

Brownfields Study Group- Liability Subgroup - Notes  
July 8, 2014 Milwaukee

Attendees:

Michael Prager – DNR

Laurie Parsons - NRT

Dan Kolberg – DNR (on phone)

Mark Thimke- Foley

Bruce Keyes – Foley

Jennifer Drury Buzacky - Whyte Hirschboeck Dudek (on phone)

Ted A. Warpinski (on phone)

Buck Sweeney - Axley Brynelson (on phone)

Full Study Group's next meeting, July 24<sup>th</sup>, goal is to get papers ready to present at the meeting to the full group.

### **Sediment Issues**

Mark summarized results of Sediment meeting with cochairs and water staff and RR staff. Mark T: Met to talk about issues, robust discussion. Private people have concerns about coordination between Water and RR and Waste

As we move from mega sites to smaller ones, , we need a program that has predictability and transparency, with replicable results to reduce transaction costs.

Remediation and Redevelopment has track record of balancing economic issues, environmental protection, etc.

Water should set standards.

A developer of waterfront land can easily figure out if sediment is an issue, and respond in a timely manner. This will limit uncertainty. We need to make strong business case as to why this is needed. Property owners should know when you enter the program.....how system works.

Next steps, group will meet again, with DNR.

Jennifer – Would this include wetlands for example? Similar DNR silo problems have occurred with cleanups in wetland areas.

When there is cross media effects , need single lead in agency

Cochairs want to develop business case for why it is important

Lori & Josh - our firms have examples, projects that are stalled because of reasons Mark made. Could explain how this impacts redevelopment

Developer won't go forward if they can't get a handle on costs and time involved with regulations.

What next? Cochairs get together after subgroups are briefed , Mark will develop business case

If you have ideas on how to build business case, email Mark with examples/ ideas

### **Private Cost recovery**

Ted W – I made a few small edits / changes to paper.

Mark – Related topic – maybe we should look at the scope of 292.11(3) cause and possess or control, donut hole, which can get out of liability. Should we look at this? Liability of interim owner? Could address LLCs Some discussion about interim donut hole owner, discussed later too.

Are there concerns with this proposal? Mark and Ted have not heard any at meetings so far.

Laurie - concerns about consultants liability/risk– they have insurance....grey zones, opportunities for less scrupulous people, different paths, on hook if there is problem.

Language in paper seems to address issue ok.

Jennifer – If someone has VPLE exemption – should not be able to pursue them.

The paper says that but it may need to be more clear.

### **VPLE**

Jennifer – VPLE – Issue paper was revised. Went over paper.

Uncertainty regarding administrative process and property issues. Property for VPLE different than for other purposes.

Laurie- paper seems clear, makes sense. Solves some things we've been struggling with too.

Would we need statutory change? What is VPLE property, what is enrolled? Can it be addressed through guidance? Informal agreement could be done by guidance,

DNR has some concerns about schedule recommendations given workload.

Jennifer – Cooperative Environmental Assistance at DNR is a good model on how to have a kick off meeting and coordinate different programs & people together.

Amendments needed to paper? People think it looks good. Ready to go.

### **Lender Issues**

Jennifer - Mark Miller from Investors Community Bank talked to group a couple meetings ago. Mark gave us one aspect of the problem.

May need to take a new look at 292.21. Does it work with the reality of the way banks work now?

Challenges; bank getting access before they foreclose Risk to bank without data, can they foreclose blind - does this process still work? Is it a useful tool?

Safe harbor, what activities can they take and when would they possess or control? Deed in lieu of foreclosure. No man's land. Site conditions, what can you do? Last issue= LLC properties, should we look at expanding the definition of lenders?

Recommending a proposal to have a group with banks to study it. Regulatory requirements for banks and how that meshes with lender exemption. Outreach needed to overcome misinformation.

Bruce K – his experience, traditional lending relationship was different, portfolio, trustee, different owners, LLCs, very complicated financing - no real bank. How to we comply?

We need right people to work on this. Reexamine 292.21, "here are topics we should look at..."

Dan – agrees with Jennifer's idea.

JB – will send out draft paper to group,

### **Access paper**

Paper was written by Louis Thorton initially but he went on paternity leave and it was not updated after group discussed some changes.

Add in recommendation to create a standard agreement that people would have to use, limit two parties arguing with each other about agreement.

Sometimes it would take DNR authority to get access, however DNR reluctant to get in. Can hold things up. What is authority to get access? Go to court.

Mark T – Michigan has a tool when private party can go to court for access.

Josh N – What is the problem, RP can't get access? Warrant. DNR reluctant, judge may not want to say yes.

Mark will include example from MI in paper.

Laurie P. - Access is a problem, contamination doesn't stop at boundary. She has examples when this can be a problem and holds things up. Inefficient.

Dan- LGU group is looking at this too for somewhat different purposes.

Access can be issue for investigation and for remediation, for remedy, there is the financial part, impacted party may want money. Issue for vapors too.

Discussion about options. Buck S. - court is ok method but problems with that, records go on CCAP.

Josh N. - Another low cost option, DNR could send RP letter to party denying access.

Mark will work with Louie to modify issue paper. To include the following recommendations:

1. Standard access agreement
2. Private access process using court
3. DNR could get access for private party

### **Off-site exemption for Vapor Intrusion (VI)**

Michael explained issue.

Josh raised several issues related to VI that are challenging. Technical issues but that is not issue here.

Group was supportive of recommendation.

### **Incentive related to Air**

Mark explained issue, he said some air consultants thought it was a good idea.

Air quality standards will get tighter with 5 yr. review.

People like it. Encourage manufacturing in WI. air quality standards getting tighter. There is more reliance on modeling. Current permitting rules encourage greenfield development. This comes up with boilers, Group is supportive of paper. Mark will reformat it and Michael will get input from DNR Air program.

**LLC** - Full study group talked about this and thought it was something we should try to address.

Discussion of different issues, liability of interim owners, fraud on creditors, release, shell corporation, to avoid responsibility,

There was some solvent case from MI to avoid liability. Court in MI held that it was fraud exception .

Buck S. – Pandora's box, unintended consequences.

Mark would try to write up issue paper for group to consider.