an umpire from

the list and inform the local governmental unit and responsible parties of the person selected.

(c) Within 10 days after receiving notice of the umpire selected by the department under par. (b), the local governmental unit may notify the department that the umpire selected is unacceptable. Within 10 days after receiving notice of the umpire selected by the department under par. (b), a responsible party may notify the department that the umpire selected is unacceptable or that the responsible party does not intend to participate in the negotiation. Failure to notify the department that the umpire is unacceptable shall be considered acceptance. If all responsible parties identified by the local governmental unit indicate that they do not intend to participate in the negotiation, the department shall inform the local governmental unit and the local governmental unit shall cease further action under this section.

(d) Upon receiving notice under par. (c) that the selected umpire is unacceptable, the secretary or his or her designee shall select 5 additional umpires from the list and inform the local governmental unit and responsible parties of the persons selected.

(e) Within 10 days after receiving notice of the umpires selected by the department under par. (d), the local governmental unit or a responsible party may notify the department that one or more of the umpires selected are unacceptable. Failure to notify the department shall be considered acceptance. The secretary or his or her designee shall select an umpire from among those umpires not identified as unacceptable by the local governmental unit or a responsible party or, if all umpires are identified as unacceptable, the secretary or his or her designee shall designate a person to be umpire for the negotiation.

**(4) NEGOTIATION PROCESS.** (a) The umpire, immediately upon being appointed, shall contact the department, the local governmental unit and the responsible parties that received the offer to settle and shall schedule the negotiating sessions. The umpire shall schedule the first negotiating session no later than 20 days after being appointed. The umpire may meet with all parties to the negotiation, individual parties or groups of parties. The umpire shall facilitate a discussion between the local governmental unit and the responsible parties to attempt to reach an agreement on the design and implementation of the remedial action plan and the contribution of funds by the local governmental unit and responsible parties.

(b) The umpire shall permit the addition to the negotiation, at any time, of any responsible party or any other person who wishes to be a party to the negotiated agreement.

(c) Negotiations may not continue for more than 60 days after the first negotiating session, unless an extension is approved by the department for cause, at the request of any party to the negotiation. The department shall approve an extension if necessary to settle insurance claims.

(d) The local governmental unit and the responsible parties that participate in negotiations shall pay for the costs of the umpire, whether or not an agreement among the parties is reached under sub. (5) or the parties accept the recommendation of the umpire under sub. (6). The umpire shall determine an equitable manner of paying for the costs of the umpire, which is binding.

**(5) AGREEMENT IN NEGOTIATION.** The local governmental unit and any of the responsible parties may enter into any agreement in negotiation regarding the design and implementation of the remedial action plan and the contribution of funds by the local governmental unit and responsible parties for the investigation and remedial action. The portion of the agreement containing the design and implementation of the remedial action plan shall be submitted to the department for approval. The department may approve that portion of the agreement as submitted or require modifications.

**(6) FAILURE TO REACH AGREEMENT IN NEGOTIATION.** (a) If the local governmental unit and any responsible parties are unable to reach an agreement under sub. (5) by the end of the period of negotiation, the umpire shall make a recommendation regarding the

design and implementation of the remedial action plan and the contribution of funds for investigation and remedial action by the local governmental unit and all responsible parties that were identified by the local governmental unit and that did not reach an agreement under sub. (5), whether or not the responsible parties participated in negotiations under sub. (4). The umpire shall submit the recommendation to the department for its approval within 20 days after the end of the period of negotiation under sub. (4) (c). The department may approve the recommendation as submitted or require modifications. The umpire shall distribute a copy of the approved recommendation to the local governmental unit and all responsible parties identified by the local governmental unit.

(b) The local governmental unit and the responsible parties that did not reach an agreement under sub. (5) shall accept or reject the umpire's recommendation within 60 days after receiving it. Failure to accept or reject the recommendation within 60 days shall be considered rejection of the recommendation. If the local governmental unit rejects the recommendation with respect to any responsible party, the recommendation does not apply to that responsible party. If a responsible party rejects the recommendation, it does not apply to that responsible party.

(7) **RESPONSIBLE PARTIES SUBJECT TO AN AGREEMENT OR RECOMMENDATION.** A responsible party that enters into an agreement under sub. (5) with a local governmental unit or that accepts the umpire's recommendation under sub. (6), if the local governmental unit does not reject the recommendation, is required to comply with the agreement or recommendation. When the responsible party has complied with the agreement or recommendation, the responsible party is not liable to the state, including under s. 292.11 (7) (b) or 292.31 (8), or to the local governmental unit for any additional costs of the investigation or remedial action; the responsible party is not liable to any other responsible party for contribution to costs incurred by any other responsible party for the investigation or remedial action; and the responsible party is not subject to an order under s. 292.11 (7) (c) for the discharge that is the subject of the agreement or recommendation.

(8) **RESPONSIBLE PARTIES NOT SUBJECT TO OR NOT COMPLYING WITH AN AGREEMENT OR RECOMMENDATION.** (a) In this subsection:

1. "Interest" means interest at the annual rate of 12 percent, commencing on the date of the umpire's recommendation under sub. (6) or, if there is no umpire's recommendation, on the date of the agreement under sub. (5).

2. "Litigation expenses" means the sum of the costs, disbursements and expenses, including engineering fees and, notwithstanding s. 814.04 (1), reasonable attorney fees necessary to prepare for or participate in proceedings before any court.

(b) A local governmental unit is entitled to recover litigation expenses and interest on the judgment against a responsible party if any of the following occurs:

1. The local governmental unit accepts the recommendation of an umpire under sub. (6), the responsible party rejects it and the local governmental unit recovers a judgment under sub. (9) against that responsible party that equals or exceeds the amount of the umpire's recommendation.

2. The local governmental unit and the responsible party enter into an agreement under sub. (5) or accept the umpire's recommendation under sub. (6), the responsible party does not comply with the requirements of the agreement or recommendation and the local governmental unit recovers a judgment against that responsible party based on the agreement or recommendation.

(c) A responsible party is entitled to recover litigation expenses from a local governmental unit if the responsible party accepts the recommendation of an umpire under sub. (6), the local governmental unit rejects the recommendation of the umpire under sub. (6) with respect to the responsible party, the local governmental unit institutes an action under sub. (9) against the responsible party and the local governmental unit recovers a judgment under sub. (9) against the responsible party that is equal to or less than the amount of the umpire's recommendation.

(9) **LIABILITY FOR REMEDIAL ACTION COSTS.** (a) This subsection applies only to a site or facility that satisfies the applicability provisions of sub. (2) and for which the remedial action specified in an agreement under sub. (5) or a recommendation under sub. (6) is completed.

(b) Except as provided in pars. (bm), (br) and (c), sub. (7) and s. 292.21, a responsible party is liable for a portion of the costs, as determined under pars. (c) to (e), incurred by a local governmental unit for remedial action in an agreement under sub. (5) or a recommendation under sub. (6) and for any related investigation. A right of action shall accrue to a local governmental unit against the responsible party for costs listed in this paragraph.

(bm) Paragraph (b) does not apply with respect to a discharge if the discharge was in compliance with a permit license, approval, special order, waiver or variance issued under ch. 283 or 285 or under corresponding federal statutes or regulations.

(br) Paragraph (b) applies with respect to a transporter only if the transporter does any of the following:

1. Selects the site or facility where the hazardous substance is disposed of without direction from the generator.

2. Violates an applicable statute, rule, plan approval or special order in effect at the time the disposal occurred and the violation causes or contributes to the condition at the site or facility.

3. Causes or contributes to the condition at the site or facility by an action related to the disposal that would result in liability under common law in effect at the time the disposal occurred, based on standards of conduct for the transporter at the time the disposal occurred.

(c) The liability of each party to the action to recover costs under par. (b) is limited to a percentage of the cost of the remedial action that is determined by dividing the percentage of that party's contribution to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility by the percentage of contribution of all responsible parties to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility. Section 895.045 does not apply to this paragraph.

(cm) Notwithstanding par. (c), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for the total contribution of all parties involved in the common scheme or plan.

(d) The finder of fact shall apportion the contribution of each responsible party to the environmental pollution resulting from the disposal or discharge of hazardous substances at the site or facility for the purposes of par. (c), using the following criteria, and any other appropriate criteria:

1. The ability of the responsible parties to demonstrate that their contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances can be distinguished from the contribution of other responsible parties.

2. The amount of hazardous substances involved.

3. The degree of toxicity of the hazardous substances involved.

4. The degree of involvement by the responsible parties in the generation, transportation, treatment, storage, disposal or discharge of the hazardous substances.

5. The degree of cooperation by the responsible parties with federal, state or local officials to prevent or minimize harm to the public health or the environment.

6. The degree of care exercised by the parties with respect to the hazardous substance, taking into account the characteristics of the hazardous substance.

(e) A responsible party is not liable under par. (b) if the responsible party establishes by a preponderance of the evidence that the responsible party's contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances was caused solely by any of the following:

1. An act of God.

2. An act of war.

3. An act or omission of a 3rd party, other than an officer, director, employee or agent of the responsible party, or other than a person whose act or omission occurs in connection with a direct or indirect contractual relationship with the responsible party if all of the following apply:

a. The responsible party establishes by a preponderance of the evidence that the responsible party exercised due care with respect to the hazardous substances that caused environmental pollution.

b. In exercising due care under subd. 3. a., the responsible party took into consideration the characteristics of the hazardous substances, in light of all relevant facts and circumstances.

c. The responsible party took precautions against foreseeable acts or omissions of the 3rd party and the consequences that could foreseeably result from those acts or omissions.

(f) Any responsible party may seek contribution from any other responsible party. Such a contribution claim may be brought as a separate action or may be brought in the action commenced against the responsible party under this section.

(10) TECHNICAL ASSISTANCE. The department shall provide technical assistance to an umpire at the request of the umpire. The department may limit the amount of staff time allocated to each negotiation.

(11) LIABILITY. Except as provided in sub. (7), no common law liability, and no statutory liability that is provided in other statutes, for damages resulting from a site or facility is affected in any manner by this section. The authority, power and remedies provided in this section are in addition to any authority, power or remedy provided in any other statutes or provided at common law.

(13) FEES. The department may, by rule, assess and collect fees to offset the cost of the department's activities under this section. The fees may include an advance deposit, from which the department shall return the amount in excess of the cost of the department's activities under this section.

**History:** 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150 s. 672; 2001 a. 16, 103.  
**Cross-reference:** See also ch. NR 749, Wis. adm. code.

**292.37 Confidentiality of records.** (1) RECORDS. Except as provided under sub. (2), any records or other information furnished to or obtained by the department in the administration of ss. 292.31 and 292.35 are public records subject to s. 19.21.

(2) CONFIDENTIAL RECORDS. (a) *Application.* An owner or operator of a solid waste facility may seek confidential treatment of any records or other information furnished to or obtained by the department in the administration of ss. 292.31 and 292.35.

