



March 8, 2016

Mr. Nicolas Sporacio
City of Manitowoc
900 Quay Street
Manitowoc, WI 54220

Subject: Clarification of the Local Government Unit Liability Exemption related to the potential acquisition of the Former Mirro Plant #9, 1512 Washington Street, City of Manitowoc, Wisconsin.
BRRTS #s 07-36-548528, 02-36-545108, FID # 436033730, Parcel # 052-000-246-000.00

Dear Mr. Sporacio:

On December 3, 2015, the Wisconsin Department of Natural Resources ("Department") received a request, dated November 13, 2015, for a general liability clarification letter from the City of Manitowoc (City). As requested, this response letter provides an explanation of the local government unit ("LGU") liability exemption outlined in Wis. Stat. § 292.11(9)(e), related to the City's potential acquisition of the Former Mirro Plant #9 property, located at 1512 Washington Street, Manitowoc, Wisconsin (the "Property"). The attached Site Location Map, which you provided to the Department, identifies the Property's location within the City.

In response to your request, the Department has reviewed the following documents, which were either submitted by the City or available in the Department's files about the Property:

- *Phase II Environmental Site Assessment*, dated March 10, 2005, prepared by Earth Science & Technology, LLC, and submitted to the Department on March 22, 2006;
- *Phase I Environmental Site Assessment*, dated January 19, 2009, prepared by AECOM and submitted to the Department on January 21, 2009;
- *Phase II Environmental Site Assessment*, dated June 4, 2009, prepared by AECOM and submitted to the Department on June 8, 2009;
- *Building Inspection Report*, dated December 23, 2009, prepared by STN Environmental JV and submitted to the Department on January 4, 2010;
- *Targeted Brownfields Assessment*, dated March 22 2011, prepared by Advanced Environmental Solutions and submitted to the Department on April 20, 2011;
- *Technical Assistance, Environmental Liability Clarification or Post-Closure Modification Request (Form #4400-237)*, from City of Manitowoc, received by the Department on December 3, 2015;
- Court Documents and Related Documents to Show the Legal Process under Wis. Stat. ch. 66, received via email from the City of Manitowoc on December 21, 2015; and
- Tax Incremental Financing Boundary Amendment Resolution from July 2010, and *PCB Contaminated Concrete Sampling and Unlabeled Drum Characterization Results Report*, received via email from the City of Manitowoc on February 8, 2016.

Background Information

There are multiple environmental repair ("ERP"), leaking underground storage tank ("LUST"), spill cases, and one general property case associated with the Property, dating back to 1988, in the Department's Remediation and Redevelopment Tracking System ("BRRTS") database. The following is a list of these cases:

- 1512 Washington St [Historic Spill], BRRTS # 04-36-046037, historic spill;
- 1512 Washington St, BRRTS # 04-36-049803, closed August 8, 1994;
- Mirro Plt #9, BRRTS # 04-36-223347, closed February 14, 1997;
- Mirro Plt #9 (East Side), BRRTS # 03-36-000085, closed March 2, 1999;
- Mirro Plt #9 – West Side, BRRTS # 02-36-216391, closed September 22, 2000;
- Mirro Plt #9, BRRTS # 03-36-274209, closed November 26, 2003;
- Mirro-Spirtas, BRRTS # 02-36-545108, opened March 7, 2006; and
- Mirro Facility (Former), BRRTS # 07-36-548528, general property

Solid and hazardous waste facility information for the Property, available on the Solid and Hazardous Waste Information System (“SHWIMS”), along with information for the USEPA removal action completed under Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”) is listed below:

- Mirro Co Plt 09 (Former), FID: 436033730, EPA ID: WID006076574, Facility Status: closed, Activity Status: active as a hazardous waste generator – very small; and
- Mirro Spirtas, CERCLIS ID: WIN000510545, EPA oversight of phase one of voluntary cleanup conducted by EJ Spirtas complete, EPA relinquished oversight to the Department for phase two of voluntary cleanup under Wisconsin’s One Cleanup Program Memorandum of Agreement (“OCP MOA”); phase two is not complete.

The Property once contained approximately 17 buildings (3-story, 5-story, 6-story, and 7-story), joined as one structure for use as the former Mirro Aluminum Plant #9 manufacturing facility, which produced various aluminum goods and novelties. The Property includes an entire city block, or about 3.72 acres, bordered by 15th, 16th, Washington, and Franklin Streets in Manitowoc. The Property is zoned for heavy industrial use. The surrounding area includes a mix of industrial, commercial, and residential land uses. The buildings were vacated by the Mirro Company when it closed the facility in 2003. In August 2003, the City passed a resolution under Wis. Stat. § 66.1105 for Tax Incremental Financing District (TID) No. 16 Project Plan consisting of 190.08 acres of land, which at the time, did not include the Property.

