ROSEVILLE

REQUEST FOR COUNCIL ACTION

Date: July 12, 2010
Item No.: 13.a

Department Approval	City Manager Approval
P. Trudgeon	WJ Malinen

Item Description: Discussion of Environmental Cost Recovery within the Twin Lakes Area

BACKGROUND

In late 2007, the City Council requested information from Attorney Larry Espel about environmental cost recovery and its potential application in the Twin Lakes area. In December 2007, he prepared a memorandum that described federal and state laws that allow for third parties to seek reimbursement for environmental assessment and remediation activities from the parties responsible for causing the contamination, discussed practical considerations that Council might consider prior to moving forward on this path, and identified a potential series of next steps. (See Attachment A: Espel Memorandum to review this document.)

In 2009, the City Council discussed the possibility of environmental cost recovery within the Twin Lakes area on at two meetings—May 11 and July 20, 2009. At the May 11 meeting, the topic was introduced and the Council requested that staff provide them with previous materials on this topic. (See Attachment B to review the discussion from this meeting.) To fulfill this request staff reviewed the City's files and records and did not find any additional information on cost recover beyond the Espel memorandum and brought these results back to the City Council at the July 20 meeting. At this meeting, the Council continued its discussion on the potential for environmental cost recovery. Council directed staff to hold preliminary discussions with consultants who could provide expertise in reviewing environmental reports to date and to review ownership records, and amend the Cost Allocation Study to include environmental costs. (See Attachment C to review the discussion from this meeting.)

Staff met with Danial Holte and Jason Kunze of Braun Intertec to discuss a possible role for an environmental consultant as part of an environmental cost recovery process. They indicated that they concurred with Mr. Espel's analysis of the cost-recovery process and indicated that it could take several years and a significant financial investment to undertake this process. They added that it would quite unusual for a third party to undertake the cost recovery process and suggested in a memorandum to Community Development Director Pat Trudgeon that "a forced third party cleanup could keep the property from being redeveloped for many years." See Attachment D to review this memorandum.

The following information summarizes existing information on past ownership and tenants and incurred environmental costs.

Existing Information on Past Ownership

The Phase 1 area of the Twin Lakes redevelopment project is comprised of sixteen original parcels. (Due to land acquisition by both the City and Metropolitan Council there are additional parcels; however, for the sake of this discussion, staff will be discussing ownership related to the original parcels.) Of the sixteen parcels, the City completed title work on ten of them for the 2009 land acquisitions. Attachment E is a map that identifies known past owners for each of the parcels based on the information provided in the title searches. This was only a cursory analysis of entities that were identified in legal documents associated with each parcel. As part of the cost recovery process, an attorney would need to determine to what extent these entities are part of the chain of title.

Information on Former Tenants

In 2000, the City received a U.S. EPA Demonstration Assessment Pilot Grant to investigate possible environmental issues along the planned Twin Lakes Parkway Corridor. As part of that work, the City retained an environmental consultant to undertake a limited areawide Phase I environmental site assessment (ESA). A Phase I ESA looks at historical information and government records to determine if subsurface soil and groundwater contamination is warranted. Part of the historical information that was gathered during this effort was the identification of past users of each parcel. These users were identified by researching old phone books. Attachment E is a table summarizing these findings. This table provides snapshots in time of numerous past tenants.

Environmental Costs Incurred for the Infrastructure Project

As part of the Twin Lakes infrastructure project, the City has funded environmental assessment, planning, and cleanup, which has been supported by tax increment balances and did not come from the general fund. The total amount expended to date on these activities is approximately $145,000 of which $30,000 has been reimbursed by a Ramsey County Environmental Response Fund grant. The City has established a mechanism for recuperation of the remaining costs. As part of the April 26, 2010 amendment to the Twin Lakes Cost Allocation Study, the City Council approved including environmental costs incurred as part of the infrastructure project as part of the overall project costs. As the property is redeveloped, those redeveloping the property will pay their share based on number of network trips of the cleanup costs needed to complete the infrastructure project.

There will be additional environmental costs for the infrastructure project to implement the Phase 2 Project’s Response Action Plan (RAP), to coordinate with the Minnesota Pollution Control Agency, and to prepare of the final documentation for the Voluntary Investigation Program for both phases of the infrastructure project. The City has received a $180,570 grant from Ramsey County for the cost to remove contamination from the Phase 2 are and is seeking additional funding from the County to offset the remaining costs described above. As with Phase 1, the project costs not reimbursed to the City with grant will be included in the 2011 amendment to the Cost Allocation Study.

STAFF DISCUSSION AND RECOMMENDATION

Staff does not recommend moving forward with additional action to attempt to recover environmental costs through the Minnesota Environmental Recovery and Liability Act

(MERCLA) for the costs incurred as part of the construction of the public infrastructure. In determining this recommendation, staff looked following elements: Financial impact to the City and likelihood of success.

<u>Financial Impact to the City</u>

The City received grant funds and approved a mechanism by which to recuperate its costs for the environmental activities completed as part of the infrastructure project. The cost to attempt a cost recovery from the responsible parties would be City dollars, which could potentially be funded by tax increment. Ultimately, if any funds were to be recovered, the money need to be distributed back to Ramsey County's and any developers who had already contributed as part of the Cost Allocation Study. If a judgment is made against a responsible party, the City could recuperate its legal fees through the process. However, if a judgment is never made against a responsible party, the City will have invested significant financial resources to attempt to recover environmental costs that will have been paid for by other entities.

<u>Likelihood of Success</u>

As described in the background section of this report, many of the parcels have had numerous users and owners that could have contributed to the release of contaminates within the Twin Lakes area. Due to the general nature of these contaminates and the similar nature of the businesses that were located within the area, attributing the contamination to any one user may be challenging. If the City can determine a specific business or group of businesses responsible for the pollution, the next step would be to determine if these businesses still exist or have any viable assets from which to seek recovery. In the 2007 Espel memorandum, Mr. Espel begins to outline these challenges by using Indianhead Trucking as an example.