(b) *Standards for granting confidential status.* Except as provided under par. (c), the department shall grant confidential status for any records or information received by the department and certified by the owner or operator of the solid waste facility as relating to production or sales figures or to processes or production unique to the owner or operator of the solid waste facility or which would tend to adversely affect the competitive position of the owner or operator if made public.

(c) *Emission data; analyses and summaries.* The department may not grant confidential status for emission data. Nothing in this subsection prevents the department from using records and other information in compiling or publishing analyses or summaries relating to the general condition of the environment if the analyses or summaries do not identify a specific owner or operator or the analyses or summaries do not reveal records or other information granted confidential status.

(d) *Use of confidential records.* Except as provided under par. (c) and this paragraph, the department or the department of justice may use records and other information granted confidential status under this subsection only in the administration and enforcement of ss. 292.31 and 292.35. The department or the department of justice may release for general distribution records and other information granted confidential status under this subsection if the owner or operator expressly agrees to the release. The department

or the department of justice may release on a limited basis records and other information granted confidential status under this subsection if the department or the department of justice is directed to take this action by a judge or hearing examiner under an order which protects the confidentiality of the records or other information. The department or the department of justice may release to the U.S. environmental protection agency, or its authorized representative, records and other information granted confidential status under this subsection if the department or the department of justice includes in each release of records or other information a request to the U.S. environmental protection agency, or its authorized representative, to protect the confidentiality of the records or other information.

**History:** 1995 a. 227 s. 993.

**292.41 Abandoned containers.** (1) DEFINITION. In this section, "abandoned container" means any container which contains a hazardous substance and is not being monitored and maintained.

(2) APPLICABILITY. (a) This section does not apply to abandoned containers which are located in an approved facility or a nonapproved facility.

(b) Action by the department under this section is not subject to s. 292.31.

(3) CONTINGENCY PLAN. (a) After consultation with other affected federal, state and local agencies and private organizations, the department shall establish by rule criteria and procedures for the development, establishment and amendment of a contingency plan for the taking of emergency actions in relation to abandoned containers.

(b) The contingency plan shall establish procedures and techniques for locating, identifying, removing and disposing of abandoned containers.

(4) REMOVAL OR OTHER EMERGENCY ACTION. The department or its authorized representative may contain, remove or dispose of abandoned containers or take any other emergency action which it deems appropriate under the circumstances.

(5) ACCESS TO PROPERTY AND RECORDS. Any officer, employee or authorized representative of the department, upon notice to the owner or occupant, may enter onto any property, premises or place at any time for the purposes of sub. (3) if the entry is necessary to prevent increased damage to the air, land or waters of the state, or may inspect any record relating to abandoned container management for the purpose of ascertaining the state of compliance with this section and the rules promulgated under this section. Notice to the owner or occupant is not required if the delay in providing the notice is likely to result in imminent risk to public health or welfare or the environment.

(6) ABANDONED CONTAINERS: APPROPRIATIONS. (a) The department may utilize moneys appropriated under s. 20.370 (2) (dv) and (my) in taking action under sub. (4). The department shall utilize these moneys to provide for the procurement, maintenance and storage of necessary equipment and supplies, personnel training and expenses incurred in locating, identifying, removing and disposing of abandoned containers.

(b) No more than 25 percent of the total of all moneys available under the appropriation under s. 20.370 (2) (dv) and (my) may be used annually for the procurement and maintenance of necessary equipment during that fiscal year.

(c) The department is entitled to recover moneys expended under this section from any person who caused the containers to be abandoned or is responsible for the containers. The funds recovered under this paragraph shall be deposited into the environmental fund for environmental management.

**History:** 1983 a. 410; 1985 a. 29 ss. 1957, 3202 (39); 1987 a. 27, 384; 1989 a. 31; 1991 a. 39; 1993 a. 453; 1995 a. 27; 1995 a. 227 s. 716; Stats. 1995 s. 292.41; 1995 a. 378 s. 46; 1997 a. 27.

**Cross-reference:** See also ch. NR 714, Wis. adm. code.

**292.51 Cooperative remedial action.** (1) In this section, "costs of remedying environmental contamination" means costs

May 24, 1996



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Mr. Richard Ventura  
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Re: Town of Newton Gravel Pit

OFFICE OF CITY ATTORNEY

Dear Insurer Representatives:

The City of Manitowoc has entered into an agreement with waste generators at the Town of Newton Gravel Pit site to facilitate the clean up of environmental damage. I'm enclosing a copy of that Agreement for your records.

Our consultant, RUST Environment and Infrastructure is in the process of submitting their Remedial Action Plan to the Wisconsin Department of Natural Resources. The cost of the recommended remedial action is approximately \$460,000. In addition, the City has spent approximately \$425,000 in engineering fees to this point.

Very truly yours,

Patrick L. Willis  
City Attorney

PLW:es

Enc.

Patrick L. Willis  
City Attorney

CITY HALL  
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**AGREEMENT BETWEEN THE CITY OF MANITOWOC AND  
PARTICIPATING GENERATORS FOR THE TOWN OF NEWTON  
GRAVEL PIT SITE**

This Agreement is entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 1996 between the City of Manitowoc (the "City") and those Parties listed in Appendix A (the "Participating Generators") (with the City and the Participating Generators collectively referred to as the "Parties") and each, individually, as a "Party").

**FACTUAL BACKGROUND**

1. The Town of Newton Gravel Pit Site (the "Site") has been identified as requiring remediation. The required remediation is proposed to be carried out according to the Remedial Option #5 of the Site Investigation and Remedial Options Report (the "Remedial Plan") prepared by Rust Environment and Infrastructure ("Rust") dated January 19, 1995. Part of the Remedial Plan includes non-aqueous phase liquid removal at a cost not to exceed \$69,800 (the "Removal"). The Remedial Plan will be submitted to the Wisconsin Department of Natural Resources ("WDNR") by the City.

2. The Participating Generators are alleged to have generated waste during the relevant time period that may have been disposed of at the Site.

3. The City was the owner of the Site during the relevant time period.

4. The Parties have met on numerous occasions to discuss a privately financed investigation and remediation of the Site.

5. Consequently, in order to accomplish an expeditious remediation of the Site, the Participating Generators and the City have reached this Agreement to jointly fund the remediation at this Site.

**PURPOSE OF THIS AGREEMENT**

6. The purpose of this Agreement is to set forth the terms under which the Parties will jointly fund the remediation work and the manner in which the remediation will be accomplished.

## SCOPE OF THIS AGREEMENT

7. The terms and conditions of this Agreement between the City and the Participating Generators apply only to the funding and conducting of the Remedial Plan, identified as Remedial Option #5 in the Rust Report dated January 19, 1995, and to the partial payment by the Participating Generators of past costs incurred by the City for site investigation services, as provided in Appendix B ("Past Costs").

8. This Agreement is contingent in part upon WDNR approval of the cleanup proposed for the Site in substantial compliance with the Remedial Plan (hereinafter the "WDNR Approval"). If WDNR fails to approve the cleanup proposed for the Site in substantial compliance with the Remedial Plan on or before December 31, 1996 (hereinafter the "Non-Approval"), this Agreement shall be declared to be null and void for all purposes except for those portions of this Agreement that relate to the Removal. Rust shall estimate the cost of implementing the cleanup for the site approved by the WDNR within 30 days after the date of the approval issued by the WDNR (hereinafter the "Rust Estimate"). The Rust Estimate shall be for total site costs including the cost of the Removal and Past Costs incurred by the City ("Total Site Costs"). As used in this Agreement, the term "substantial compliance" shall mean that Rust Estimate is not greater than \$1,000,000 for Total Site Costs.

9. In the event following WDNR Approval it is later determined that the actual costs of implementing the WDNR Approval exceed \$1,000,000 for Total Site Costs, the Participating Generators shall have no obligation under this Agreement to fund the portion of the costs in excess of \$1,000,000, provided, however, that the City and the other Parties shall retain any and all rights not specifically waived in this Agreement to seek contribution from other Parties to this Agreement as well as from any third parties for any such excess cost.

10. The Parties agree to waive consistency with the National Contingency Plan ("NCP") as to all work performed before or after the date of this Agreement.

11. The Parties agree that no portion of the tolling period beginning from January 1, 1995 up to the date that any Party to this Agreement mails written notification to all other Parties of its intent to terminate the tolling period shall be used for purposes of calculating the passage of time under an applicable statute of limitations for any claim that a Party may have against another Party relating to contamination at the Site.

12. The obligations of the Parties under this Agreement are limited solely to this Agreement and have no effect outside the terms of this Agreement. Nothing in this Agreement shall be an admission of law or fact or evidence of any liability or responsibility with respect to the Site. Nothing in this Agreement is intended to release, discharge, or in

any way affect any claim, cause of action, or demand in law or equity which the Parties may have against any other person or entity who is not a Party relating to the generation, storage, treatment, transportation, release, or disposal of any hazardous substances at, to, or from the Site.

13. The Parties do not admit or concede, and reserve the right to contest any determination, allegation, finding or conclusion regarding the Site in any action other than one brought by any of the Parties to enforce this Agreement.

14. This Agreement shall not create any private right, other than a right by any of the Parties to enforce this Agreement.

#### ALLOCATION OF COSTS

15. The Parties agree to fund jointly the cost of implementing the WDNR Approval and, in the event of Non-Approval, the Removal.

16. The Participating Generators shall pay the City \$69,800 for the Removal within 30 days of the execution of this Agreement. In the event of Non-Approval, this shall constitute the sole payment for which the Participating Generators are obligated under this Agreement.

17. In the event of WDNR Approval, the Participating Generators shall pay the City the balance of 67.5% of the Rust Estimate remaining after the payment made under paragraph 16, within 30 days of the date of mailing of the Rust Estimate. In the event of WDNR Approval, the City agrees to pay 32.5 percent of the Rust Estimate.

18. The City shall maintain the payments received from the Participating Generators in a separate account which shall not be commingled with monies from any source not covered by this Agreement (hereinafter the "Account"). The City is authorized to utilize the Account for the payment of costs incurred for the implementation of the WDNR Approval or, in the event of Non-Approval, the Removal.

19. The Parties agree that the City of Manitowoc, to date, has expended \$421,609 in project costs paid to Rust for cleanup activities at the Site. In the event of WDNR Approval and within 30 days of the date of the mailing of the Rust Estimate, the Participating Generators agree to reimburse the City an amount calculated in accordance with the following formula:  $\$421,609 - (\text{Rust Estimate} \times 32.5\%)$ . As a result of this reimbursement, the City is deemed to have contributed its 32.5 percent share of the Rust Estimate in accordance with paragraph 17 of this Agreement in the event of WDNR Approval.

20. If the total actual costs for the WDNR Approval exceed the Rust Estimate, the Participating Generators shall pay the City 67.5% of such excess costs within 45 days of the date of mailing by the City to the Participating Generators of notification of such excess costs provided, however, that the Participating Generators shall have no obligation for any portion of the total costs for the WDNR Approval in excess of \$1,000,000 Total Site Costs. In the event the total actual costs for the WDNR Approval are less than the Rust Estimate, the City shall distribute to the Participating Generators the balance in the Fund within 45 days of the date that WDNR has approved the completion of the WDNR Approval.

