

## Notes for Brownfields Study Group Liability Subgroup

**April 15, 2015**

**U.S. Venture Inc, 425 Better Way**

**Appleton WI 54915**

**1:00 to 4:00 PM**

Attendees:

Michael Prager – DNR (on phone)

Dan Kolberg - DNR

Louis Thorton – Foley (on phone)

Mark Thimke- Foley

Margaret Brunette (on phone)

Karen Dettmer – City of Milwaukee

Jodie Peotter – True North Consultants

Jennifer Drury BuzECKy - Whyte Hirschboeck Dudek

Dan Kolberg - DNR

Kathryn West - Whyte Hirschboeck Dudek

Ted A. Warpinski- Friebert, Finerty & St. John

Don Johnson –USVentures

Buck Sweeney - Axley Brynelson's

Introductions

Don J – Background on building

built in 2010 to LEAD gold but not certified

Salvage wood

Green roofs

Etc. walk trail

Background on US Ventures

Grouped topics

Liability issues related to 292.11(3)

Lawyers are creative, shield liability

Indemnities – no prospecting

Can't test- is it appropriate, base law is Chrysler

Does issue list capture everything? Yes, add issue of sales agreements that include a no poke/ indemnification clause

**PCBs in building materials-** summary of topic but explained that technical group will take this up

One cleanup program

Should we open up one cleanup? DNR expressed some concerns about reopening the One Cleanup Program MOU since it was challenge to get EPA to approve it, maybe other ways to address issue other than that.

Technical committee will pursue it

Summary of what issue is for NR 718/ beneficial reuse/ how to manage, technical committee will discuss this topic.

### **Lender Issues**

Dan K. - lender topics should be separate, problematic, personal property, mortgage rights/ statutory rights, 292.21 changes, definition of lender, lending activities. Rules?

Do we know anyone in lending community? Anyone have contacts?

Dan – LLCs requested letters and DNR issued denials, then it has been quiet

Mark - could we invite people who got denied

Jennifer – large banks out of state don't know WI laws

Dan will invite people who got denied

Jennifer asked Dan to pull together list, she can share it.

*Follow-up: Dan agreed to write up a summary of some of the issues DNR has seen which they group may want to consider responding to.*

**LLC topic:** Analysis of tools used to shield parties from liability, consequences, options - Underfunded or single-purpose LLCs, receivership and bankruptcy, lender exemption issues, abandonment, plant closures, Wisconsin v. Chrysler Outboard Corporation decision outreach, clarification of what possess and control means and how it applies to lenders and others situations

Michael P - Summarized issue paper from Bill Scott regarding LLC recommending local governments adopt ordinances regulating salvage and demolition.

Buck Sweeney- Why would seller not just unload it if they can. There are some bottom feeders who would buy any property as is.

There was some discussion about disclosure issues and real estate law. Does the Seller have recourse if someone buys it

Placeholder

How do you control damage

Make it worse

It is common that Real estate developer would set up entity for this purpose

New Jersey tried to address it with an aggressive program for disclosure.

You are supposed to cleanup mess you make or own

Shield that off

What about the middle owner, one to another party then the middle owner would not have any liability.

What do they know at time of sale?

Out of business

There are cases when some inherits a property it and want to get rid of it.

VPLE good tool

Karen – we have seen situations when there is a transfer of only assets not property, new LLC leaves behind no viable RP.

Also, sometimes thieves steal scrap and assets.

Company shuts down, assets transferred to new LLC, did not operate 3 people dealing with auction but benefited from sale of stuff, new LLC not in chain of title

Private parties and lenders

Mark T. – idea – what if we gave the Wisconsin Plant Recovery Initiative (WPRI) some teeth, not an optional voluntary thing but an obligation. Incentive for people to clean it up so they do wait until they are gone. Requirements – if they are doing layoffs, compel listing of spills, disclosure etc.

