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Re: Watercraft Inspection and Decontamination Station Liability (NSGLC-17-04-04)

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Dear Tim,

Thank you for sending us your question regarding liability issues for watercraft inspection and decontamination (WID) stations. These stations serve to prevent the spread of aquatic invasive species by facilitating the inspection and decontamination of watercraft moving overland from one waterbody to the next. As you mentioned in your email, stations in Wisconsin may be managed by one of several entities: a federal, state, or local agency or even by a nonprofit organization. Paid staff or volunteers operate some stations, while others are self-service.

The management and operation of WID stations can raise several liability concerns. The liability risks will vary depending on the location of the station, the agency or organization responsible for the equipment and operations, and the type of personnel present. The three primary liability questions are:

- What if trained personnel injure a boat owner or damage a boat during an inspection or decontamination?
- What if trained personnel or a volunteer was injured while conducting an inspection or decontamination?

- What if a person injures himself or damages his boat while using a self-service station?

The liability risks and applicable laws governing each of these scenarios will be discussed below. The following information is intended as advisory research only and does not constitute legal representation of Wisconsin Sea Grant or its constituents by the National Sea Grant Law Center. It represents our interpretation of the relevant laws and cases.

### **Personal Injury or Property Damage Caused by WID Inspector/Decontaminator**

Most likely, any liability claim against a WID station operator related to personal injury or property damage would be a tort claim based in negligence, though there could be strict liability against the manufacture of the equipment. Common law, which is law developed by courts as opposed to legislatures, defines negligence as “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.”<sup>1</sup> To prove negligence, a plaintiff must prove three elements: 1) that the defendant owed a duty to the plaintiff; 2) the defendant breached that duty; and 3) the breach proximately caused injury to the plaintiff.

The “duty of care” owed to visitors to the stations would be the duty of “ordinary care.” While in many states, the duty of care owed to a plaintiff depends on the status of the person on the land at the time of the accident, Wisconsin courts have held that, “[e]very person has a duty to use ordinary care in all of his or her activities, and a person is negligent when that person fails to exercise ordinary care.”<sup>2</sup> The duty applies “...whenever it is foreseeable that a person’s act or failure to act might cause harm to another person.”<sup>3</sup> Generally, “a person is not using ordinary care and is negligent, if the person, without intending to do harm does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.”<sup>4</sup>

### **Stations Managed by Federal Agencies**

Sovereign immunity is a legal doctrine that protects state and federal governments from suit without their consent. The Federal Tort Claims Act (FTCA) is a limited waiver of sovereign immunity for negligence claims. It allows individuals who are injured by the wrongful or negligent act of a federal employee acting in the scope of his or her official duties to file a claim against the United States. Under the FTCA, an “employee of the government” includes employees of any federal agency, and individuals acting on behalf of a federal agency in any official capacity, temporarily or permanently “in the service of the United States” either with or without compensation.<sup>5</sup> This means that any injury or damage caused by negligent acts by agency employees or volunteers at federally run WID stations could be subject to a claim under the FTCA.

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<sup>1</sup> Restatement (Second) of Torts § 285 (1965).

<sup>2</sup> Alvarado v. Sersch, 2003 WI 55 (2003).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> 28 U.S.C. § 2671.

Prior to filing a lawsuit under the FTCA, a claimant must first file an administrative claim with the appropriate federal agency.<sup>6</sup> There is a two-year statute of limitations for these actions and plaintiffs may only recover compensatory, not punitive damages.<sup>7</sup>

There are exceptions to the FTCA's immunity waiver. One of relevance to the liability questions under consideration here is the "discretionary function" exception. This precludes recovery for *Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.*<sup>8</sup>

This means that the federal government retains immunity for discretionary acts of government employees. Generally, a discretionary act occurs when the employee exercised judgment in making a decision. The U.S. Supreme Court has outlined a two-step test to determine whether an action is a discretionary function.<sup>9</sup> A court must first determine whether the conduct involved "an element of judgment or choice."<sup>10</sup> If a federal regulation specifically recommends a procedure for an employee to follow, and the employee follows it, the action is not discretionary.

If a court determines that the employee's actions did have an element of judgment, the second question is whether the decisions are "grounded in the social, economic, or political goals of the statute and regulations are protected."<sup>11</sup> If both elements are met, the discretionary function exception applies and the government may not be sued. Planning-level decisions, such as an agency developing regulations through its Congressional authority are protected.<sup>12</sup>

Consider the examples below.

