



## **Responses to FAQs Related to Estabrook Dam**

1. Who is responsible for paying to remove sediment and vegetation that might cause flooding, restrict navigation, impact aesthetics, and other uses? Who is liable for flood and ice jam damages?

*The District or local municipalities routinely remove obstructions to waterways that pose flood risk, depending on the location and nature of the obstruction. However, there is no reason to believe this stretch of river, more so than any other waterway in southeast Wisconsin, will suddenly be subject to floating debris that would cause flooding or restrict navigation once the Estabrook Dam is removed. This is true because the removal of the dam will not significantly affect current river levels during non-storm conditions, since the dam has been open for the last eight years.*

2. There may also be questions about landowner liability from sediment and newly exposed sediment as soils per NR 720 standards based on location of the Ordinary High Water Mark (OHWM).

*We cannot offer a legal opinion on individual landowners' liability for contaminant removal. However, state statute 292.13 provides an exemption from environmental liability to owners of properties on which the contamination did not originate. This is called an offsite exemption. See the attached fact sheet for more information.*

3. As owner of the Estabrook Dam, what is the MMSD's responsibility for repairing failing natural and man-made river bank structures, piers, etc. (upstream of the dam)?

*As the dam owner, MMSD is responsible for the condition of the dam until its removal. Dam owners are generally not responsible for the condition of upstream and downstream structures; but we note again that the river level will not be significantly changed during non-storm conditions, so it is not expected that natural or man-made river bank structures will be affected by the dam removal.*

4. What is going to be done about aesthetic issues and hazards associated with “miles” of WPA constructed “sea walls”?

*The project involves the removal of the dam and the restoration of the streambanks immediately adjacent to the dam where the materials will be trucked out. The removal or repair of the upstream and downstream sea walls is not part of this dam removal project; and, again, the removal of the dam is not expected to affect the sea walls since the normal river level will not be significantly different from the current level with the dam open.*

5. Who legally owns the new land that is now exposed?

*We expect little to no change to the shoreline from the current shoreline with the dam open. However, it is our opinion that, if the river alters course and creates new land as a result, the owner of the new land may be the riparian landowner. Each landowner should consult his or her own attorneys about this.*

6. Will the MMSD be responsible for lost uses of the river and decreases in property values following dam removal?

*The District does not believe that property values will decrease as the result of the dam removal; nor does it believe that there will be “lost uses”. The dam has been open for eight years, and the river level will not change significantly from the current level. We have no other comment on liability for perceived damages upstream landowners may claim as a result of the dam removal.*

7. The WDNR should require an Environmental Impact Statement (EIS).

*The MMSD will abide by the WDNR's decision to complete the appropriate environmental analyses and public review process.*

8. Will MMSD be responsible for erosion at storm sewer outfalls?

*It is the responsibility of the storm sewer system owner to maintain its outfalls. Hydraulic analysis suggests that removing the dam structures does not pose a significant increase in erosive energy near these outfalls (today's conditions – dam gates open vs. dam completely removed).*



# When Contamination Crosses a Property Line – Rights and Responsibilities of Property Owners

## *Off-Site Limited Liability Exemption*

PUB-RR-589

July 2012

### Information in this Fact Sheet

- A. Summary of Property Owner Rights and Responsibilities
- B. The Statutory Exemption from Environmental Cleanup
- C. Option for a Written, Property-Specific Liability Exemption
- D. Other Options & Situations – Liability Clarification Letters
- E. Responsibility for Continuing Obligations
- F. More Information

### A. Summary of Property Owner Rights and Responsibilities

When contamination from one property crosses a property line and affects a second property, Wisconsin law provides an exemption from environmental liability to the second owner, known as an “off-site” owner (s. 292.13, Wis. Stats.). This means that generally the Department of Natural Resources (DNR) will not ask property owners to clean up contamination that did not originate on their property.

An *Off-Site Property Owner* is someone who owns property that has been affected by contamination that originated on another

Instead, the responsibilities of off-site owners are to;

- 1) allow access to their property so that those responsible for the contamination may follow it across the property line as they investigate and clean it up, and
- 2) if the cleanup approval includes a continuing obligation on the off-site property, maintain the required physical and administrative conditions of that obligation. Please see Section E to learn more about continuing obligations.