Based on information in the Department’s Mirro-Spirtas site file, BRRTS # 02-36-545108, the Department was first notified of contaminant discharges of petroleum and chlorinated volatile organic compounds (“VOCs”), polycyclic aromatic hydrocarbons (“PAHs”), Resource Conservation and Recovery Act (“RCRA”) metals, and polychlorinated biphenyls (“PCBs”) to soil and/or groundwater for this case from a Phase II Environmental Site Assessment (“ESA”) submitted to the Department in March 2006. In addition to the discharge to the soil and groundwater, there were also many issues associated with the buildings, including: solid waste materials, asbestos, PCBs & PCB contaminated materials subject to the Toxic Substances Control Act of 1976 (“TSCA”), and other hazardous substances subject to CERCLA.

The Property was purchased by EJ Spirtas Manitowoc, LLC (“EJ Spirtas”) in June 2006. A Brownfield Site Assessment Grant (“SAG”) was awarded by the Department in 2008 to conduct Phase I and Phase II ESA activities. The Phase I and II ESAs performed using the SAG funding were submitted to the Department in January 2009 and June 2009. Soil sampling from the Phase II ESA showed PCB concentrations above 50 parts per million (“ppm”), which triggered a notification from the Department to EPA under Wisconsin’s OCP MOA with EPA. The Department worked with EPA to manage, clean up, and dispose of PCB wastes regulated under 40 Code of Federal Regulations (“CFR”) 761. The containerized PCB oils were properly handled and disposed of in October, 2009, with remaining SAG funds.

In May 2009, the City requested Targeted Brownfields Assessment (“TBA”) assistance from the U.S. Environmental Protection Agency (“EPA”), to expand upon the SAG assessment work and continue to address building concerns. A building inspection report, completed in December 2009 under the TBA from EPA, focused on identifying and quantifying building materials and equipment that might require special handling and disposal as part of building demolition activities, including asbestos, lead-based paint, evaluation of light fixture ballast for PCBs, dielectric

fluids for PCBs, mercury-containing light bulbs and switches, identification of Freon-containing equipment, evaluation of containers housing chemicals and other fluids, and an evaluation of ash in floors.

All of the materials identified above were found on the Property in various amounts and concentrations. The City requested TBA assistance again in June 2010, for further evaluation of the Property through a supplemental Phase II ESA. During TBA activities, additional drums containing PCB transformer oil were discovered. The Department reported the additional findings to EPA under the OCP MOA. In August 2010, the City of Manitowoc passed a resolution under Wis. Stat. § 66.1105 approving Boundary and Text Amendment Number One to TID No. 16. This amendment included the addition of 30.436 acres of land, including the Property, that is blighted or in need of rehabilitation/conservation work.

In December 2010, the Department requested and received EPA assistance for a time-critical removal action at the Property to address the immediate threat posed by the PCB transformer oil drained from two on-site transformers, investigate potential environmental discharges resulting from missing PCB oil, and to identify potential responsible parties ("PRPs"). The TBA was completed in March 2011 and a report was submitted to the Department in April 2011. Also in March 2011, EPA assessed the Property to evaluate the need for a removal action. EPA approved the request for a time-critical removal action in April 2011.

During enforcement negotiations, it was agreed between EPA and EJ Spirtas, in March 2011, that EJ Spirtas would conduct a voluntary cleanup with EPA oversight to address the threats identified in EPA's site assessment. The cleanup was to be completed in two phases: 1) address immediate threats, including removal of hazardous waste, eliminating direct contact risks, and reducing the threat of off-site discharges through the sewers; and 2) the buildings would be demolished and remaining PCB-contaminated building materials would be properly disposed as required by TSCA. Remediation of sub-slab PCB contamination and sewer contamination may be required as well, pending access to the sub-slab to evaluate the contamination extent.

EJ Spirtas hired EQ to conduct phase one of the agreed-upon cleanup action in July 2011, which included complete draining and cleaning of transformers, contaminated concrete floors cleaned and marked for proper disposal during phase two, proper disposal of PCB-contaminated liquids (oil and wash water) and solids (wood flooring, debris, and containers), wipe sampling of the loading dock floor, loading dock drain sampled, cleaned, and plugged, and all mercury switches throughout the facility collected. Phase one of the removal action was considered complete by EPA.

