

**MEMORANDUM**

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**TO:** Darsi Foss, Wisconsin Department of Natural Resources  
Christine Haag, Wisconsin Department of Natural Resources  
Molly Schmidt, Wisconsin Department of Natural Resources  
Roxanne Chronert, Wisconsin Department of Natural Resources  
Tauren Beggs, Wisconsin Department of Natural Resources

**FROM:** Edward B. Witte, Godfrey & Kahn  
Dan Koski, City of Manitowoc

**CC:** Kathleen McDaniel, City of Manitowoc  
Dan Koski, City of Manitowoc

**DATE:** April 3, 2018

**RE:** Analysis of Wis. Stats. §292.35(7)

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The City of Manitowoc (City) understands that the Wisconsin Department of Natural Resources (Department) has identified a potential concern that its approval of an umpire's recommendation under Wis. Stat. § 292.35(6) could result in an unintentional release of a Local Governmental Unit (LGU), such as the City, from further liability under § 292.35(7). § 292.35(7) provides, in pertinent part:

When the responsible party has complied with the agreement [in negotiation] or [the umpire's] 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.

The Department has suggested that § 292.35(7) could operate in a manner similar to the voluntary party liability exemption ("VPLE") under § 292.15. For a number of reasons, we do not believe that § 292.35(7) provides for a release of an LGU under the circumstances addressed by this statutory section.

For the reasons identified herein, the City believes the most straightforward interpretation of § 292.35(7) is that it provides limited contribution protection to settling "generator parties", and only to these generator parties. As demonstrated in each of the attached settlement agreements, the City and the three settling generator parties have interpreted § 292.35(7) in this manner. This interpretation is supported by the plain language and structure of the statute, as

well as by comparison with the VPLE program in § 292.15 and the contribution protection provision in CERCLA.

First, § 292.35(7) provides a limited release to “[a] responsible party that enters into an agreement under sub. (5) with a local government unit.” A “responsible party” necessarily cannot be the local governmental unit, since the LGU cannot enter into an agreement with itself. Even in the unlikely case where a quasi-municipal corporation, like a municipal redevelopment authority, could arguably enter an agreement with a related LGU, because the agreement would involve two parties (i.e. the LGU and the redevelopment authority), there would still be an LGU after all the settlements were finalized.

In addition, Subsection (7) applies to “a responsible party ... that accepts the umpire’s recommendation under sub. (6), if the local governmental unit does not reject the recommendation.” Because this portion of the statute requires the “responsible party” to accept the recommendation, on the one hand, and the LGU to “not reject” the recommendation, on the other hand, it is evident that the “responsible party” (actually any responsible party) and the LGU are separate entities here as well. The subsection goes on to provide that “the responsible party is not liable to the state... or to the local governmental unit for any additional costs of the investigation or remedial action.” The subsection here refers to the same “responsible party” defined earlier to exclude the LGU, and is, again, clearly suggesting that the “responsible party” is separate from the LGU (in part because the LGU cannot be liable to itself).

The broader structure of the statute also supports this interpretation. The process described in § 292.35(3)-(6) involves negotiation between the LGU and other responsible parties. The LGU serves an offer to settle upon all responsible parties, and the selected umpire subsequently helps negotiate a settlement between the LGU and the responsible parties. The statute does not suggest the LGU could “negotiate” on both sides as both the local government unit and a responsible party, which would render the role of the umpire meaningless. Presumably, the LGU would not need to be convinced of or negotiate the terms of the remedial action plan with itself. The only interpretation that preserves the meaning of §292.35(7) is that the “responsible party entering into an agreement ... with a local government unit or that accepts the umpire’s recommendation” cannot be the same LGU; accordingly, because the “responsible party” in (7) cannot be the LGU, the LGU is not released from liability to the state “for any additional costs of the investigation or remedial action.” Indeed, as the “owner” of the “site”, as required under § 292.35 for an LGU to be eligible for the negotiation and cost recovery, the LGU’s liability carries on indefinitely. § 292.35, and by way of the contribution protection, § 292.35(7), simply provide the means for shifting part of the financial responsibility an LGU would otherwise need to bear to the responsible generator parties.