Because the process of exacting cleanup costs from the parties responsible for contamination is onerous and often times fruitless, the federal, state, and regional governments have created financial tools to help local government offset the costs of environmental cleanup in order to bring brownfield properties back to their highest and best use. The City has utilized these tools by applying for and receiving grants and creating a hazardous substance subdistrict as part of TIF 17. Staff recommends the City continue to pursue grants and use TIF funds characterize contamination, develop cleanup plans, and help offset remediation costs. In addition, for those environmental costs incurred as part of the City's infrastructure project that cannot be reimbursed through grants, staff recommends the continued inclusion of those costs in the Cost Allocation Study.

REQUESTED COUNCIL ACTION

A. If the City Council determines that it does not want to pursue environmental cost recovery, no action is needed.

B. If the City Council determines it wants to pursue environmental cost recovery, direct staff to prepare a request for proposals for an attorney and an environmental consultant to begin undertaking the process.

Prepared by: Jamie Radel, Economic Development Associate

Attachments: A: Espel Memorandum dated December 17, 2007

B: Extract of City Council Meeting Minutes from May 18, 2009
C: Extract of City Council Meeting Minutes from July 20, 2009
D: Daniel Holte (Braun Intertec) Memorandum dated November 23,2009
E: Map depicting past and present ownership
F: Table identifying tenants over time

GREENE ESPEL MEMORANDUM
PROFESSIONAL LIMITED LIABILITY PARTNERSHIP
SUITE 1200
200 SOUTH SIXTH STREET
MINNEAPOLIS, MINNESOTA 55402
(612) 373-0830 FAX (612) 373-0929

PRIVILEGED AND CONFIDENTIAL

TO: Roseville City Council

FROM: Larry D. Espel, Greene Espel PLLP

DATE: December 17, 2007

RE: *Environmental Cost Recovery*

Introduction

We have been requested to prepare, for the benefit of the Roseville City Council, an introductory summary describing the process by which the City could attempt to have current and/or previous property owners pay for any environmental contamination that they may have caused in the Roseville Twin Lakes Redevelopment Area.

The principal available options include various statutory or common law claims that can support private cost recovery, declaratory relief or injunctive relief. In some circumstances, federal or state agencies will take steps to mandate response actions by private parties. The following memorandum will outline the various alternatives.

RCRA

Under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6971, *et seq.*, the City could pursue injunctive relief (not cost recovery) against past or current generators or operators who contributed to environmental problems. Under 42 U.S.C. § 6972(a)(1)(B), "any person may commence a civil action on his own behalf * * * against any person, including any past or present generator . . . or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed . . . to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." RCRA allows injunctive relief to compel the past or present owner or operator to cease disposal or to take such other action as may be necessary. This is not a cost recovery remedy. However, courts can order responsible persons to pay future response costs.

As noted, RCRA claims depend upon an imminent and substantial endangerment to health or the environment. This entails a showing of a threat, and may be shown even if the impact will not be felt until later. The Eighth Circuit Court of Appeals has said that RCRA is limited to situations in which the potential for harm is great, but this is a fact-specific analysis that leaves room for interpretation. If remedies have already been performed, RCRA injunctions are generally not available and prior costs cannot be recovered. Conversely, in at least one Seventh Circuit case, a claim for an injunction under RCRA failed where the risks of off-site contamination would not materialize unless or until excavation was performed and there was no showing that the excavation was imminent.

Remedies under RCRA can be any form of injunctive relief necessary to prevent ongoing releases. RCRA remedies may not support clean-up of the offending site itself.

RCRA can reach any type of hazardous waste and there is no petroleum exclusion under RCRA.

Before a citizen (or any other person, such as the City) may bring a RCRA action, notice must be given to the EPA, the state and the alleged violator. RCRA actions will not be allowed to proceed if there is already a response action underway at the instigation of the federal or state authorities.

RCRA allows the recovery of attorneys' fees or other costs to the prevailing party.

CERCLA

Under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 to 9675, the City can pursue a cost recovery claim against owners, operators or transporters who are responsible for sites or facilities from which there is a release, or a threatened release, which causes the incurrence of response costs for a hazardous substance. The cost recovery statute is set forth at 42 U.S.C. § 9607. The plaintiff can recover any "necessary costs of response ... consistent with the national contingency plan." *Id.*

CERCLA claims are available for "hazardous substances," which are defined somewhat differently than RCRA's "hazardous wastes." In some respects, CERCLA's reach is broader than RCRA's but in other respects CERCLA is more limited. A significant difference is that CERCLA does not reach petroleum spills.

In contrast to RCRA, which is primarily a preventative statute, CERCLA is designed to address situations in which harm has already occurred in addition to preventing threats. The remedy in CERCLA is, in the first instance, cost recovery. This means that parties seek to recover sums that have already been expended on the recovery. However, courts have also coupled cost recovery awards with additional relief such declaratory relief and injunctions addressing ongoing or future obligations. CERCLA does not allow recovery of attorneys' fees for the prosecution of cost recovery claims (although fees can be recovered if incurred as part of the response action itself).

Private cost recovery (including claims by parties such as the City) depend upon a showing that the sums expended were necessary and consistent with the National Contingency Plan ("NCP").

The NCP has certain requirements for action. Those requirements depend upon whether a response action is a "removal" action or a "remedial" action.

For a removal action, the steps included are limited and expeditious. They include a Removal Site Evaluation (400 CFR 300.410) and a Removal Action (400 CFR 300.415). A removal site evaluation consists of a removal preliminary assessment and, if warranted, a removal site inspection. 400 CFR 300.410(a). A removal site evaluation shall be undertaken "as promptly as possible." 400 CFR 300.410(b). The removal preliminary assessment shall be based on readily available information. If removal action is not required, [1] but remedial action under 300.430 may be necessary, a remedial site evaluation shall be initiated. 400 CFR 300.410(i).

