



# State & Federal Liability Protections for Local Governmental Units

RR-579

October 2013

## **Introduction**

Local Governmental Units (LGUs) in Wisconsin have an important role in the cleanup and redevelopment of brownfields, which are defined as “abandoned, idle or underused commercial or industrial properties, where expansion or redevelopment is hindered by real or perceived contamination.”

Fortunately, state and federal laws provide incentives for LGUs to acquire and redevelop brownfield properties, without incurring liability for the contamination. A table summarizing these state and federal liability protection incentives is included in this fact sheet (see p.5).

This fact sheet offers a concise overview of how state and federal liability protections work, and what LGUs can do to safely acquire and transform these properties. Also included is a brief discussion on the importance of CERCLA (federal Superfund Law) liability protections for LGUs applying for federal cleanup funding—either federally or state administered upon acquiring a contaminated property.

## **State Liability Protections**

### **LGU Liability Exemption from Wisconsin’s Spill Law**

Assuming the LGU did not cause the contamination, it can be eligible for the Local Governmental Liability Exemption by acquiring a contaminated property in accordance with state law (s. 292.11(9)(e)1m, Wis. Stats.). The eight eligible methods of acquisition include:

- Tax delinquency;
- Bankruptcy proceedings;

- Condemnation;
- Eminent domain (according to Ch. 32, Wis. Stats.);
- Escheat (no legal property heirs);
- For the purposes of slum clearance or blight elimination (according to s. 66.1333, Wis. Stats.);
- By using Stewardship funds; or,
- Acquiring from another eligible LGU.

### **Who qualifies as an LGU under the Wisconsin Spill Law?**

The following entities qualify as Local Governmental Units (LGU) for Spill Law liability exemptions:

- city;
- town;
- village;
- county;
- county utility district;
- town sanitary district;
- public inland lake protection and rehabilitation district;
- metropolitan sewage district;
- redevelopment authorities created for blight elimination;
- other public bodies designated by a municipality for urban renewal;
- a community development authority; or,
- a housing authority.

The state liability exemption protects an LGU from investigation and clean up responsibilities, *unless* the spill is caused by an action taken by the LGU, or by the LGU’s failure to take “limited actions” to prevent further spills. Those limited actions are:



Wisconsin Department of Natural Resources  
P.O. Box 7921, Madison, WI 53707  
dnr.wi.gov, search “brownfield”



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

An LGU planning to redevelop and re-use a contaminated property that it owns, is advised to work closely with the DNR, starting early in the process, to determine what actions should or should not be taken on the property. The DNR can help the LGU avoid actions that could cause or exacerbate discharges of hazardous substances on the property. Together these parties can also evaluate and select site development plans and construction techniques that will protect health and safety associated with onsite risks, and ensure the LGU retains the liability exemption. Even exempt LGUs are required to:

- Remove any abandoned or unused underground storage tanks that are present on the property;
- Mitigate public health threats if deemed necessary by the DNR with regard to future development; and
- Notify the DNR immediately about the discharge of any hazardous substances on the property.

The liability exemption cannot be transferred to another party, except for another eligible LGU.

### **Liability Clarification Letters**

The DNR's Remediation and Redevelopment Program can assist LGUs by clarifying environmental liability at a property with soil or groundwater contamination. Upon request, DNR can provide a fee-based (\$700) liability clarification letter that explains how the LGU exemption applies to a specific property. Use our [Technical Assistance and Environmental Liability Clarification Request \(Form 4400-237\)](#) to request a liability clarification letter, or contact your DNR project manager for details.

### **Solid Waste Exemption**

There are several thousand known properties in Wisconsin where past disposal of solid waste has occurred. Many local governments are reluctant to take title to a property with an unlicensed landfill on it (e.g., an historic foundry sand disposal site), due to concerns about the long-term environmental liability and costs. Section 292.23(2)(a-f), Wis. Stats. exempts the local government from certain parts of the Wisconsin Solid Waste Law (ch. 289, Wis. Stats.) if an LGU acquires an unlicensed landfill through any of the eight methods listed within the statute (see pg. 1 for a list).

The properties must contain solid waste sites or facilities that have never been licensed by the DNR. The LGU cannot have owned, operated, or taken waste to the site. The exemption is modeled after the LGU Liability Exemption under the Spill Law. However, the LGU would be responsible for maintaining pre-existing systems (e.g., landfill cover, gas or leachate collection, monitoring, etc.)

The local government is required to prevent any unacceptable exposures to wastes or contamination when the property is put to its intended use. Written approval from DNR is required for building on an abandoned landfill. See publications RR-683, RR-684, and RR-685 for more information on this process. The LGU would also be required to maintain and monitor any existing environmental control systems for the landfill. Communities that are landlocked may be able to use these past disposal properties for public purposes and green space, as well as economic development purposes.