Buck – Could this hurt business? taking business away from state

Mark T. - It is a problem when people put off liability, they should do it upfront

How can you get them to know about it, disclose

Jennifer B. – similar to property transfer laws in other states

Deal with it before they are dead and gone

Walk through, mandatory under WRPI, so you can flag drums or other clear issues

Found

Dan K. – Site Assessment Grant saw tail end, when no one wants site

More persuasive than WPRI voluntary

Prevent danger, Walk through

Buck S – hard issue is to be clear about what do they know? How do they know?

Presumption of contamination instead of presumption that they are clean unless discharge is reported.

Could there be a Carrot to come forward

1000 feet, want to redevelop sites

NJ tried that, did not work well, Bill collectors coming

Coming forward

Don J. - compel people to do Phase I and II, older people at companies know, new managers do not

Michael P. – when we review bankruptcies – we have filed contingent claims with limited information about contamination but no one arguing that sites are clean.

Mark Thimke - new rules, making progress, get them to address these issues while making money

Are their carrots, assistance now? Don J - Back end, US Ventures, they may have done more if there was money/ incentives

Jennifer B- maybe companies that come forward could get VPLE vs closure, no reopener  
Pennsylvania – Act 2 – exemption is sort of like this.

In the middle

Should this be a policy change or a law change?

Reward for responding quickly, no reopeners

Sale context/ release specific/ discharge specific release

Not easy, don't need to work out all the details

Identify problems, ideas, not details

Mark T – Sometimes companies spin off an LLC and the LLC leases it back to the company – to shield them. LLC to own it then lease it back. It is hard for state to pierce LLC veil, Attorney General needs to do it.

Transfer of property to related entity

Operating entity that has the assets also liable

Sham transaction- should there be a change to possession and control law?

Companies set up LLCs for other reasons besides environmental liability, tax issues, etc.

if this were changed, there could be unintended consequences

Would the company have a reason to know

Are their requests for lease letters in these cases?

Gas station, often LLCs are used for older gas.

Aware of contamination but sell to LLC

Works well for plant closing and spin off

Spending money up front, if you knew it, possess and control

The prior owner is not out of liability, if they should have known, were you in possession and control, like CERCLA, insurance, idea? Further thought. Could we change spill law to make it clear that (in some cases?) former owners would be RPs too?

Follow-up: Mark and interested parties will draft issue paper on this topic and will include some of ideas suggested during this meeting.

### **Sediment Issues**

Sediment paper with outline of issues – sent out – Mark T. summarized the background he sent out, 292.12, Ordinary High Water Mark, engineered remedies, VPLE, how has long term obligations,

Notice, issue to property owners, in water, do I have to tell anyone? You should tell property owners

Like groundwater, dirt dig,

BS- what if ordinary High Water Mark changes,

Chapter 30, delineated, they can move.

Default, owner has to follow cont. obligations, with GIS

Access must be available

Financial responsibility. Real letter of credit, attach to engineered control in water

Subsequent owners of remediated property, where cont. occurred.

Mark T. explained VPLE for sediment proposal – easiest part – insurance would be required, partial VPLE would be ok for upland cleanup to encourage redevelopment

Exemptions – proposal includes protections from liability under – TMDL and from natural resources damages (NRD). Mark T. – DNR did not like NRD protection Discussion about putting dock on the Fox River, how a water is a dynamic system, things can change.

Follow-up: a separate study group subgroup call/ meeting will be held to discuss sediment issues. Interested parties should participate.

### **Private cause of action**

Ted W. discussed issue paper and Pros and cons

Downside, negative impact, federal tool available but not very practical. How it impacts insurance, RP letter, triggers defense, others don't RP letter. It seems like missing component of WI scheme. Prevent law suits, cost of law suites, smaller ones, not cost effective. Econ of scale, CERLCA needs big site to be worth while. Contribution, cost recovery, get to allocation of money faster. Could trigger insurance if it is available. Save grant money, state money. Polluter pays. What would be the standard? Reasonable standard, getting closure, recover all of it or some of it, extra cost. Equitable allocation

Only RPs. Causers, hard to get DNR to go after everyone.