The limited release in § 292.35(7) bears an analogy to the contribution protection found in CERCLA (42 U.S.C. §§ 9601 et seq.). § 292.35 resembles CERCLA in numerous ways, including its subject matter (cost recovery for disposal of hazardous substances), and its adoption of the Gore factors for determining an appropriate apportionment of costs among responsible parties. See § 292.35(9)(d). CERCLA also provides contribution protection to settling responsible parties: “A person who has resolved its liability to the United States or a State in an administrative to judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.” 42 U.S.C. § 9613(f)(2). The purpose of this

protection is to encourage responsible parties to settle with government parties without fear that other responsible parties will come after them for the same amount. Likewise, § 292.35(7) allows (non-municipal) responsible parties to settle with an LGU, which is effectively acting as a government party, and, by so doing, gain protection against claims by the state, LGU, or other responsible parties – but only as to that settling party.

The VPLE process, however, is substantially different than the limited contribution protection afforded by § 292.35(7). Section 292.15 provides that a voluntary party is “exempt from the provisions of” a number of statutes only upon the satisfaction of a number of specific conditions in Section 292.15(2), including an investigation approved by the Department, restoration of the environment, and obtaining a certificate of completion. An application and fee must also be submitted by the party seeking the exemption. No comparable conditions, nor an application or fee requirement, are found in § 292.35(7). There is also no structural or linguistic overlap between § 292.35(7) and 292.15.

Finally, legislative history suggests the drafters did not intend an overlap between §292.15(2) and §292.35(7), which were previously numbered as Wis. Stat. §144.76(2) and Wis. Stat. § 144.4422(7). Both § 144.76(2) and §144.4422(7) became law through 1993 Act 453. The City’s review of all legislative materials available and pertinent to 1993 Act 453 did not identify any notes or comments indicating that the exemption available through the VPLE process should also be available through §292.35(7). The absence of any legislative note or comment suggests that the two sections (and the relevant exemptions and releases from liability thereof) are distinct and non-overlapping.

The City appreciates the Department’s concerns, especially since it is the City’s understanding that this will be the first time that the Department has approved the recommendation of an umpire under § 292.35, and the Department wants to “get this right” as a precedent for future proceedings under this statute. To the extent it would provide greater peace of mind to the Department as a model for future § 292.35 actions, the City of Manitowoc would be agreeable to entering into a memorandum of understanding or other negotiated agreement confirming that it is not eligible for the exemption from liability identified in § 292.35(7), based upon the reasons identified in this correspondence.

Attachments

18741231.1

**SETTLEMENT, MUTUAL RELEASE AND COVENANT NOT TO SUE**

~~March~~ <sup>April</sup> This Settlement, Mutual Release and Covenant Not to Sue is made on this 2<sup>nd</sup> day of ~~March~~, 2018 (the "Effective Date") by and between the City of Manitowoc ("City") and Gould Electronics Inc. ("GEI"), each referred to herein as a "Party" and collectively as the "Parties."

**RECITALS**

**WHEREAS**, this matter arises out of contamination discovered at the site known as the Newton Gravel Pit, 3130 Hecker Road, Manitowoc, Wisconsin, WI/WDNR BRRTS Activity # 02-36-000268 (the "Site"), which is owned by the City; and

**WHEREAS**, the City initiated the municipal cost recovery procedure against GEI, among other generator parties, pursuant to Section 292.35, Wis. Stats, to recover costs the City had incurred and will reasonably incur in the future to address the contamination at the Site; and

**WHEREAS**, the City submitted a Remedial Action Plan ("RAP") in connection with the Site to the Wisconsin Department of Natural Resources ("WDNR") on June 12, 2017, which was approved by the WDNR on July 7, 2017; and

**WHEREAS**, the Parties have negotiated an agreement within the meaning of Wis. Stat. §§ 292.35(5) and (7) regarding the design and implementation of the RAP and the contribution of funds by GEI for the investigation and remedial action for the Site; and

**WHEREAS**, by entering into this Settlement, Mutual Release and Covenant Not to Sue, the City and GEI intend to fully and finally resolve all past, present and future Claims, as defined herein, arising out of or related to the Site, including without limitation the Claims specified in Wis. Stat. § 292.35(7).

**NOW, THEREFORE**, for the good and valuable consideration recited below and such other good and valuable consideration as may have been received, the Parties agree as follows:

1. **Definition of Claims.** For purposes of this Settlement, Mutual Release and Covenant Not to Sue, "Claims" means any and all claims at law or in equity, actions or causes of action of any kind, suits, demands, judgments, assessments, awards, damages, injuries, losses, penalties, fines, sanctions, charges, costs, obligations, liabilities (including without limitation sums paid in settlement of Claims), or other expenses (including without limitation reasonable fees and costs for attorneys, consultants, appraisers, accountants, witnesses, investigators and any other agents of the Parties), court costs and litigation expenses, and disbursements, and shall include, without limitation, claims for personal injury or death, property damage, statutory or regulatory claims under environmental laws (including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*), claims for contribution, investigation of property conditions, and any clean-up, remedial, removal, or restoration work.

