INSTITUTIONAL CONTROLS AND PETROLEUM BROWNFIELDS

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SHORT HISTORICAL REFERENCE

At the end of 2010, there were approximately 600,000 Brownfield sites in the United States.[1] Approximately half of those sites were designated as having petroleum impacts[2] which were hampering the redevelopment and reuse of the properties. The United States Environmental Protection Agency ("USEPA") believes many of these sites are former service stations, which are readily developable for small business use - but for the spectre of known or suspected contamination and the potential requirement to undertake remediation of the property.[3] Those former gas station petroleum impacts are generally believed to have been the result of leaks from undereground storage tank systems ("USTs"), which included both tanks and the piping used to convey the gasoline from the tanks to the pumps.

As part of its statutory charge, the USEPA is the agency primarily responsible for the regulation of USTs either directly or through delegation agreements with states or Indian tribes.[4] Whether through direct supervision or through delegation, the USEPA must assure that the operation of USTs and the remediation of releases are protective of the public health and the environment. In 2009, the USEPA was also given a significant tool in federal efforts to reclaim leaking underground storage tank ("LUST") sites[5] with the appropriation of tens of millions of dollars being specifically designated for petroleum impacted locations.

USTs and petroleum releases were typically unregulated until 1984 when they were included in the Resource Conservation and Recovery Act ("RCRA") [6] and a comprehensive statutory scheme was developed to oversee the installation, use and disposition of USTs and to require the retirement of USTs which did not meet new standards.[7]

The statutory scheme was augmented by a series of cases decided by federal and state courts which held that petroleum products which leaked from UST systems were "waste" and were subject to not only governmental oversight, but also to private enforcements actions.[8] Where initial efforts were aimed at the total removal of petroleum constituents in soil and groundwater with attendant significant cost and limited success, the USEPA as lead agency in RCRA enforcement began moving toward a different approach, Risk Based Corrective Action ("RBCA").[9] The underlying premise of RBCA, is that:

> "site-specific, risk-based media cleanup levels developed under the RCRA corrective action and CERCLA cleanup programs are appropriate levels at which to define clean closure."[10]

The memorandum further noted that it would be appropriate to consider the closing of incidents involving commercial properties with the use of appropriate land use controls such as zoning ordinances or deed/easement restrictions.[11] The specified land use controls are not all formal mechanisms. As noted by the USEPA, these types of methods are acceptable as "Institutional Controls" which are defined as "non-engineered instruments, such as administrative and legal controls, that help minimize the potential for human exposure to contamination and/or protect the integrity of the remedy."

In 2005, the USEPA Region 5 expanded on the Institutional Control mechanisms by encouraging its project managers to require persons wishing to rely on Institutional Control mechanisms to enter into Administrative Orders or Consent Decrees to "ensure federal enforceability of the owner/operator's commitment to maintain and operate the selected institutional control"[12]

ILLINOIS EXPERIENCE

Companion and similar to the RBCA approach, in 1997 the Illinois Pollution Control Board adopted its own risk based program by adopting regulations which provided a Tiered Approach to Corrective Objectives ("TACO")[13] which looked at the realistic exposure level from a contaminated site to determine whether cleanup measures were required. If there were contaminates which were determined to be at levels that posed a risk to human health or the environment, a responsible party could take affirmative steps to remove the contaminate or to eliminate the potential exposure. That "exposure pathway" could be eliminated by the use of appropriate land use controls or by the use of "institutional controls" which are defined by the Illinois Environmental Protection Agency ("IEPA") to be:

> "legal mechanisms for imposing restrictions and conditions on land use….which may include: restrictive covenants and deed restrictions, negative easements, Ordinances adopted and administered by a unit of local government, and agreements between a property owner and a highway authority."[14]

The primary institutional controls contemplated by the IEPA included the highway authority agreement ("HAA") and the groundwater use restriction ordinances ("GWO") which could either be community wide or limited in scope.

The HAA would be entered into between a governmental entity, which had control of highways that were impacted by contamination, and the party responsible for remediating an incident. The governmental entity could be a state, county or local unit, but it had to have the authority to allow contamination to remain in place and, as importantly, to limit the use of groundwater under the roadway as a potable water source. Similarly, the GWO would prohibit the installation or use of potable water wells within the area covered by the GWO with attendant penalties if the ordinance was violated.

Since there was no specific guidance on how those documents were to be drafted, jurisdictions around the state of Illinois crafted their own versions of institutional controls, some of which the IEPA found appropriate and others which it did not. To alleviate the patchwork, the Illinois Pollution Control Board ("IPCB"), during a significant revision of its administrative regulations governing the TACO program, expressly identified what it would consider acceptable institutional controls, which included:

> 1) No Further Remediation Letters;
> 2) Environmental Land Use Controls;
> 3) Land Use Control Memoranda of Agreement;
> 4) Ordinances adopted and administered by a unit of local government;
> 5) Agreements between a property owner (or, in the case of a petroleum leaking underground storage tank, the owner or operator of the tank) and a highway authority with respect to any contamination remaining under highways; and
> 6) Agreements between a highway authority that is also the property owner (or, in the case of a petroleum leaking underground storage tank, the owner or operator of the tank) and the Agency with respect to any contamination remaining under the highways.[15]

At the request of the IEPA, the IPCB incorporated in the rulemaking specific form documents which it would consider acceptable to document each or any of the proposed institutional controls available in a TACO program closure request.[16]

Where prior non-form documents had been accepted by the IEPA which incorporated specific agreements between responsible parties and governmental entities to induce those governmental units to agree to property restrictions, the enacting of the regulatory documents prohibited any additional incorporated undertakings in the formal institutional control filing. That led to many governmental entities requiring parties seeking institutional controls to augment their request with indemnification agreements, which were designed to prevent the governmental agency from facing financial risk due to environmental conditions remaining on property which had received no further remediation ("NFR") determinations.[17]

UNIFORM ENVIRONMENTAL COVENANTS ACT

In 2008, concurrent with the IPCB TACO revisions, the state of Illinois adopted the Uniform Environmental Covenants Act ("UECA"),[18] joining 24 other states which had (or by now have) enacted statutes which track UECA.