#### **ACTIONS TO BE PERFORMED BY THE CITY OF MANITOWOC**

21. Upon execution of this Agreement, the City shall direct its consultant, Rust, to conduct the Removal immediately or as promptly as site and weather conditions allow. Conduct of the Removal shall not be postponed until WDNR Approval or Non-Approval.

22. The Parties agree that the City of Manitowoc will continue to act as the primary representative dealing with the WDNR. The City of Manitowoc further agrees that it will not inform WDNR of the terms of this Agreement between the Participating Generators and the City unless prohibited by applicable law as defined in paragraph 29 of this Agreement.

23. The Parties agree that the City is the party responsible for entering into and overseeing all contracts for work performed at this Site under the WDNR Approval or the Removal. The City will use reasonable efforts, as determined solely in the exercise of the City's discretion, to perform tasks covered by the WDNR Approval or the Removal with City personnel.

24. The Parties agree that the City is responsible for monitoring the total costs for the WDNR Approval and for providing notification to the Participating Generators in the event that total costs of the WDNR Approval exceed the Rust Estimate. The Parties further agree that the City will provide a final accounting of all costs for the WDNR Approval upon its completion and make distributions, if any are required, in accordance with paragraph 20 of this Agreement.

#### **ACTIONS TO BE PERFORMED BY THE PARTICIPATING GENERATORS**

25. The Participating Generators will agree among themselves how to fund the Participating Generators' allocated share of the costs of the WDNR Approval or the Removal as required by this Agreement.

26. The Participating Generators shall designate one or more representatives to coordinate the work to be performed with the City and for the receipt of any notices or payments made by the City or Rust under this Agreement.

#### COVENANT NOT TO SUE

27. In the event WDNR approves the completion of the WDNR Approval for the Site in accordance with applicable law and the Parties have fulfilled all of their obligations under this Agreement, and the clean up is accomplished at a cost of not more than \$1,000,000.00 Total Site Costs, the Parties agree not to sue each other for costs associated with the WDNR Approval; provided, however, that nothing herein shall preclude or bar the Parties from any available legal remedies directed against anyone who is not a Party for such costs, nor shall anything herein preclude or bar any of the Parties from any available legal remedies against any other Party in the event of a suit or claim against any Party from any party who is not a signatory to this Agreement.

#### INDEMNIFICATION

28. Each Party agrees to indemnify, defend and hold harmless any Party and its representative(s) from and against any claim, demand, liability, cost, expense, legal fee, penalty, loss or judgment (collectively "Liability") which in any way relates to the good faith performance of any duties under this Agreement by any Party or its representative(s) on behalf of the Parties, including, but not limited to, any liability arising from any contract or agreement required to implement the WDNR Approval or the Removal. This indemnification shall not apply to any liability arising from a criminal conviction, unless the Party or its representative(s) demonstrates to the satisfaction of the Parties that the Party or its representative(s) had reasonable cause to believe that the conduct in question was lawful. However, nothing in this paragraph shall constitute a waiver or release of any claim or potential claim by any Party which is reserved within this Agreement. In addition, if assertion of any remedies against anyone who was not a Party which are specifically reserved in paragraph 27 of this Agreement results in claims being asserted by anyone who is not a Party against a Party who does not elect to assert such a claim ("Non-Claimant") or results in any person or entity asserting an indemnity claim against a Non-Claimant, then the claimants who are also Parties jointly and severally agree to defend, indemnify and hold harmless such Non-Claimants from such litigation costs, attorneys' fees, money damages, judgments and/or settlements relating to such contribution or indemnity claim.

### **CONFIDENTIALITY**

29. The City will maintain the confidentiality of this Agreement unless prohibited by applicable law, including, but not limited to, the Wisconsin Public Records law, Wis. Stats. §19.31 et. seq.

### **SUCCESSORS AND ASSIGNS**

30. This Agreement shall be binding upon the successors and assigns of the Parties. No assignment or delegation of the obligation to make any payment or reimbursement hereunder will release the assigning Party without the prior written consent of the remaining Parties.

### **MAILING**

31. Any reference to mail or mailing in this Agreement shall be accomplished by mailing a notification by certified mail, return receipt requested to the intended recipient(s).

### **APPLICABLE LAW**

32. For purposes of enforcement or interpretation of the provisions of this Agreement, the Parties agree that the laws of the State of Wisconsin shall be applicable, except to the extent federal law shall apply to questions arising under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, or the NCP promulgated thereunder, and further agree not to contest personal jurisdiction in the state or federal courts of Wisconsin with respect to litigation brought for such purposes.

### **NATURE OF AGREEMENT**

33. Nothing herein shall be deemed to create a partnership or joint venture and/or principal and agent relationship between or among the Parties.

### **COUNTERPARTS**

34. This Agreement may be executed in any number of counterparts, each of which shall be deemed a duplicate original, but all of which together shall constitute one and the same instrument and shall become effective as to each Party when the counterpart executed by such Party as of the date the last Party signs the Agreement provided all counterparts have been delivered to Susan H. Martin, Foley & Lardner.

APPENDIX A

Participating Generators

A & P

Heresite

Imperial Eastman

Invincible

Manitowoc Co.  
(Manitowoc Engineering)  
(Manitowoc Shipbuilding)

Manitowoc Products Co.  
(Chrysler Corporation)  
(White Consolidated)

Newell  
(Aluminum Spec.)  
(Mirro)

APPENDIX B

RECEIVED  
JAN 16 1996  
CITY ATTORNEY



January 16, 1996

MEMO TO: CITY ATTORNEY PAT WILLIS  
FROM: MICHAEL E. HAWLEY, P.E. *MEH*  
Director of Public Works & City Engineer  
SUBJECT: Gravel Pit Investigation

Pursuant to your request for information on costs incurred in the Gravel Pit Investigation, we have paid the following to date.



OFFICE OF DEPARTMENT  
OF PUBLIC WORKS  
ENGINEERING

RUST ENVIRONMENT & INFRASTRUCTURE

Contract 1 - Site Investigation Services  
from December, 1992 thru  
December 10, 1993 \$166,072.00  
(Final Payment 1/14/94)

Contract 2 - Continuing Site Investigation  
January, 1994 thru  
December 8, 1995 \$255,536.69  
(\$626.91 Paid 1/12/96)

MEH:ca  
Revised 1/16/96  
(450-353130-529900)

Michael E. Hawley  
Director of Public Works  
and City Engineer

CITY HALL  
817 Franklin Street  
P.O. Box 1697  
Manitowoc, WI 54221-1697  
Phone: (414) 683-4410  
FAX: (414) 683-4424



MODIFICATION

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

4-16-96  
Date of Execution

INVINCIBLE METAL FURNITURE CO.

Name of Party

By:

  
(Signature)

Name:

JOHN A. SCHUETTE

(Typed Name)

Title:

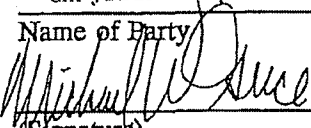
PRESIDENT

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3-12-96  
Date of Execution

Chrysler Corporation  
Name of Party  
By:   
(Signature)

Name: Michael W. Grice ✓  
(Typed Name)

Title: Senior Staff Counsel

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

April 15, 1996  
Date of Execution

City of Manitowoc  
Name of Party

By: *Patrick L. Willis*  
(Signature)

Name: Patrick L. Willis  
(Typed Name)

Title: City Attorney


**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 29, 1996  
Date of Execution

The Manitowoc Company, Inc.  
Name of Party

By:   
(Signature)

Name: E. Dean Flynn  
(Typed Name)

Title: Secretary & Manager - Corp. Insurance

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3/22/96  
Date of Execution

Great Atlantic & Pacific Tea Co., Inc.  
Name of Party

By: *Alfred Limbrick*  
(Signature)

Name: Alfred Limbrick ✓  
(Typed Name)

Title: Group Vice-President

**MODIFICATION**


35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 8, 1996  
Date of Execution

Gould Electronics Inc.  
Name of Party

By:

  
(Signature)

Name:

Lawrence W. Mitchell  
(Typed Name)

Title:

Associate Counsel


**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3-11-96  
Date of Execution

HERESITE PROTECTIVE COATINGS, INC.  
Name of Party

By:   
(Signature)

Name: GEOFFREY C. LIBAN  
(Typed Name)

Title: C.E.O.

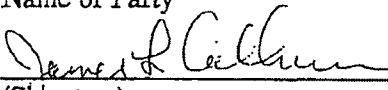
**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 12, 1996  
Date of Execution

White Consolidated Industries, Inc  
Name of Party

By:   
(Signature)

Name: James L. Calhoun  
(Typed Name)

Title: Vice President - Regulatory Affairs



**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 7, 1996  
Date of Execution

Newell Co.  
Name of Party

By: [Signature]  
(Signature)

Name: Richard H. Wolff  
(Typed Name)

Title: Secretary

Mike



January 11, 1993

MEMO TO: CITY ATTORNEY PAT WILLIS

FROM: MICHAEL E. HAWLEY, P. E. *MEH*  
 Director of Public Works and City Engineer

SUBJECT: Gravel Pit

File Search

Jean Campbell and Carol Adler searched the Engineering Department files for any material on the Gravel Pit, and couldn't find anything pertaining to industrial dumping. Mostly found old yearly crushing reports.

Tony Scherer searched the files at the Street Department, and found the attached report dated March 4, 1968, outlining materials and companies hauling to the Gravel Pit.

Company Drivers

We have only been able to come up with names of three drivers, one of whom we haven't been able to locate.

<u>Name</u>	<u>Name of Company</u>	<u>Address</u>	<u>Phone</u>
Erwin C. Musial	Manitowoc Company	2115 Madison	684-3274
Earl A. Mueller	Mirro Aluminum	944 So.26th	684-3727
Richard Budnik	Invincible	Unable to Locate	
(Mrs. Gladys Budnik might be his mother)		922 So.30th	682-2643

OFFICE OF DEPARTMENT  
OF PUBLIC WORKS,  
ENGINEERING

Michael E. Hawley  
Director of Public Works  
and City Engineer

CITY HALL  
7 Franklin Street  
P. Box 1597  
Manitowoc, WI 54221-1597  
Phone: (414) 683-4410  
Fax: (414) 683-4424

MEH:ca  
Attached

March 4, 1968

WASTE MATERIALS HAULED TO CITY GRAVEL PIT  
BY VARIOUS INDUSTRIAL PLANTS

MANITOWOC ENGINEERING CO.

CLEANING SOLVENT WATER SOLUBLE -- 600 Gal. @ week  
(noninflammable)

CUTTING and DRAIN OILS -- 200 Gal. @ week (inflammable).

MANITOWOC SHIPBUILDING INC.

WASTE FUEL OIL -- 1000 Gal. about four times a year Fall & Winter.  
(inflammable).

MIRRO ALUMINUM CO.