- The U.S. Forest Service develops a regulation outlining the steps for watercraft inspections. This would be a discretionary function. Under the FTCA, the agency would likely be immune from liability for developing this regulation, as long as they had Congressional authority to regulate.
- Although not required by regulation or policy, a Forest Service employee decides to place signage warning of the potential for burns from the hot water wash and warning boaters that they should remain 10 feet away from the equipment. She drafts the language for the signs, prints them, and places them around the station. During the course of decontamination, a boater gets too close to the equipment and is burned. Among other claims, the boater alleges that the agency was negligent in its placement of signs.

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<sup>6</sup> *Id.* § 2675(a).

<sup>7</sup> *Id.*

<sup>8</sup> 28 U.S.C. § 2680(a).

<sup>9</sup> *U.S. v. Gaubert*, 499 U.S. 315 (1991).

<sup>10</sup> *Id.* at 322.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 323.

Immunity would likely apply in this situation, since the employee's decision of whether and where to place the signs was discretionary.

- A Forest Service employee is conducting an inspection of a watercraft in accordance with regulations. The regulation states that in addition to visually inspecting the boat for mud, plants, and mussels, the agent should gently run a hand along the entire surface of the equipment. An inspection performed pursuant to this would be within the scope of the agent's duties (not a discretionary function). In performing the inspection, the agent damaged the boat's propeller guards. If he was acting within scope of duties when performing the inspection and his conduct was negligent, the government could be liable for the damage.

### *Volunteers at Federally Managed Stations*

The federal Volunteer Protection Act (VPA)<sup>13</sup> provides a limitation on liability for volunteers falling within the scope of the Act. The VPA aims to increase volunteerism by limiting personal tort liability of volunteers. Section 14503(c) states that "nothing in the section of the act shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to the harm caused by its volunteers to another person."

Volunteers are immunized from liability for harm caused by them in the scope of their responsibilities, if the harm is not caused by willful misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the person harmed. Willful misconduct is deliberate violation of rules. Gross negligence is a conscious and voluntary disregard of the need to use reasonable care, which is likely to cause foreseeable grave injury or harm to persons, property, or both. It is conduct that is extreme when compared with ordinary negligence. Conscious indifference is the disregard of the consequences of one's acts or omissions. The protection only applies to those who perform services for a nonprofit and do not receive compensation exceeding \$500 per year.

The VPA preempts state laws that are inconsistent with it, but it does not preempt state laws that provide additional protection to volunteers. A Wisconsin volunteer liability statute discussed in a section below provides protection consistent with the VPA.

Consider the example below.

- A Forest Service volunteer is conducting a decontamination of a watercraft in accordance with the manual he was given during training. The hot water pressure wash damages the vessel. If the decontamination was done within the scope of his duties and his actions were not caused by willful misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference, he would not be personally liable. (As discussed in the section above, however, if the decontamination was done within the scope of the volunteer's duties and the volunteer's actions were merely "negligent" the government could be liable.)

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<sup>13</sup> 42 U.S.C. § 14503.

## Stations Managed by State Agencies or Local Governments

State constitutions, tort claims acts, common law (judge-made law), or other laws can dictate whether or not state agencies, local governments, employees, and volunteers are immune from suit. Article IV, Section 27 of the Wisconsin Constitution states that the State of Wisconsin may only be sued when authorized by the legislature. Generally, for purposes of government immunity, an action against a state agency is an action against the state.<sup>14</sup> Therefore, state agencies may only be sued when authorized by the legislature.

Although local governments and its employees are not protected under government immunity, the Wisconsin legislature has provided broad immunity for certain functions.

*No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.*<sup>15</sup>

First, this means that local governments in Wisconsin have immunity when employees commit intentional torts. The necessary elements for intentional torts are similar to that of negligence: a duty owed, a breach of that duty, causation, and injury. The key distinction between an intentional tort and a negligent act is that intentional torts, generally, require the proof of the existence of intent to commit the act.