“Claims” shall include all special, incidental, consequential, exemplary, or punitive damages.

2. The City Releases and Covenants Not to Sue. In consideration of the One Hundred Seventy Thousand Dollars (\$170,000.00) to be paid by GEI to the City (the “Payment”) as reflected in Paragraph 5 herein, and GEI’s other covenants and obligations under this settlement, the City hereby releases, forever discharges and covenants not to sue GEI, its parents, subsidiaries, predecessors, successors and affiliates, and their respective officers, directors and employees, from any and all past and future Claims in any way arising out of, resulting from or to result from the Site, whether asserted or not, known or unknown, developed or undeveloped and all liens of any kind or character which the City has or may have against GEI, its parents, subsidiaries, predecessors, successors and affiliates, and their respective officers, directors and employees, in respect thereof. The Parties agree that the terms of this Paragraph 2 shall not release, discharge, or limit any claims the City has or may have against Parker-Hannifin Corp. (“Parker”), as set forth in Paragraph 4, and that Parker shall not be deemed a third party beneficiary under this Settlement, Mutual Release and Covenant Not to Sue.
3. GEI’s Release of and Covenant Not to Sue the City. In consideration of the City’s assumption of past and future liability for remediating and otherwise maintaining the Site and the City’s other covenants and obligations under this settlement, GEI, on behalf of its parents, subsidiaries, and affiliates and their respective officers, directors and employees, hereby releases, forever discharges and covenants not to sue the City from any and all past and future Claims in any way arising out of, resulting from or to result from the Site, whether asserted or not, known or unknown, developed or undeveloped and all liens of any kind or character which GEI has or may have against the City in respect thereof.
4. GEI’s Release of and Covenant Not to Sue Parker Hannifin. GEI acknowledges that the City may seek recovery for site-related expenses from Parker and that the City is not, through this Settlement, Mutual Release and Covenant Not to Sue, releasing or discharging any Claims it has or may have against Parker arising out of, resulting from or to result from the Site. In further consideration of the City’s assumption of past and future liability for remediating and otherwise maintaining the Site and the City’s other covenants and obligations under this settlement, GEI, on behalf of its parents, subsidiaries, and affiliates, and their respective officers, directors and employees, hereby releases, forever discharges and covenants not to sue Parker from any and all past and future Claims, whether asserted or not, known or unknown, developed or undeveloped and all liens of any kind or character which GEI, its parents, subsidiaries, and affiliates and their respective officers, directors and employees has or may have against Parker arising out of, resulting from or to result from the Site; provided, however, that if Parker asserts a Claim or threatens to assert a Claim against GEI in any way arising out of, resulting from or to result from the Site, then GEI’s release of and covenant not to sue Parker as reflected in this Paragraph shall be null and void, and GEI shall be entitled to assert any Claim against Parker.

5. **Payment.** Within thirty days of the Effective Date, GEI shall make payment in the amount of One Hundred Seventy Thousand Dollars (\$170,000.00) to the City by check made payable to the City of Manitowoc.
  
6. **Miscellaneous.**
  - a. This Settlement, Mutual Release and Covenant Not to Sue constitutes a compromise and settlement and is not to be interpreted or construed as an admission by any of the Parties of any issue of fact, liability, causation, wrongdoing or omission of any kind, or of the merit or lack of merit of any of their positions. Each Party hereto expressly denies any liability to the other as well as any liability for the Site. Neither this Settlement, Mutual Release and Covenant Not to Sue nor the consideration described herein, shall be used as evidence of liability or wrongdoing at any time in any way. Moreover, the Parties hereto, covenant and agree not to disparage publicly the other Party regarding the subject matter described herein.
  - b. This Settlement, Mutual Release and Covenant Not to Sue constitutes an agreement under Wis. Stat. § 292.35(5), under which the Parties agree on the design and implementation of the RAP as submitted to and approved by the WDNR. GEI shall, upon request, provide WDNR with any necessary assurances regarding GEI's acceptance of the approved RAP.
  - c. For the purpose of construction and interpretation, this Settlement, Mutual Release and Covenant Not to Sue shall be deemed to have been drafted jointly by the Parties and shall not be construed against either Party.
  - d. Each Party represents that it has had the opportunity to consult with its attorney, and has carefully read and understands the scope and effect of the provisions of this Settlement, Mutual Release and Covenant Not to Sue.
  - e. This Settlement, Mutual Release and Covenant Not to Sue may be signed in counterparts, each of which shall be deemed original, but all of which together shall constitute one and the same instrument. A signature transmitted by facsimile or electronically shall be deemed an original. This Settlement, Mutual Release and Covenant Not to Sue shall be deemed to have been executed when all Parties have signed and delivered the same or separate copies thereof.
  - f. GEI does hereby represent and warrant that the GEI signatory is duly authorized to execute and deliver this Settlement, Mutual Release and Covenant Not to Sue in such manner as to create legal, valid, and enforceable obligations of GEI.
  - g. The City does hereby represent and warrant that the City signatory is duly authorized to execute and deliver this Settlement, Mutual Release and Covenant Not to Sue in such manner as to create legal, valid, and enforceable obligations that bind the Parties in accordance with the terms hereof.

