



March 18, 2019

Ms. Kathleen McDaniel
Attorney, City of Manitowoc
900 Quay Street
Manitowoc, WI 54220-4543

Subject: Applicability of the State Local Governmental Unit Environmental Liability Exemption for the Former Railroad Property, North 10th and North 11th Streets, Manitowoc, Wisconsin
DNR BRRTS #: 07-36-583000

Dear Ms. McDaniel:

On January 16, 2019, the Wisconsin Department of Natural Resources (DNR) received your request, dated January 11, 2019, for an environmental liability clarification letter for approximately 20.136 acres of land located at and around North 10th and 11th Streets, City of Manitowoc, Manitowoc County, Wisconsin (the Property). The Property is comprised of 23 individual county tax parcels. The Property is further identified on the map included with this letter as Attachment A.

This letter provides clarification to the City of Manitowoc Community Development Authority (CDA) about the local governmental unit (LGU) liability exemption authorized by Wis. Stat. § 292.11(9)(e), as well as notice of statutory conditions required to maintain the exemption, and a reminder of an LGU's responsibilities if any elective demolition, cleanup or redevelopment activities occur on the Property. This letter also includes the DNR's determination about the potential applicability of the LGU liability exemption at the Property, should the CDA take title, given the proposed method of Property acquisition.

Documents and Other Information Reviewed

The DNR has reviewed the following documents provided by the City of Manitowoc (City) and the CDA to help make a determination about the potential future applicability of the LGU liability exemption for the Property:

- *Technical Assistance, Environmental Liability Clarification or Post-Closure Modification Request*, DNR Form 4400-237, with attachments and review fee, dated January 11, 2019, submitted by Kathleen McDaniel, City of Manitowoc Attorney;
- *Resolution Declaring the Canadian National Peninsula Blighted and Authorizing the Community Development Authority to Acquire and Assist the Redevelopment of the Property*, Resolution 18-0968, dated September 18, 2018, signed by Justin Nickels, City of Manitowoc Mayor; and
- *10th Street Railroad Property, Manitowoc, Wisconsin, Phase I Environmental Site Assessment*, dated August 16, 2018, submitted by Harris Byers, Stantec.

The DNR has also reviewed the following Bureau of Remediation & Redevelopment Tracking System (BRRTS) case files associated with the Property:

- Holmes Oil Corp, BRRTS # 03-36-001962;
- WCL – Turntable Former Roundhouse, BRRTS # 02-36-176478; and
- WCL – 200 N 10th St, BRRTS # 02-36-000408.

Environmental Activity Summary for the Property

The Property is currently owned by Wisconsin Central Ltd. and consists of 20.136 acres of land. The Property was historically used primarily for railroad operations and is now largely vacant land. A Phase I Environmental Site Assessment (ESA) was completed for the Property on August 16, 2018. The Phase I ESA identified five Recognized Environmental Conditions (RECs):

- Prior railroad use: Rail operations remained at the Property until the early 2000s. Identified railroad features include multiple tracks/spurs, rail depots, a turn table, an engine house, a cinder pit, and multiple maintenance garages/storage sheds.
- Prior industrial use: Industrial activities include bulk coal storage, bulk petroleum storage, ship building, metal/scrap/junk yard storage and other uses.
- Residual impacts to soil and groundwater: Documented releases of hazardous substances were assessed and residual impacts to soil and groundwater are being managed by continuing obligations associated with the closed environmental cases.
- Apparent anthropogenic fill: Fill materials including cinders/ash/coal/clinkers and piles of soil fill are present at the Property.
- Storage/dumping by adjacent property owners: Adjacent property occupants appear to have egressed onto the Property and are using it for vehicle storage/parking and storage of materials/dumping.
- Residual impacts from nearby properties: A former manufactured gas plant with ongoing investigation and cleanup of soil and groundwater impacts is located adjacent to and northeast of the Property.

Given these RECs, the Phase I ESA recommended collection of soil and groundwater samples at select locations throughout the Property to determine if the identified RECs have affected soil and/or groundwater quality at the Property. The Phase I ESA also recommended a geophysical survey be conducted to determine if underground anomalies consistent with former railroad uses remain and a pre-demolition lead-based paint and asbestos containing material inspection and restricted waste inventory be conducted prior to demolition to determine if hazardous building materials are present that would require abatement or management related to the scale house/weigh station. Identified storage vessels and all remaining materials/debris/waste/vehicles should be removed from the Property for proper disposal.