Second, liability is not imposed on a local government body or its employees when in the exercise of “legislative or judicial or quasi-legislative functions.” These functions are discretionary functions, which have been defined by Wisconsin courts as acts that “involve the exercise of judgment in the application of a rule to specific facts.” This doctrine applies to all public bodies within the state. This would include counties, cities, villages, towns, school districts, sewer districts, and any other political subdivision. This immunity may apply to volunteers working at stations managed by local government agencies. For purposes of the state tort immunity law, a volunteer is defined as someone who provides services and duties for a government agency or subdivision with that agency’s expressed or implied consent.<sup>16</sup> Therefore, a local government would have immunity if a volunteer committed an intentional tort. The local government, employees, and volunteers may also have immunity when those individuals are performing discretionary acts.

These discretionary functions have been broadly interpreted. In one court case, a high school student relied on a guidance counselor’s advice in which courses to take to attain eligibility to

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<sup>14</sup> Bahr v. State Inv. Bd., 521 N.W.2d 152 (Ct. App.1994).

<sup>15</sup> WIS. STAT. ANN. § 893.80.

<sup>16</sup> Even if the volunteer’s activities regarding the services and duties that they provide, and the details and methods of how that volunteer carries those services out are left to the volunteer’s discretion, that person is still a volunteer. WIS. STAT. ANN. § 893.80(1b-b). To be a volunteer, that individual cannot be paid a fee, salary, or compensation of any kind. However, reimbursement of expenses is not considered compensation. *Id.* at §893.80(c).

play college hockey.<sup>17</sup> Later, the student's four-year college scholarship was rescinded after it was determined that he was ineligible for the scholarship due to not having the appropriate courses. The court held that the school and counselor were immune from liability, because the counselor's advice not to take a required class was discretionary. The court reasoned that although the counselor's duties were proscribed, the manner in which he carried out the duties was discretionary; therefore, immunity applied.

In addition, a Wisconsin governmental immunity statute provides immunity for "ministerial acts." These are acts by "... any state officer, employee or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employee's or agent's duties..."<sup>18</sup> Wisconsin courts have defined these duties narrowly. "A ... duty is ministerial only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion."<sup>19</sup> There are exceptions to the immunity. If a ministerial duty is performed negligently, immunity does not apply.<sup>20</sup>

There are also exceptions to immunity for duties to address a known danger. The known danger exception applies when "an obviously hazardous situation exists and 'the nature of the danger is compelling and known to the officer and is of such force that the public officer has no discretion not to act.'"<sup>21</sup> In *Cords v. Anderson*, hikers fell at nighttime from a hazardous portion of the trail into a deep gorge.<sup>22</sup> The court concluded that the park manager had a ministerial duty to place warning signs or advise superiors of the trail condition.<sup>23</sup> Since the park manager was negligent in the performance of these duties, the court found that he was liable.

Although state agencies and employees have broad governmental immunity, there is recourse. Individuals with a monetary claim against a state agency may bring a claim to the state claims board. The state claims board is authorized to pay claims up to \$10,000. For claims above that amount, the legislature must pass a bill to approve the claim. If the legislature does not allow the claim, the individual bringing the claim may then sue the state: "Upon the refusal of the legislature to allow a claim against the state the claimant may commence an action against the state."<sup>24</sup>

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<sup>17</sup> *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60 (2003).

<sup>18</sup> WIS. STAT. ANN. § 893.82(3).

<sup>19</sup> *Umansky v. ABC Ins. Co.*, 769 N.W.2d 1, 6 *quoting* *C.L. v. Olson*, 422 N.W.2d 614 (1988). For these types of claims, notice of the claim must be served within 120 days after the event that gives rise to the claim. WIS. STAT. ANN. 893.82(3). The statute limits damages to \$250,000 for claims against the state and its employees and no punitive damages are allowed. WIS. STAT. ANN. § 892.83(6).

<sup>20</sup> *Cords v. Anderson*, 259 N.W.2d 672 (Wis. 1977).

<sup>21</sup> *Pries v. McMillon*, 2010 WI 63 (2010).

<sup>22</sup> *Cords*, *supra* note 21.

<sup>23</sup> *Id.*

<sup>24</sup> WIS. STAT. ANN. § 775.01.

Consider the examples below.

- A WID inspector at a state-managed station decontaminates a boat with a hot water, high-pressure wash. In the course of performing the decontamination, he damages the hull of a boat. As noted above, the governmental immunity statute likely provides immunity for the state agency. A plaintiff could bring a claim against the state through the state claims board and potentially sue in court if the claim meets certain requirements. The inspector may also have personal immunity. He could have immunity if there was not a specific protocol for performing the inspections; in such case, his actions would be discretionary. He could also have immunity for the performance of ministerial duties, such as following decontamination protocol. However, if he is performing a ministerial duty (a specifically defined duty) and he performs the duties negligently, he could be liable.
- A city employee at a station managed by a local government decontaminates a boat with a hot water, high-pressure wash. In the course of performing the decontamination, he damages the hull of a boat. If state regulations require decontamination but do not describe the process, the inspector and government may have immunity if he used discretion in carrying out his duties.

