INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, 78th ANNUAL CONFERENCE

SAN FRANCISCO, CA

BROWNFIELDS

CONCURRENT AFTERNOON SESSION

Monday, September 30, 2013

USING AFFIRMATIVE LITIGATION TO TURN BROWNFIELDS GREEN (IN MORE WAYS THAN ONE)

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Armed with powerful federal law, city attorneys can transform fallow, polluted and dangerous wastelands into safe, vibrant and productive properties

The numbers are staggering, but still only scratch the problem's surface. The United States government estimates more than 425,000 brownfields stain the nation's landscape.[1] American cities have suffered the worst: In aggregate, contamination from abandoned industrial sites has rendered roughly 5,000,000 acres of urban property useless – in total, "roughly the same amount of land occupied by *60 of our largest cities*."[2]

But, the quandary goes far beyond mere mathematical figures. Though officially dormant as the result of their polluted present status, the nation's brownfields nonetheless remain active as toxic traps - home to countless chemical killers like arsenic, hexavalent chromium and benzene. Put differently, brownfields are not simply dead to the world, they are literally lethal to its citizens.

As overwhelming as the epidemic appears, cities *can* do something about the crisis that is environmental contamination – and it all starts with their attorneys.

Legal Playbook

Viewed through the lens of history, Jersey City, New Jersey is virtually unrecognizable. But, the transformation of City where I served as Corporation Counsel is proof of what is possible. Jersey City was once a major industrial and rail center – a manufacturing and transportation hub directly across the Hudson River from Manhattan. But the countless factories

[1] U.S. Housing and Urban Development Website, Brownfields Frequently Asked Questions, http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/economicdevelopment/programs/bedi/bfieldsfaq (last visited July 21, 2013).

[2] Id.

that boomed at the dawn of the 20th century were left for dead, then left behind a legacy of toxic waste. In this article, we briefly outline the legal tools we used – legal tools *all* cities can use – to hold corporate polluters accountable, and engineer the rebirth of the land those polluters contaminated.

The Tools of the Trade

Federal law provides powerful ammunition to cities seeking to remediate, rehabilitate or otherwise reclaim their contaminated land – and take its polluters to task. The Resource Conservation and Recovery Act, 43 U.S.C. § 6972 et seq., and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601, are the primary weapons municipalities may use to compel corporations to remediate contamination for which they bear responsibility. The laws are frequently complementary: Typically, a plaintiff seeking to compel a corporate defendant to remediate land it sullied will sue under both statutes.

Standards

When cities seek to compel the clean-up of contaminated land, the law is truly on their sides. The relevant legal thresholds in environmental remediation suits are relatively simple to understand, and generally very liberally construed.[3]

[3] See, e.g. Hanford Downwinders Coalition, Inc. v. Dowdle, 71 F.3d 1469, 1481 (9th Cir. 1995) (nothing that CERCLA was enacted to protect public health, and thus, should be construed broadly); see also United Sttes v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989) (recognizing that RCRA is a remedial statute that should be construed liberally).

RCRA

To prevail under RCRA, a plaintiff must prove that a defendant "(1) has contributed or is contributing to (2) the past or present handling, storage, treatment, transportation, or disposal of (3) any solid or hazardous waste that (4) may present an imminent and substantial endangerment to health or the environment."[4] A plaintiff "need not show actual harm to health or the environment. It is enough to show that such an endangerment *may* exist."[5]

RCRA actions provide municipal plaintiffs a unique win-win opportunity: Plaintiffs who successfully resolve actions under RCRA recover *all of their litigation expenses*. Pursuant to RCRA's explicit terms, courts may "award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party."[6] Congress specifically intended the fee-shifting framework it included in RCRA incentivize citizen (and, by extension, municipal) enforcement of the law.[7]

CERCLA

Liability is established under CERCLA § 107(a) if: (1) the site in question is a "facility" as defined in § 101(9); (2) the defendant is a responsible person under § 107(a); (3) a release or a threatened release of a hazardous substance has occurred; and (4) the release or the threatened

[4] Interfaith Community Organization v. Honeywell Intern. Inc., 263 F.Supp.2d 796, 835 (D.N.J. 2003).

[5] Id. (emphasis in original).

[6] 42 U.S.C. § 6972(e).