Removal actions are to "begin as soon as possible to abate, prevent, minimize, stabilize, mitigate, or eliminate the threat to public health or welfare of the United States or the environment." 400 CFR 300.415(b)(3).[2] Under 400 CFR 300.415(b)(5), removal actions shall be terminated after \$2 million has been obligated for the action or 12 months have elapsed from the date that removal activities begin on-site, unless there is a determination that (i) there is an immediate risk to public health or the environment; and continued response actions are immediately required to prevent, limit, or mitigate an emergency, and such assistance will not otherwise be provided; or (ii) continued response action is otherwise appropriate and consistent with the remedial action to be taken. Under 40 CFR 300.415(g), if a removal action will not fully address the threat and the release may require remedial action, there shall be an orderly transition from removal to remedial response activities.

In contrast to the relatively expeditious and preliminary nature of a removal assessment, an investigation for a remedial action includes many more formal and fully developed investigation, planning and implementation steps. These include a Remedial Preliminary Assessment (PA) (40 CFR 300.420(b)), a Remedial Site Inspection (SI) (40 CFR 300.420(c)) and a Remedial Investigation/Feasibility Study (RI/FS) (40 CFR 300.430). "Remedial actions are to be

---

[1] The NCP provides a listing of factors to be considered in determining the appropriateness of a removal action. 400 CFR 300.415(b)(1). These include:

Exposure to nearby human populations, animals or the food chain
Contamination of drinking water supplies or sensitive ecosystems
Hazardous substances in drums, barrels, tanks, or other bulk storage containers, that may pose a threat of release
High levels of hazardous substances largely near the surface
Weather conditions that may cause migration or releases
Threat of fire or explosion
Availability of other mechanisms to respond
Other situations or factors that may pose threats

[2] A list of removal actions is provided at (e)(1)-(8), such as fences, drainage controls, stabilization of berms, capping to reduce migration, using chemicals to retard or mitigate spread, excavation or removal of highly contaminated soils from drainage areas to reduce spread or direct contact,

implemented as soon as site data and information make it possible to do so." 40 CFR 300.430(a)(1). The NCP provides program management principles, including: "Sites should generally be remediated in operable units when early actions are necessary or appropriate to achieve significant risk reduction quickly, when phased analysis and response is necessary or appropriate to achieve significant risk reduction quickly, when phased analysis and response is necessary or appropriate given the size or complexity of the site, or to expedite the completion of the total site cleanup." 40 CFR 300.430(a)(1)(ii).

Extensive guidance is given for remedial investigations and related work. "The purpose of the remedial investigation/feasibility study (RI/FS) is to assess site conditions and evaluate alternatives to the extent necessary to select a remedy." 40 CFR 300.430(a)(2). An RI/FS generally includes project scoping, data collection, risk assessment, treatability studies, and analysis of alternatives. *Id.* The NCP addresses numerous topics for an RI/FS, including Project Scoping (40 CFR 300.430(b)), Community Relations (40 CFR 300.430(c)), Remedial Investigations (RI) (40 CFR 300.430(d)) and Feasibility Studies (40 CFR 300.430(e)). The Remedial Design/Remedial Action (RD/RA) stage includes the development of the actual design of the selected remedy and the implementation of the remedy through construction. A period of operation and maintenance may follow the Remedial Action activities. 40 CFR 300.435(a).[3]

MERLA

Minnesota has its own cost recovery statute, the Minnesota Environmental Response and Liability Act ("MERLA"), found at Minn. Stat. §§ 115B.01, *et seq.* MERLA is similar to CERCLA in some respects although there are many differences. MERLA allows cost recovery for response actions necessary as a result of releases or threatened releases of hazardous substances, but also allows recovery of lost profits and other damages in certain circumstances. MERLA allows a prevailing plaintiff to recovery attorneys' fees. However, MERLA is subject to certain defenses on retroactivity depending upon the date of the releases of hazardous substances. But, the City is in a better position that private parties to pursue claims for historical releases. Also, the City is allowed to recovery any "reasonable and necessary response costs," whereas private parties could recover only removal costs. Minn. Stat. § 115.B.04, subd. 1.

Under Minn. Stat. § 115B.04, subd. 1, "any person" who is responsible for a release or threatened release of a hazardous substance from a facility is strictly liable, joint and severally, for, among other things, "all reasonable and necessary response costs incurred by the state, a political subdivision of the state or the United states" and "all reasonable and necessary removal costs incurred by any person." Minn. Stat. § 115B.04, subd. 1(1) and (2). A responsible person (RP), however, may assert as a defense against such claims that the hazardous substance released from the facility in question was placed or came to be located in or on the facility before April 1, 1982 <u>and</u>

[3] In addition to the provisions presented in the NCP, the EPA has provided a library full of other guidance documents addressing removal actions, remedial actions, and the types of documents one needs to prepare to address different steps in either type of process. In general, the EPA tends to refer to removal actions as immediate, short-term responses, whereas remedial actions are long term actions.

that the MPCA did not authorize the response action(s) taken by the political subdivision or the private person pursuant to Minn. Stat. § 115B.04, subd. 6.

MERA

Minnesota also has a Minnesota Environmental Rights Act ("MERA"), Minn. Stat. §§ 116B.01, *et seq.* This statute allows "civil action in the district court for declaratory or equitable relief in the name of the state of Minnesota against any person, for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction." Minn. Stat. § 116B.03. A claim under MERA depends upon a showing of actual or threatened pollution, impairment or destruction. The statute allows injunctive relief, but not damages, and does not provide for recovery of attorneys' fees.

Common Law Claims

Various common law claims can be invoked in some circumstances. Typical claims include claims for nuisance, trespass, negligence, strict liability for ultrahazardous activities, contribution or indemnity. These common law claims do not materially augment the available claims or remedies and are largely superseded by the statutory claims mentioned above. However, if there is litigation, parties customarily invoke such claims in addition to the statutory claims mentioned above.

Statutes of Limitation

We have not looked closely enough at the facts to evaluate the application of potential statutes of limitation. However, we do not believe that most available claims would be cut-off.

In general, if there is an ongoing imminent and substantial endangerment, RCRA claims will be available, because the statute of limitations will not cut off ongoing claims.