#### *Contractors at State or Local Stations*

Wisconsin contractors working at a state or local station may have derivative government immunity. For the immunity to apply, the contractor must show that 1) the contractor was acting as an agent of the government and 2) the contractor's conduct comes within a legislative, quasi-legislative, judicial, or quasi-judicial function.<sup>25</sup> To show that the contractor was an agent, he must meet the three-part test established in *Estate of Lyons v. CNA Insurance*:

*An independent professional contractor who follows official directives is an “agent” for the purposes of § 893.80(4), Stats., or is entitled to common law immunity when:*

- (1) the governmental authority approved reasonably precise specifications;*
- (2) the contractor's actions conformed to those specifications; and*
- (3) the contractor warned the supervising governmental authority about the possible dangers associated with those specifications that were known to the contractor but not to the governmental officials.<sup>26</sup>*

Consider the example below.

- A city contracts with an individual to perform decontaminations at its WID station. The contractor damages a boat while performing an inspection. To qualify for immunity, the contractor would have to meet the “agent” requirements outlined above and show that conduct comes within a legislative, quasi-legislative, judicial, or quasi-judicial function.

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<sup>25</sup> *Showers Appraisals, LLC v. Musson Bros.*, 835 N.W.2d 226 (Wis. 2013).

<sup>26</sup> *Estate of Lyons v. CNA Ins. Companies*, 558 N.W.2d 658, 663 (Wis. Ct. App. 1996).

### *Volunteers at State or Local Stations*

As noted above, the federal Volunteer Protection Act provides a limitation on liability for volunteers, which would also apply to volunteers at state or local stations. Volunteers are immunized from liability for harm caused by them in the scope of their responsibilities, if the harm is not caused by willful misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the person harmed.

The VPA preempts state laws that are inconsistent with it, but it does not preempt state laws that provide additional protection to volunteers. A Wisconsin liability statute provides volunteers protection against liability consistent with the VPA.<sup>27</sup>

### Stations Managed by a Nonprofit

Nonprofits that manage WID stations would not qualify for governmental immunity. As mentioned above, any liability claim against a WID station operator related to personal injury or property damage would most likely be a tort claim based in negligence, though there could be strict liability against the manufacture of the equipment. Volunteers, however, could have protection under the laws described in the section above.

The Wisconsin Limited Liability Act immunizes nonprofit directors against conduct that constitutes gross negligence or reckless or conscious indifference but not for willful conduct.<sup>28</sup> Another Wisconsin statute provides protection for a nonprofit member.<sup>29</sup> A person is not liable for a breach of contract of a nonprofit association, a tortious act or omission of the nonprofit, or a tortious act or omission of a member of the nonprofit, just because he or she is a member of the nonprofit.

Consider the examples below.

- A training manual describes the hot water pressure wash procedure, noting that the nozzle of the pressure washing hose should never be closer than three feet to a watercraft. A nonprofit *employee* decontaminates a boat with a hot water pressure wash, resulting in paint peeling from the boat. The boat owner could bring a negligence claim against the employee and nonprofit.
  - If the employee exercised ordinary care while performing the decontamination, following the procedure and maintaining a distance of three feet from the watercraft, the court would likely find that the volunteer was exercising ordinary care. Neither the employee nor the nonprofit would be found negligent.
  - If, on the other hand, an employee uses the pressure washes just inches from the boat, rather than three feet away, the court could find that the employee was not using ordinary care. The employee and the nonprofit could be liable.

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<sup>27</sup> WIS. STAT. ANN. § 181.0670

<sup>28</sup> *Id.* § 181.0855.

<sup>29</sup> *Id.* § 184.06.