- h. This Settlement, Mutual Release and Covenant Not to Sue shall be interpreted and enforced in accordance with the laws of Wisconsin. Any litigation arising hereunder shall be filed and maintained only in the Circuit Court for Manitowoc County.
- i. No modifications, amendment, or waiver of any provision of this Settlement, Mutual Release and Covenant Not to Sue shall be effective unless approved in writing by all Parties. Any Party's failure at any time to enforce any of the provisions of this Settlement, Mutual Release and Covenant Not to Sue shall in no way be construed as a waiver of such provisions and shall not affect such party's right thereafter to enforce each and every provision hereof in accordance with its terms.
- j. The undersigned hereby declare and represent that no promise, inducement, representation, or agreement not herein expressed or referenced has been made between the Parties. All agreements and understandings between the Parties related to the subject matter herein are embodied and expressed herein.

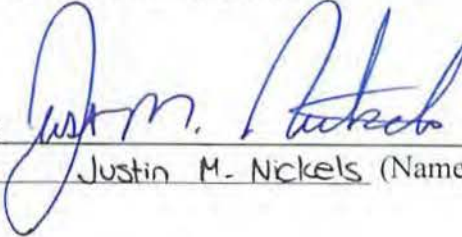
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***SIGNATURES CONTAINED ON NEXT 2 PAGES***

Signed, sealed and delivered this 2 day of April, 2018.

**CAUTION: READ BEFORE SIGNING BELOW**

CITY OF MANITOWOC

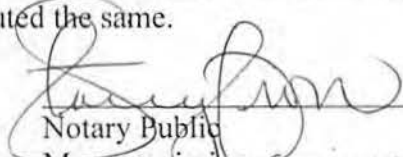
By:   
Justin M. Nickels (Name Printed)

By:   
Kathleen M. McDaniel (Name Printed)

STATE OF Wisconsin )  
 ) SS  
Manitowoc COUNTY )

On the 2nd day of April, 2018, before me personally appeared Justin M. Nickels, Mayor, and Kathleen M. McDaniel, City Attorney, known to me to be the persons named herein and who executed the foregoing Settlement, Mutual Release and Covenant Not to Sue and acknowledged to me that s/he voluntarily executed the same.



  
Notary Public  
My commission expires 03/26/21



Signed, sealed and delivered this 27 day of March, 2018.

**CAUTION: READ BEFORE SIGNING BELOW**

GOULD ELECTRONICS INC.

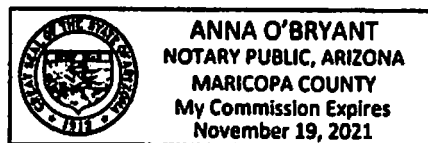
By: [Signature]  
TOMM CALLAHAN (Name Printed)

STATE OF Arizona )  
 ) SS  
Maricopa COUNTY )

On the 27 day of March, 2018, before me personally appeared Tomm Callahan known to me to be the person named herein and who executed the foregoing Settlement, Mutual Release and Covenant Not to Sue and acknowledged to me that s/he voluntarily executed the same.

[Signature]  
Notary Public  
My commission Nov 19, 2021

18621836.1



**MUTUAL RELEASE AND COVENANT NOT TO SUE**

This Mutual Release and Covenant Not to Sue is made on this 16<sup>th</sup> day of February, 2018 (the "Effective Date") by and between the City of Manitowoc ("City") and Geoff Liban ("Liban") and Fritzke ("Fritzke"), each referred to herein as a "Party" and collectively as the "Parties."

