

Memorandum

To: Rep. Jacque & Rep. Taylor and Sen. Risser

From: Wisconsin Brownfield Study Group

August 31, 2018

Re: Co-Sponsors LRB 0948 – Innocent Purchaser Protection

Background: In November 2017, LRB 0948 was introduced with the intention of absolving individual property owners from liability for cleaning up contamination that they were not responsible for causing. This bill was meant to give an understandable exemption from remediation in cases where the property owner is not a corporate entity and if:

1. The owner purchased the property prior to September 1, 1992 (when mandatory disclosure laws went into effect);
2. The owner demonstrates that the discharge was caused by another person without the owner's knowledge;
3. The property was not listed in the database of contaminated properties maintained by the DNR when the owner purchased the property.

The Problem: Under the Spills Statute, in addition to whomever causes contamination, the current property owner is considered a responsible party because he or she “possesses or controls” the contaminated site. Where a viable causer does not exist, absolution of environmental liability for the “innocent owner” does not address the root contamination problem – who will pay to investigate and remediate the contamination in order to protect public health and restore the environment. If the intent of the legislation is to provide relief to parties like Mr. Ken Koepler of Madison, the State must decide how it can assist these innocent landowners in mitigating the effects of the contamination while at the same time protecting public health, restoring the environment, and promoting economic renewal of the subject property and surrounding area.

Many “innocent landowners” want to see the contamination properly addressed but have no access to outside funding sources to assist with investigation and remediation. These owners are expected to fully fund remediation costs which may be beyond their financial means and which may exceed the property value, especially outside of urban centers. By contrast, municipalities, development authorities, businesses, and developers have access to multiple funding mechanisms to assist with or completely cover costs associated with investigation or remediation (e.g., federal or state brownfields grants, TIF, WEDC grants, Dry Cleaner Fund, bank financing, etc.). This raises a question of fairness of the current system.

A Wisconsin Brownfield Study Group (WBSG) subcommittee of environmental scientists, attorneys, insurance risk experts and academic

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researchers convened to attempt to quantify the potential scope of this “innocent landowner” problem as well as derive potential solutions. While ad hoc examples gave a sense of types of situations where such a law might be applicable, the number of likely cases could not be determined by this group or WDNR staff.

The Solution: State-aided funding is the only practical solution at this time to relieve the impacts on these innocent landowner situations while simultaneously protecting the welfare of the public and promoting economic development. Studies show that state investment in this area yields large returns.

In 2015, the WBSG funded the University of Whitewater Fiscal and Economic Research Center to quantify the benefits of contaminated site cleanups and redevelopment. The study found that State funded grants of \$121.4 million cumulatively recouped a \$1.77 billion return—**a more than 14-fold return on the state investment.**

Over half of the state grant funding outlay is recouped in state tax revenues from construction activities alone, and redevelopment of the properties directly or indirectly resulted in the retention of 54,483 permanent jobs. Study economists calculated that local Wisconsin governments gained \$88.5 million annually in tax revenues from redeveloped brownfields, not including property taxes derived from the new or renovated buildings. On average, post-redevelopment assessed values exceed pre-development values at a ratio of 3.5 to 1.

The Ask: It is the recommendation of the Wisconsin Brownfield Study Group that the legislature augment the Wisconsin Environmental Fund from the current \$2.3million to \$4million annually and dedicate a portion of that fund to be allowed for use on private property when the innocent landowner provisions listed in LRB0948 are met in lieu of absolving current owners of environmental liability.

Currently, approximately \$2.3 million is collected annually from a wide variety of sources and placed into the Wisconsin Environmental Fund (Wis. Stat. 25.46). The WDNR fully utilizes the entire annual allotment yet is only able to stabilize only the most imminent and hazardous threats to the public and environment.

Sources of additional funding should be the subject of further study. For example, many of these sites may have been covered under general liability insurance policies pre-dating the “absolute pollution” exclusion that was incorporated into most policies in the mid-1980’s. Serious study should be given to how the State might pursue these old policies as a way to supplement the Environmental Fund. This type of investigation is beyond the capabilities of most individuals, but WDNR staff funded to this may yield

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substantial additions in funding from insurance claims. Similarly, industries which have had a disproportionate role in producing environmental contamination of land and groundwater should be considered for additional fees to cover the costs of clean-up. Programs such as now-retired PECFA and the Dry Cleaners fund may serve as a template. Ultimately, these remedies will be more efficient for the state and result in timelier cleanup and redevelopment than leaving innocent landowners to pursue private action against prior owners.

The following are examples of where access to an augmented state Environmental Fund, state industry derived remediation funds (e.g. dry-cleaner fund, PECFA), and insurance claim support would provide relief from environmental liability as well as protection of human and environmental health.

Case #1:

A former dry-cleaning site was purchased by an individual, converted to residential units and rented. Dry-cleaning chemicals are discovered in the soil underneath the property. Contaminant cleanup will remove the risk to the current occupants of the property and neighbors. If the contaminant spreads multiple properties will become economically worthless and people sickened if vapors move through the soil into basements and houses.

Case #2:

An individual building owner adjacent to a long-defunct rural gas station begins to have gasoline seep through basement walls making the structure unusable for the current first floor small business operation as well as the second story rental units uninhabitable. Remediation is required of both the owner's property as well as the adjacent contaminant source. The rural location of this site makes commercial redevelopment fiscally unviable.

Case #3

A family farm in the Driftless region becomes aware of lead contamination of soil and stream sediment due to mining operations from the early 1900s. The lead is hazardous to the farm family during normal farm operations, livestock if the area is grazed and nearby trout stream and wildlife. Self-funding the cleanup will bankrupt the farming operation.