- A training manual describes the hot water pressure wash procedure, noting that the nozzle of the pressure washing hose should never be closer than three feet to a watercraft. A *volunteer* decontaminates a boat with a hot water pressure wash, resulting in paint peeling from the boat. The boat owner could bring a negligence claim against the volunteer and nonprofit.
  - A volunteer would likely be protected under the VPA and Wisconsin statutes. The court would likely find that the volunteer was not acting negligently as long as the volunteer exercised an adequate level of care (no gross negligence, willful misconduct, etc.) and meeting the other requirements while performing the decontamination.
  - If, on the other hand, a volunteer acted negligently or purposely peels paint from the boat, the court would likely find that the volunteer liable.

### **Personal Injury Suffered by WID Inspector/Decontaminator**

If someone hired or contracted by a federal, state, local, or nonprofit entity to inspect or decontaminate watercraft is injured, he or she may have a claim against that entity. As noted above, the injured person’s recourse for relief depends on the status of the person.

### **Employees**

#### *Federal Employees*

The Federal Employees’ Compensation Act (FECA) provides workers’ compensation for federal employees.<sup>30</sup> The Act defines an employee as “a civil officer or employee in any branch of the Government of the United States[.]”<sup>31</sup> Employees of the Fish and Wildlife Service (FWS), U.S. Forest Service, or other federal agencies working at federally operated stations would be covered by the act. FECA covers most job-related injuries but does not apply if injury or death is caused by the willful misconduct of the employee, if the employee intends to bring about the injury or death of himself or of another, or if the injury is proximately caused by the intoxication of the injured employee. FECA is an exclusive remedy, meaning that a federal employee or surviving dependent is not entitled to sue the United States or recover damages for such injury or death under any other law for a work injury.<sup>32</sup>

#### *State/Local Employees*

The Wisconsin Workers Compensation Act (WWCA) is the exclusive remedy for state and local government employees against state or local governments.<sup>33</sup> For the purposes of workers compensation, an employee includes “[e]very person, including all officials, in the services of the state, or of any local governmental unit in this state, whether elected or under any

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<sup>30</sup> 5 U.S.C. §§ 8101-8193.

<sup>31</sup> *Id.* § 8101(1)(A).

<sup>32</sup> *Id.* § 8116.

<sup>33</sup> WIS. STAT. ANN. § 102.03.

appointment or contract of hire, [either] express or implied.”<sup>34</sup> The following are not considered employees for purposes of the WWCA:

1. Any person whose employment is not in the trade, business, profession or occupation of the employer;<sup>35</sup>
2. Domestic servants;
3. Some farm employees;
4. Volunteers, including volunteers of non-profit organizations that receive money or other things of value totaling not more than \$10.00 per week;
5. Religious sect members that qualify and are certified for an exemption; and
6. Employees of Native American tribal enterprises (including casinos), unless the tribe elects to waive its sovereign immunity and voluntarily become subject to the Act.<sup>36</sup>

WWCA requires the payment of reasonable medical expenses and compensation for lost wages resulting from work-related injuries or disabilities. The WWCA does not apply when employees are commuting to and from work, when participating in voluntary wellness activities, and when an injury is self-inflicted.<sup>37</sup>

### *Nonprofit Employees*

WWCA requires employers who employ three or more full-time or part-time employees or who employ one or more full-time or part-time employees paid combined gross wages of \$500 or more in any calendar quarter for work done at one or more locations in Wisconsin to purchase worker's compensation insurance to cover their employees.<sup>38</sup> If the nonprofit is required to provide workers compensation insurance, injured employees will be covered by the insurance company's worker's compensation system for medical care and lost wages. If workers compensation is not available, injured employees may bring suit.

## **Contractors**

### *Federal Stations*

An employee of an independent contractor injured while performing an inspection at a federal station would not be covered under FECA. An independent contractor may have recourse against his employer, which would likely have workers compensation insurance.

### *State/Local Stations*

In Wisconsin, an independent contractor is considered an employee for workers compensation purposes when performing service in the course of the trade, business, profession or occupation

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<sup>34</sup> *Id.* § 102.07(1)(a).

<sup>35</sup> Certain independent contractors could fall under this exception. For example, an independent contractor hired by a homeowner to mow the lawn.

<sup>36</sup> WIS. STAT. ANN. § 102.07(4)(a).

<sup>37</sup> *Id.* § 102.03.