[7] Janet S. Kole, Attorney Fees Awards Under RCRA § 7002, Environmental Law Reporter, 25 ELR 10256 (1995)(quoting Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240, 260-63 (1975)).

release has caused the plaintiff to incur response costs."[8] Additionally, response costs must be "'necessary' and consistent with the national contingency plan," which means that there is "an actual and real threat to human health or the environment exists."[9]

The Challenge of Merging Law and Fact

While the legal standards are relatively simple, the factual issues at the core of contamination cases can be dauntingly complex. The questions are many – and their answers rely on high-end scientific exposition:

- Did the defendant create the contamination – or, is the defendant a victim, too?
- Is the proposed or undertaken method of remediation by the plaintiff necessary, or is there a more efficient and economically-sound viable alternative?
- Does the contamination represent a real threat or endangerment to health or the environment?

Expert Assistance

A fact-finder can only get to the answers to these questions with the assistance of expert testimony. Accordingly, before a city attorney decides to bring suit under these laws, the attorney should seek an expert's opinion as to the suit's necessity and viability, even when a particular state's environmental agency has labeled as "Contaminated" the relevant site. If the

[8] Kerr McGee Chemical Corp. v. Lefton Iron and Medical Corp., 14 F.3d 321, 325 (7th. Cir. 1994).

[9] City of Colton v. American Promotional Events Inc. et. al, __ F.3d __ (9th Cir. 2010) WL 2991399 quoting Carson Harbor Village Ltd. v. County of Los Angeles, 433 F.3d 1260, 1265 (9th Cir. 2006).

expert determines the case is a "no-go," the attorney would be wise to listen, and conserve valuable resources.

The successful prosecution of most RCRA and CERCLA cases demands input from experts across several disciplines. For example, a geologist may be useful in identifying the contamination that exists in soil, as well as in explaining how the contaminants could have infected the land in the first place, how the soil will react to various methods of remediation, and the likelihood that contaminants will be exposed to and endanger people if left unremediated. Likewise, environmental engineers are essential in providing expert opinions as to the best and most cost-effective methods of remediation. Toxicologists and physicians are frequently key in establishing the health risk created by a contaminant. Economists and real estate appraisers help demonstrate the economic impact that contamination has had on a parcel of land or a neighborhood. Any specific case can create the need for other types of experts such as sedimentation remediation experts or Ph.D.s that have published on a specific type of contamination.

As a fundamental pragmatic requirement, city attorneys should only seek out, employ and utilize engineering experts with actual experience in the remediation of contaminated sites. Publication history and litigation experience are also important. Our own experiences have shown us companies responsible for contamination will often propose and try to do as little as possible to remediate a site. Experts must have enough practical, on-the-ground understanding to recognize when a corporation's proposed plan is inadequate, enough gravitas to convince a court of the same, and enough knowledge to be able to craft an effective remedy in response.

In contemplation of a case, it is therefore important to *immediately* consider what facts you will need to prove and what types of experts can help demonstrate those facts. The sooner a team of experts is marshaled, the more effective you will be in preparing your case and in negotiating a possible settlement with the adversary. Indeed, it is very advisable to have your team of experts assembled from the very start.

The Future use of Contaminated Land at Issue

Of extreme relevance whenever a city attorney contemplates a case to compel the cleanup of a contaminated site, the attorney must consider the relevant municipality's plan for the property's future use. The acceptable method of remediation may vary greatly depending upon those designs. For example, a future residential use typically calls for more stringent methods of remediation than anticipated commercial uses, while open-space calls for far less. Knowing what the plan is for property can help you negotiate a settlement with a defendant who may be willing to pay for certain types of remediation, but not others.

A Special Master to oversee the cleanup

Since city attorneys would typically file a RCRA or CERCLA lawsuit because of the inability or unwillingness of the state's environmental protection agency to bring about the targeted clean-up, it is only logical for the City to seek as part of its requested relief the appointment "Special Master" to oversee any remediation. A Special Master - or another individual appointed to be an independent site administrator - that has the funds, supplied by the responsible party, to employ experts can expedite a remediation by creating and implementing a schedule for the remedial tasks to be performed. Importantly, the City will need the continued

assistance of its experts, at the expense if the defendant, to monitor the remediation to ensure its quality and effectiveness.

