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EMERGING ENVIRONMENTAL STRATEGIES

By Steve Bergsman

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A law-based, recent history of contaminated site remediation can probably be taken back over 30 years to the Comprehensive Environmental Response Compensation and Liability Act of 1980, often called CERCLA, which required a full detoxification or removal of contaminants.

It was, in some ways, a drastic response to the necessary task of protecting the public from the after-effects of industrialization, chemical-usage, and untreated manufacturing waste. Over time however, it became obvious that to re-develop, an industrial site for a different purpose didn't require such full-bore measures, and that a more measured response would be sufficient.

The new, more flexible response has come to be called "risk-based" action, or as one environmental attorney defined it: "use-restricted cleanup that pairs reduced removal or detoxification of materials at a contaminated site with a limitation of use ensuring that the site will not be used in ways that will expose people to the remaining contaminants."

"The push for the moderate approach has come from the states, which were better able to recognize the great potential in brownfield sites or even old gas stations if remediation could be tied to the next usage.

"Tennessee's approach to dealing with contaminated properties has shifted over the years to risk-based corrective action, where the state looks at exposure pathways," notes Darlene Taylor Marsh, an attorney with Nashville-based Dickinson Wright PLLC and immediate past chair of the Environmental Law Section of the Tennessee Bar Association. "As long as you are not talking about a residential area, school, day-care, church, or something similar that is located close-by to where you could have a problem with migration, the state is much more willing to allow capped contamination to stay in place so the property can be redeveloped into productive use."

She adds, "that is quite a departure from the initial approach of dealing with contamination, which was trying to clean

everything up to pristine conditions. That didn't make a lot of sense from an economic perspective."

So how did Tennessee, a generally conservative state, become a leader in risk-based remediation? As Marsh notes, "we were forced to."

Marsh, who either chaired or was a member of state environmental boards put together to address contamination from underground storage tanks (mostly gas stations) and dry cleaners, says it was a question of maintaining solvency of the re-imbusement funds used to cover the cost of cleaning up properties where there weren't any financially responsible parties. Those funds were going bankrupt before the shift to risk-based corrective action.

Other states meandered into risk-based solutions to contaminated properties as well. SIOR Report checked in with two SIOR members in Michigan and South Carolina to see how more flexible legislation has been working.

Limiting Liability

Before Chip Hurley, SIOR, CCIM, a managing director at Newmark Grubb Cressy & Everett in Grand Rapids, Mich., got into real estate, he was an environmental geologist. Perhaps this is why sliding into industrial brokerage work was so fulfilling to him. In Michigan, an old industrial state, there is some form of environmental component to almost every deal where there was an existing, industrial structure.

Hurley's business became a lot easier 20 years ago when the state created a tool called a Baseline Environmental Assessment, or BEA.

"We put a different spin on the whole process," he says.

Generally, an existing industrial site has a Phase I completed and then possibly the environmental consulting company recommends a Phase II. The Phase I generally consists of historical data and information gathered from public records. The Phase II is the next recommended step if the buyer wants to continue with the transaction and the consultant identifies Recognized Environmental Conditions, or RECs, which generally involve groundwater and soil sample collection. If the samples are below the cleanup criteria, the process is completed. If there are chemicals that are above the cleanup criteria, the buyer has the option of either terminating the transaction or opting to continue. If the latter is the preferred option, the buyer will want to document the current condition (a baseline condition) of the site prior to occupancy. If done correctly, the state releases the buyer from liability of the past releases.

"In Michigan, we have this tool that essentially takes the Phase II documentation, a confirmation that there is contamination, and draws a line in the sand, saying prior to the date of the BEA, the buyer did not occupy the site and so by default all the existing contamination

that is at the site is someone else's problem," Hurley explains. "It documents a confirmation that can be submitted to the state. As a buyer you can consider the site without the liability from a purchasing perspective; thus the buyer can utilize the site."

The state considers overlaps with what the buyer's existing business is, to see if there are similarities. For example, take the case of an old, vacant gas station. If another gas station owner wants to come in and use that site, the new owner would have a stricter requirement to prove how he would either mitigate or prevent the ongoing business from exacerbating the contamination as it

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exists. In that example, maybe the tanks and the lines were on the south end of property but there is an ability to put new equipment on the north side of the property that is not impacted. That would be a method by which the new buyer is assuring that their issue, if they had one, is not tied into the issue that pre-dates them.

In Michigan, prior to 1995, if you had a contaminated site, regardless of whether it was a gas station, a cleaners, or an industrial plant, you had to clean the land to residential standards,

The new due diligence process is now risk-based, allowing developers to use

engineering controls to use or redevelop the site.