Per the Department's request, EPA returned oversight for phase two of the removal action at the Property to the Department in 2013 to facilitate the provision of Brownfields financial assistance.

Efforts at the Property in 2013 to 2014 focused on asbestos abatement and preparation for demolition of the 3-story portion of the amalgamated building. Sampling and analysis plans for additional site investigation of soil and groundwater and for PCB-impacted building materials and unlabeled drums of unknown liquids were submitted to and approved by the Department and/or EPA in 2013 and 2014, respectively.

In March 2014, the 3-story portion of the building was razed; however, it was not adequately completed. Building demolition materials and waste were left on-site. There was no additional phase two progress made at the Property by EJ Spirtas in 2014.

To prevent unsafe work practices, and prevent the removal of valuable building materials, the City placed a "stop work" order on the Property in January 2015. Following negotiations, the City extended the demolition permit for EJ Spirtas in March 2015. No further progress was made on the demolition after the extension was granted.

In late February/early March 2015, the two identified areas of PCB-contaminated concrete and the liquids in the unlabeled drums were sampled using funding provided through a SAG awarded in July 2014. The primary purpose was to delineate the concrete contamination and characterize the unlabeled drum contents. Based on sampling

results, the concrete must be disposed of as TSCA hazardous waste and the unlabeled drums can be disposed of as a non-hazardous waste. Prior to building demolition, additional sampling will be needed to confirm that all the contaminated concrete was removed.

On May 8, 2015, the City Mayor delivered a letter to EJ Spirtas demanding a complete demolition permit application by June 22, 2015. The letter stated that an approved demolition permit application must be in place by that date, otherwise the City would begin condemnation proceedings on the Property by Common Council approval. EJ Spirtas gave the City an incomplete demolition permit application, failing to comply with the Mayor's demand, and the Common Council voted to begin the condemnation process.

On June 26, 2015, the City issued a raze order for the Property, under Wis. Stat. § 66.0413, to EJ Spirtas. On July 27, 2015, EJ Spirtas petitioned the Manitowoc County Circuit Court for a restraining order against the raze order. On September 29, 2015, the court ruled in favor of the City, upheld the raze order, and dismissed the restraining order request. An appeal to the raze order was submitted on October 9, 2015.

The City is currently moving forward with condemnation proceedings under Wis. Stat. Ch. 32, due to a lack of responsiveness and a failure to complete required work by the Property owner, EJ Spirtas.

Liability Determinations Related to Property Acquisition Via Condemnation and/or Blight Elimination

The Department provides the following clarifications and assurances to the City of Manitowoc concerning two potential methods of acquiring the Property. This letter is not a legal opinion or a directive, however, and its contents should be carefully reviewed and considered by the City's legal staff and/or advisors before taking action.

The definition of a LGU in Wis. Stat. §§ 292.11(9)(e)(1) and 292.23(1) is "a municipality, a redevelopment authority created under Wis. Stat. § 66.1333, a public body designated by a municipality under Wis. Stat. § 66.1337(4), a community development authority or a housing authority." The City of Manitowoc qualifies as an LGU under this definition.

In order to qualify for the LGU liability exemption, the LGU must acquire the Property through one of the methods listed in Wis. Stat. § 292.11(9)(e)(1m), and § 292.23(2). The Department understands the City is considering acquiring the Property either through condemnation proceedings under Wis. Stat. Ch. 32, or for the purpose of blight elimination.

Wis. Stat. § 292.11(9)(e)(1m)(c), and § 292.23(2)(c), state that an LGU qualifies for the liability exemption if "the local governmental unit acquired the property through condemnation or other proceeding under Wis. Stat. Ch. 32."

Under Wis. Stat. § 32.06, the initiation of condemnation by a municipality typically involves, at a minimum, the following three steps:

1. Determine the necessity for condemnation as provided in Wis. Stat. § 32.07, (and any related local ordinances);
2. Cause at least one appraisal to be made of the property proposed to be condemned; and
3. Attempt to negotiate personally with the owner of the Property or a representative, to reach an agreed upon price for acquisition.

If an agreement is reached with the property owner, the municipality shall record any conveyance by or on behalf of the owner of the property to the municipality executed as a result of negotiations under this subsection with the register of deeds of the county in which the property is located. The municipality shall also record a certificate of compensation stating the identity of all persons having an interest of record in the property immediately prior to its conveyance, the legal description of the property, the nature of the interest acquired and the compensation for such acquisition.