### **Off-Site Property Owners Must:**

1. Allow access to their property so that those responsible for the contamination may take action, and
2. If a continuing obligation is part of the final cleanup, maintain those conditions on the relevant portion of their property.

### B. The Statutory Exemption from Environmental Cleanup Requirements

Wisconsin law, s. 292.11, Wis. Stats., generally holds those who cause, possess or control contamination responsible for reporting the contamination to DNR, investigating its full extent, and cleaning it up. This responsibility does not end at their property line.



Another section, s. 292.13, Wis. Stats., provides an exemption from environmental liability to owners of “off-site” properties, properties on which the contamination did not originate. The owners of these properties do not need to take action to obtain this exemption. However, they have the option to request a written, site-specific liability exemption or a liability clarification letter from DNR. Please see sections C and D for more information about these options.

Usually off-site contamination is discovered as the party responsible for it conducts an investigation to determine the degree and extent of contamination. If the contamination crosses a property line, the responsible party needs to ask the owners of affected off-site properties for permissions so they may complete their investigation and /or cleanup. It’s important for off-site owners to reach agreement on access with the responsible party, because failure to provide access can nullify an off-site property owner’s exemption from liability. The access agreement is an opportunity to negotiate terms such as the restoration of landscaping and scheduling the work.

Sometimes contamination that originated on one property is not discovered by the responsible party, but rather by neighbors who conduct their own environmental assessments on their properties. Neighbors may do this in order to assure potential purchasers of their property’s condition or to obtain financing. Property owners who discover contamination that they believe originated elsewhere may qualify for the statutory exemption from environmental liability. However, they need to demonstrate that the contamination originated somewhere else by collecting

appropriate environmental data and property history.

In this situation, owners of “off-site” properties must first notify DNR about the contamination they have found. DNR will work with the responsible party to take appropriate actions to investigate and cleanup the contamination. For example, if a long-time office supply store located next to a dry cleaner discovers dry cleaning solvents near the property line, DNR may not ask the office supply store to do more than to provide access so that the dry cleaner may complete an investigation.

<p style="text-align: center;"><b>Responsible Party Notifications to Neighbors</b></p> <p>Those responsible for contamination should take these steps to provide information to the owners of off-site property affected by their contamination:</p> <ol style="list-style-type: none"><li>1) When initially requesting site access to sample for contamination on neighboring property, offer to share those sampling results with the neighbors.</li> <li>2) Notify off-site property owners before requesting state approval of any cleanup that leaves residual contamination on an off-site property, including any engineering controls that would be required in order for the state to approve the cleanup. <b>This notification is required by law, s. 292.12(4), Wis. Stats.</b></li></ol>
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### **C. Option for a Written, Property-Specific Liability Exemption**

If off-site property owners can demonstrate that the contamination originated

somewhere else on another property, they may obtain a written liability exemption from DNR. The fee to obtain DNR's review of this data and make a determination of liability is required in accordance with ch. NR 749, Wis. Adm. Code.

A written liability exemption letter can be useful if the off-site neighbors affected by contamination from another property needs to refinance, lease their property, sell their property or undertake construction.

The off-site property owner can use investigation data collected by the responsible party in response to the contamination or, an owner of an off-site property may collect their own data to demonstrate the contamination is coming from somewhere else..

In order to obtain this liability exemption, an off-site property owner must demonstrate that:

- The contamination originated somewhere else;
- The off-site owner did not possess or control the property where the contamination originated; and
- The off-site owner did not possess or control the hazardous substance, or cause its discharge onto the contaminated properties.

Off-site property owners must also:

- Allow the party that is responsible for the contamination, as well as DNR, reasonable access to their property for investigation and clean up of the contamination; and
- Avoid actions that worsen the contamination, not interfere with actions taken in response to the

contamination and comply with any other conditions that DNR finds necessary.

The liability exemption is not transferable to future off-site owners. DNR's Off-site Liability Exemption application, Form 4400-201, includes instructions and describes the information needed by DNR in order to grant a site-specific off-site liability exemption. Please see Section F for more information.