Currently, no Phase II ESA has been submitted to the DNR. There are three closed environmental cases at the Property: Holmes Oil Corp, BRRTS # 03-36-001962, WCL – Turntable Former Roundhouse, BRRTS # 02-36-176478, and WCL – 200 N 10th St, BRRTS # 02-36-000408. Following are brief summaries of how these cases closed:

- Holmes Oil Corp was closed with continuing obligations for residual soil and groundwater contamination on October 17, 2005;
- WCL – Turntable Former Roundhouse was closed with continuing obligations for residual soil and groundwater contamination, cap maintenance, and an industrial zoning requirement on February 22, 2007; and
- WCL – 200 N 10th St was closed with no continuing obligations on March 9, 1993.

Method and Purpose of Property Acquisition

The City of Manitowoc has provided to DNR a copy of City Resolution 18-0968, titled *Resolution Declaring the Canadian National Peninsula Blighted and Authorizing the Community Development Authority to Acquire and Assist the Redevelopment of the Property*, that was approved by the City Council on September 17, 2018, and signed by the Mayor on September 18, 2018. The resolution declares the Property blighted and outlines the process used to make this blight finding. The CDA has executed a letter of intent, along with an offer to purchase

the Property, with the current Property owner, Wisconsin Central Ltd. Title acquisition is planned for mid-March, 2019. DNR has been informed that the CDA plans to acquire the Property for the purpose of blight elimination. DNR has been informed that the likely reuse of the Property will include recreational, mixed-use commercial/multi-family residential, and industrial developments. DNR's liability determinations below are based on this property title acquisition scenario.

Liability Determinations

The DNR provides the following statutory responsibility clarifications and assurances to the CDA concerning its proposed purpose for and method of acquiring the Property, as related to intended reuse plans:

1. The CDA meets the definition of a "local governmental unit" as described in Wis. Stat. § 292.11(9)(e)(1).
2. The CDA has officially declared the Property blighted by resolution under the authority of Wis. Stat. § 66.1333.
3. If the CDA takes title to the Property for the purpose of blight elimination, the CDA will obtain the local governmental unit environmental liability exemption authorized by Wis. Stat. § 292.11(9)(e). A resolution authorizing acquisition of the Property could explicitly state blight elimination as a purpose of the action.

Local Governmental Unit Spill Law Exemption Information

Wis. Stat. § 292.11, titled Hazardous Substance Spills, is often informally referred to as the Spill Law. This section of the state statutes, along with the rest of Wis. Stat. ch. 292, titled Remedial Action, provides the legal foundation for Wis. Admin. Rules chs. NR 700 – 754, which are titled Environmental Protection – Investigation and Remediation of Environmental Contamination.

Wis. Stat. § 292.11(9)(e) authorizes an environmental liability exemption for local governmental units (LGUs) that take title to property using one of the methods or purposes listed in Wis. Stat. 292.11(9)(e)(1m). Acquiring a property for the purpose of blight elimination is one of the listed ways for an LGU to obtain the exemption.

When in effect at a property, the LGU exemption, as authorized by Wis. Stat. § 292.11(9)(e), exempts an LGU from the following statutory responsibilities related to environmental contamination that was caused by another person or entity and exists on a property prior to the LGU's acquisition:

- The responsibility to take actions necessary to restore the environment and minimize harmful effects of hazardous substance discharges to soil, groundwater, sediment, surface water and air of the state.
- The responsibility to comply with DNR orders to act to prevent hazardous substance discharges.
- The responsibility to reimburse the DNR for activities it takes at a property to identify, locate, monitor, contain, remove or dispose of hazardous substances.

The most common regulatory effect of an exemption from the statutory responsibilities noted above is that an exempt LGU is not required to complete a Wis. Admin. Code ch. NR 716 site investigation or conduct a remedial response action per Wis. Admin. Code chs. NR 722-724 for contamination caused by another party prior to the LGU's acquisition of the property.

An exempt LGU can always choose to voluntarily move forward with standard site investigation and cleanup efforts, but it is not required to do so (as other landowners would be). Little to no environmental investigation or cleanup work is generally required of an exempt LGU while the property remains as is. There are some exceptions, but that is the general situation.

Conditions and limitations of the LGU Spill Law exemption are described in a following section of this letter. More information about the LGU environmental exemption is available on DNR's web site at <https://dnr.wi.gov/topic/Brownfields/lgu.html>, and in [DNR PUB RR-055](#).