CERCLA claims are likewise generally available where the response actions remain incomplete. Claims for a removal action are to be brought within 3 years after completion of the removal action and claims for a remedial action must be brought within 6 years after initiation of physical on-site construction of the remedial action. It does not appear, from information we have received, that the City has conducted a removal action or initiated a remedial action. So, the statute of limitations is unlikely to have expired.

MERLA claims for cost recovery are probably available. A 1998 amendment to Minn. Stat. § 115B.11, specifies:

> Subd. 2. Action for recovery of costs.
>
> (a) An action for recovery of response costs under section 115B.04 * * * may be commenced any time after costs and expenses have been incurred but must be commenced no later than six years after initiation of physical on-site construction of a response action."

> (b) A party prevailing in an action commenced within the time required under paragraph (a) shall be entitled to a declaratory judgment of liability for all future reasonable and necessary costs incurred by that party to respond to the release or threatened release * * *.

The availability of the tort-style damages available under Section 115B.05 depend upon the time of placement. Under Minn. Stat. § 115B.06, "Section 115B.05 does not apply to any claim for damages arising out of the release of a hazardous substance which was placed or came to be located in or on the facility wholly before July 1, 1983."

There are other provisions limiting the retroactivity of MERLA. For example, Section 115B.15 provides:

> Sections 115B.01 to 115B.14 apply to any release or threatened release of a hazardous substance occurring on or after July 1, 1983, including any release which began before July 1, 1983, and continued after that date. Sections 115B.01 to 115B.14 do not apply to a release or threatened release which occurred wholly before July 1, 1983, regardless of the date of discovery of any injury or loss caused by the release or threatened release.

Similarly, Section 115B.04, subd. 6, states:

> Defense to certain claims by political subdivisions and private persons. It is a defense to a claim by a * * * private person for recover of the costs of its response actions under this section that the hazardous substance released from the facility was placed or came to be located in or on the facility before April 1, 1982, and that the response actions of the political subdivision or private person were not authorized by the agency as provided in section 115B.17, subdivision 12. This defense applies only to response costs incurred on or after July 1, 1983.

Minn. Stat. § 115B.17, subd. 12 states that the MPCA <u>may</u> authorize a political subdivision to undertake a response action or a private party to undertake a removal action with respect to a pre-April 1, 1982 hazardous substance release <u>if</u> the action qualifies for authorization under rules developed under Minn. Stat. § 115B.17, subd. 13. The MPCA's authorization must be consistent with this authorization criteria established under subdivision 13. Subdivision 12 does not prohibit a political subdivision or a private person from undertaking a removal or remedial action without MPCA authorization. Presumably, however, such action would be done without the ability to recover the costs from an RP.

The MPCA, under Minn. Stat. § 115B.17, subd. 13, is required to maintain rules "establishing state criteria for determining priorities among releases and threatened releases." In addition to promulgating the criteria for determining priorities, the MPCA is also to maintain a Permanent List of Priorities (PLP) which reflects "priorities among releases or threatened releases for the purpose of taking remedial action and, to the extent practicable consistent with the urgency of the action, for taking removal action" under Minn. Stat. § 115B.17. The MPCA is to modify the PLP "from time to time, according to the criteria set forth in the rules." The list of priorities and the rules promulgated pursuant to this subdivision:

> shall be based upon the relative risk or danger to public health or welfare or the environment, taking into account to the extent possible the population at risk, the hazardous potential of the hazardous substances at the facilities, the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive ecosystems, the administrative and financial capabilities of the [MPCA], and other appropriate factors.

Minn. R. Ch. 7044 includes the MPCA rules created pursuant to Minn. Stat. § 115B.17, subd. 13. As will be seen, however, while Chapter 7044 establishes how it is that the MPCA will create and maintain the PLP, it is silent in terms of explaining exactly how it is that the MPCA uses these rules (if at all) to "authorize" pre-April 1, 1982 response actions under Minn. Stat. § 115B.17, subd. 12. Indeed, Minn. R. 7044.0100 ("Scope") says nothing about providing guidance for such authorizations. Instead, the "scope" of the Chapter 7044 rules is to establish release classifications, to describe the procedures for the creation and maintenance of the state's Permanent List of Priorities and Project List, to establish funding priorities for the Project List and to specify a ranking system to be used in scoring sites. Minn. R. 7044.0100. Furthermore, the rules leave many gaps about, e.g., what the MPCA does with a site's HRS ranking and what criteria it uses to classify releases or threatened releases.

The MPCA does not have any objective standards that it uses when it considers a cleanup authorization under subdivision 12. The few MPCA subdivision 12 authorizations that exist typically lack at lot of detail or rationale.

Practical Considerations

Any consideration of efforts to compel past or current parties to pay for historical or ongoing contamination is tied to the ability to identify past or current polluters who have viable assets or funding. The information provided to us suggests that Indianhead Trucking was a prior owner for a significant portion of the Roseville Twin Lakes Redevelopment Area. We have not checked into the historical records closely, but we believe that Indianhead has long ago filed for bankruptcy and is defunct. We are unaware that Indianhead has any viable successors who assumed Indianhead's liability. Thus, evidence that might tie existing contamination to prior activities of Indianhead will not, as a practical matter, support claims either for cost recovery or injunctive relief.

On the other hand, where various hazardous substances or wastes have become commingled, one party can be called upon to pay jointly and severally for an entire liability, unless the polluter can establish the divisibility of its own releases. So, if the evidence establishes that there are viable parties who are responsible for past or ongoing releases, those parties might be called upon to pay far more than their share of liability. A long-standing debate in environmental law relates to responsibility for "orphan shares," that is, those shares attributable to defunct parties. There are some cases that suggest that a plaintiff bears responsibility for such shares, but there has been considerable re-shuffling of the case law by recent United States Supreme Court cases and those cases could lead to re-examination of the "orphan share" allocation.