### **Hazardous Waste Exemptions**

Section 292.24, Wis. Stats., exempts LGUs from certain hazardous waste requirements with respect to hazardous waste discharges on property acquired through any of the methods listed in ch. 292.11, Wis. Stats.(see pg. 1), if all the following conditions have been met:

- DNR-approved investigation is conducted that identifies hazardous waste discharges;
- hazardous waste discharges are cleaned up;
- LGU receives an approval from the DNR that the hazardous waste has been satisfactorily cleaned up;

- LGU maintains and monitors the property;
- LGU did not cause the hazardous waste discharge; and
- Hazardous waste treatment, storage, or disposal facility is not operated on the property after the date that the LGU acquired the property.

The DNR and the US EPA have also discussed additional ways to strengthen the Resource Conservation and Recovery Act (RCRA) hazardous waste exemption for sites that have a history of hazardous waste management activities. On October 26, 2009, DNR received EPA approval for a permanent program authorizing the DNR to exercise enforcement discretion, on a case-by-case basis, at sites with hazardous waste back-grounds. The EPA approval for this policy is dated December 6, 2006.

To request a RCRA enforcement discretion determination letter for a site with hazardous waste contamination, the LGU must request a general liability clarification letter from the DNR for a property they intend to acquire under the provisions of s. 292.11(9)(e), Wis. Stats. The DNR will then have the case-by-case discretion to determine whether or not to apply the Wisconsin hazardous waste regulations to that property. Where applicable, this letter will provide the LGU with an even stronger protection against long-term financial liabilities for the property when combined with the state's hazardous waste exemption (s. 292.24, Wis. Stats.) described above.

## **Federal Liability Protections**

### **CERCLA Liability Protections for Local Governments**

In addition to state law protections, there are liability protections for LGUs under the federal law known as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund. Unlike state law, under federal law, a school district is also considered an LGU.

CERCLA liability protections, discussed in further detail below, may be available to a local government when it:

- Acquires contaminated property involuntarily by virtue of its function as a sovereign, CERCLA § 101(20)(D);
- Qualifies as a bona fide prospective purchaser (BFPP) when it acquires the contaminated property, CERCLA §§ 101(40), 107(r)(1);
- Qualifies for a third party defense or innocent land owner liability protection, CERCLA §§ 107(b)(3), 101(35)(A); or
- Is conducting or has completed a clean-up of a contaminated property in compliance with a state cleanup program, CERCLA § 128(b) (Courtesy US EPA).

### **Involuntary Acquisition**

According to the Superfund law (CERCLA § 101(20)(D)), a “unit of state or local government which acquired ownership or control *involuntarily* through bankruptcy, tax delinquency, abandonment or other circumstances in which the government *involuntarily* acquires title by virtue of its function as a sovereign” is not considered to be an “owner” or “operator.” It is not necessary for the municipality to be completely passive in order for the acquisition to be considered “involuntary” for purposes of CERCLA.

This exemption does not apply to a municipality that caused the spill. A municipality should exercise “due care” to ensure that it does not cause or contribute to an actual or potential release at a property that it has acquired involuntarily. See the EPA fact sheet on CERCLA Liability and Local Government Acquisitions and other Activities at

[www.epa.gov/oecaerth/resources/publications/cleanup/brownfields/local-gov-liab-acq-fs-rev.pdf](http://www.epa.gov/oecaerth/resources/publications/cleanup/brownfields/local-gov-liab-acq-fs-rev.pdf)

### **Bona Fide Prospective Purchaser (BFPP)**

BFPP certification provides a local government with CERCLA liability protection in the event that they knowingly purchase a property with environmental contamination. The following bullet points must be true in order for an LGU to meet BFPP certification:

- Property must be acquired after January 11, 2002;

- Purchaser must perform All Appropriate Inquiries (AAI) prior to the purchase of the property (must be completed within 180 days prior to acquisition)<sup>1</sup>;
- Contamination must have occurred before purchaser acquired property; and
- Purchaser has no “affiliation” with a liable or potentially liable party.

Additionally, once acquisition is complete, local governments must comply with the following continuing obligations in order to maintain BFPP status; including:

- Comply with land use restrictions;
- Take “reasonable steps” to prevent the release of hazardous substances;
- Provide full cooperation, assistance and access;
- Comply with information requests; and
- Provide legally-required notices.

For more information on Bona Fide Prospective Purchaser, please see the EPA website at: [www.epa.gov/oecaerth/cleanup/revitalization/bfpp.html](http://www.epa.gov/oecaerth/cleanup/revitalization/bfpp.html).