**RECITALS**

**WHEREAS**, this matter arises out of contamination discovered at the site known as the Newton Gravel Pit, 3130 Hecker Road, Manitowoc, Wisconsin, WI/WDNR BRRTS Activity # 02-36-000268 (the "Site"), which is owned by the City; and

**WHEREAS**, Liban and Fritzke are the successors in interest to Heresite & Chemical Co. and are considered "responsible parties" as that term is used in Section 292.35, Wis. Stats.; and

**WHEREAS**, the City initiated the municipal cost recovery procedure against Liban and Fritzke, among other generator parties, pursuant to Section 292.35, Wis. Stats., to recover costs the City had incurred and will reasonably incur in the future to address the contamination at the Site and the City is considered a "local government unit" as that term is used in Section 292.35, Wis. Stats.; and

**WHEREAS**, the City submitted a Remedial Action Plan ("RAP") in connection with the Site to the Wisconsin Department of Natural Resources ("WDNR") on June 12, 2017, which was approved by the WDNR on July 7, 2017; and

**WHEREAS**, on February 2, 2018, the Parties agreed in principle to resolve their differences under the terms and conditions set forth below; and

**WHEREAS**, by entering into this Mutual Release and Covenant Not to Sue, the City, Liban, and Fritzke intend to fully and finally resolve all past and future Claims arising out of or related to the Site.

**NOW, THEREFORE**, for the good and valuable consideration recited below and such other good and valuable consideration as may have been received, the Parties agree as follows:

1. **Definition of Claims.** For purposes of this Mutual Release and Covenant Not to Sue, "Claims" means any and all Claims at law or in equity, actions or causes of action of any kind, suits, demands, judgments, assessments, awards, damages, injuries, losses, penalties, fines, sanctions, charges, costs, obligations, liabilities (including without limitation sums paid in settlement of Claims), or other expenses (including without limitation reasonable fees and costs for attorneys, consultants, appraisers, accountants, witnesses, investigators and any other agents of the Parties), court costs and litigation expenses, and disbursements, and shall include, without limitation, claims for personal injury or death, property damage, statutory or regulatory claims under environmental laws, claims for contribution, investigation of property

conditions, and any clean-up, remedial, removal, or restoration work required by any federal, state, or local government authority or political subdivision. "Claims" shall include all special, incidental, consequential, exemplary, or punitive damages.

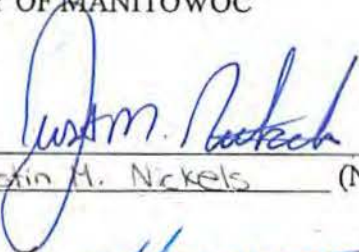
2. The City Releases and Covenants Not to Sue. For the sole consideration of Thirteen Thousand Two Hundred Fifty Dollars (\$13,250.00) to be paid by Liban and Fritzke, jointly and severally, to the City (the "Payment") as reflected in § 4 herein, the City hereby releases, forever discharges and covenants not to sue Liban and/or Fritzke, from any and all past and future Claims, whether asserted or not, known or unknown, developed or undeveloped and all liens of any kind or character which the City has or may have against Liban and/or Fritzke in any way arising out of, resulting from or to result from the Site.
3. Liban and Fritzke Release and Covenant Not to Sue. For the sole consideration of the City assuming past and future liability for remediating and otherwise maintaining the Site, Liban and Fritzke hereby release, forever discharge and covenant not to sue the City from any and all past and future Claims, whether asserted or not, known or unknown, developed or undeveloped and all liens of any kind or character which Liban and/or Fritzke has or may have against the City arising out of, resulting from or to result from the Site.
4. Payment. Within thirty days of the Effective Date, Liban and Fritzke, jointly and severally, shall make payment in the amount of Thirteen Thousand Two Hundred Fifty Dollars (\$13,250.00) to the City by check made payable to the City of Manitowoc.
5. Miscellaneous.
  - a. This Mutual Release and Covenant Not to Sue constitutes a compromise and settlement and is not to be interpreted or construed as an admission by any of the Parties of liability, causation, wrongdoing or omission of any kind, or of the merit or lack of merit of any of their positions. Each Party hereto expressly denies any liability to the other as well as any liability for the Site. Neither this Mutual Release and Covenant Not to Sue nor the consideration described herein, shall be used as evidence of liability or wrongdoing at any time in any way. Moreover, the Parties hereto, covenant and agree not to disparage publicly the other Party regarding the subject matter described herein. This Mutual Release and Covenant Not to Sue constitutes an agreement under Wis. Stat. § 292.35(5), under which the Parties agree on the design and implementation of the RAP. The Parties commit to cooperate with each other to effectuate the objectives of this Agreement.
  - b. For the purpose of construction and interpretation, this Mutual Release and Covenant Not to Sue shall be deemed to have been drafted jointly by the Parties and shall not be construed against either Party.