Local Governmental Unit Solid Waste Management Exemption Information

Wis. Stat. § 292.23 authorizes an LGU exemption from Wis. Stat. § 289.05, titled Solid Waste Management Standards, and administrative rules promulgated under that section, when an LGU takes title to property using one of the methods, or purposes, listed in Wis. Stat. 292.23(2). These are the same methods and purposes listed for the Spill Law exemption.

The solid waste management exemption applies to pre-existing, unlicensed solid waste disposal sites and facilities that were not operated or used by the LGU. Most solid waste regulations are found in Wis. Admin. Code chs. NR 500 – 555.

The above-mentioned conditions and limitations of the Wis. Stat. § 292.11(9)(e) exemption also apply to the solid waste exemption, along with others that are specific to solid waste as listed in Wis. Stat. § 292.23(3). Wis. Stat. § 292.23 should be reviewed and consulted if any unlicensed solid waste disposal areas exist on the Property.

Conditions and limitations of the solid waste management exemption are described in a following section of this letter. More information about solid waste management is available on DNR's web site at <https://dnr.wi.gov/topic/Waste/Solid.html>.

Conditions and Limitations of the Spill Law and Solid Waste Management Exemptions

The state's local government Spill Law exemption and the solid waste management liability exemption can help LGUs take charge of derelict properties by providing significant liability relief from several statutory environmental responsibilities. However, be aware that both exemptions have conditions and limitations, as spelled out in the statutes and as summarized below.

Wis. Stat. §§ 292.11(9)(e)(2), and 292.23(3) clearly state that the liability exemptions are not available for hazardous substance discharges to the environment or unlicensed solid waste disposal that were caused by an LGU, either before or after acquisition of the property. The word "discharge" means spilling, leaking, dumping, etc., and the causing of contamination can occur due to both action and inaction.

Building demolition and soil disturbing activities on a property with environmental contamination also have the potential to make pre-existing contamination worse (essentially causing a new discharge that wouldn't have occurred otherwise). All demolition and excavation activities should be discussed with DNR before they occur to ensure they won't inadvertently be the cause of new contamination or the exacerbation of pre-existing contamination. Otherwise, an LGU could lose its exemption.

Wis. Stat. §§ 292.11(9)(e)(2) and 292.23(3) also specifically identify several situations in which an LGU's actions or inaction could cause environmental contamination, and clearly specify that an LGU is not exempt from legal responsibility if discharges occur due to:

- A failure to take appropriate action to restrict access to the property in order to minimize costs or damages that may result from unauthorized persons entering the property.
- A failure to sample and analyze unidentified substances in containers stored aboveground on the property.
- A failure to remove and properly dispose of, or to place in a different container and properly store, any hazardous substance stored aboveground on the property in a container that is leaking or is likely to leak.

The solid waste management exemption statute lists further conditions in Wis. Stat. §§ 292.23(3)(d – k).

Neither Wis. Stat. § 292.11(9)(e) or Wis. Stat. § 292.23 exempt an LGU from Wis. Stat. § 292.11(2), titled “Notice of Discharge.” Therefore, all LGUs (whether exempt or not) must notify the DNR immediately of any known and/or newly discovered discharge of a hazardous substance to the environment at the Property. See DNR publication RR-560, at <http://dnr.wi.gov/files/PDF/pubs/rr/RR560.pdf> for additional information about spill and discharge reporting. When the LGU exemption is in effect, reporting identified contamination to the DNR that was caused by others prior to LGU acquisition of the property does not trigger site investigation or cleanup requirements for the LGU.

When an LGU redevelops or otherwise reuses a contaminated property for which it has an exemption, Wis. Stat. § 292.11(9)(e)(4) and Wis. Stat. § 292.23(3)(b) specify that the LGU must, to maintain its exemption, take actions directed by DNR to reduce substantial threats to public health or safety that could occur when the Property is developed or reused by the LGU. This does not require the LGU to conduct a full site investigation or cleanup, but it may involve protective measures such as those identified in Wis. Admin. Code § NR 708.17.

Before beginning any demolition work at the Property, a pre-inspection is required, along with filing of DNR Form 4500-113, Notification for Demolition. See DNR publication WA-651, available at <http://dnr.wi.gov/files/pdf/pubs/wa/wa651.pdf> for additional information about demolition activities. Storm water management permits may also be necessary for demolition and construction activities. All LGUs must comply with these requirements.