### **Third Party Defense or Innocent Landowner Defense**

Under Superfund, one private party often sues another to obtain money to assist with cleanup costs. This is known as a “third-party” lawsuit. A municipality that acquires property involuntarily, through the exercise of eminent domain by purchase or condemnation, or through direct purchase using the AAI process can be protected from “third-party” liability under CERCLA § 107(b)(3), if they meet certain minimum requirements. These requirements pertain to:

- The absence of any contractual relationship between the municipality and the causer;
- Showing that due care was exercised with respect to the contamination;

---

<sup>1</sup> AAI is defined by US EPA as “a process of evaluating a property’s environmental conditions and assessing the likelihood of any contamination.” The AAI Final Rule states that the standards set forth in the ASTM-E1527-05 Phase I Environmental Site Assessment Process satisfy the statutory requirements for all appropriate inquiries.

- Showing that the municipality took precautions against foreseeable acts or omissions, and the consequences thereof, by the third party that caused the contamination; and
- Meeting the specific criteria laid out in the applicable section of CERCLA that pertains to the innocent landowner defense being claimed.

A careful reading and study of CERCLA is necessary to assert and defend the third party liability defense effectively. Legal assistance is highly recommended.

### **Enforcement Bar**

Local governments are protected from EPA enforcement under Superfund while they are conducting, or after they have completed a response action in compliance with a state response program at brownfield sites. This protection is referred to as the “enforcement bar.” This is a protection provided by federal law.

### **One Cleanup MOA**

EPA and DNR entered into a Memorandum of Agreement (MOA), dated November 24, 2006, which clarifies EPA’s non-enforcement intentions at sites enrolled in Wisconsin’s voluntary cleanup program known as the Voluntary Party Liability Exemption (VPLE) Program. The MOA encourages the voluntary cleanup of brownfields without undue fear of EPA intervention.

### **CERCLA Liability and Federal Brownfields Grant Funding**

EPA brownfields grant funds cannot be used to pay response costs (i.e. the cost of cleanup activities) at a brownfield site for which the grantee is potentially liable under CERCLA § 107. Applicants for federal brownfield grant funds, including Wisconsin’s Ready for Reuse cleanup funding, must document that they qualify for one of the CERCLA liability protections listed above in order to be considered eligible for funding. The Department recommends that a local government contact the Department brownfields staff prior to acquiring a site to discuss the appropriate steps.

The DNR recommends that LGUs consider using property acquisition methods that will provide both state Spill Law and federal CERCLA liability protections when acquiring contaminated properties.

### **Table # 1 – Liability Protection Summary**

The following table summarizes both state and federal liability protection incentives as discussed in this fact sheet.

	<b>Methods of Property Acquisition</b>									
<ul style="list-style-type: none"> <li>• <i>Could apply to local governments</i></li> <li>○ <i>Could apply to local governments if state and federal law and requirements under both are followed</i></li> </ul>	Tax Foreclosure	Bankruptcy Order	Escheat	Eminent Domain (slum or blight; condemnation)	Purchase	Inheritance or Bequest	Abandonment	Gift / Donation	Stewardship	From an eligible LGU
<b>Key CERCLA Provisions</b>										
<b>Involuntary Acquisition</b> § 101(20)(D)	●	●	●	○			●			○
<b>Bona Fide Prospective Purchaser</b> §§ 101(40) and 107(r)(1)	●	●	●	●	●	●	●	●	●	●
<b>Third Party and Innocent Landowner Defenses</b> §§ 107(b)(3) and 101(35)(A)			●	●	○	●				
<b>Enforcement Bar</b> § 128(b)	●	●	●	●	●	●	●	●	●	●
<b>Key Wisconsin Provisions</b>										
<b>Spill Law</b> § 292.11(9)(e)	●	●	●	●					●	●
<b>Solid Waste</b> § 292.23	○	○	○	○					○	○
<b>Hazardous Waste</b> § 292.24 and RCRA	○	○	○	○					○	○

### **For More Information**

Information and frequently asked questions about liability protections for LGUs can be found at [dnr.wi.gov](http://dnr.wi.gov), search [LGU](#).

Questions about the Local Government Liability Exemption should be directed to the brownfield specialist in your local DNR regional office - [dnr.wi.gov/topic/Brownfields/Contact.html](http://dnr.wi.gov/topic/Brownfields/Contact.html)

This document contains information about certain state statutes and administrative rules but does not necessarily include all of the details found in the statutes and rules. Readers should consult the actual language of the statutes and rules to answer specific questions. The Wisconsin Department of Natural Resources provides equal opportunity in its employment, programs, services, and functions under an Affirmative Action Plan. If you have any questions, please write to Equal Opportunity Office, Department of Interior, Washington, D.C. 20240. This publication is available in alternative format upon request. Please call 608-267-3543 for more information.