#### **D. Other Options & Situations – Liability Clarification Letters**

If an affected property owner is unable to meet the conditions to obtain an off-site liability exemption, DNR can instead provide a liability clarification letter for a fee. For more information about this option, please see fact sheet RR-619, *General Liability Clarification Letters*.

Liability clarification letters may be helpful when:

- Someone is considering purchase of property with contamination that may have originated somewhere else; the clarification letter would state the conditions under which the liability exemption would be available to an off-site owner;
- Widespread contamination has affected multiple properties; DNR can write one liability clarification letter that describes the conditions under which an off-site exemption would be available to the affected property owners;
- There is credible evidence that groundwater contamination has moved onto a property from somewhere else,

although no groundwater samples have been collected and analyzed from the affected “off-site” property;

- There is groundwater contamination in the area and a likelihood that a property may become affected by contamination that originated somewhere else.

If any of these liability clarification letters are requested, the DNR’s Off-Site Liability Exemption form (Form 4400-201) should be used.

## **E. Responsibility for Continuing Obligations**

Often residual contamination remains after an approved environmental cleanup, and sometimes the cleanup approval includes engineering controls to reduce its impact. For example, a common type of continuing obligation is maintaining a “cap” of asphalt or concrete to keep rain from flushing soil contaminants into the groundwater, or a cap of clean soil that prevents human contact with contaminated soil.

When residual contamination extends across a property line, a continuing obligation may also extend onto a neighboring “off-site” property as a legal part of the cleanup approval. So while owners of off-site properties may not be responsible for cleaning up the contamination, they may become responsible by law for maintaining the continuing obligation.

### **Important information about continuing obligations**

1. The party responsible for cleaning up contamination must notify all affected off-site property owners of a proposed continuing obligation on their property before DNR reviews the cleanup

proposal. This is required by law and allows off-site property owners time to tell DNR about any technical concerns regarding the proposed cleanup. The law does not provide for objections based on convenience.

2. If a cleanup proposal that includes off-site continuing obligations is approved, DNR will send a letter to off-site owners detailing their requirements to maintain the continuing obligation.
3. An off-site property owner may enter into a “legally enforceable agreement” (i.e. a private contract) with the party responsible for the contamination, under which the responsible party assumes responsibility for maintaining a continuing obligation on the off-site person’s property.
4. A property owner may request modification of a continuing obligation when environmental conditions change. For example, petroleum contamination degrades over time and results of new analytical samples may support modifying or removing a continuing obligation. A review fee is required for this step.
5. All contaminated properties that get closure appear in DNR’s GIS Registry, an on-line property information system. If there is a continuing obligation, it will be described in the closure approval letter found in the GIS Registry, allowing current and future property owners to find information about the continuing obligation requirements.

**Legal requirements for “off-site” property owners when continuing obligations are in place:**

1. The property owner must obtain prior approval from DNR if the owner intends to construct or reconstruct a water supply well.
2. If residual contamination is disturbed, the property owner is responsible for proper sampling, handling and treatment or disposal of the contamination.
3. If specified in the cleanup approval, the property owner must periodically inspect the continuing obligation, maintain it and record the maintenance activities. For example, this often means keeping in good repair the pavement that covers contaminated soil.
4. The property owner must obtain prior written approval from the state before

changing the physical conditions specified in a continuing obligation.

For more information about related topics, please consult these resources on DNR’s Remediation and Redevelopment Program web site at [dnr.wi.gov/topic/Brownfields/](http://dnr.wi.gov/topic/Brownfields/).

- [Off-site Liability Exemption Application](#), DNR form 4400-201,
- [General Liability Clarification Letters](#), Publication RR-619.
- Off-Site Contamination web page, including Frequently Asked Questions, at [dnr.wi.gov/topic/brownfields/offsite.html](http://dnr.wi.gov/topic/brownfields/offsite.html)
- Residual Contamination and Continuing Obligations web page at [dnr.wi.gov/topic/Brownfields/Residual.html](http://dnr.wi.gov/topic/Brownfields/Residual.html)

**DNR Regional Brownfield Contacts**

Please direct questions 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).

To find out more information about the Remediation and Redevelopment Program, please see our website at [dnr.wi.gov/topic/brownfields/](http://dnr.wi.gov/topic/brownfields/).