

Local Government Environmental Cost Recovery Tools

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Many local governmental units (“LGUs”) may still be dealing with old municipal dumps and most have abandoned contaminated properties ripe for development if sources of funds to clean them up can be identified. It is time to look again at the tools available to recover investigative and remediation costs from the parties responsible for the contamination. In addition, older liability policies (before the absolute pollution exclusion was added to most policies in 1986) insuring the municipality may provide a significant source of funds to clean up old municipal dumps.

Section 292.33

Wisconsin Stat. § 292.33 provides LGUs with a cause of action to recover cleanup costs from “responsible persons” for a property acquired through property tax foreclosure, condemnation, for the purpose of slum clearance or blight elimination and under other listed circumstances.¹ Responsible persons include a person who at the time the property was acquired by the LGU possessed or controlled the hazardous substance that was discharged at the property as well as the person who caused the discharge.² This description of responsible persons mirrors the language in Wis. Stat. § 292.11(3), which is commonly referred to as the Wisconsin Spill Law. “Possession and control” has been interpreted to mean ownership of the property where the contamination exists.³

There are limitations on the amounts that can be recovered. For example, one who “caused” the contamination is liable only for their proportional share of costs.⁴ And, those in possession and control,

which is typically the person from whom the LGU acquired the property, are limited to amounts the LGU cannot recover from those who caused the contamination.⁵ In all cases, recoverable costs are reduced by the fair market value of the property after completion of remedial activities at the property.⁶

A cost recovery action under § 292.33(2) must be commenced within six (6) years after completion of remedial activities at the property.⁷

Section 292.35

Wisconsin Stat. § 292.35 is a potential tool for an LGU to recover investigative and cleanup costs for a municipally-owned property that was historically used by third parties to dispose of hazardous substances. The statute is designed to encourage an LGU and a responsible party to agree on an allocation of investigative and remedial costs without litigation.

Section § 292.35 includes a detailed pre-litigation negotiation process after the LGU gives notice to a party the LGU believes may be responsible for contamination at a municipally-owned property, provides each party with the opportunity to comment on the draft remedial action plan and submits an offer(s) to settle.⁸ A party’s liability under the statute is based upon the party’s percentage contribution to the contamination at the site.⁹ If all of the parties are unable to resolve the matter directly, an “Umpire” is appointed by Wisconsin Department of Natural Resources (“WDNR”) to conduct what amounts to a mediation.¹⁰ If the

mediation is not successful, the Umpire submits a report to WDNR making a recommendation regarding the design and implementation of the remedial action plan and making a recommendation on the allocation of costs to each non-settling responsible party.¹¹ WDNR can approve the report as submitted or require modifications. Once the report is finalized, the LGU and the remaining responsible parties have 60 days to accept or reject the Umpire’s approved allocation of costs.¹²

If this process fails to resolve the entire matter, the LGU has a right of action against each responsible party who rejects the approved allocation of costs.¹³ If the LGU accepts the Umpire’s recommendation and a responsible party rejects it, and the LGU later recovers an amount that equals or exceeds the approved allocation, the LGU is entitled to recover litigation expenses including expert and reasonable attorney’s fees incurred in the litigation.¹⁴

Insurance

One potentially significant source of funds to pay for investigative and remediation costs incurred by an LGU are pre-1987 liability policies (and umbrella policies) that insured the LGU during times when coverage was “triggered.” The Wisconsin Supreme Court ruled several years ago that “responsible party” letters from the regulatory agency directing a party to investigate and clean up contamination are the equivalent of a lawsuit and that environmental cleanup costs are covered damages under typical general liability policies.¹⁵ Liability

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1. See Wis. Stat. §§ 292.33(2) and 292.11(9)(e)1m.

2. Wis. Stat. § 292.33(3).

3. See *State v. Mauthe*, 123 Wis.2d 288, 301, 366 N.W.2d 871 (1985).

4. Wis. Stat. § 292.33(4)(d)1.

5. Wis. Stat. § 292.33(4)(d)2.

6. Wis. Stat. § 292.33(4)(b).

7. Wis. Stat. § 292.33(7).

8. Wis. Stat. §§ 292.35(2r) and (3).

9. Wis. Stat. § 292.35(9)(c).

10. Wis. Stat. §§ 292.35(3) and (4).

11. Wis. Stat. § 292.35(6)(a).

12. Wis. Stat. § 292.35(6)(b).

13. Wis. Stat. § 292.35(9)(b).

14. Wis. Stat. § 292.35(8)(b)1.

15. See *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 264 Wis.2d 60, 665 N.W.2d 257 (2003).

insurers did incorporate an “absolute pollution exclusion” into most policies starting around 1986, but coverage under policies issued without the absolute pollution exclusion can still be triggered. Most general liability policies require that the damage occur during the policy period, but where the contamination may have occurred over many years, this means that multiple years of coverage may be available. For example, if an LGU owned a dump site where wastes were disposed during the 1960s, liability policies issued to that LGU in the 1960s may still provide coverage.

For this reason, it is recommended that LGUs search their own records for evidence of old insurance policies and, where property may have been acquired later by an LGU, to attempt to get records of policies that may have been issued to parties that formerly owned the property. There are services available, like PolicyFind for example, that engage in insurance archeology to search municipal and industry records to identify

and locate lost or mislaid liability policies providing defense and indemnity coverage to the LGU. If policies are identified, the LGU, working with legal counsel, can determine if coverage may be available and tender the claim as appropriate. Experienced insurance litigation counsel is recommended to respond to policy defenses which insurers inevitably raise because of the passage of time.

About the Authors:

At Davis|Kuelthau, s.c., our experienced attorneys have successfully represented municipalities and private parties in municipal cost recovery proceedings, in insurance matters involving the use of older CGL policies to fund investigative and remedial activities, and in coverage disputes and litigation. If you have questions, please contact Ted Warpinski at (920) 431-2236, twarpinski@dkattorneys.com, or Todd Farris at (414) 225-1487, tfarris@dkattorneys.com

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| Local Government 101 Agenda | 8:30 a.m. Registration |
| | 9:00 a.m. Welcome |
| | 9:15 a.m. Organization & Powers of Cities and Villages |
| | 10:00 a.m. Recognizing and Avoiding Conflicts of Interest |
| | 11:00 a.m. Budgeting & Financial Oversight |
| | 12:15 p.m. Lunch (included) |
| | 1:00 p.m. Procedures for Local Government Meetings |
| | 2:45 p.m. Managing Public Works Activities |
| | 4:00 p.m. Adjourn |

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| May 10 - Pewaukee: Ingleside Hotel |
| May 17 - Eau Claire: Lismore Hotel |
| May 31 - Madison: Holiday Inn at the American Center |
| June 21 - Appleton: Red Lion Paper Valley |
| June 28 - Ashland: Best Western Chequamegon Hotel |
| September 13 - Waupaca: Par 4 Resort |