The first steps in any formal program to compel others to address contamination include the following:

1. An environmental consultant should be engaged to examine available reports with the specific charge of identifying

    a. Reasonable and necessary response actions associated with imminent and substantial threats or releases, and

    b. Responsible persons, past and present (viable or not).

    c. Without checking with any consultants, but based upon the general nature of the existing available reports, we anticipate that the costs for this analysis would be in the $20-$40,000 range.

2. An attorney should be engaged to evaluate the viability of any specific claims against identified responsible persons.

    a. In general, the costs associated with this analysis would be in the $15-30,000 range.

3. The attorney and consultant should work with the City to develop a plan relating to

    a. A specific plan to identify any work that the City considers necessary and reasonable under applicable environmental standards, including a timetable and rationale for when the steps need to be taken;

    b. A plan for communications with the MPCA (or, less likely, the EPA) to see if the MPCA will prompt actions by the responsible persons or will authorize the City to take any response actions with anticipated cost recovery;

    c. Ensuring that any steps taken in which the City would advance costs would comply with the NCP to ensure eligibility for cost recovery;

    d. Attending to any notices to EPA, the State and responsible parties if any injunctive relief is contemplated under RCRA.

    e. It is premature to estimate costs associated with the costs of work or implementation of this plan. These costs could be better identified in connection with the work that is outlined in steps 1 and 2.

As noted above, it is possible that the costs incurred in connection with this work would be recoverable from responsible parties. However, this would depend upon a valid showing that potentially responsible parties have caused or contributed to past or ongoing releases of hazardous wastes or hazardous materials and that the relief proposed is consistent with one or more of the applicable statutes that allow such recoveries.

Extract of the Meeting Minutes from the May 18, 2009 Roseville City Council Meeting

a. Discuss Recovery of Environmental Clean-up Costs at Twin Lakes

Community Development Director Patrick Trudgeon provided information, as detailed in the Request for Council Action dated May 1, 2009, related to recovery of environmental clean-up costs at Twin Lakes. Mr. Trudgeon provided a memorandum previously prepared by Larry Espel of Greene Espel Law Firm, dated December 17, 2007, and discussing laws regarding environmental cost recovery, procedures, and estimate on costs to implement such a process.

Discussion included whether a Request for Qualifications (RFQ) or Request for Proposals (RFP) was indicated; threshold for services under $50,000 not requiring an RFP; law firms specializing in this type of environmental law and a short list of those firms; whether upfront costs were tax increment financing (TIF) eligible expenses; and actual and practical steps in the process.

Further discussion included determining what the prospects of recovery may be prior to initiating recovery procedures; and staff researching previous firms and information related to this environmental issue, to present to the City Council again for their review and discussion.

City Manager Malinen advised that the Greene Espel firm had been engaged by the City in defense of the Northwestern College environmental litigation; and had provided this information at the request of staff prior to seeking RFQ's or RFP's. City Manager Malinen suggested there may be other firms specializing in this type of law, whose names could be provided by the League of Minnesota Cities Insurance Trust (LMCIT).

Councilmembers concurred that staff provide previously-researched materials to the City Council prior to proceeding or seeking additional firms.

Extract of the Meeting Minutes from the July 20, 2009 City Council Meeting

Discussion of Environmental Cost Recovery within the Twin Lakes Area

Community Development Director Patrick Trudgeon provided a written memorandum from Attorney Larry Espel dated December 17, 2007, describing federal and state laws allowing for third parties to seek reimbursement for environmental assessment and remediation activities from responsible parties causing the contamination; and staff's analysis dated July 20, 2009. Mr. Trudgeon advised that he had reviewed City files and available materials for City Council discussion. Mr. Trudgeon noted the problem in assessment and remediation since the City did not have ownership of much property other than that acquired, or to be acquired, for rights-of-way purposes, without seeking property owner permission to assess their properties, and the lack of support of those owners in allowing the City to perform such an assessment.

Discussion among staff and Councilmembers included additional costs to pursue factual information once a chain of title for each specific property had been determined; difficulties in identifying past property owners creating the rationale for MPCA funding and grant programs for property clean-up based on public benefit in removing contaminants; the City's creation of the Hazardous Substance Sub-District for use of TIF funds for environmental contamination clean up; and the need for outside expertise to provide further analysis.

Further discussion included Statute of Limitations for recovery of funds for clean –up (addressed in Attorney Espel's letter, page five).

Councilmember Ihlan opined that additional information, identification of the type, and determination of the extent of contaminants was obviously needed. Councilmember Ihlan noted that, to-date, the City had been prepared to use public monies to pay for clean-up, specifically on Roseville Properties parcels, and that while this may be prudent upfront, she would like those having polluted the land to pay for its clean up. Councilmember Ihlan opined that it was imperative that private parties and landowners be identified and would be well worth the City's investment to research, while taking steps to preserve those claims to avoid any potential future collection from those responsible parties. Councilmember Ihlan recognized that this research would take time and money; however, she opined that the end result would provide a good investment of public dollars to allow recovery of substantially more monies for environmental remediation.

Councilmember Johnson sought clarification on what criteria would be used for those former property owners/users unable to be identified and held accountable compared to those easily identified, and payment by future developers as a cost of the land.

Councilmember Ihlan opined that a legal analysis of potential claims was necessary; otherwise the City would be spending public monies to recover costs. Councilmember Ihlan suggested use of funds currently being expended in building infrastructure, or using TIF monies for an investigative report.

Mayor Klausing concurred to the extent that responsible parties could be identified; however, he noted that the problem appeared to be to hire an environmental consultant to examine available reports to-date; and then an inspection of properties to determine contaminants, then identifying who contributed to that contamination. Mayor Klausing asked how Councilmembers proposed to accomplish on-site inspections and soil borings on private properties.

Councilmember Johnson suggested that, as property developed, that analysis would seem to be a natural process in development moving forward without City involvement.

Mayor Klausing concurred, noting that it would depend on the nature of development and how much clean up was required.

Councilmember Pust noted that the previous Council request for more information that had been provided by staff via the potential causes of action. Councilmember Pust opined that the need remained for an analysis of who the property owners were over time, and that this information was available through title searches on each respective property and whether those previous owners remained viable resources for financial recovery, and could be achieved by requesting public records.

