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New York City Superfund Sites
Presentations to:
Southwest Brooklyn Industrial Development Corp.
East Williamsburg Valley Industrial Development Co.

October 18 and 19, 2011



Louis A. Evans, Esq.
Herrick, Feinstein LLP
2 Park Avenue
New York, NY 10016
(212) 592-1400
levans@herrick.com

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I. Introduction

- A. Gowanus Canal was listed by USEPA as a Federal Superfund site in March 2010
- B. Newtown Creek was listed by USEPA as a Federal Superfund site in September 2010
- C. Impacts of listing on local businesses--legal, financial, operational
- D. What can local businesses do to mitigate these impacts and protect themselves?

II. Superfund and Other Applicable Laws

A. CERCLA (a/k/a the “Federal Superfund Law”)

1. Authorizes USEPA to identify the most severely contaminated sites and designate them as “National Priorities List” (NPL) or “Superfund” sites
2. Contamination must include “Hazardous Substances” --defined by reference to lists of contaminants compiled under other laws
3. CERCLA explicitly excludes petroleum products from the definition of “Hazardous Substances”

II. Superfund and Other Applicable Laws

- i. CERCLA authorizes USEPA to compel “potentially responsible parties’ (PRPs) to conduct or pay for “response actions” (actions that are necessary to investigate and/or remediate releases of hazardous substances)
- ii. PRPs include
 - a. the current owner of the site
 - b. the owner of the site at the time the release occurred
 - c. the current operator of the site
 - d. the operator of the site at the time the release occurred
 - e. generators: persons whose actions resulted in the release of hazardous substances
 - f. transporters

II. Superfund and Other Applicable Laws

- iii. Possible Defenses to Ownership Liability
 - a. innocent purchaser
 - b. contiguous property
 - c. bona fide prospective purchaser

II. Superfund and Other Applicable Laws

- iii. CERBLE Process
 - a. Remedial Investigation/Feasibility Study--evaluation of extent of contamination and recommendations for remedial action methodology
 - b. Proposed Remedial Action Plan
 - c. Record of Decision (ROD)--selection of remedial action methodology by USEPA
 - d. Remedial Design
 - e. Consent Decree--approved by Federal District Court
 - f. Remedial Action
 - g. Operations, Monitoring and Maintenance--making sure remedy is working--long-term groundwater monitoring--engineering and institutional controls
 - h. Each step in the process has statutory requirements for public notice and comment
 - i. Operable Units--USEPA may divide Superfund sites into discrete areas of contamination based on nature of contamination, geographic separation or environmental media

II. Superfund and Other Applicable Laws

B. New York State Navigation Law, Article 12

1. Law that authorizes NYSDEC to compel cleanup of petroleum spills by responsible parties (a/k/a dischargers)
2. Dischargers include parties that actually cause the spill as well as owner of property where spill occurs
3. Process is similar to CERCLA except much less formal. No requirement of public notice and comment.
4. Process can “feel adversarial.”

II. Superfund and Other Applicable Laws

C. NYSDEC Permitting Issues

1. Bulkheads
2. Disturbance of wetlands
3. Discharges of pollutants into surface water or groundwater (SPDES permits)
4. Solid waste management facilities

II. Superfund and Other Applicable Laws

D. Cleanup Programs

1. New York State Brownfield Cleanup Program
2. New York City Local Brownfield Cleanup Program

II. Superfund and Other Applicable Laws

E. Uniform Land Use Review Procedures (ULURP)

1. New York City law governing approvals such as re-zoning or zoning variances
2. SEQR/CEQR process (environmental impact review)
3. may be complicated by contamination (e-designations, restrictive declarations)

III. Status of Cleanups

A. Gowanus Canal

1. According to USEPA, soil, groundwater and sediments in Canal are contaminated with polycyclic aromatic hydrocarbons (“PAHs”), polychlorinated biphenyls (“PCBs”), pesticides, metals and volatile organic compounds (“VOCs”). Contamination extends the entire length of the Canal.
2. City of New York has signed Consent Order with USEPA calling for RI/FS . Includes groundwater monitoring at property owned by City, plus other investigations and studies as may be required by USEPA and agreed to by City.
3. National Grid has signed Consent Order with USEPA calling for RI/FS. Includes more comprehensive groundwater monitoring plan to be prepared by USEPA, plus other investigations and studies as may be required by USEPA and agreed to by National Grid.

III. Status of Cleanups

A. Newtown Creek

1. NYSDEC has entered into Consent Orders with 4 different responsible parties for cleanup at 4 separate locations (former refineries). Remedy primarily consists of product recovery and groundwater monitoring.
2. According to USEPA, Creek sediment is contaminated with metals, PAHs and PCBs.
3. In July 2011, USEPA entered into Consent Order with 6 responsible parties for RI/FS involving sampling and analysis of Creek sludge, for the purpose of further delineating the extent of contamination. Responsible parties include Phelps Dodge, Chevron, BP, ExxonMobil, National Grid and the City of New York. No active cleanup is expected for 7 years. USEPA says it will take 18 to 22 years for cleanup to be complete.

III. Liability Issues

- A. Conceivable that local businesses may be identified as PRPs.
- B. Government may conduct PRP searches.
- C. PRPs may conduct searches to identify other PRPs.
- D. Local businesses may receive Notice Letters or Information Requests from USEPA.
- E. Typical outcome is de minimis settlement
 - 1. agreed-upon cash settlement
 - 2. release from liability to government
 - 3. protection against contribution actions by other PRPs.
- F. Third-party suits (migrating contamination)

IV. Stigma Issues

- A. When risks are perceived as being excessive, calculations of risk versus benefit are replaced with the approach of shunning. The following factors increase the likelihood of shunning a property located on or near a Superfund site by lenders, purchasers or investors:
 - 1. **Ambiguity.** Ambiguous and unclear reports given by experts, government officials and the media lead to doubt and skepticism.
 - 2. **Lack of Experience.** Small to mid-size lenders without in-house environmental professionals may not understand how to manage their risks as lenders.
 - 3. **Current Financial Environment.**

IV. Stigma Issues

- B. What credit underwriting adjustments may lenders make to compensate for increased risks
1. Reduced loan-to-value ratio.
 2. Increased environmental insurance
 3. Loan is contingent on the completion of the plan for remediation.
 4. Contaminated property cannot serve as collateral.

VI. What can local businesses do to mitigate these impacts?

- A. Keep informed. Disseminate information rather than misinformation or rumor. IDC's can be a clearinghouse for information.
- B. Invite local financial institutions to be part of the Community Advisory Group so they are informed and involved in the remediation process.
- C. Businesses that receive CERCLA information requests should submit responses that are accurate, complete and carefully written.

VI. What can local businesses do to mitigate these impacts?

- D. Access agreements for environmental work performed on property:
 - 1. reasonable time restrictions
 - 2. minimize disruption to operations
 - 3. obligation to restore property to prior condition
 - 4. indemnification for property damage or personal injury
 - 5. benefits of consultants' and contractors' insurance coverage
- E. Environmental Insurance
 - 1. coverage for cleanup of previously unknown or undiscovered conditions
 - 2. coverage against 3rd party claims for property damage or personal injury
 - 3. policyholder's lender can be additional insured on environmental policy

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