The UECA was initially proposed with the backing of the USEPA as a method to standardize institutional controls across the spectrum of remedial programs. The drafters argued that while many states had authorizations for land use controls as part of the toolbox for RBCA and/or TACO programs, there was a lack of consistency. The UECA was seen as a method to give stability to land use control mechanisms to the regulatory community and to prospective purchasers who would have actual knowledge of controls that were in place to address on-property contamination.[19]

Although the IPCB has already adopted by rule a Model Environmental Land Use Control document,[20] the EUCA gave additional teeth to institutional controls because it included private and public enforcement of the controls set forth in the EUCA filing,

including enforcement by the municipality in where the property that had such a control was located irrespective of whether it was a party to the EUCA restriction. And while an environmental covenant recorded pursuant to EUCA would be enforceable, the Illinois statute clearly provided that EUCA it would not preclude a different filing of an institutional control document based upon the IPCB model documents:

> "This Act does not invalidate or render unenforceable any interest, whether designated as an environmental covenant or other interest, that is otherwise enforceable under the law of this State, including but not limited to interests compliant with 35 Ill. Adm. Code 742."[21]

CANADA EXPERIENCE

There are an estimated 200,000 underground storage tanks systems in Canada, and it is believed that up to 25% of those have experienced leaks[22]. In 2006, the Canadian Council of Ministers of the Environment issued its Recommended Principals on Contaminated Sites Liability[23] in which the concept of site specific environmental remediation was addressed. The Recommended Principals suggested that "Benchmarks should be developed for the remediation of contaminated sites, which will vary based upon the land usage and site location of a particular site. The use of such benchmarks will allow remediation plans or orders to be tailored on a site-specific basis.[24]

Institutional controls do not appear to be formalized.

CONCLUSION

Virtually all states have the availability of institutional control mechanisms to address contamination resulting from petroleum releases. In its April 2011, state-by-state review of Brownfield and Voluntary Response Programs, the USEPA identified each state's identified method of utilizing land use controls to accomplish remedial closures.[25] A similar analysis was conducted of tribal programs[26] indicating that each sovereign tribe

was in the process of analyzing its environmental programs with many adopting institutional controls as a remedial tool.

It is incumbent on attorneys employed by, working for, or working with municipalities to understand the role institutional controls can and do play in corrective action for petroleum release sites and to use those controls where appropriate for the development and redevelopment of otherwise distressed properties.

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[1] "FY 2010 Annual Report on the Underground Storage Tank Program," USEPA, www.epa.gov/oust: http://www.epa.gov/oust/pubs/fy10_annual_ust_report_3-11.pdf .
[2] Id.
[3] USEPA, OSWER, Petroleum Brownfields, "Opportunities for Small Business," http://www.epa.gov/oust/petroleumbrownfields/pbbusin.htm#advantage USEPA.
[4] 42 USC §§6901 et seq.
[5] American Recovery and Reinvestment Act, Public Law No. 111-5.
[6] 42 USC §§6901 et seq.
[7] 42 USC §§6991, et seq.
[8] See, *e.g.* Zands v. Nelson, 779 F.Supp. 1254, 1261-64 (S.D.Cal.1991).
[9] Cotsworth, Elizabeth, Office of Solid Waste Acting Director, March 16, 1998 memorandum "Risk Based Clean Closure." http://www.epa.gov/osw/hazard/correctiveaction/resources/guidance/risk/cclosfnl.pdf .
[10] Id. at p. 2.
[11] Id. at p. 5.
[12] "Use of Institutional Controls in the RCRA Corrective Action Program," ESEPA Region 5, March, 2000, p.12.
[13] 35 Ill Adm. Code §742.
[14] "TACO Fact Sheet 4:Institutional Controls," Illinois Environmental Protection Agency, http://www.epa.state.il.us/land/taco/4-institutional-controls.html .
[15] 735 IAC 742.1000(c).
[16] Copies of each document which are located at 35 IAC 742 Appendix D-H are attached.
[17] Exemplar of a typical Indemnification Agreement attached.
[18] 765 ILCS 122/1 et seq.
[19] Uniform Environmental Covenants Act with Prefatory Note and Comments. National Conference of Commissioners on Uniform Laws, 2003. http://www.nccusl.org/Act.aspx?title=Environmental Covenants Act.
[20] 35 IAC 742 Appendix F.
[21] 765 ILCS 122/5(d).
[22] Swaigen, Toxic Time Bombs: The Regulation of Canada's Leaking Underground Storage Tanks (1995),
[23] Canadian Council of Ministers of the Environment issued its Recommended Principals on Contaminated Sites Liability, 2003. http://www.ccme.ca/assets/pdf/csl_14_principles_e.pdf .
[24] Id at p. 17, recommendation 13.
[25] USEPA, 2011. Brownfield and Voluntary Response Programs, an Update from the States.
[26] USEPA, 2011. Tribal Brownfields and response Programs, Respecting Our Land, Revitalizing our Communities.