- c. Each Party represents that it has had the opportunity to consult with its attorney, and has carefully read and understands the scope and effect of the provisions of this Mutual Release and Covenant Not to Sue.
- d. This Mutual Release and Covenant Not to Sue may be signed in counterparts, each of which shall be deemed original, but all of which together shall constitute one and the same instrument. A signature transmitted by facsimile or electronically shall be deemed an original. This Mutual Release and Covenant Not to Sue shall be deemed to have been executed when all Parties have signed and delivered the same or separate copies thereof.
- e. This Mutual Release and Covenant Not to Sue shall be interpreted and enforced in accordance with the laws of Wisconsin. Any litigation arising hereunder shall be filed and maintained only in the Circuit Court for Manitowoc County.
- f. No modifications, amendment, or waiver of any provision of this Mutual Release and Covenant Not to Sue shall be effective unless approved in writing by all Parties. Any Party's failure at any time to enforce any of the provisions of this Mutual Release and Covenant Not to Sue shall in no way be construed as a waiver of such provisions and shall not affect such party's right thereafter to enforce each and every provision hereof in accordance with its terms.
- g. The undersigned hereby declare and represent that no promise, inducement, representation, or agreement not herein expressed or referenced has been made between the Parties. All agreements and understandings between the Parties related to the subject matter herein are embodied and expressed herein.

Signed, sealed and delivered this 5 <sup>March</sup> day of February, 2018.

**CAUTION: READ BEFORE SIGNING BELOW**

CITY OF MANITOWOC

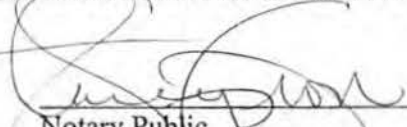
By:   
Justin M. Nickels (Name Printed)

By:   
Kathleen M. McDaniel (Name Printed)

STATE OF Wisconsin )  
 ) SS  
Manitowoc COUNTY )

On the 5<sup>th</sup> day of <sup>March</sup> February, 2018, before me personally appeared Justin M. Nickels, Mayor, and Kathleen M. McDaniel, City Attorney, known to me to be the persons named herein and who executed the foregoing Mutual Release and Covenant Not to Sue and acknowledged to me that s/he voluntarily executed the same.



  
Notary Public  
My commission 03/20/21 expires

Signed, sealed and delivered this 20th day of February 2018.

**CAUTION: READ BEFORE SIGNING BELOW**

By: Thomas Fritzke  
Thomas Fritzke

STATE OF WI )  
Manitowish COUNTY ) SS  
)

On the 20th day of February, 2018, before me personally appeared Thomas Fritzke known to me to be the person named herein and who executed the foregoing Mutual Release and Covenant Not to Sue and acknowledged to me that s/he voluntarily executed the same.

Sarah Endries  
Notary Public  
My commission 8/16/19.

18450902.2



Signed, sealed and delivered this 20th day of February 2018.

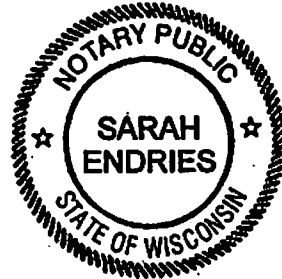
**CAUTION: READ BEFORE SIGNING BELOW**

By: *Geoff Liban*  
Geoff Liban

STATE OF WI )  
 ) SS  
Manitowoc COUNTY )

On the 20th day of February, 2018, before me personally appeared Geoff Liban known to me to be the person named herein and who executed the foregoing Mutual Release and Covenant Not to Sue and acknowledged to me that s/he voluntarily executed the same.

*Sarah Endries*  
Notary Public  
My commission expires 8/16/19.



**CONFIDENTIAL WIS. STAT. § 292.35(5) AGREEMENT IN NEGOTIATION AND  
MUTUAL RELEASE AND COVENANT NOT TO SUE**

This Wis. Stat. § 292.35(5) Agreement in Negotiation and Mutual Release and Covenant Not to Sue ("Agreement") is made on this 7<sup>th</sup> day of February, 2018 (the "Effective Date") by and between the City of Manitowoc ("City") and The Manitowoc Company, Inc. ("Manitowoc Company"), each referred to herein as a "Party" and collectively as the "Parties."

