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Environmental Law

Risks, Remediation: Contaminated Property Now May Offer Owners Attractive Economic Opportunities

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For more than 20 years, government and private parties have been addressing issues relating to contamination of real property. During that time, technical knowledge regarding risks and remediation has advanced. As a result, views of contaminated real property have changed dramatically. No longer do parties automatically assume that such property is a substantial liability. Rather, such property may offer attractive economic opportunities.

Governments, concerned with keeping property productive, now often approach cleanup decisions on a site-by-site basis and set cleanup levels based on actual, rather than theoretical, property uses and the exposures and risks associated with such uses.

Current Approach

Institutional controls, such as land- and water-use restrictions and requirements to monitor and maintain remedial structures, are an important element of the current approach to contaminated real property. Use restrictions, which are tied to actual use of the property, allow governments to set cleanup levels that may be less stringent.

For example, the likely highest and best use of a parcel of land in an industrial area is an industrial or other commercial use. Because of its surroundings, it is unlikely that such a parcel would be used for a day-care center. Cleanup to a level that is safe for the industrial or commercial use, even though not as stringent as the level for a day-care center, is therefore appropriate.

Another category of use restriction applies where the remedy includes an engineered structure to isolate residual contamination on site. Requirements to protect, maintain and monitor remedial structures allow governments to permit such a remediation approach.

Examples of remedial structures requiring use restriction are caps of former landfills and tailings ponds; monitoring wells or leak-detection systems for on-site containment structures; and water-treatment systems with a long-expected operation period. These structures must be protected. For a cap restriction on drilling, excavating and sometimes irrigation is necessary. Leak detection and water-treatment systems may also require monitoring and maintenance for many years. To ensure that the approved remedy continues to be protective, it is necessary that access for monitoring and maintenance always be available.

Use restrictions and access requirements have often been included as part of the remedy decision for Superfund sites as well as remedy decisions for sites subject to other federal and state programs.

Failed Legislation

In order for institutional controls to serve their intended purpose, they must be enforceable against subsequent property owners. Enforceability of these controls has received increased attention. The National Academy of Sciences recently completed a study of the effectiveness of institutional controls at Department of Energy sites. The department concluded that such controls were too often ineffective. In addition, some commentators believe that institutional controls have had a questionable track record to date.

Last year, the Colorado attorney general's office raised concerns about the enforceability of institutional controls at state-lead sites. Together with the state Department of Public Health and Environment, the state attorney general proposed legislation, Senate Bill 168, to clarify and confirm that the state Department of Public Health and Environment could enforce such controls. That legislation was unsuccessful.

The defeat of SB168 did not end the concerns. The attorney general's office still believes that there is no clear legal authority for actions by the state against subsequent landowners to enforce institutional controls agreed to by their predecessors as part of a mandated cleanup of contaminated land. Zoning is still regarded as an insufficient protective mechanism for several reasons. The Colorado Department of Public Health and Environment cannot enforce zoning. Local zoning authorities often lack the technical expertise to evaluate the safety of potential land-use changes, and zoning may change. The regulated community is also concerned because the state's uncertainty may have a chilling effect on its willingness to allow institutional controls in lieu of requiring remediation to the most stringent standards.

Proposed Legislation

For these reasons, since the end of the legislative session last spring, the Colorado attorney general's office, the Department of Public Health and Environment and interested members of the regulated community have been working on proposed environmental-covenant legislation to be introduced when the next legislative session begins in January. The current draft amends Title 25 Section 15 and Title 8 Section 20.5 of the Colorado Revised Statutes -- the Department of Public Health and Environment and petroleum storage-tank program legislation respectively. The draft is broader than SB168, which did not apply to petroleum storage tank cleanups.

Essentially, the proposed legislation creates a new real-property interest (an environmental covenant) containing the environmental-use restriction. The covenant is created by the property owner through a written grant by deed or other conveyance to the Department of Public Health and Environment or, for petroleum storage tanks, to the Department of Labor and Employment and its delegee, the state inspector of oils. It is recorded in the real-property records like any other instrument affecting title.

The environmental-use restriction may be "a prohibition of one or more uses of or activities on specified real property, including drilling for or pumping ground water; a requirement to perform certain acts, including requirements for maintenance, operation, or monitoring; or both, where such prohibitions or requirements are imposed as a condition of an environmental remediation project for the purpose of protecting human health or the environment."

Environmental Covenant

The covenant runs with the land. It will be perpetual unless its terms limit it to a specific period. The Department of Public Health and Environment or the state inspector of oils approves a request to terminate or modify, or a court terminates it. It may not be extinguished, limited, or impaired by issuance of a tax deed, adverse possession or by any of the common-law principles applicable to real-estate covenants such as abandonment, waiver or lack of enforcement.

Each covenant itself will include:

- A statement of its duration and any conditions under which it may be modified or terminated.
- The specific environmental-use restriction it imposes.
- A requirement that the property owner provides a 15-day advance notice to the Department of Public Health and Environment or the state inspector of oils, as appropriate, of any transfer of ownership or any application to a local government for a building permit or change in land use.
- A right of entry with prior notice for the Department of Public Health and Environment or the state inspector of oils to determine compliance with the covenant's terms.
- A legend on its first page stating that the property is subject to an environmental covenant held by the Department of Public Health and Environment or the state inspector of oils, as appropriate.
- An agreement to incorporate or reference the covenant in any leases, licenses or other instruments granting a right to use the property that may be affected by the environmental covenant.

Under the proposed legislation, an environmental covenant may be terminated or modified if such an action will be protective of human health and the environment. Factors to be considered include:

- Whether additional remedial work is proposed;
- Whether there is new information regarding the risks posed by the residual contamination;
- Whether there is information that the residual contamination has diminished or that an engineered structure is no longer necessary.

The Department of Public Health and Environment or the state inspector of oils must approve any modification or termination.

Environmental covenants would not be required if the remediation results in levels of residual contamination safe for all uses and does not incorporate any engineered structure or require ongoing monitoring, maintenance or operation. The Department of Public Health and Environment or the state inspector of oils may also waive the requirement for a covenant if there is another statute authorizing the agency to implement and enforce environmental-use restrictions against present and subsequent property owners.

In addition, no covenant would be required if the property owner is not the party doing the remediation and refuses to grant a covenant, provided there is an enforceable local government ordinance imposing the use restriction and the local government and the Department of Public Health and Environment have an intergovernmental agreement for oversight and enforcement of the local ordinance.

The covenants are to be enforced by administrative order or injunction. The Department of Public Health and Environment would maintain a registry of environmental covenants and provide copies to affected local governments. Local governments would be required to notify Colorado Department of Public Health and Environment or the state inspector of oils of applications affecting land use or development of land subject to an environmental covenant. The proposed legislation would become effective as of July 1, 2001. However, it would also validate environmental-use restrictions recorded prior to that date regardless of their form as an easement, covenant, deed restriction or other instrument.