<sup>38</sup> *Id.* § 102.31.

of such employer at the time of the injury.<sup>39</sup> Independent contractors working at state or local decontamination stations falling under this definition would be covered by the WWCA. However, independent contractors are not considered employees if the independent contractors meet nine conditions:

- 1) Maintains separate business with own office, equipment, materials and other facilities;
- 2) Has or has applied for a FID # with IRS or has business or self-employment income tax returns with IRS based on *that* work or service in previous year;
- 3) Operates under contracts to performs specific services for specific amounts *and* the independent contractor controls the means of performance;
- 4) The independent contractor incurs the main expenses related to the work or service performed;
- 5) Is responsible for contracted work or services and is liable if not satisfactorily completed;
- 6) Receives compensation for work performed under contract on a commission or per job or competitive bid basis and not any other basis;
- 7) May have profit or loss under K's for the work or service;
- 8) Has continuing recurring business liabilities or obligations; and
- 9) Success of business depends on the relationship of business receipts to business expenditures.<sup>40</sup>

If an independent contractor who meets these nine requirements is injured while working at a state or local decontamination station, then that independent contractor would not fall under the WWCA and could pursue other legal remedies, such as filing a lawsuit.

### *Nonprofit Stations*

Independent contractors injured at stations run by Wisconsin nonprofits would undergo the same analysis as the independent contractors working at state and local decontamination stations. If the independent contractor does not meet the nine requirements listed above, he would meet the definition of employee and would be eligible for workers compensation insurance. Therefore, if an independent contractor who does not meet the nine requirements is injured while working at a state or local decontamination station, then that independent contractor could sue, as workers compensation is not his exclusive remedy.

## **Volunteers**

### *Federal*

FECA provides that some volunteers that fall within specific categories will be covered by the act. They are as follows:

- Corporation for National and Community Service volunteers. These would be AmeriCorps and Senior Corps volunteers.

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<sup>39</sup> *Id.* § 102.07(8)(a).

<sup>40</sup> *Id.* § 102.07(8)(b).

- Department of Interior, volunteers recruited to assist with, or facilitate programs of the Bureau of Indian Affairs, the Geological Survey, the Bureau of Reclamation, and the Office of the Secretary deemed employees of United States for purposes of this subchapter.
- National Forests Program volunteers.
- Take Pride in America Program volunteers. This Department of Interior program that encourages individuals, civic groups, corporations and others to volunteer in caring for the public lands that it controls
- United States Fish and Wildlife Service and National Oceanic and Atmospheric Administration programs volunteers.

These program volunteers will be considered federal employees and covered by FECA for work related injuries. Volunteers not covered by FECA may have a claim under the Federal Tort Claims Act, discussed above in the first section of this memorandum.

*State/Local/Nonprofit*

Volunteers are specifically excluded from Wisconsin’s Workers Compensation Act. “The Wisconsin Worker’s Compensation Insurance Act does not provide for worker’s compensation coverage for volunteers, including volunteers of non-profit organizations that receive money or other things of value totaling not more than \$10.00 per week.<sup>41</sup> Those not covered by FECA may have a claim under the Federal Tort Claims Act, discussed above in the first section of this memorandum.

**Personal Injury or Property Damage Suffered at Unmanned Station**

Personal injury or property damage suffered at an unmanned station could result in a liability claim for negligence. For example, those injured could claim that signage was inadequate or that equipment at the station was not well maintained. Whether government agencies or nonprofits running the stations could have liability depends on the duty imposed on them under the law and whether they have breached that duty.

*State or Local Government*

As noted above, there are broad immunity protections under Wisconsin state law. State agencies have immunity unless the legislature specifically waives that immunity. Government subdivisions and employees have immunity when employees perform discretionary acts.<sup>42</sup> The government has immunity when agents or employees commit intentional torts.<sup>43</sup>

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<sup>41</sup> *Id.* §§ 102.07(11) and 102.07(11m).

<sup>42</sup> WIS. STAT. ANN. § 893.80.

<sup>43</sup> As noted above, the necessary elements for intentional torts are similar to that of negligence: a duty owed, a breach of that duty, causation, and injury. The key distinction between an intentional tort and a negligent act is that intentional torts, generally, require the proof of the existence of intent to commit the act.

There are several exceptions to immunity. An individual may bring suit against a state agency, if its claim to the state claims board is for more than \$10,000 and the legislature does not authorize the payment of that claim. Immunity does not apply for the negligent performance of ministerial duties. As noted above, ministerial duties are those specifically defined duties that only require the performance of a task in the manner the law proscribes. Wisconsin courts have also held that there are known and compelling dangers that give rise to ministerial duties. This means that although the duties may not be defined, certain conditions give rise to ministerial duties. If an employee does not perform these duties or performs them negligently, he or she could be liable.<sup>44</sup> Finally, there is not immunity for acts that are malicious, willful, and intentional. This would be a deliberate violation of the rules by an employee.