The Jersey City Experience(s)

Among the myriad contaminants Jersey City has tried to eliminate as it seeks to convert local brownfields into productive properties, hexavalent chromium has topped the list as both the most prevalent and most pressing problem. For several decades, two plants processed chromate ore in Jersey City, and produced over 1.5 million tons of contaminated residue. The leftover over pollutant is hexavalent chromium, ranked by the United States Environmental Protection Agency in the top quartile of most deadly carcinogens. In addition to the former production facilities, Jersey City is the unwilling home to a host of other chromium contaminated sites, because the substance was used as "fill" in construction projects around the City for decades. Indeed, contractors *preferred* chromium because it was cheap, readily accessible and known to prevent rodents.

In 1990, the New Jersey Department of Environmental protection entered into an Administrative Consent Order with the companies responsible for the chromium contamination, pursuant to which those companies were supposed to remediate their respective chromium sites. While some small sites were remediated, the NJDEP lacked the resources and general wherewithal to compel the companies to live up to their full commitments: Most properties remained unremediated, hazardous wastelands, including the City's most contaminated sites - namely, the aforesaid former processing plants.

The Honeywell Site: A Successful Partnership

One of the responsible parties is Honeywell Inc., which became liable as a result of a merger with AlliedSignal, Inc., which had previously acquired the Mutual Chemical Company ("Mutual"). Starting in the early 20th century, Mutual operated a chromate chemical plant where it manufactured sodium dichromate and chromic acid, compounds used to manufacture pigments, produce alloy steels, tan leather and anti-corrosion solutions, and coat surfaces of steel and aluminum. Chromite ore was railed to the factory and was used in a manufacturing process that included roasting and leaching the ore to create the end products. Chromium extracted as residue in the process was pumped as slurry into wetlands that a created a landmass of piled waste – 15- to 20-foot mountains of contamination standing both under and above water, across more than 32 acres of property subsequently acquired by WR Grace. WR Grace had plans to develop the site, but could not due to the heavy contamination.

This site adjoined slightly more than 40 acres of City-owned property (the "Jersey City Property"). The Jersey City Property was the headquarters for the City's Department of Public Works and Municipal Utilities Authority, and it is the staging area for the city's trash and snow removal operations. A significant amount of chromium spilled onto the Jersey City Property.

In May 1994, community groups filed a lawsuit in federal court against Honeywell, seeking to compel the corporation to remediate chromium contamination on the 32-acre site owned by WR Grace. The case went to trial in 2003, and the court held Honeywell liable under RCRA.[10] WR Grace and the environmental groups successfully demonstrated that Honeywell was responsible for the presence of the chromium, and that the chromium was an imminent and

[10] ICO v. Honeywell, 263 F.2d 796 (D.N.J. 2003).

substantial risk to both human health and the environment.[11] As a consequence of this litigation, Honeywell was ordered to excavate and haul away nearly a million tons of chromium-contaminated soil and to replace it with clean fill, and to develop remediation methods for groundwater and the Hackensack River sediment the chromium had also polluted. Honeywell ultimately bought the 32 acres of contaminated land, and has since completed the remediation of this property.

In May 2005, Jersey City and a local environmental organization teamed to initiate legal actions against Honeywell in state and federal court, in an effort to force Honeywell to remediate chromium on the Jersey City Property. Honeywell counterclaimed, seeking to compel Jersey City to remediate non-chromium contamination on the Property, such as incinerator ash and sewage sludge. The parties agreed to enter into mediation while discovery continued.

In mediation, it became clear Jersey City and Honeywell could – and, frankly, *should* work together. In an area where developable land is exceedingly scarce, the City and the company owned significant parcels of adjoining property along the Hackensack River, a major waterway. The two parties thus began to jointly contemplate the Jersey City Property's future – how it could be used, what it might become, and how it should therefore be developed - both because the cleanup standards for chromium vary significantly depending upon a property's future use, and because they saw the opportunity to engineer a mutually-beneficial development on the land.

Jersey City's Planning Department had already undertaken a public participation process with respect to the relevant properties – one that resulted in the Bayside Development Plan,

[11] Id.

calling for a mixed-use community with plentiful open space, new businesses and jobs, housing opportunities and mass transit. Based upon this plan and the trend toward residential development in city centers, Honeywell and Jersey City – with the assistance of one of the nation's leading urban planners - began to sketch out a coherent redevelopment plan for the entire area comprising respective properties, as well as adjoining properties.