Councilmember Roe concurred with Councilmember Pust; however, noted that the legal opinion as outlined was for information purposes only, and not pursuing further environmental issues. Councilmember Roe opined that, as a particular development moved forward, an environmental review and past ownership history would be helpful; however, he questioned whether researching this information would be cost-effective all at once, or based on a more project-specific need. Councilmember Roe suggested researching preliminary information on property ownership of specific parcels; and a summary of environmental conditions if available.

Councilmember Pust noted the existence of some reports made available to the City; however suggested that at the time the property is developed, title work would be completed by the developer and would not be a cost to be borne by the City, nor needing to be completed at this time. Councilmember Pust opined that the only action needed by the City was to write into their processes that they be allowed access to those title records, and to make that language a condition to future developer agreements.

Councilmember Ihlan referenced page 8 of the attorney memo laying out possible next steps; and focused on #1.a and b in determining responsible parties past and present; and suggested hiring someone to perform this environmental review at a cost not to exceed $20 – 40,000 in order to protect claims going forward and leverage people to share environmental information. Councilmember Ihlan opined that this was a minimal cost and should be accomplished now before the City was in the midst of a proposed development.

City Attorney Jay Squires noted that the City wore two hats: regulatory and/or owner for properties as development occurred in Twin Lakes. Attorney Squires provided additional detail the City played based on these respective roles; the regulatory role of the City requiring developers to investigate and remediate environmental issues at their cost, with the City unconcerned about how, but with the final goal of clean property; and options the City needed to consider when they wore the ownership hat and determining the depth and nature of contamination and possible avenues for recovery of costs for clean up of those contaminants. Attorney Squires used the example of the Mounds View School District Office site; and opined that, while it would be good to have no remaining contamination on any property in the Twin Lakes area, the question was whether it was appropriate for the City to spend money now, or on a project by project basis, requiring that information be provided and contamination resolved on those properties not acquired by the City.

Councilmember Roe clarified, in a regulatory role with a private developer responsible for clean up, if they requested funds through the Hazardous Substance District and the City requested grant funds on their behalf, then the City would be involved, and may represent a situation when the City wasn't simply an owner or serving in a regulatory role.

Mayor Klausing opined that this still wouldn't change Attorney Squires' underlying point, that the role the City played was crucial to its involvement; and that research on the chain of title not be pursued unless the City was going to develop the property or was responding to a development request.

Councilmember Roe concurred with Mayor Klausing's observation; however, he recognized Councilmember Ihlan's perspective in wanting to know what you were getting into, and to reasonably anticipate TIF and/or grant funding; opining that it may be reasonable to know that information upfront.

Councilmember Ihlan opined that a potential third role of the City was for proposed developments coupled with requests for public subsidy, no matter their source; and determining how the City responded to future requests after they knew what potential contaminants were indicated.

Councilmember Johnson spoke in support of title research, and establishing a chain of title for those properties the City has acquired; however, he opined that, when property was owned by private parties, questioned whether it was appropriate for the City to step in to test their land for pollution without a viable development indicated.

Councilmember Ihlan suggested that the City start with those properties being acquired for rights-of-way or those most likely to be developed.

Mr. Trudgeon noted that the right-of-way for Mount Ridge Road touched upon almost every parcel from County Road C-2 to the PIK Terminal; and noted that the main contamination to-date appeared to be on the PIK and Roseville Properties parcels; and anticipated that financial assistance for environmental clean up would be sought.

Councilmember Roe questioned whether the City's acquisition of land for rights-of-way allowed investigation of the remainder of the private property.

Councilmember Pust expressed her interest in the concept put forth by Councilmember Ihlan; however, referenced language in the first paragraph of page 8 of Attorney Espel's memorandum, lack of information under 1.a, and a lack of clear definition as to what an environmental consultant is being requested to provide. Councilmember Pust opined that the language referenced by Councilmember Ihlan for action on page 8, #1.a and b, didn't serve the intent, and that the requested action of Councilmember Ihlan was premature at this time without further definition.

Mayor Klausing noted the availability of environmental reports as part of earlier litigation and settlement agreements. Mayor Klausing opined that Councilmember Ihlan's request made sense in the terms of parcels the City may acquire or were in a position to develop them as an owner; however, expressed his concern in attempting to determine the City's role on undeveloped parcels or the City's potential future ownership, whether the property would be developed privately, lack of access to the property without owner consent, and complications in identifying past and present chain of title ownership.

Discussion ensued regarding potential parcels to be acquired for right-of-way; practical considerations in the property acquisition process; soil borings done to-date along the right-of-way acquisition area; examination to-date of available environmental analyses; refining level of exposure for the City on future acquisitions; and then accuracy of environmental analyses to-date.

Mayor Klausing summarized that it was Council consensus to more proactively determine responsible persons on properties the City anticipated acquiring for right-of-way purposes; the need to seek outside consultant expertise to determine potential costs. Staff was requested to hold preliminary discussions with consultants who could provide expertise in reviewing available reports to-date; staff's analysis of ownership on those properties already acquired for rights-of-way; and the need to amend documentation to provide that costs for environmental remediation would become part of the allocation costs for each development.

Memo

To: Mr. Pat Trudgeon, City of Roseville

From: Daniel R. Holte, PG, Braun Intertec

c: Jason Kunze, Braun Intertec

Date: November 23, 2009

Re: Opinions Regarding the December 17, 2007 Memo from Larry D. Espel to the Roseville City Council

---

In the above-referenced memo, Mr. Espel summarizes the process by which the City could attempt to pursue previous landowners for investigation and possible cleanup costs for soil and groundwater contamination at the Twin Lakes Redevelopment Area. Mr. Espel describes the alternatives for cost recovery available under Federal and State Statutes. On page 8 of the memo, Mr. Espel estimates the costs and general scope of services for an environmental consultant as the first step in a cost recovery action. As a consultant with experience in these matters, we agree with the generalized cost range Mr. Espel describes.