Consider the examples below.

- A boater burns himself performing decontamination with a pressure washer at an unstaffed station managed by a city. The boater brings a claim against the city and facilities manager, alleging that equipment had not been maintained properly. The city has a manual of detailed instructions for the cleaning and maintenance of the equipment, which requires the office of the facilities manager to take apart, clean, and reattach the hose and then test the equipment. By instituting policies related to equipment management, the city now has a duty to carry out those procedures with reasonable care. If the facilities manager did not follow the instructions in maintaining the equipment, a court could find that the manager was negligent and liable.
- At an unstaffed station managed by the county, the signage gives detailed instructions for the decontamination, including a warning not to allow the nozzle of the pressure washing hose to get within three feet of the boat. A boater performs a decontamination of his own boat with a pressure washer. The paint on his boat peels, and he brings suit alleging that the signage was unclear. A court would likely find that the wording on the signs was a discretionary decision, and immunity would apply.

### *Federal Stations*

The Federal Tort Claims Act is a limited waiver of sovereign immunity for negligence claims. If an individual is injured at an unmanned station, that person may file a claim against the United States with the appropriate agency. After following the claim procedure, an individual may file suit against the government. The FTCA does have a discretionary function exception that would provide immunity for the government. This exception applies 1) when there is an element of judgment or choice and 2) the judgment is grounded in social, economic, or political goals.

Consider the example below.

- The U.S. Forest Service has provided warning signs advising of the hot water temperature. A boater uses a hose to decontaminate his boat and suffers burns from the water. He alleges that the warnings at the station were inadequate. He may file a claim

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<sup>44</sup> 259 N.W.2d 672 (Wis. 1977).

with the Forest Service and, following that process, a suit against the Service. A court would look at whether the design and placement of the signage contained an element of judgment and whether that judgment was grounded in social, economic, or political goals.

### *Nonprofit Stations*

If the stations operated by nonprofits are on private land, general negligence would apply. Common law, which is law developed by courts as opposed to legislatures, defines negligence as “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.”<sup>45</sup> To prove negligence, a plaintiff must prove three elements: 1) that the defendant owed a duty to the plaintiff; 2) the defendant breached that duty; and 3) the breach proximately caused injury to the plaintiff.

The “duty of care” owed to visitors to the stations would be the duty of “ordinary care.” While in many states, the “duty of care” owed to a plaintiff depends on the status of the person on the land at the time of the accident, Wisconsin courts have held that, “[e]very person has a duty to use ordinary care in all of his or her activities, and a person is negligent when that person fails to exercise ordinary care.”<sup>46</sup> The duty applies “...whenever it is foreseeable that a person’s act or failure to act might cause harm to another person.”<sup>47</sup> Generally, “a person is not using ordinary care and is negligent, if the person, without intending to do harm does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.”<sup>48</sup>

Consider the example below.

- A boater uses a hose to decontaminate his boat. The nozzle of the hose breaks off, causing the boater to burn himself. The boater may allege that the injury occurred because equipment at the station was not well maintained. A court would look at whether the nonprofit used ordinary care in maintaining the equipment. If the nonprofit inspected the equipment for damage on a regular basis, the court may find that the nonprofit met the standard of ordinary care.

### **Conclusion**

Governmental bodies can use Wisconsin’s governmental immunity laws as a defense to tort claims for wrongful or negligent conduct; however, immunity protection will not apply in every case. In determining whether immunity applies, Wisconsin courts will weigh the facts of each claim. Similarly, nonprofits operating decontamination stations may have statutory immunity protections, but courts will decide whether those apply on a case-by-case basis. For that reason, it is essential for public entities and nonprofits to both exercise ordinary care in operating these stations and to have insurance coverage to protect against liability for tort claims.

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<sup>45</sup> Restatement (Second) of Torts § 285 (1965).

<sup>46</sup> *Alvarado v. Sersch*, 2003 WI 55 (2003).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

Thank you for bringing this request to the National Sea Grant Law Center. I hope this information is helpful. If you have any further questions or would like additional information, please let me know.

Sincerely,

/s/ Terra Bowling  
Sr. Research Counsel