**RECITALS**

**WHEREAS**, this matter arises out of contamination discovered at the site known as the Newton Gravel Pit, 3130 Hecker Road, Manitowoc, Wisconsin, WI/WDNR BRRTS Activity # 02-36-000268 (the "Site"), which is owned by the City; and

**WHEREAS**, Manitowoc Company is the successor in interest to Manitowoc Shipbuilding Inc. and Manitowoc Engineering Co.; and

**WHEREAS**, the City initiated the municipal cost recovery procedure against Manitowoc Company, among other generator parties, pursuant to Section 292.35, Wis. Stats, to recover costs the City had incurred and will reasonably incur in the future to address the contamination at the Site; and

**WHEREAS**, the City submitted a Remedial Action Plan ("RAP") in connection with the Site to the Wisconsin Department of Natural Resources ("WDNR") on June 12, 2017, which was approved by the WDNR on July 7, 2017; and

**WHEREAS**, on December 18, 2017, the Parties reached an Agreement in Negotiation under Wis. Stat. § 292.35(5) under the terms and conditions set forth below; and

**WHEREAS**, by entering into this Agreement, the City and Manitowoc Company intend to fully and finally resolve all past and future Claims arising out of or related to the Site.

**NOW, THEREFORE**, for the good and valuable consideration recited below and such other good and valuable consideration as may have been received, the Parties agree as follows:

1. **Definition of Claims.** For purposes of this Agreement, "Claims" means any and all Claims at law or in equity, actions or causes of action of any kind, suits, demands, judgments, assessments, awards, damages, injuries, losses, penalties, fines, sanctions, charges, costs, obligations, liabilities (including without limitation sums paid in settlement of Claims), or other expenses (including without limitation reasonable fees and costs for attorneys, consultants, appraisers, accountants, witnesses, investigators and any other agents of the Parties), court costs and litigation expenses, and disbursements, and shall include, without limitation, claims for personal injury or death, property damage, statutory or regulatory claims under environmental laws, claims for contribution, investigation of property conditions, and any clean-up, remedial, removal, or restoration work required by any federal, state, or local



government authority or political subdivision. "Claims" shall include all special, incidental, consequential, exemplary, or punitive damages.

2. **The City Releases, Covenants Not to Sue.** For the sole consideration of Five Hundred Thousand Dollars (\$500,000.00) to be paid by Manitowoc Company to the City (the "Payment") as reflected in § 4 herein, the City hereby releases, forever discharges and covenants not to sue Manitowoc Company, its parents, subsidiaries, affiliates, insurance carriers and their respective officers, directors and employees from any and all past and future Claims, whether asserted or not, known or unknown, developed or undeveloped and all liens of any kind or character which the City has or may have against Manitowoc Company, its parents, subsidiaries, and affiliates and their respective officers, directors and employees in any way arising out of, resulting from or to result from the Site.
3. **Manitowoc Company's Release and Covenant Not to Sue.** For the sole consideration of the City assuming past and future liability for remediating and otherwise maintaining the Site, Manitowoc Company, its parents, subsidiaries, and affiliates and their respective officers, directors and employees hereby releases, forever discharges and covenants not to sue the City from any and all past and future Claims, whether asserted or not, known or unknown, developed or undeveloped and all liens of any kind or character which Manitowoc Company, its parents, subsidiaries, and affiliates and their respective officers, directors and employees has or may have against the City arising out of, resulting from or to result from the Site.
4. **Payment.** Within thirty days of the Effective Date, Manitowoc Company shall make payment in the amount of Five Hundred Thousand Dollars (\$500,000.00) to the City by check made payable to the City of Manitowoc.
5. **Miscellaneous.**
  - a. This Agreement constitutes a compromise and settlement and is not to be interpreted or construed as an admission by any of the Parties of liability, causation, wrongdoing or omission of any kind, or of the merit or lack of merit of any of their positions. Each Party hereto expressly denies any liability to the other as well as any liability for the Site. Neither this Agreement nor the consideration described herein, shall be used as evidence of liability or wrongdoing at any time in any way. Moreover, the Parties hereto, covenant and agree not to disparage publicly the other Party regarding the subject matter described herein. This Agreement constitutes an agreement under Wis. Stat. § 292.35(5), under which the Parties agree on the design and implementation of the RAP and the contribution of funds by Manitowoc Company. Upon payment of the contribution described in paragraph 2 of this Agreement, Manitowoc Company shall be deemed to have complied with this Agreement and shall be entitled to the immunities set forth in Wis. Stat. § 292.35(7). The Parties commit to cooperate with each other to effectuate the objectives of this Agreement.