It is our opinion that one important impediment to development of the Twin Lakes Redevelopment Area is that the magnitude and extent of soil and groundwater contamination at this site has not been sufficiently delineated. As a result, potential owners, lenders and developers will not want to invest in this site because of the uncertainty of the extent and magnitude of the environmental contamination. This uncertainty, or stigma, would likely hinder development in any economy or lending environment, but is exacerbated in the present tight lending environment.

In addition to the technical document review and search for responsible parties Mr. Espel describes, it is very likely that the additional assessment of soil and groundwater will be necessary prior to undertaking a recovery action. What, if any, options for cost recovery that may be available to the City will depend on the results of the consultant's and attorney's document review and the additional soil and groundwater assessment. For example, the research must identify viable responsible parties and the soil and groundwater assessment must reveal contamination sufficient to trigger a cleanup by the Minnesota Pollution Control Agency (MPCA).

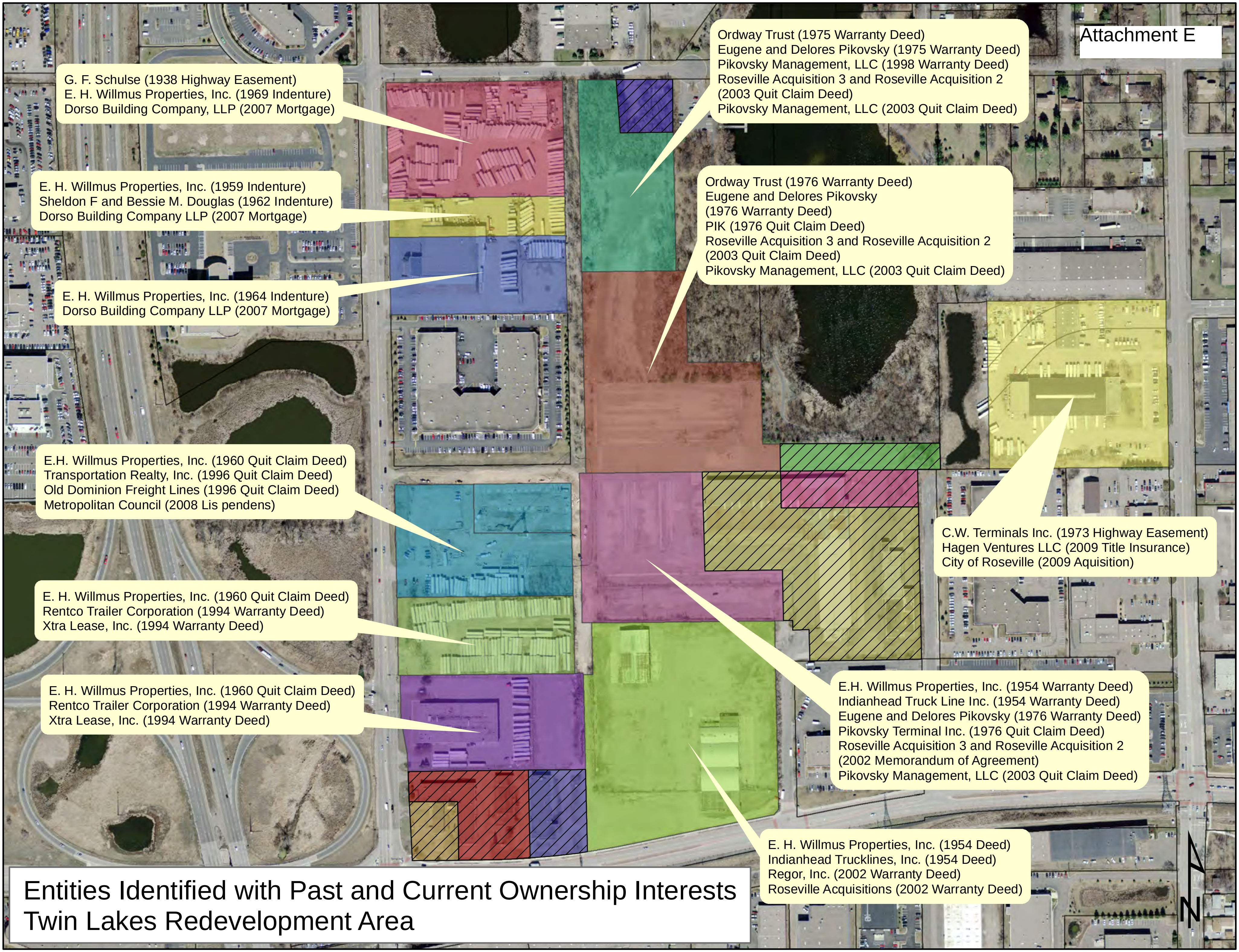
Once the soil and groundwater contamination at the site has been sufficiently delineated, a specific cleanup plan (if warranted) will need to be developed for submittal to, and approved by, the MPCA prior to implementation of the cleanup under most cost recovery strategies. As Mr. Espel indicates, third party cleanups do occur, but not often. Getting MPCA approval may take months instead of the usual weeks because of the unusual request by the City.

Mr. Espel points out that petroleum contamination differs significantly from non-petroleum contamination when it comes to Environmental Statutes. Both petroleum and non-petroleum contamination are present on the site. Non-petroleum contamination, in this case chlorinated solvent contamination of the soil and groundwater, in our opinion represents the biggest risk at this site because cleanup of chlorinated solvents in the soil and groundwater is typically more likely to be required by the MPCA and typically more expensive than a petroleum cleanup.

As implied by Mr. Espel's memo, the City would incur significant costs prior to knowing whether a viable cost recovery action was possible. If a cost recovery action were deemed viable, we anticipate that cleanup activities would be delayed by legal actions of affected owners who would likely resist cleanup actions taken on their property by a third party. As Mr. Espel pointed out in his memo, many defenses are potentially available to current and former landowners. Not knowing the results of the research and contamination assessment, thus which cost recovery strategy would be employed, it is not possible to predict the cost and timeframe for cleanup. It is our opinion the timeframe could be years and cost in the hundreds of thousands of dollars not including attorney's fees.