12,000 Gal. each two months of a 95% water, 5%  
soluble oil solution.

500 Gal. @ month of various combustibile oils.

500 Gal. @ year of used gear box oils.

2,700 Gal. each six weeks of 80% water, 20%  
Sulphuric acid solution.

1,000 Gal. of naptha on very rare occasions

(Obtained from D.P.W. Street Dept. files)

March 4, 1968

WASTE MATERIALS HAULED TO CITY GRAVEL PIT  
BY VARIOUS INDUSTRIAL PLANTS

INVINCIBLE METAL FURNITURE CO.

PAINT SLUDGE--- 55 Gal. @ week and 550 Gal. every third week.  
(inflammable)

MANITOWOC PRODUCTS CO.

PAINT SLUDGE -- 5 Cu. Yds. @ week (inflammable).

HERESITE & CHEMICAL CO.

WASTE ALCOHOL -- 25 Gal. to 30 Gal. @ week (inflammable).

IMPERIAL EASTMAN CORP.

WASTE OIL --- 200 Gal. @ week (inflammable).

WATER SOLUBLE COOLANT -- 100 Gal. @ week (noninflammable).

WHITE HOUSE MILK DIV.

CLEANING SOLVENT -- 20 Gal. @ Week (inflammable).

ALUMINUM SPECIALTY CO.

DRAIN OIL -- 110 Gal. @ week (inflammable).

PAINT STRIPPER -- 55 Gal. @ week (inflammable).

PAINT THINNER -- 55 Gal. @ week (inflammable).

(Obtained from D.P.W. Street Dept. files)

AFFIDAVIT RICHARD WHITE

STATE OF WISCONSIN )  
                                  ) ss  
MANITOWOC COUNTY )

I, Richard White, being duly sworn on oath, depose and state as follows:

1. I was the Department of Public Works Accountant for the City of Manitowoc from 1967 until approximately June of 1981.
2. That in my role as Accountant for the Public Works Department, I was familiar with the operation costs of the Newton Gravel Pit.
3. That I have a distinct memory that the industrial waste dumping at the Newton Gravel Pit ended some time in 1972 when the Department of Public Works shop moved from the 14<sup>th</sup> and Clark Street location to the 35<sup>th</sup> and Viebahn location.
4. I believe the above statements to be true and correct to the best of my recollection of the facts, and I make this affidavit on behalf of the City of Manitowoc.

Dated this 20<sup>th</sup> day of December 2010.

Richard White  
Richard White

Subscribed and sworn to before me this 20<sup>th</sup> day of December 2010.

Jane M. Rhode  
Notary Public     Jane M. Rhode  
My commission expires 6-3-2012

January 25, 2017

**VIA U.S. CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

White Consolidated Industries  
c/o Electrolux North America, Inc.  
CT Corporation System  
1300 East 9<sup>th</sup> Street  
Cleveland, Ohio 44114

RE: City of Manitowoc/Former Town of Newton Gravel Pit, 3130 Hecker Road,  
Manitowoc, WI - WDNR BRRTS Activity # 02-36-000268 (the "Site")

Dear Sir or Madam:

Pursuant to Wis. Stat. § 292.35(2g)(b) (copy enclosed), the City of Manitowoc (the "City") hereby requests that White Consolidated Industries provide access to or delivery of any records or documents in its custody, possession or control that relate to all of the following:

1. The type and quantity of any wastes containing hazardous substances that White Consolidated Industries or the party the City believes to be its corporate predecessor in interest, Manitowoc Products, (collectively, "White Consolidated") disposed of or discharged at the above-referenced Site and the dates of the disposal or discharge.
2. The identity of any person who may be a "responsible party" for contamination at the above-referenced Site under Wis. Stat. § 292.35(1).
3. The identity of subsidiary or parent corporations, as defined in Wis. Stat. § 292.31(8)(a)3, of any person who may be a responsible party. Section 292.31(8)(a)3 defines a "subsidiary or parent corporation" as "any business entity, including a subsidiary, parent corporation, or other business arrangement which has elements of common ownership or control or uses a long-term contractual arrangement with any person to avoid direct responsibility for conditions at a site or facility."

For context, I am attaching correspondence that includes a 1996 settlement agreement between the City and certain parties, including White Consolidated, as well as a January 11, 1993 City memorandum (based on a 1968 Manitowoc Department of Public Works document) that identifies certain parties, including Manitowoc Products, that arranged for disposal of waste at the Site.

White Consolidated Industries

January 25, 2017

Page 2

It is requested that White Consolidated provide delivery or access within thirty (30) days of your receipt of this request. The City intends to assemble all the available information in advance of the public hearing on the City's Draft Remedial Action Plan for the Site, which is currently planned for Monday, March 13, 2017 (details to follow).

Finally, as a preliminary request, please refrain from destroying any documents and/or any electronic information which may be in any way related to the Site or White Consolidated's/ Manitowoc Products' operations or activities during the 1960's and 1970's, when the Site was operating.

Thank you for your cooperation in this matter. If you have any questions or concerns, please contact me.

Very truly yours,

GODFREY & KAHN, S.C.



Edward B. Witte

Enclosure

cc: Molly E. Schmidt, Wisconsin Department of Natural Resources (via E-mail w/enclosure)  
Kathleen M. McDaniel, City of Manitowoc (via E-mail w/enclosure)

16706320.1

CHAPTER 292  
REMEDIAL ACTION

	SUBCHAPTER I		
	DEFINITIONS		
292.01	Definitions.		
	SUBCHAPTER II		
	REMEDIAL ACTION		
292.11	Hazardous substance spills.	292.37	Confidentiality of records.
292.12	Sites with residual contamination.	292.41	Abandoned containers.
292.13	Property affected by off-site discharge.	292.51	Cooperative remedial action.
292.15	Voluntary party remediation and exemption from liability.	292.53	Availability of environmental insurance.
292.16	Responsibility of certain municipalities acquiring closed landfills.	292.55	Requests for liability clarification and technical assistance.
292.19	Responsibility of persons conducting investigations.	292.57	Database of properties with residual contamination.
292.21	Responsibility of lenders and representatives.	292.63	Petroleum storage remedial action; financial assistance.
292.23	Responsibility of local governmental units; solid waste.	292.64	Removal of abandoned underground petroleum storage tanks.
292.24	Responsibility of local governmental units; hazardous waste.	292.65	Dry cleaner environmental response program.
292.25	Report on impact of exemptions from liability.	292.68	Reimbursement for disposal of PCB contaminated sediment.
292.255	Report on brownfield efforts.	292.70	Indemnification for disposal of polychlorinated biphenyls.
292.26	Civil immunity; local governmental units.	292.72	Brownfields revolving loan program.
292.31	Environmental repair.	292.81	Notice; lien.
292.33	Local government cost recovery cause of action.		SUBCHAPTER III
292.35	Local governmental unit negotiation and cost recovery.		ENFORCEMENT; PENALTIES
		292.93	Orders.
		292.94	Fees related to enforcement actions.
		292.95	Review of alleged violations; environmental repair and cost recovery.
		292.98	Violations and enforcement; environmental repair and cost recovery.
		292.99	Penalties.

SUBCHAPTER I  
DEFINITIONS

**292.01 Definitions.** In this chapter:

- (1) "Approved facility" has the meaning given in s. 289.01 (3).
- (1m) "Approved mining facility" has the meaning given in s. 289.01 (4) and includes a mining waste site, as defined in s. 295.41 (31).
- (1s) "Contaminated sediment" means sediment that contains a hazardous substance.
- (2) "Department" means the department of natural resources.
- (3) "Discharge" means, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying or dumping.
- (3m) "Engineering control" means an object or action designed and implemented to contain contamination or to minimize the spread of contamination, including a cap, soil cover, or in-place stabilization, but not including a sediment cover.
- (4) "Environmental pollution" means the contaminating or rendering unclean or impure the air, land or waters of the state, or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to fish, bird, animal or plant life.
- (5) "Hazardous substance" means any substance or combination of substances including any waste of a solid, semisolid, liquid or gaseous form which may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or which may pose a substantial present or potential hazard to human health or the environment because of its quantity, concentration or physical, chemical or infectious characteristics. This term includes, but is not limited to, substances which are toxic, corrosive, flammable, irritants, strong sensitizers or explosives as determined by the department.
- (6) "Hazardous waste" means any solid waste identified by the department as hazardous under s. 291.05.
- (7) "Landfill" means a solid waste facility for solid waste disposal.
- (8) "Lender" means a bank, credit union, savings bank, savings and loan association, mortgage banker or similar financial institution, the primary business of which is to engage in lending

activities or an insurance company, pension fund or government agency engaged in secured lending.

(9) "Lending activities" means advancing funds or credit to and collecting funds from another person; entering into security agreements, including executing mortgages, liens, factoring agreements, accounts receivable financing arrangements, conditional sales, sale and leaseback arrangements and installment sales contracts; conducting inspections of or monitoring a borrower's business and collateral; providing financial assistance; restructuring or renegotiating the terms of a loan obligation; requiring payment of additional interest; extending the payment period of a loan obligation; initiating foreclosure or other proceedings to enforce a security interest in property before obtaining title; requesting and obtaining the appointment of a receiver; and making decisions related to extending or refusing to extend credit.

(10) "Long-term care" means the routine care, maintenance and monitoring of a solid or hazardous waste facility following closing of the facility.

(11) "Municipality" means any city, town, village, county, county utility district, town sanitary district, public inland lake protection and rehabilitation district or metropolitan sewage district.

(12) "Nonapproved facility" has the meaning given in s. 289.01 (24).

(13) "Person" means an individual, owner, operator, corporation, limited liability company, partnership, association, municipality, interstate agency, state agency or federal agency.

(15) "Preventive measures" mean the installation or testing of equipment or devices, a designated way of performing a specified operation or the preparation of an emergency response plan.

(16) "Representative" means any person acting in the capacity of a conservator, guardian, court-appointed receiver, personal representative, testamentary trustee of a deceased person, trustee of a living trust, or fiduciary of real or personal property.

(17) "Secretary" means the secretary of natural resources.

(17g) "Sediment" means particles in the bed of a navigable water up to the ordinary high-water mark that are derived from the erosion of rock, minerals, soil, and biological materials and from chemical precipitation from the water column and that are transported or deposited by water.



**292.33 Local government cost recovery cause of action.** (1) **DEFINITION.** In this section “local governmental unit” has the meaning given in s. 292.11 (9) (c) 1.

(2) **CAUSE OF ACTION.** Except as provided in sub. (6), a local governmental unit may recover costs as provided in sub. (4) from a responsible person described in sub. (3) if the costs are incurred in connection with a property acquired as provided in s. 292.11 (9) (c) 1m. on which a hazardous substance has been discharged.

(3) **RESPONSIBLE PERSONS.** (a) Except as provided in par. (b), a local governmental unit may recover costs in an action under this section from any of the following:

1. A person who, at the time that the local governmental unit acquired the property, possessed or controlled the hazardous substance that was discharged on the property.