As Honeywell and the City worked on developing a comprehensive land use plan for the area now known as Bayfront, a settlement agreement was negotiated that led to a federal consent decree creating a public-private partnership that detailed the future use of the property and how it would be remediated. The court's decree also established the mechanism pursuant to which Honeywell and Jersey City would oversee the remediated land's development, and split the proceeds of the sale of the property – each party would receive a percentage of the profit that reflected how much land each contributed to the partnership.

Part of the redevelopment plan called for 20 of the 100 acres to be open space/parkland, which reflected the goals of the public participation process. By setting aside 20 acres of land for open space, remediation costs were reduced, because New Jersey remediation standards for chromium permitted a capping method for the remediation of parks, whereas excavation as deep as 20 feet could be required for residential uses. The policy behind this remediation protocol is that a municipality can maintain parkland and ensure that the integrity of a cap is not compromised in public open space. Here, the cap will be between six and eight feet below the surface. Before we the endorsed this method of remediation, it was reviewed and approved by environmental engineers that were retained by the City. There is a deed restriction and restrictive covenant that will ensure no development ever occurs on the open space above the cap, which has also been placed on New Jersey's open space inventory. The Hackensack Riveerkeeper has

been named a trustee on the covenant to help insure its sanctity. Based upon Jersey City's commitment to a redevelopment plan that called for 20 acres of open space, Honeywell agreed to undertake the chromium remediation for the entire site, which included a combination of excavation and capping. Additionally, Honeywell agreed to undertake the non-chromium remediation of contaminants that were the result of historic City operations, estimated to cost $10 million, and to allow the City to pay off the costs of the non-chromium remediation from proceeds from the land sales at a later date.

Out of the 100 acre Bayfront redevelopment area, the City contributed nearly 40 acres. Pursuant to the terms of the settlement, the City will obtain 40% of the revenue from future land sales. Honeywell paid the City $25 million up front, which will be deducted from the future land sales. Honeywell is also paying Jersey City $13 million to assist in the relocation of its operations that currently take place at Bayfront, but need to be relocated for the development to occur. Additionally, Honeywell paid the City $1 million, to be used for environmentally beneficial projects.

As a result of the settlement of the litigation brought by Jersey City against Honeywell, dangerous chromium contamination will be remediated and a 100-acre waterfront area of Jersey City, which is currently either vacant or occupied by dilapidated and obsolete industrial buildings, will be converted into a mixed-use, transit-oriented community with open space and attractive housing. The Bayfront Redevelopment plan, which calls for sustainable construction practices, has already won several planning awards. The City and Honeywell are working closely together to ensure that the vision of Bayfront becomes a reality on a number of fronts - from environmental remediation, to infrastructure planning, to lobbying to extend the Light Rail transit system ¼ of a mile to the Bayfront area. Ultimately, the City will reap tens of millions of

dollars from land sales and hundreds of millions of dollars in property taxes that it otherwise would not collect.

The PPG Sites

Another chromate plant operated in the center of Jersey City from 1920 until 1954, one which was ultimately acquired by PPG Industries. Like Honeywell, PPG entered into an ACO with the DEP, but never remediated the contamination at its former plant. Among the problems causing the clean-up's delay was the inability of the DEP to adequately oversee the remediation of large, complex, heavily-contaminated sites.[12] The DEP was simply too understaffed and overburdened to adequately police the remediation of each one of New Jersey's 20,000 contaminated brownfields.

Recognizing that RCRA includes a "citizen suit" provision designed to help in exactly this kind of situation – where a regulatory authorities were logistically or pragmatically restrained from effectively regulating – Jersey City decided to act.[13] After the City sent a demand letter to PPG and lobbied the NJDEP to compel PPG to live up to its responsibility to remediate the chromium at the company's 16-acre former plant, the City and DEP held a joint press conference regarding the site, announcing the filing of a lawsuit in State court under the New Jersey Spill Act, N.J.S.A. 58.10-23.1. Simultaneously, the city filed a requisite formal declaration of its intent to sue under RCRA.

[12] The State recently passed legislation that allows for the use of private environmental engineering firms to assist in the remediation of such sites. *See* The Site Remediation Reform Act, N.J.S.A. 58:10-c, 1 et seq.