Only RP letters, who we send them too. Take DNR out of who is invited to party.

When would it be used, back ownership chain. Lots of states have it, not big detriment to business

Tweaks, someone is stepping forward. If someone agreed to cleanup it up with DNR, if you are in compliance with agreement

Have to have incurred costs.

Mark T. talked about Local Government cause of action that is in law now that the Study group recommended several years ago, and protections in there threats do more cleanup and send then send bill, tangible agreement right to enforce

Pulled some other states, language

Some tied to CERCLA

Some simple

Next time, share what other states have,

Prager- we don't want this to delay cleanup or cause multiple RPs to argue about cleanup plan.

MT – don't see downside.

Entourage negotiated agreement

How does allocations work, 5/6 criteria

Follow-up: group was supportive of the proposal.

### **Access Issue**

Louis T. – Access issue paper – some owners not allowing access for SI or Remediation

Dnr role. DOJ warrant, not working so well now, give RP more rights to get access  
1. Administrative warrant process, dnr could grant access  
2. private right to go to court and get access, get a stick, without having to go to court

DNR doesn't want to be in middle of access situation, we could write a letter.  
Idea, standard access agreement, ? statutory approved. Exercising control. Simple.  
People agree. Don't look for other stuff

Test for contamination from off site  
Substances of control only  
Not open ended.

People add on lots of stuff.  
Chasing a plume  
You know what it is  
Another case, find something on your, trying to find where it is from  
Issues – JB, were you place wells. Business care, not interfere,  
Dnr letter works well. Does dnr have to approve what is to be tested for. ? category not exact substance.  
Some people ask for \$  
Like a form  
Standard. Business interruption  
Vapor Instruction – others, home owners, etc. owners use similar chemicals, separate process for residential owner for VI? Need to do something to move towards closure  
Follow-up: Louis will revise paper based on input from the group for next meeting.

### **Post closure obligations**

Louis T. discussed issue paper  
do people avoid sites with long term obligations, or is that a problem?  
Potential problem  
Options, financial assurance for owners, state money, distressed owners  
Assurance of post closure follow up  
Give the dnr authority to require financial assurance in some cases  
Landfill, 3 years, 5 years, some don't last that long, forever, etc.  
Issue of CO, statutory provision like sediment proposal  
Louie T.- buyer is concerned about site with post closure obligations  
Enforcement issues later. Can be problem later  
Quantify cap enforcement issues  
Decision/ follow-up??

### **VPLE**

Jennifer B. - VPLE – Josh, Katie, VPLE, for redevelopment large site that takes a long time  
How much does it cost, how long does it take, 8 quarters of monitoring for NA. done with active removal, 2 years, could discourage development, sit until closure.

2 ideas, how word “property” is used. Different ways, vple statute uses it. Change how we view that. Risk, does area need to be reevaluated for VPLE?, could it fall out of VPLE

Time can be very long delay project because closure will take a while, want to sell one or 2 lots. Property boundaries change, amended applications, guidance keep it simple, not new eligibility determination. Do we need statutory changes or rule changes? Off site vple, throws a wrench in there. Challenge, long sites take a long time. Lots of time and money

Mark T. we have to be careful if we suggest statutory changes, don’t want bill drafters to mess it up law.

Guidance can be controversial if there disagreement

Follow-up: Jennifer and Josh will revise paper based on comments from the group.

Other VPLE topics: Jennifer B.- Other issue – clarification from DNR on issues common for redevelopment, bringing fill on a property. Not COC yet. Protocols. Don’t want to create new problems.

Michael P. – is insurance good idea to continue?

Jennifer B. – On one site she heard that Fanny Mae liked it

Mark T. - lots of money for insurance, water not used usually for drinking near these sites.

Is there a way to get the insurance cost down given the claim experience?

Underwriting dnr, no claims.

One example of an IL manufacturing company that liked VPLE and it attracted them to WI site.

Next meeting – Milwaukee, May 1 from 9 to Noon.