2. A person who caused the discharge of the hazardous substance on the property.

(b) A local governmental unit may not recover costs in an action under sub. (2) from a person listed in par. (a) if any of the following applies:

1. The person is exempt from liability under s. 292.11 (9) (e), 292.13, 292.15, 292.16, 292.19 or 292.21 with respect to the discharge that is the subject of the action.

2. The person has entered into a consent order under this chapter or ch. 289 or 291 or an agreement under s. 292.11 (7) (d) or 292.31 (8) (h) with respect to the discharge that is the subject of the action and the person is in compliance with the consent order or agreement.

3. The person is exempt from liability under s. 292.35 (9) (e) with respect to the discharge that is the subject of the action.

4. The discharge that was caused by the person and that is the subject of the action was in compliance with a permit, license, approval, special order, waiver or variance issued under ch. 283 or 285 or under corresponding federal statutes or regulations.

(4) **RECOVERABLE COSTS.** (a) Except as provided in par. (b), in an action under this section a local governmental unit may recover the reasonable and necessary costs that it incurs for all of the following:

1. Investigating environmental contamination on the property and planning remedial activities described in subd. 2.

2. Conducting remedial activities to restore the property for its intended future use.

3. Administering the activities under subds. 1. and 2. and bringing the action under this section, including costs, disbursements and engineering fees but excluding attorney fees.

(b) The costs determined under par. (a) shall be reduced by the fair market value of the property after completion of the activities under par. (a) 2.

(c) Recoverable costs under this subsection may not be reduced by the amount of any state or federal moneys received by the local governmental unit for any of the activities under par. (a).

(d) 1. In an action under this section, the liability of a responsible person described in sub. (3) (a) 2. is limited to the amount that bears the same proportion to the total costs under par. (a), adjusted as provided in par. (b), as the amount of the environmental pollution on the property from the discharge caused by the responsible person bears to all of the environmental pollution on the property from discharges of hazardous substances.

2. In an action under this section, the liability of a responsible person described in sub. (3) (a) 1. is limited to the amount of the total costs under par. (a), adjusted as provided in par. (b), that the local governmental unit is unable to recover from responsible parties described in sub. (3) (a) 2. less the amount that the local governmental unit is unable to recover because of the exemptions in sub. (3) (b) 3. and 4.

(5) **REPAYING STATE ASSISTANCE.** If a local governmental unit that recovers costs under this section received money from this state, other than under s. 292.11 (7) or 292.31 (1), (3) or (7), for any of the activities under sub. (4) (a), the local governmental unit

shall reimburse to the state an amount that bears the same proportion to the total amount recovered under this section as the amount received from the state, other than under s. 292.11 (7) or 292.31 (1), (3) or (7), bears to the total costs under sub. (4) (a) adjusted as provided in sub. (4) (b).

(6) **EXCEPTION.** A local governmental unit may not recover costs under this section for remedial activities conducted on a property or portion of a property with respect to a discharge after the department of natural resources, the department of safety and professional services, or the department of agriculture, trade and consumer protection has indicated that no further remedial activities are necessary on the property or portion of the property with respect to the discharge.

(7) **LIMITATION OF ACTION.** An action under this section shall be commenced within 6 years after the date that the local governmental unit completes the activities under sub. (4) (a) 2. or be barred.

**History:** 1999 a. 9; 2011 a. 32.

**292.35 Local governmental unit negotiation and cost recovery.** (1) **DEFINITIONS.** In this section:

(am) “Financial assistance” means money, other than a loan, provided by a governmental unit that is not a responsible party to pay a portion of the cost of investigation and remedial action for a site or facility.

(b) “Generator” means a person who, by contract, agreement or otherwise, either arranges or arranged for disposal or treatment, or arranges or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by the person, if the disposal or treatment is done by another person at a site or facility owned and operated by another person and the site or facility contains the hazardous substance.

(bm) “Local governmental unit” means a municipality, a redevelopment authority created under s. 66.1333 or a public body designated by a municipality under s. 66.1337 (4).

(c) “Owner or operator” means any of the following:

1. If the property is taken for tax delinquency, a person who owns or operates a site or facility at the time that the site or facility is taken for tax delinquency.

2. A person who owns or operates a site or facility at the time that the disposal or discharge of a hazardous substance at the site or facility occurs.

(e) “Responsible party” means a generator, an owner or operator, a transporter or a person who possesses or controls a hazardous substance that is discharged or disposed of or who causes the discharge or disposal of a hazardous substance.

(f) “Site or facility” means an approved facility, an approved mining facility, a nonapproved facility, a waste site or any site where a hazardous substance is discharged on or after May 21, 1978.

(g) “Transporter” means a person who accepts or accepted a hazardous substance for transport to a site or facility.

(2) **APPLICABILITY.** This section only applies to a site or facility if one of the following criteria is satisfied:

(a) The site or facility is owned by a local governmental unit.

(b) A local governmental unit that owns a portion of the site or facility commits itself, by resolution of its governing body, to paying more than 50 percent of the amount equal to the difference between the cost of investigation and remedial action for the site or facility and any financial assistance received for the site or facility.

(2g) **IDENTIFICATION OF RESPONSIBLE PARTIES.** (a) A local governmental unit that intends to use the cost recovery procedures in this section shall attempt to identify all responsible parties. All information obtained by the local governmental unit regarding responsible parties is a public record and may be inspected and copied under s. 19.35.

(b) Upon the request of an employee or authorized representative of the local governmental unit, or pursuant to a special inspec-

tion warrant under s. 66.0119, any person who generated, transported, treated, stored or disposed of a hazardous substance that may have been disposed of or discharged at the site or facility or who is or was an owner or operator shall provide the employee or authorized representative access to any records or documents in that person's custody, possession or control that relate to all of the following:

1. The type and quantity of hazardous substance that was disposed of or discharged at the site or facility and the dates of the disposal or discharge.
2. The identity of any person who may be a responsible party.
3. The identity of subsidiary or parent corporations, as defined in s. 292.31 (8) (a) 3., of any person who may be a responsible party.

(c) The local governmental unit shall maintain a single repository that is readily accessible to the public for all documents related to responsible parties, the investigation, the remedial action and plans for redevelopment of the property.

**(2r) PRELIMINARY REMEDIAL ACTION PLAN.** (a) The local governmental unit shall, in consultation with the department, prepare a draft remedial action plan.

(b) Upon completion of the draft remedial action plan, the local governmental unit shall send written notice to all responsible parties identified by the local governmental unit, provide public notice and conduct a public hearing on the draft remedial action plan. The notice to responsible parties shall offer the person receiving the notice an opportunity to provide information regarding the status of that person or any other person as a responsible party, notice and a description of the public hearing and a description of the procedures in this section. At the public hearing, the local governmental unit shall solicit testimony on whether the draft remedial action plan is the least costly method of meeting the standards for remedial action promulgated by the department by rule. The local governmental unit shall accept written comments for at least 30 days after the close of the public hearing.

(c) Upon the conclusion of the period for written comment, the local governmental unit shall prepare a preliminary remedial action plan, taking into account the written comments and comments received at the public hearing and shall submit the preliminary remedial action plan to the department for approval. The department may approve the preliminary remedial action plan as submitted or require modifications.

**(3) OFFER TO SETTLE; SELECTION OF UMPIRE.** (a) Upon receiving the department's approval of the preliminary remedial action plan, the local governmental unit shall serve an offer to settle regarding the contribution of funds for investigation and remedial action at the site or facility on each of the responsible parties identified by the local governmental unit, using the procedure for service of a summons under s. 801.11 and shall notify the department that the offer to settle has been served. The local governmental unit shall include in the offer to settle all of the following information:

1. The amount of the offer and a rationale for the amount.
2. The names, addresses and contact persons, to the extent known, for all of the responsible parties identified by the local governmental unit.
3. The location and availability of documents that support the claim of the local governmental unit against the responsible party.
4. The location of the public repository where documents relating to the site or facility are maintained, the times during which the repository is open and the name and telephone number of the contact person at the repository.
5. A description of the procedures under this section.

(b) The department shall maintain a list of competent and disinterested umpires qualified to perform the duties under subs. (4) to (6). None of the umpires may be employees of the department. Upon receiving notice from a local governmental unit under par. (a), the secretary or his or her designee shall select an umpire from

the list and inform the local governmental unit and responsible parties of the person selected.

(c) Within 10 days after receiving notice of the umpire selected by the department under par. (b), the local governmental unit may notify the department that the umpire selected is unacceptable. Within 10 days after receiving notice of the umpire selected by the department under par. (b), a responsible party may notify the department that the umpire selected is unacceptable or that the responsible party does not intend to participate in the negotiation. Failure to notify the department that the umpire is unacceptable shall be considered acceptance. If all responsible parties identified by the local governmental unit indicate that they do not intend to participate in the negotiation, the department shall inform the local governmental unit and the local governmental unit shall cease further action under this section.

(d) Upon receiving notice under par. (c) that the selected umpire is unacceptable, the secretary or his or her designee shall select 5 additional umpires from the list and inform the local governmental unit and responsible parties of the persons selected.

(e) Within 10 days after receiving notice of the umpires selected by the department under par. (d), the local governmental unit or a responsible party may notify the department that one or more of the umpires selected are unacceptable. Failure to notify the department shall be considered acceptance. The secretary or his or her designee shall select an umpire from among those umpires not identified as unacceptable by the local governmental unit or a responsible party or, if all umpires are identified as unacceptable, the secretary or his or her designee shall designate a person to be umpire for the negotiation.

**(4) NEGOTIATION PROCESS.** (a) The umpire, immediately upon being appointed, shall contact the department, the local governmental unit and the responsible parties that received the offer to settle and shall schedule the negotiating sessions. The umpire shall schedule the first negotiating session no later than 20 days after being appointed. The umpire may meet with all parties to the negotiation, individual parties or groups of parties. The umpire shall facilitate a discussion between the local governmental unit and the responsible parties to attempt to reach an agreement on the design and implementation of the remedial action plan and the contribution of funds by the local governmental unit and responsible parties.

(b) The umpire shall permit the addition to the negotiation, at any time, of any responsible party or any other person who wishes to be a party to the negotiated agreement.

(c) Negotiations may not continue for more than 60 days after the first negotiating session, unless an extension is approved by the department for cause, at the request of any party to the negotiation. The department shall approve an extension if necessary to settle insurance claims.

(d) The local governmental unit and the responsible parties that participate in negotiations shall pay for the costs of the umpire, whether or not an agreement among the parties is reached under sub. (5) or the parties accept the recommendation of the umpire under sub. (6). The umpire shall determine an equitable manner of paying for the costs of the umpire, which is binding.

**(5) AGREEMENT IN NEGOTIATION.** The local governmental unit and any of the responsible parties may enter into any agreement in negotiation regarding the design and implementation of the remedial action plan and the contribution of funds by the local governmental unit and responsible parties for the investigation and remedial action. The portion of the agreement containing the design and implementation of the remedial action plan shall be submitted to the department for approval. The department may approve that portion of the agreement as submitted or require modifications.