In the case of an industrial building a new, concrete flooring can act as a cap to prevent water from percolating through, picking up contaminants and transporting them further on the site or an adjacent property. Also, one can use parking lots to act as a cap and barrier to contaminated soil. Another example could be to line all the landscaping with a clay barrier between the contaminated soil and the soil used for landscaping.

"Even though some of these things in perception are daunting and scary, what the state has done is allow people to be creative and use logic behind the uses of these sites and clean-ups," says Hurley.

By also using Brownfield Redevelopment Authority Credits, TIFF financing, etc., developers are actively looking for these sites because there are so many incentives to put these things back into productive use," says Hurley. "We have a very low inventory of these types of opportunities. However, they are out there."

Hurley warns, developers need a due-care plan, which assures the state that they won't exacerbate the existing contaminate situation. "If you do, then you potentially end up inheriting the liability," he says.

The Clean-up Contract

In South Carolina, limiting liability has also been the objective when developers want to create developable sites out of contaminated properties.

"One of the things that South Carolina did when it adopted all of the federal brownfield regulations was to create a voluntary clean-up contract that is available to a purchaser who is a non-responsible party and wants to buy a contaminated piece of property," explains Chuck Salley, SIOR, vice president and director of the Industrial Brokerage

Team for Colliers International in Columbia.

The way the contract works is that the purchaser typically has had a Phase I environmental audit performed on a property that resulted in Recognized Environmental Concerns, REC being present. The purchaser then works with the staff of the South Carolina Department of Health and Environmental Control to agree on a scope of work for further site investigation and or remediation. Each Voluntary Clean Up Contract, or VCC, is specific to a certain site and the scope of work is measured by the severity of the impact and potential health risk to the public. Sometimes the Scope is as simple as putting a deed restriction on the property for residential uses or it may be more complex such as drilling test wells or even remediating contaminants.

Once the scope of work is completed, it is incorporated into the Voluntary Clean Up Contract and once completed the buyer has no further responsibility for that environmental contamination. In addition, any non-responsible party who buys that property in the future and the lender are also protected.

"The contract also protects against third-party litigation from another property owners who may have been affected by the site," Salley says. "So, if you have a site that is badly contaminated and you go into it with a voluntary clean-up contract you are immune from third-party lawsuits that would go back against you. This is only available to the non-responsible party."

A purchaser doesn't have to do a voluntary clean-up contract, Salley adds." The purchaser can just use brownfield regulations and its umbrella of protection. To qualify for this protection one must completed a qualified Phase I Environmental Audit on the property. The VCC is just another layer on top that protects you from being sued by the Environmental Protection Agency, the state or third-parties."

This regulation has been in effect about 10 years and Salley claims it has been very effective.

"We have done transactions that would not have closed otherwise," he says. "We did a deal last year for a sale/ leaseback with a printing company that had bought a building once owned by Litton Industries. A contamination occurred back in the 1970s when solvent got into wells. The company wanted to sell the property, lease it back and do an expansion. I had an investor come in who bought the property, but to do the deal it had to go through the voluntary clean-up contract process, which was extensive."

"The regulation has been very helpful because of the immunity from third-party lawsuits," Salley says. ▾



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A CHARITABLE APPROACH

Darlene Marsh, an attorney with Nashville-based Dickinson Wright PLLC and immediate past chair of the Environmental Law Section of the Tennessee Bar Association, says "what I have just started to see in the last few years are brownfield redevelopers who qualify as 501(c)(3) organizations and that has a lot of positive benefits: it permits either a deeply discounted sale or an outright donation of property to the redevelopment company that will qualify the donor for a tax deduction. That ability, to realize a tax benefit, at the same time as transfer of the property, has such potential for this area of development."

A 501(c) organization refers to a tax-exempt, non-profit organization; a 501(c)(3) is a subset group, i.e., a religious, educational, charitable, scientific, or literary group promoting a specifically limited cause.

"I have often seen contaminated properties that are inherited by second or third generation owners of small businesses that caused contamination (i.e., dry cleaners and service stations), where the heirs, who were never active in the business, need to sell the property but can't because it is contaminated. These kinds of donations to tax-exempt brownfield redevelopers can be an estate planning tool for the new owners."

How it works is, the developer, a 501(c)(3) organization, puts the property back into productive use. At the same time any profit it realizes goes toward, for example, organizations that work toward cleaning up water resources.

The key, Marsh says, is that "any profit the 501(c)(3) organization makes over and above expenses of cleaning up these sites is going to go to non-profits." ▾