If an agreement is not reached, additional statutory requirements, beginning at Wis. Stat. § 32.06(3), must be complied with to complete the condemnation process.

Based on the information provided to the Department and described above in this letter, the City should meet the conditions of Wis. Stat. § 292.11(9)(e)(1m)(c), and § 292.23(2)(c), if the City acquires the Property through Wis. Stat. Ch. 32 condemnation proceedings. The City would be exempt from state responsibility to investigate and clean up hazardous substance discharges and solid waste previously disposed of at the Property, under the state's Spill and Solid Waste laws, if it satisfies all relevant provisions of the statutes noted above.

Acquiring property "for the purpose of slum clearance or blight elimination," per Wis. Stat. § 292.11(9)(e)(1m)(d), qualifies a local government for an exemption from Wis. Stat. §§ 292.11(3),(4),(7b) and (7c).

In reviewing requests for liability clarification related to property acquisition for the purpose of blight elimination, the Department looks to other state statutes for definitions of the terms "blighted property" and "blighted area." These statutes include, but are not limited to, Wis. Stat. § 66.1301 to § 66.1341 (urban redevelopment and renewal), Wis. Stat. 66.1105 (tax increment law), and Wis. Stat § 32.03(6) (condemnation). They contain similar, but not identical, definitions.

In addition to defining terms, these statutes, and the chapters they reside in, discuss proper processes and documentation for blight determinations. In addition to following statutory procedures, it is simply good practice to build a case in writing for all blight determinations that may result in property acquisition.

The Department generally agrees that the statutory requirements of the local government liability exemption are met when we receive documented evidence of: 1) A thorough blight determination performed by a qualified evaluator, and 2) Approval of this determination via a resolution of the local governmental unit's legislative body.

Local governments should document to the Department's satisfaction that they have followed appropriate statutory processes and procedures for specific situations. For example, some statutes require that a public hearing be held about the blight determination; others have two-thirds majority approval requirements, etc.

In the situation involving the Property, the Department has learned from City staff, and an informal review of the city development plans available on municipal web site, that the Property is identified as "blighted" on a map included in City resolution 415, July 2010, titled Boundary and Text Amendment Number One (1) to Tax Incremental Financing (TIF) District No. 16 Project Plan, but there does not appear to be written documentation of how the blight determination was made or what facts support it.

The Property was also referenced in the City's 2009 Downtown & River Corridor Master Plan, and identified as needing environmental repair work and building demolition, but no supporting documentation of blight was noted.

If the City intends to proceed with acquisition of the Property for purposes of blight elimination, the Department suggests that the following process, or something substantially similar, be used to make and document a statutorily sound determination of blight.

Just as an example, one possible blight determination process that would likely satisfy statutory requirements may run as follows:

1. Review definition of "blighted property" found in Wis. Stat. § 66.1333(2m)(bm).
2. The Manitowoc Community Development Authority (CDA) creates a document that includes findings of fact about conditions at the Property that demonstrate it is a "blighted property" per the statutory definition. Photos may be useful too.
3. Follow the process for acquiring individual blighted properties outlined in Wis. Stat. § 66.1333(5)(c)(1g), which, in summary, includes:

- a. Obtaining advance approval from the city's common council, by at least a two-thirds vote of all members, for acquisition of the property.
 - b. The two-thirds approval must be by resolution and the resolution must contain a finding by the council "that a comprehensive redevelopment plan is not necessary to determine the need for the acquisition, the uses of the property after acquisition and the relation of the acquisition to other property redevelopment by the authority."
4. Provide public notice of an informational hearing about the blight determination at the property (see Wis. Stat. § 66.1333(5)(c)(2), for specific notice requirements for affected parties, along with other details).
 5. Hold a public hearing about the blight determination.
 6. CDA adopts a resolution approving the blight determination, by a two-thirds vote of all members, and outlines next steps, including acquisition, for cleanup and reuse of the property.
 7. CDA forwards their blight resolution to the common council.
 8. Common council adopts the recommended resolution by a two-thirds vote of all members.
 9. CDA and/or City proceed with acquisition of the property for the purpose of blight elimination.

Once a statutorily sufficient blight determination is in place, and the City's legislative body approves acquisition of the Property for the purpose of blight elimination, the City should be able to acquire the property through a purchase, donation, condemnation, or any other method, and obtain the LGU liability exemption.