Federal and State Tank Regulations: The LGU exemption statutes do not exempt above ground or underground storage tanks on the Property from compliance with federal and state requirements, including Wis. Admin. Code ch. ATCP 93. If you have questions about tank requirements, contact the Wisconsin Department of Agriculture, Trade and Consumer Protection (the Bureau of Weights and Measures) directly. Wis. Admin. Code ch. ATCP 93 is available at https://docs.legis.wisconsin.gov/code/admin_code/atcp/090/93. DNR publication RR-627, titled Removing Underground Storage Tanks, is at <http://dnr.wi.gov/files/PDF/pubs/rr/RR627.pdf>.

The LGU exemption is only available to local governmental units, as defined in Wis. Stat. § 292.11(9)(e)(1). This liability exemption is not transferrable from the exempt LGU to future property owners, except to other eligible LGUs. Nonexempt owners are subject to full environmental responsibility and regulation by, at a minimum, Wis. Stat. ch. 292 and Wis. Admin. Code chs. NR 700-754.

Future Use of the Property

If the CDA intends to redevelop or otherwise reuse the Property during or after taking title and obtaining the Spill Law liability exemption and the Solid Waste Management exemption, the CDA should discuss proposed near-term and long-term property uses and improvements with the DNR before proceeding. Wis. Stat. § 292.11(9)(e)(4) and Wis. Stat. § 292.23(3)(b) require exempt LGUs to take actions that DNR determines are 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.

It is very important to consult with the DNR before and during any demolition, excavation, construction or other development work on the Property. The LGU exemption can be lost if significant public health or safety threats arises in relation to the new use. Wis. Admin. Code § NR 708.17 lists some types of protective actions that DNR may direct when a new use is planned for an LGU-exempt property.

Federal Liability Protections

In addition to state liability protections, an LGU may also be eligible for federal CERCLA liability protection in certain situations. In general, CERCLA provides liability protection to local governments that acquire ownership or control of property through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government acquires title by

virtue of its function as 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, an LGU can obtain CERCLA liability protections if it qualifies as a “bona fide prospective purchaser.” One key requirement for obtaining this protection is the completion of a Phase I environmental site assessment (ESA) that meets EPA’s “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 title to a property. ESAs following the 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>.

This Letter is Based on Information Provided to DNR

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

Information on LGU exemption determinations and other contaminated site activities is tracked in a DNR database that is available on the internet at <http://dnr.wi.gov/botw/SetUpBasicSearchForm.do>. The 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 DNR has made an “LGU Exemption” determination.

DNR Contact Information

The DNR hopes this letter provides the Town with the requested clarification concerning the LGU liability exemption for the Property. The DNR looks forward to working with you on this project and others.

If you have any questions, please contact the DNR Project Manager for the Property, Tauren Beggs at 920-662-5178 or by email at Tauren.Beggs@wisconsin.gov. For questions specific to the LGU exemption, and other local government cleanup tools, contact Barry Ashenfelter at 608-267-3120 or at Barry.Ashenfelter@wisconsin.gov.

Sincerely,



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

Attachment: Attachment A - Site Map

ec: Harris Byers, Stantec (harris.byers@stantec.com)
Andrew Steimle, Steimle Birschbach, LLC (Andrew@steimlebirschbach.com)
Barry Ashenfelter, DNR, RR/5 (Barry.Ashenfelter@wisconsin.gov)

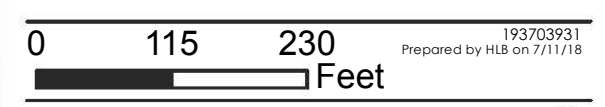
Attachment A - Site Map



Figure No.
2
Title

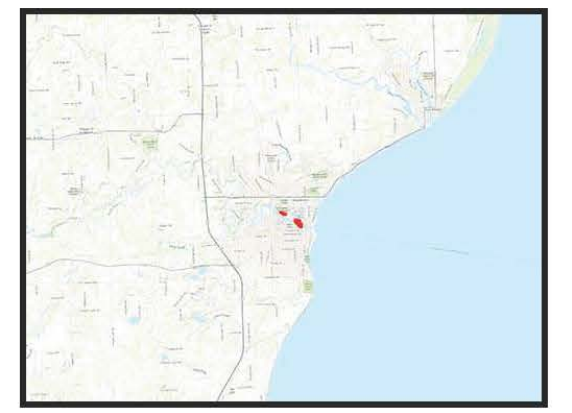
Target Property and 2017 Orthophotograph

Client/Project
City of Manitowoc
USEPA Brownfield Assessment Grant



Legend

- Target Property
- Target Parcels
- Nearby Parcels



Notes
1. Coordinate System: NAD 1983 StatePlane Wisconsin South FIPS 4803 Feet