**(6) FAILURE TO REACH AGREEMENT IN NEGOTIATION.** (a) If the local governmental unit and any responsible parties are unable to reach an agreement under sub. (5) by the end of the period of negotiation, the umpire shall make a recommendation regarding the

design and implementation of the remedial action plan and the contribution of funds for investigation and remedial action by the local governmental unit and all responsible parties that were identified by the local governmental unit and that did not reach an agreement under sub. (5), whether or not the responsible parties participated in negotiations under sub. (4). The umpire shall submit the recommendation to the department for its approval within 20 days after the end of the period of negotiation under sub. (4) (c). The department may approve the recommendation as submitted or require modifications. The umpire shall distribute a copy of the approved recommendation to the local governmental unit and all responsible parties identified by the local governmental unit.

(b) The local governmental unit and the responsible parties that did not reach an agreement under sub. (5) shall accept or reject the umpire's recommendation within 60 days after receiving it. Failure to accept or reject the recommendation within 60 days shall be considered rejection of the recommendation. If the local governmental unit rejects the recommendation with respect to any responsible party, the recommendation does not apply to that responsible party. If a responsible party rejects the recommendation, it does not apply to that responsible party.

(7) **RESPONSIBLE PARTIES SUBJECT TO AN AGREEMENT OR RECOMMENDATION.** A responsible party that enters into an agreement under sub. (5) with a local governmental unit or that accepts the umpire's recommendation under sub. (6), if the local governmental unit does not reject the recommendation, is required to comply with the agreement or recommendation. When the responsible party has complied with the agreement or recommendation, the responsible party is not liable to the state, including under s. 292.11 (7) (b) or 292.31 (8), or to the local governmental unit for any additional costs of the investigation or remedial action; the responsible party is not liable to any other responsible party for contribution to costs incurred by any other responsible party for the investigation or remedial action; and the responsible party is not subject to an order under s. 292.11 (7) (c) for the discharge that is the subject of the agreement or recommendation.

(8) **RESPONSIBLE PARTIES NOT SUBJECT TO OR NOT COMPLYING WITH AN AGREEMENT OR RECOMMENDATION.** (a) In this subsection:

1. "Interest" means interest at the annual rate of 12 percent, commencing on the date of the umpire's recommendation under sub. (6) or, if there is no umpire's recommendation, on the date of the agreement under sub. (5).

2. "Litigation expenses" means the sum of the costs, disbursements and expenses, including engineering fees and, notwithstanding s. 814.04 (1), reasonable attorney fees necessary to prepare for or participate in proceedings before any court.

(b) A local governmental unit is entitled to recover litigation expenses and interest on the judgment against a responsible party if any of the following occurs:

1. The local governmental unit accepts the recommendation of an umpire under sub. (6), the responsible party rejects it and the local governmental unit recovers a judgment under sub. (9) against that responsible party that equals or exceeds the amount of the umpire's recommendation.

2. The local governmental unit and the responsible party enter into an agreement under sub. (5) or accept the umpire's recommendation under sub. (6), the responsible party does not comply with the requirements of the agreement or recommendation and the local governmental unit recovers a judgment against that responsible party based on the agreement or recommendation.

(c) A responsible party is entitled to recover litigation expenses from a local governmental unit if the responsible party accepts the recommendation of an umpire under sub. (6), the local governmental unit rejects the recommendation of the umpire under sub. (6) with respect to the responsible party, the local governmental unit institutes an action under sub. (9) against the responsible party and the local governmental unit recovers a judgment under sub. (9) against the responsible party that is equal to or less than the amount of the umpire's recommendation.

(9) **LIABILITY FOR REMEDIAL ACTION COSTS.** (a) This subsection applies only to a site or facility that satisfies the applicability provisions of sub. (2) and for which the remedial action specified in an agreement under sub. (5) or a recommendation under sub. (6) is completed.

(b) Except as provided in pars. (bm), (br) and (c), sub. (7) and s. 292.21, a responsible party is liable for a portion of the costs, as determined under pars. (c) to (e), incurred by a local governmental unit for remedial action in an agreement under sub. (5) or a recommendation under sub. (6) and for any related investigation. A right of action shall accrue to a local governmental unit against the responsible party for costs listed in this paragraph.

(bm) Paragraph (b) does not apply with respect to a discharge if the discharge was in compliance with a permit license, approval, special order, waiver or variance issued under ch. 283 or 285 or under corresponding federal statutes or regulations.

(br) Paragraph (b) applies with respect to a transporter only if the transporter does any of the following:

1. Selects the site or facility where the hazardous substance is disposed of without direction from the generator.

2. Violates an applicable statute, rule, plan approval or special order in effect at the time the disposal occurred and the violation causes or contributes to the condition at the site or facility.

3. Causes or contributes to the condition at the site or facility by an action related to the disposal that would result in liability under common law in effect at the time the disposal occurred, based on standards of conduct for the transporter at the time the disposal occurred.

(c) The liability of each party to the action to recover costs under par. (b) is limited to a percentage of the cost of the remedial action that is determined by dividing the percentage of that party's contribution to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility by the percentage of contribution of all responsible parties to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility. Section 895.045 does not apply to this paragraph.

(cm) Notwithstanding par. (c), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for the total contribution of all parties involved in the common scheme or plan.

(d) The finder of fact shall apportion the contribution of each responsible party to the environmental pollution resulting from the disposal or discharge of hazardous substances at the site or facility for the purposes of par. (c), using the following criteria, and any other appropriate criteria:

1. The ability of the responsible parties to demonstrate that their contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances can be distinguished from the contribution of other responsible parties.

2. The amount of hazardous substances involved.

3. The degree of toxicity of the hazardous substances involved.

4. The degree of involvement by the responsible parties in the generation, transportation, treatment, storage, disposal or discharge of the hazardous substances.

5. The degree of cooperation by the responsible parties with federal, state or local officials to prevent or minimize harm to the public health or the environment.

6. The degree of care exercised by the parties with respect to the hazardous substance, taking into account the characteristics of the hazardous substance.

(e) A responsible party is not liable under par. (b) if the responsible party establishes by a preponderance of the evidence that the responsible party's contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances was caused solely by any of the following:

1. An act of God.

2. An act of war.

3. An act or omission of a 3rd party, other than an officer, director, employee or agent of the responsible party, or other than a person whose act or omission occurs in connection with a direct or indirect contractual relationship with the responsible party if all of the following apply:

a. The responsible party establishes by a preponderance of the evidence that the responsible party exercised due care with respect to the hazardous substances that caused environmental pollution.

b. In exercising due care under subd. 3. a., the responsible party took into consideration the characteristics of the hazardous substances, in light of all relevant facts and circumstances.

c. The responsible party took precautions against foreseeable acts or omissions of the 3rd party and the consequences that could foreseeably result from those acts or omissions.

(f) Any responsible party may seek contribution from any other responsible party. Such a contribution claim may be brought as a separate action or may be brought in the action commenced against the responsible party under this section.

(10) TECHNICAL ASSISTANCE. The department shall provide technical assistance to an umpire at the request of the umpire. The department may limit the amount of staff time allocated to each negotiation.

(11) LIABILITY. Except as provided in sub. (7), no common law liability, and no statutory liability that is provided in other statutes, for damages resulting from a site or facility is affected in any manner by this section. The authority, power and remedies provided in this section are in addition to any authority, power or remedy provided in any other statutes or provided at common law.

(13) FEES. The department may, by rule, assess and collect fees to offset the cost of the department's activities under this section. The fees may include an advance deposit, from which the department shall return the amount in excess of the cost of the department's activities under this section.

**History:** 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150 s. 672; 2001 a. 16, 103.  
**Cross-reference:** See also ch. NR 749, Wis. adm. code.

**292.37 Confidentiality of records.** (1) RECORDS. Except as provided under sub. (2), any records or other information furnished to or obtained by the department in the administration of ss. 292.31 and 292.35 are public records subject to s. 19.21.

(2) CONFIDENTIAL RECORDS. (a) *Application.* An owner or operator of a solid waste facility may seek confidential treatment of any records or other information furnished to or obtained by the department in the administration of ss. 292.31 and 292.35.

(b) *Standards for granting confidential status.* Except as provided under par. (c), the department shall grant confidential status for any records or information received by the department and certified by the owner or operator of the solid waste facility as relating to production or sales figures or to processes or production unique to the owner or operator of the solid waste facility or which would tend to adversely affect the competitive position of the owner or operator if made public.

(c) *Emission data; analyses and summaries.* The department may not grant confidential status for emission data. Nothing in this subsection prevents the department from using records and other information in compiling or publishing analyses or summaries relating to the general condition of the environment if the analyses or summaries do not identify a specific owner or operator or the analyses or summaries do not reveal records or other information granted confidential status.

(d) *Use of confidential records.* Except as provided under par. (c) and this paragraph, the department or the department of justice may use records and other information granted confidential status under this subsection only in the administration and enforcement of ss. 292.31 and 292.35. The department or the department of justice may release for general distribution records and other information granted confidential status under this subsection if the owner or operator expressly agrees to the release. The department

or the department of justice may release on a limited basis records and other information granted confidential status under this subsection if the department or the department of justice is directed to take this action by a judge or hearing examiner under an order which protects the confidentiality of the records or other information. The department or the department of justice may release to the U.S. environmental protection agency, or its authorized representative, records and other information granted confidential status under this subsection if the department or the department of justice includes in each release of records or other information a request to the U.S. environmental protection agency, or its authorized representative, to protect the confidentiality of the records or other information.

**History:** 1995 a. 227 s. 993.

**292.41 Abandoned containers.** (1) DEFINITION. In this section, "abandoned container" means any container which contains a hazardous substance and is not being monitored and maintained.

(2) APPLICABILITY. (a) This section does not apply to abandoned containers which are located in an approved facility or a nonapproved facility.

(b) Action by the department under this section is not subject to s. 292.31.

(3) CONTINGENCY PLAN. (a) After consultation with other affected federal, state and local agencies and private organizations, the department shall establish by rule criteria and procedures for the development, establishment and amendment of a contingency plan for the taking of emergency actions in relation to abandoned containers.

(b) The contingency plan shall establish procedures and techniques for locating, identifying, removing and disposing of abandoned containers.

(4) REMOVAL OR OTHER EMERGENCY ACTION. The department or its authorized representative may contain, remove or dispose of abandoned containers or take any other emergency action which it deems appropriate under the circumstances.

(5) ACCESS TO PROPERTY AND RECORDS. Any officer, employee or authorized representative of the department, upon notice to the owner or occupant, may enter onto any property, premises or place at any time for the purposes of sub. (3) if the entry is necessary to prevent increased damage to the air, land or waters of the state, or may inspect any record relating to abandoned container management for the purpose of ascertaining the state of compliance with this section and the rules promulgated under this section. Notice to the owner or occupant is not required if the delay in providing the notice is likely to result in imminent risk to public health or welfare or the environment.