Upon completion of this, or a substantially similar process, the Department requests a summary memo of the process used, a copy of the blight determination document, a copy of the approved resolution, and the executed deed.

If the process suggested above, or something substantially similar, is used to define and acquire the Property, the City should meet the conditions of Wis. Stat. § 292.11(9)(e)(1m)(c), and § 292.23(2)(c), and would be exempt from state responsibility to investigate and clean up hazardous substance discharges and solid waste previously disposed of at the Property, under the state's Spill and Solid Waste laws, if it satisfies all relevant provisions of the statutes noted above.

State Exemption Conditions and Limitations

This liability exemption protects a LGU from receiving a responsible party notice from the Department, unless the hazardous substance discharge or disposal is/was caused by an action taken by the LGU, or by failure of the LGU to take "limited actions" to prevent further discharges. Those limited actions include:

- Sampling and analyzing unidentified substances in containers stored above ground on the Property;
- Removing and disposing, or properly storing, any hazardous substances in above ground containers that are leaking or likely to leak;
- Restricting access to the Property to minimize costs or damages that may result from unauthorized persons entering the Property; and
- Immediately reporting any identified discharges of hazardous substances on the Property to the Department.

Federal Liability Protections

In addition to state liability protections, a LGU is also eligible for federal CERCLA liability protections in certain situations. In general, CERCLA provides liability protection to local governments that acquire property as a function of their governmental powers. This is called the Involuntary Acquisitions Exemption, and includes obtaining property through bankruptcy, tax delinquency, abandonment, and other circumstances in which the local government involuntarily acquires title by virtue of its function as a sovereign. More information is available on the US EPA web site at: <http://www.epa.gov/enforcement/state-and-local-government-activities-and-liability-protections>.

In situations involving the purchase of a property, a LGU can obtain CERCLA liability protections if it qualifies as a bona fide prospective purchaser. One key requirement is the completion a Phase I environmental site assessment (ESA) that meets the All Appropriate Inquiries ("AAI") standards under 40 CFR, Part 312. This federal standard also requires that a Phase I ESA be completed within 180 days prior to acquisition of a property. ESA's following the American Society for Testing and Materials ("ASTM") Standard E1527-13, meet EPA's AAI standards.

For more information, a US EPA fact sheet, titled "CERCLA Liability and Local Government Acquisitions and Other Activities," is available at <http://www.epa.gov/sites/production/files/documents/local-gov-liab-acq-fs-rev.pdf>.

Future Use of the Property

If the City intends to use or redevelop the Property after acquiring it through condemnation or for the purpose of blight elimination, the City should discuss proposed Property improvements with the Department before proceeding. The City is required to take any action the Department determines is necessary to reduce to acceptable levels any substantial threat to public health or safety when the Property is developed or put into its intended use. The City must also comply with continuing obligations, if applicable, associated with closed environmental cases on the Property.

This state liability determination is based on the information provided in the above referenced documents. If new or more extensive contamination is discovered at the Property, the City is required to notify the Department in accordance with Wis. Stat. § 292.11(2). The City should also know that the LGU exemption from the state Spill Law and Solid Waste Management Requirements will apply to the City throughout the City's ownership of the Property, but these liability protections are not transferable from the City to future owners, except to another eligible LGU.

Information on all LGU exemption determinations and other contaminated site activities is tracked in a Department database that is available on the internet at <http://dnr.wi.gov/botw/SetUpBasicSearchForm.do>. The Bureau for Remediation and Redevelopment Tracking System ("BRRTS") identification number for this location can be found at the top of this letter. The Property, if it is acquired in a manner consistent with Wis. Stat. § 292.11(9)(e)(1m), will be identified in the database as a location where the Department has made an "LGU Exemption" determination.

The Department hopes this letter provides the City with the requested clarification concerning the City's potential LGU exemption at the Property. We look forward to working with you on future redevelopment of the Property. If you have questions regarding technical issues at the Property please contact project manager Tauren Beggs at (920) 662-5178, or contact Barry Ashenfelter at (608) 267-3120 regarding liability exemption issues.

Sincerely,



Roxanne N. Chronert, Team Supervisor
Northeast Remediation & Redevelopment Program

Attachment: Site Location Map, prepared by the City of Manitowoc, dated 10/07/2015

cc: Kathleen McDaniel – City Attorney (electronic)
Tauren Beggs – NER (electronic)
Barry Ashenfelter – RR/5 (electronic)