It seems to us that the Twin Lakes Redevelopment Area will not be redeveloped anytime soon unless the soil and particularly groundwater contamination is sufficiently delineated. Once delineated, the City should be in a much better position to plot a strategy. Options include: obtaining grant funds for cleanup, negotiating with property owners in a joint voluntary cleanup action, taking direct action and pursuing cost recovery or some combination of these. Practically speaking, the likely litigation involved in a forced third party cleanup could keep the property from being redeveloped for many years.

Please do not hesitate to call me at 952.995.2460 with questions or to discuss further.



Entities Identified with Past and Current Ownership Interests
Twin Lakes Redevelopment Area

Twin Lakes Property Users 1956 - 2002

Property	PIN	ESA Reference #	1956	1961	1966	1971	1976	1981	1986-87	2002
Dorso	042923320001	1-1		American Trailer Service		American Trailer Service	American Trailer	American Trailer	American Trailer	American Semi
	042923320002	1-2	See 1-3.							
	042923320003	1-3		Dorso Trailer Sales	Dorso Trailer Sales	Dorso Trailer Sales Artctic Leasing-trailer Hope Insurance Agency Okay Constuction Co Sammons Trucking Unites Systems consulting	Dorso Leasing Arctic Leasing-trailer Continental Oil Co	Dorso Leasing Arctic Leasing-trailer Conoco Inc.	Dorso Leasing Arctic Leasing-trailer	
PIK	042923320008	1-4	The site is identified as residential between 1956 and 1986-1987 on the city directories.							
	042923320007	1-5	City directories are not available for this site as it is located to the rear of the PIK Terminal and does not have its own street address.							
	042923320012	2-1	Unable to be reviewed for this site as it is located to the rear of the PIK Terminal and does not have its own street address.							
	042923310015 042923340001 042923340002	2-2			Hyman Freightways Inc Sodak Transport Freight Transit Co		Hyman Freightways Inc	Hyman Freightways Inc	Hyman Freightways Inc	PIK Terminal CTC Distributing Direct Dedicated Logistics, Inc
	042923330007	2-3	See ESA Reference #2-2.							K&R Express Systems ADS Parcel Shippers Express R&R Donnelley Logistics
Old Dominion	042923330015	3-1			Dohrn Transfer Co	Dohrn Transfer Co	Dohrn Transfer Co	Dohrn Transfer Co	ABF Freight Systems Inc.	Old Dominion Freight Lines
Xtra Lease	042923330002	3-2			Rentco (a division of Fruehauf Corp.)	Rentco (a division of Fruehauf Corp.)	Rentco (a division of Fruehauf Corp.)	Rentco (a division of Fruehauf Corp.)	Rentco (a division of Fruehauf Corp.)	Xtra Lease
Toll Gas	042923330004	4-1					Standard Service C Car Rental	C Standard Service Avis Car Rental	Amoco	Toll Gas & Welding Supply
Multi-Use Building	042923330009	4-2								
		2025 County Rd C		Suburban Veterinary Hospital Willmus TM Construction	Suburban Veterinary Hospital Willmus TM Construction	Suburban Veterinary Hospital Willmus TM Construction	Suburban Animal Hospital Ledeoln	Suburban Animal Hospital K O Inc.	Brown Computer	Enterprise Car Rental
		2023 County Rd C				Industrial Filter Service	Industrial Filter Service	Industrial Filter Service	Air Systems Co.	Alternative Video Solutions
		2021 County Rd C				B&E Patrol Faircon Inc	Metropolitan Guard Dogs Service Capital Sales Co	Professional Systems Engineering Capital Sales Co.	Diamond Metal Products	Fantasy Flight Inc
		2019 County Rd C							C Three International	Chemical Indicators
		2035 County Rd C					D&D Speedometers Service	P M Engineering	Lickety Print	
		2033 County Rd C						USA Janitorial	M R Representaives	
		2031 County Rd C					Roseville Auto Body	Roseville Auto Body	Roseville Auto Body	
		2660 Cleveland Avenue					Care Property Management	Roseville Properties Counsel Sales	Roseville Properties Counsel Sales NCR Comten Mendota Forge Inc	Stained Glass
Multi-Use Building	042923330010	4-3				Harmon Glass Ted's Auto Repair Electro Mold Co. Certified Fabricators Co	Harmon Glass Ted's Auto Repair Diesel Cost Welding	Harmon Glass Ted's Auto Repair D&D Truck Instuments	Harmon Glass Collision Center	Harmon Glass D&D Speedometer Instrument Ritzers Roseville Auto Body
Cummins Diesel	042923330019	4-4				Cummins Diesel	Cummins Diesel Sales Inc.	Cummins Diesel Sales Inc.	Cummins Diesel Sales Inc.	Cummins Diesel
Indianhead	042923330021	4-5	Indianhead Truck Lines	Indianhead Truck Lines Moore Motor Freight Lines	Indianhead Truck Lines	Indianhead Truck Lines	Indianhead Truck Lines	Indianhead Truck Lines	Indianhead Truck Lines Quast Transfer Inc. Carolina Freight Carriers Corp	Indianhead Trucking
Hagen	042923310023	5-1	Central Wisconsin Motor Transport	Central Wisconsin Motor Transport		CW Transport Thermosafe Enterprise	CW Transport	CW Transport Thermosafe Enterprise	CW Transport Financial Marketing	Varitech Fargo Freight Terminal Penners International North Country Trailer Services Mayfield Transfer
ERP	042923310017	8-1							Cardiac Pace Medical Powell McGee Association Inc.	Lakeville Motor Express Data Processing Inc. N.E. Contemporary Services
ERP	042923310018	8-2							Control Data warehouse Control Data warehouse overflow	Twin City Glass Alside Api FAB North Star Surfaces
City	042923310020	8-3								Stormwater Detention Area

Note: Information derived from Limited Environmental Assessment prepared by DPRA, July 2002