(6) ABANDONED CONTAINERS: APPROPRIATIONS. (a) The department may utilize moneys appropriated under s. 20.370 (2) (dv) and (my) in taking action under sub. (4). The department shall utilize these moneys to provide for the procurement, maintenance and storage of necessary equipment and supplies, personnel training and expenses incurred in locating, identifying, removing and disposing of abandoned containers.

(b) No more than 25 percent of the total of all moneys available under the appropriation under s. 20.370 (2) (dv) and (my) may be used annually for the procurement and maintenance of necessary equipment during that fiscal year.

(c) The department is entitled to recover moneys expended under this section from any person who caused the containers to be abandoned or is responsible for the containers. The funds recovered under this paragraph shall be deposited into the environmental fund for environmental management.

**History:** 1983 a. 410; 1985 a. 29 ss. 1957, 3202 (39); 1987 a. 27, 384; 1989 a. 31; 1991 a. 39; 1993 a. 453; 1995 a. 27; 1995 a. 227 s. 716; Stats. 1995 s. 292.41; 1995 a. 378 s. 46; 1997 a. 27.

**Cross-reference:** See also ch. NR 714, Wis. adm. code.

**292.51 Cooperative remedial action.** (1) In this section, "costs of remedying environmental contamination" means costs

May 24, 1996



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Wausau Insurance Companies  
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Mr. Richard Ventura  
CIGNA Property & Casualty  
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Ms. Brenda L. DuPree  
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Re: Town of Newton Gravel Pit

OFFICE OF CITY ATTORNEY

Dear Insurer Representatives:

The City of Manitowoc has entered into an agreement with waste generators at the Town of Newton Gravel Pit site to facilitate the clean up of environmental damage. I'm enclosing a copy of that Agreement for your records.

Our consultant, RUST Environment and Infrastructure is in the process of submitting their Remedial Action Plan to the Wisconsin Department of Natural Resources. The cost of the recommended remedial action is approximately \$460,000. In addition, the City has spent approximately \$425,000 in engineering fees to this point.

Very truly yours,

Patrick L. Willis  
City Attorney

PLW:es

Enc.

Patrick L. Willis  
City Attorney

CITY HALL  
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**AGREEMENT BETWEEN THE CITY OF MANITOWOC AND  
PARTICIPATING GENERATORS FOR THE TOWN OF NEWTON  
GRAVEL PIT SITE**

This Agreement is entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 1996 between the City of Manitowoc (the "City") and those Parties listed in Appendix A (the "Participating Generators") (with the City and the Participating Generators collectively referred to as the "Parties") and each, individually, as a "Party").

**FACTUAL BACKGROUND**

1. The Town of Newton Gravel Pit Site (the "Site") has been identified as requiring remediation. The required remediation is proposed to be carried out according to the Remedial Option #5 of the Site Investigation and Remedial Options Report (the "Remedial Plan") prepared by Rust Environment and Infrastructure ("Rust") dated January 19, 1995. Part of the Remedial Plan includes non-aqueous phase liquid removal at a cost not to exceed \$69,800 (the "Removal"). The Remedial Plan will be submitted to the Wisconsin Department of Natural Resources ("WDNR") by the City.
2. The Participating Generators are alleged to have generated waste during the relevant time period that may have been disposed of at the Site.
3. The City was the owner of the Site during the relevant time period.
4. The Parties have met on numerous occasions to discuss a privately financed investigation and remediation of the Site.
5. Consequently, in order to accomplish an expeditious remediation of the Site, the Participating Generators and the City have reached this Agreement to jointly fund the remediation at this Site.

**PURPOSE OF THIS AGREEMENT**

6. The purpose of this Agreement is to set forth the terms under which the Parties will jointly fund the remediation work and the manner in which the remediation will be accomplished.

## SCOPE OF THIS AGREEMENT

7. The terms and conditions of this Agreement between the City and the Participating Generators apply only to the funding and conducting of the Remedial Plan, identified as Remedial Option #5 in the Rust Report dated January 19, 1995, and to the partial payment by the Participating Generators of past costs incurred by the City for site investigation services, as provided in Appendix B ("Past Costs").

8. This Agreement is contingent in part upon WDNR approval of the cleanup proposed for the Site in substantial compliance with the Remedial Plan (hereinafter the "WDNR Approval"). If WDNR fails to approve the cleanup proposed for the Site in substantial compliance with the Remedial Plan on or before December 31, 1996 (hereinafter the "Non-Approval"), this Agreement shall be declared to be null and void for all purposes except for those portions of this Agreement that relate to the Removal. Rust shall estimate the cost of implementing the cleanup for the site approved by the WDNR within 30 days after the date of the approval issued by the WDNR (hereinafter the "Rust Estimate"). The Rust Estimate shall be for total site costs including the cost of the Removal and Past Costs incurred by the City ("Total Site Costs"). As used in this Agreement, the term "substantial compliance" shall mean that Rust Estimate is not greater than \$1,000,000 for Total Site Costs.

9. In the event following WDNR Approval it is later determined that the actual costs of implementing the WDNR Approval exceed \$1,000,000 for Total Site Costs, the Participating Generators shall have no obligation under this Agreement to fund the portion of the costs in excess of \$1,000,000, provided, however, that the City and the other Parties shall retain any and all rights not specifically waived in this Agreement to seek contribution from other Parties to this Agreement as well as from any third parties for any such excess cost.

10. The Parties agree to waive consistency with the National Contingency Plan ("NCP") as to all work performed before or after the date of this Agreement.

11. The Parties agree that no portion of the tolling period beginning from January 1, 1995 up to the date that any Party to this Agreement mails written notification to all other Parties of its intent to terminate the tolling period shall be used for purposes of calculating the passage of time under an applicable statute of limitations for any claim that a Party may have against another Party relating to contamination at the Site.

12. The obligations of the Parties under this Agreement are limited solely to this Agreement and have no effect outside the terms of this Agreement. Nothing in this Agreement shall be an admission of law or fact or evidence of any liability or responsibility with respect to the Site. Nothing in this Agreement is intended to release, discharge, or in

any way affect any claim, cause of action, or demand in law or equity which the Parties may have against any other person or entity who is not a Party relating to the generation, storage, treatment, transportation, release, or disposal of any hazardous substances at, to, or from the Site.

13. The Parties do not admit or concede, and reserve the right to contest any determination, allegation, finding or conclusion regarding the Site in any action other than one brought by any of the Parties to enforce this Agreement.

14. This Agreement shall not create any private right, other than a right by any of the Parties to enforce this Agreement.

#### ALLOCATION OF COSTS

15. The Parties agree to fund jointly the cost of implementing the WDNR Approval and, in the event of Non-Approval, the Removal.

16. The Participating Generators shall pay the City \$69,800 for the Removal within 30 days of the execution of this Agreement. In the event of Non-Approval, this shall constitute the sole payment for which the Participating Generators are obligated under this Agreement.

17. In the event of WDNR Approval, the Participating Generators shall pay the City the balance of 67.5% of the Rust Estimate remaining after the payment made under paragraph 16, within 30 days of the date of mailing of the Rust Estimate. In the event of WDNR Approval, the City agrees to pay 32.5 percent of the Rust Estimate.

18. The City shall maintain the payments received from the Participating Generators in a separate account which shall not be commingled with monies from any source not covered by this Agreement (hereinafter the "Account"). The City is authorized to utilize the Account for the payment of costs incurred for the implementation of the WDNR Approval or, in the event of Non-Approval, the Removal.

19. The Parties agree that the City of Manitowoc, to date, has expended \$421,609 in project costs paid to Rust for cleanup activities at the Site. In the event of WDNR Approval and within 30 days of the date of the mailing of the Rust Estimate, the Participating Generators agree to reimburse the City an amount calculated in accordance with the following formula:  $\$421,609 - (\text{Rust Estimate} \times 32.5\%)$ . As a result of this reimbursement, the City is deemed to have contributed its 32.5 percent share of the Rust Estimate in accordance with paragraph 17 of this Agreement in the event of WDNR Approval.



20. If the total actual costs for the WDNR Approval exceed the Rust Estimate, the Participating Generators shall pay the City 67.5% of such excess costs within 45 days of the date of mailing by the City to the Participating Generators of notification of such excess costs provided, however, that the Participating Generators shall have no obligation for any portion of the total costs for the WDNR Approval in excess of \$1,000,000 Total Site Costs. In the event the total actual costs for the WDNR Approval are less than the Rust Estimate, the City shall distribute to the Participating Generators the balance in the Fund within 45 days of the date that WDNR has approved the completion of the WDNR Approval.

#### **ACTIONS TO BE PERFORMED BY THE CITY OF MANITOWOC**

21. Upon execution of this Agreement, the City shall direct its consultant, Rust, to conduct the Removal immediately or as promptly as site and weather conditions allow. Conduct of the Removal shall not be postponed until WDNR Approval or Non-Approval.

22. The Parties agree that the City of Manitowoc will continue to act as the primary representative dealing with the WDNR. The City of Manitowoc further agrees that it will not inform WDNR of the terms of this Agreement between the Participating Generators and the City unless prohibited by applicable law as defined in paragraph 29 of this Agreement.

23. The Parties agree that the City is the party responsible for entering into and overseeing all contracts for work performed at this Site under the WDNR Approval or the Removal. The City will use reasonable efforts, as determined solely in the exercise of the City's discretion, to perform tasks covered by the WDNR Approval or the Removal with City personnel.

24. The Parties agree that the City is responsible for monitoring the total costs for the WDNR Approval and for providing notification to the Participating Generators in the event that total costs of the WDNR Approval exceed the Rust Estimate. The Parties further agree that the City will provide a final accounting of all costs for the WDNR Approval upon its completion and make distributions, if any are required, in accordance with paragraph 20 of this Agreement.

#### **ACTIONS TO BE PERFORMED BY THE PARTICIPATING GENERATORS**

25. The Participating Generators will agree among themselves how to fund the Participating Generators' allocated share of the costs of the WDNR Approval or the Removal as required by this Agreement.

26. The Participating Generators shall designate one or more representatives to coordinate the work to be performed with the City and for the receipt of any notices or payments made by the City or Rust under this Agreement.

#### COVENANT NOT TO SUE

27. In the event WDNR approves the completion of the WDNR Approval for the Site in accordance with applicable law and the Parties have fulfilled all of their obligations under this Agreement, and the clean up is accomplished at a cost of not more than \$1,000,000.00 Total Site Costs, the Parties agree not to sue each other for costs associated with the WDNR Approval; provided, however, that nothing herein shall preclude or bar the Parties from any available legal remedies directed against anyone who is not a Party for such costs, nor shall anything herein preclude or bar any of the Parties from any available legal remedies against any other Party in the event of a suit or claim against any Party from any party who is not a signatory to this Agreement.