[13] RCRA authorizes citizen suits under 42 U.S.C. § 6972.

The City was adamant about the site being thoroughly remediated as soon as possible, as it sits only a few hundred yards away from a densely-populated residential neighborhood. Moreover, the property is adjacent to a newly-built, heavily-trafficked light-rail transit station, and the site's new owners have correspondingly created plans for a significant development that will create jobs, produce property tax dollars for the City and substantially improve the aesthetic quality in the entire area.

With the assistance of the judge overseeing the matter, PPG, the State and the City entered into settlement negotiations. Since PPG admitted responsibility for the contamination, the only issues in dispute were the appropriate method of remediation and the process pursuant to which the clean up take place.

Despite its relatively limited scope, the negotiation process was still highly contentious: Jersey City demanded that PPG excavate all chromium at the site, while PPG sought to remediate some of the chromium through chemical treatment, which is permitted under New Jersey regulations. While the City was willing to allow PPG an opportunity to conduct a "pilot test" to prove its technological solution could work, we did not want this testing to lead to a further delay in the remediation. Further, in exchange for agreeing to this "pilot test," the City insisted that PPG excavate the chromium in the event that the company could not convincingly demonstrate that its proposed chemical treatment was effective.

PPG, the DEP and Jersey City reached a settlement that was approved by the New Jersey Superior Court, pursuant to which PPG is remediating the site based on the strictest residential

guidelines for chromium remediation,[14] and on a five-year schedule under the guidance of a court-appointed Site Administrator.[15] The Site Administrator is responsible for setting up and ensuring the adherence to a master schedule for the remediation, achieved by having regular meetings with the parties and by facilitating the resolution of any disputes or problems that arise during the remediation process. Moreover, while the NJDEP has final authority over all remediation decisions, a technical consultant selected by the Site Administrator assists the agency: The technical consultant reviews all submittals and makes recommendations as to their completeness and appropriateness.

As a result of this process, PPG is excavating and removing essentially all chromium contaminated soil down to 20 feet deep – or to the so-called "meadow mat," a naturally occurring geological barrier. The settlement process caused PPG to abandon its plan to use chemical treatment to remediate large swaths of chromium contaminated soil – a significant milestone, as the City, the DEP and the court-appointed Site Administrator all opposed PPG's initial plans.[16] A website describing the clean-up process - one designed to also keep the

[14] In 2007 then Commissioner of the DEP Lisa Jackson, whom President Obama subsequently selected to lead the United States Environmental Protection Agency, issued a memorandum ending the suspensions on NFAs and setting forth a new standard for chromium remediation of soil. For land dedicated to residential development, Lisa Jackson's policy required that any soil containing readings for higher than 20 ppm for hexavalent chromium had to be excavated to a depth of 20 feet or treated to lower the concentration of hexavalent chromium below 20 ppm.

[15] Importantly, the parties were able to agree on the identity of the Site Administrator - and the court Mike McCabe, who had previously served as a Regional Administrator for the Environmental Protection Agency and, ultimately, the agency's Deputy Administrator under President Bill Clinton.

[16] Of note, a consortium of community and non-profit organizations – spearheaded by the National Resources Defense Council – protested the settlement discussed here. These groups filed a separate lawsuit against PPG, which the two sides agreed to settle in 2011. That settlement calls for PPG to reduce chromium levels on its contaminated sites to 5 parts per million – a more stringent standard than the 20 parts per million standard required under both New Jersey law and the settlement the City reached with PPG. However, the 5 ppm standard has no impact on the pragmatic remediation of the PPG sites: Since PPG is removing the contaminated soil on its sites, it effectively eliminating all traces of chromium thereupon. This said, the community groups and NRDC do have the right to review the clean-up of the PPG properties.

community informed on clean-up progress - is located at http://chromiumcleanup.com/overview.html.

Conclusion

In sum, federal law provides municipal attorneys the significant opportunity to reshape their cities, by transforming contaminated wastelands into productive parcels of property. While the sheer number of contaminated sites – not to mention the severity of the contaminants on them – can be overwhelming to even contemplate, the City of Jersey City stands as an example: The elimination of City brownfields via affirmative litigation has helped speed the City's development into a thriving and trendy destination for residents and businesses alike – and the promise of future development is quickly erasing the memories of the City's polluted past.