- b. For the purpose of construction and interpretation, this Agreement shall be deemed to have been drafted jointly by the Parties and shall not be construed against either Party.
- c. Each Party represents that it has had the opportunity to consult with its attorney, and has carefully read and understands the scope and effect of the provisions of this Agreement.
- d. This Agreement may be signed in counterparts, each of which shall be deemed original, but all of which together shall constitute one and the same instrument. A signature transmitted by facsimile or electronically shall be deemed an original. This Agreement shall be deemed to have been executed when all Parties have signed and delivered the same or separate copies thereof.
- e. Manitowoc Company does hereby represent and warrant that the Manitowoc Company signatory is duly authorized to execute and deliver this Agreement in such manner as to create legal, valid, and enforceable obligations of Manitowoc Company.
- f. The City does hereby represent and warrant that the City signatory is duly authorized to execute and deliver this Agreement in such manner as to create legal, valid, and enforceable obligations that bind the Parties in accordance with the terms hereof.
- g. This Agreement shall be interpreted and enforced in accordance with the laws of Wisconsin. Any litigation arising hereunder shall be filed and maintained only in the Circuit Court for Manitowoc County.
- h. This Agreement and all matters relating to the terms and negotiations of this Agreement are and shall remain confidential and shall not be published, disseminated, circulated or disclosed by the Parties, except for: (1) disclosure to City officials and members of the Common Council; (2) disclosure to relevant state agencies, tax advisors or accountants, legal counsel, and such other persons as are necessary to carry out the Agreement; (3) disclosure to WDNR (including the WDNR-appointed umpire under Wis. Stat. § 292.35(3)); (4) disclosure to "responsible parties" identified by the City under Wis. Stat. § 292.35(2g) for the sole purpose of negotiating a Wis. Stat. § 292.35(5) Agreement with such parties; and (5) disclosures that are otherwise required by law, including disclosures required by the Wisconsin Open Records Law.
- i. No modifications, amendment, or waiver of any provision of this Agreement shall be effective unless approved in writing by all Parties. Any Party's failure at any time to enforce any of the provisions of this Agreement shall in no way be construed as a waiver of such provisions and shall not affect such party's right thereafter to enforce each and every provision hereof in accordance with its terms.
- j. The undersigned hereby declare and represent that no promise, inducement, representation, or agreement not herein expressed or referenced has been made

between the Parties. All agreements and understandings between the Parties related to the subject matter herein are embodied and expressed herein.

Signed, sealed and delivered this 7<sup>th</sup> day of February, 2018.

**CAUTION: READ BEFORE SIGNING BELOW**

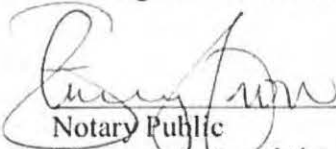
CITY OF MANITOWOC

By:   
Justin M. Nickels, Mayor

By:   
Kathleen M. McDaniel, City Attorney

STATE OF Wisconsin )  
 ) SS  
Manitowoc COUNTY )

On the 7<sup>th</sup> day of February, 2018, before me personally appeared Justin M. Nickels, Mayor, and Kathleen M. McDaniel, City Attorney, known to me to be the person(s) named herein and who executed the foregoing Wis. Stat. § 292.35(5) Agreement in Negotiation and Mutual Release and Covenant Not to Sue and acknowledged to me that s/he voluntarily executed the same.

  
Notary Public  
My commission EXPIRES 03/26/21



Signed, sealed and delivered this 13<sup>TH</sup> day of February 2018.

**CAUTION: READ BEFORE SIGNING BELOW**

THE MANITOWOC COMPANY, INC.

By:   
**Thomas L. Doerr, Jr.** (Name Printed)  
**Senior Vice President**  
**General Counsel & Secretary**

STATE OF WISCONSIN )  
MILWAUKEE COUNTY ) SS  
 )

On the 13<sup>TH</sup> day of February, 2018, before me personally appeared THOMAS L. DOERR, JR. known to me to be the person named herein and who executed the foregoing Wis. Stat. § 292.35(5) Agreement in Negotiation and Mutual Release and Covenant Not to Sue and acknowledged to me that s/he voluntarily executed the same.

GALO I. VARGAS  
 Notary Public  
 My commission IS PERMANENT