#### INDEMNIFICATION

28. Each Party agrees to indemnify, defend and hold harmless any Party and its representative(s) from and against any claim, demand, liability, cost, expense, legal fee, penalty, loss or judgment (collectively "Liability") which in any way relates to the good faith performance of any duties under this Agreement by any Party or its representative(s) on behalf of the Parties, including, but not limited to, any liability arising from any contract or agreement required to implement the WDNR Approval or the Removal. This indemnification shall not apply to any liability arising from a criminal conviction, unless the Party or its representative(s) demonstrates to the satisfaction of the Parties that the Party or its representative(s) had reasonable cause to believe that the conduct in question was lawful. However, nothing in this paragraph shall constitute a waiver or release of any claim or potential claim by any Party which is reserved within this Agreement. In addition, if assertion of any remedies against anyone who was not a Party which are specifically reserved in paragraph 27 of this Agreement results in claims being asserted by anyone who is not a Party against a Party who does not elect to assert such a claim ("Non-Claimant") or results in any person or entity asserting an indemnity claim against a Non-Claimant, then the claimants who are also Parties jointly and severally agree to defend, indemnify and hold harmless such Non-Claimants from such litigation costs, attorneys' fees, money damages, judgments and/or settlements relating to such contribution or indemnity claim.

### **CONFIDENTIALITY**

29. The City will maintain the confidentiality of this Agreement unless prohibited by applicable law, including, but not limited to, the Wisconsin Public Records law, Wis. Stats. §19.31 et. seq.

### **SUCCESSORS AND ASSIGNS**

30. This Agreement shall be binding upon the successors and assigns of the Parties. No assignment or delegation of the obligation to make any payment or reimbursement hereunder will release the assigning Party without the prior written consent of the remaining Parties.

### **MAILING**

31. Any reference to mail or mailing in this Agreement shall be accomplished by mailing a notification by certified mail, return receipt requested to the intended recipient(s).

### **APPLICABLE LAW**

32. For purposes of enforcement or interpretation of the provisions of this Agreement, the Parties agree that the laws of the State of Wisconsin shall be applicable, except to the extent federal law shall apply to questions arising under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, or the NCP promulgated thereunder, and further agree not to contest personal jurisdiction in the state or federal courts of Wisconsin with respect to litigation brought for such purposes.

### **NATURE OF AGREEMENT**

33. Nothing herein shall be deemed to create a partnership or joint venture and/or principal and agent relationship between or among the Parties.

### **COUNTERPARTS**

34. This Agreement may be executed in any number of counterparts, each of which shall be deemed a duplicate original, but all of which together shall constitute one and the same instrument and shall become effective as to each Party when the counterpart executed by such Party as of the date the last Party signs the Agreement provided all counterparts have been delivered to Susan H. Martin, Foley & Lardner.

APPENDIX A

Participating Generators

A & P

Heresite

Imperial Eastman

Invincible

Manitowoc Co.  
(Manitowoc Engineering)  
(Manitowoc Shipbuilding)

Manitowoc Products Co.  
(Chrysler Corporation)  
(White Consolidated)

Newell  
(Aluminum Spec.)  
(Mirro)

APPENDIX B

RECEIVED  
JAN 16 1996  
CITY ATTORNEY



January 16, 1996

MEMO TO: CITY ATTORNEY PAT WILLIS  
FROM: MICHAEL E. HAWLEY, P.E. *MEH*  
Director of Public Works & City Engineer  
SUBJECT: Gravel Pit Investigation

Pursuant to your request for information on costs incurred in the Gravel Pit Investigation, we have paid the following to date.



OFFICE OF DEPARTMENT  
OF PUBLIC WORKS  
ENGINEERING

RUST ENVIRONMENT & INFRASTRUCTURE

Contract 1 - Site Investigation Services  
from December, 1992 thru  
December 10, 1993 \$166,072.00  
(Final Payment 1/14/94)

Contract 2 - Continuing Site Investigation  
January, 1994 thru  
December 8, 1995 \$255,536.69  
(\$626.91 Paid 1/12/96)

MEH:ca  
Revised 1/16/96  
(450-353130-529900)

Michael E. Hawley  
Director of Public Works  
and City Engineer

CITY HALL  
817 Franklin Street  
P.O. Box 1697  
Manitowoc, WI 54221-1697  
Phone: (414) 683-4410  
FAX: (414) 683-4424

MODIFICATION

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

4-16-96  
Date of Execution

INVINCIBLE METAL FURNITURE CO.

Name of Party

By:

  
(Signature)

Name:

JOHN A. SCHUETTE

(Typed Name)

Title:

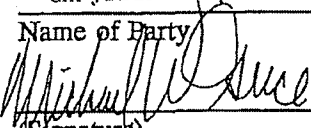
PRESIDENT

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3-12-96  
Date of Execution

Chrysler Corporation  
Name of Party  
By:   
(Signature)

Name: Michael W. Grice  
(Typed Name) ✓

Title: Senior Staff Counsel

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

April 15, 1996  
Date of Execution

City of Manitowoc  
Name of Party

By: *Patrick L. Willis*  
(Signature)

Name: Patrick L. Willis  
(Typed Name)

Title: City Attorney




**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 29, 1996  
Date of Execution

The Manitowoc Company, Inc.  
Name of Party

By:   
(Signature)

Name: E. Dean Flynn  
(Typed Name)

Title: Secretary & Manager - Corp. Insurance

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3/22/96  
Date of Execution

Great Atlantic & Pacific Tea Co., Inc.  
Name of Party

By: *Alfred Limbrick*  
(Signature)

Name: Alfred Limbrick ✓  
(Typed Name)

Title: Group Vice-President

**MODIFICATION**


35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 8, 1996  
Date of Execution

Gould Electronics Inc.  
Name of Party

By:

  
(Signature)

Name:

Lawrence W. Mitchell  
(Typed Name)

Title:

Associate Counsel


**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

3-11-96  
Date of Execution

HERESITE PROTECTIVE COATINGS, INC.  
Name of Party

By:   
(Signature)

Name: GEOFFREY C. LIBAN  
(Typed Name)

Title: C.E.O.

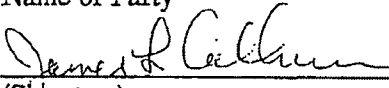
**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 12, 1996  
Date of Execution

White Consolidated Industries, Inc  
Name of Party

By:   
(Signature)

Name: James L. Calhoun  
(Typed Name)

Title: Vice President - Regulatory Affairs

**MODIFICATION**

35. No modification may be made to this Agreement except in writing and signed by all parties.

The Parties have caused this instrument to be signed by persons duly authorized to sign on behalf of the Parties.

March 7, 1996  
Date of Execution

Newell Co.  
Name of Party

By: [Signature]  
(Signature)

Name: Richard H. Wolff  
(Typed Name)

Title: Secretary

Mike



January 11, 1993

MEMO TO: CITY ATTORNEY PAT WILLIS

FROM: MICHAEL E. HAWLEY, P. E. *MEH*  
 Director of Public Works and City Engineer

SUBJECT: Gravel Pit

File Search

Jean Campbell and Carol Adler searched the Engineering Department files for any material on the Gravel Pit, and couldn't find anything pertaining to industrial dumping. Mostly found old yearly crushing reports.

Tony Scherer searched the files at the Street Department, and found the attached report dated March 4, 1968, outlining materials and companies hauling to the Gravel Pit.

Company Drivers

We have only been able to come up with names of three drivers, one of whom we haven't been able to locate.

<u>Name</u>	<u>Name of Company</u>	<u>Address</u>	<u>Phone</u>
Erwin C. Musial	Manitowoc Company	2115 Madison	684-3274
Earl A. Mueller	Mirro Aluminum	944 So.26th	684-3727
Richard Budnik	Invincible	Unable to Locate	
(Mrs. Gladys Budnik might be his mother)		922 So.30th	682-2643



OFFICE OF DEPARTMENT  
OF PUBLIC WORKS,  
ENGINEERING

Michael E. Hawley  
Director of Public Works  
and City Engineer

MEH:ca  
Attached

RY HALL  
7 Franklin Street  
P. Box 1597  
Manitowoc, WI 54221-1597  
Phone: (414) 683-4410  
Fax: (414) 683-4424

March 4, 1968

WASTE MATERIALS HAULED TO CITY GRAVEL PIT  
BY VARIOUS INDUSTRIAL PLANTS

MANITOWOC ENGINEERING CO.

CLEANING SOLVENT WATER SOLUBLE -- 600 Gal. @ week  
(noninflammable)

CUTTING and DRAIN OILS -- 200 Gal. @ week (inflammable).

MANITOWOC SHIPBUILDING INC.

WASTE FUEL OIL -- 1000 Gal. about four times a year Fall & Winter.  
(inflammable).

MIRRO ALUMINUM CO.

12,000 Gal. each two months of a 95% water, 5%  
soluble oil solution.

500 Gal. @ month of various combustibile oils.

500 Gal. @ year of used gear box oils.

2,700 Gal. each six weeks of 80% water, 20%  
Sulphuric acid solution.

1,000 Gal. of naptha on very rare occasions

(Obtained from D.P.W. Street Dept. files)



March 4, 1968

WASTE MATERIALS HAULED TO CITY GRAVEL PIT  
BY VARIOUS INDUSTRIAL PLANTS

INVINCIBLE METAL FURNITURE CO.

PAINT SLUDGE--- 55 Gal. @ week and 550 Gal. every third week.  
(inflammable)

MANITOWOC PRODUCTS CO.

PAINT SLUDGE -- 5 Cu. Yds. @ week (inflammable).

HERESITE & CHEMICAL CO.

WASTE ALCOHOL -- 25 Gal. to 30 Gal. @ week (inflammable).

IMPERIAL EASTMAN CORP.

WASTE OIL --- 200 Gal. @ week (inflammable).

WATER SOLUBLE COOLANT -- 100 Gal. @ week (noninflammable).

WHITE HOUSE MILK DIV.

CLEANING SOLVENT -- 20 Gal. @ Week (inflammable).

ALUMINUM SPECIALTY CO.

DRAIN OIL -- 110 Gal. @ week (inflammable).

PAINT STRIPPER -- 55 Gal. @ week (inflammable).

PAINT THINNER -- 55 Gal. @ week (inflammable).

(Obtained from D.P.W. Street Dept. files)

AFFIDAVIT RICHARD WHITE

STATE OF WISCONSIN )  
                                  ) ss  
MANITOWOC COUNTY )

I, Richard White, being duly sworn on oath, depose and state as follows:

1. I was the Department of Public Works Accountant for the City of Manitowoc from 1967 until approximately June of 1981.

2. That in my role as Accountant for the Public Works Department, I was familiar with the operation costs of the Newton Gravel Pit.

3. That I have a distinct memory that the industrial waste dumping at the Newton Gravel Pit ended some time in 1972 when the Department of Public Works shop moved from the 14<sup>th</sup> and Clark Street location to the 35<sup>th</sup> and Viebahn location.

4. I believe the above statements to be true and correct to the best of my recollection of the facts, and I make this affidavit on behalf of the City of Manitowoc.

Dated this 20<sup>th</sup> day of December 2010.

Richard White  
Richard White

Subscribed and sworn to before me this 20<sup>th</sup> day of December 2010.

Jane M. Rhode  
Notary Public Jane M. Rhode  
My commission expires 6-3-2012