Legal Liability and the Reuse of Contaminated Soil

Minnesota Brownfields Forum

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Topics

• Impact of liability concerns on off-site reuse
• Sources of legal liability
• Assessing and mitigating liability risk
• Regulatory approaches in other states
• Options for addressing the issue in Minnesota
Framing the Issue

• Brownfield redevelopment can require export of soils containing low-level contamination

• Disposal of soils in a landfill is expensive and, as a matter of public policy, considered a poor use of landfill space

• Reuse of such soils at other development properties needing to import soil may be a practical solution, but what about the potential liability?
Sources of Liability

- CERCLA
- MERLA
- RCRA
- Tort / common law claims
The federal Superfund statute establishes “strict, joint, and several liability” for:

- owners
- operators
- arrangers
- transporters
Strict liability

= liability regardless of compliance with laws or lack of negligence
Joint liability

= every party that is an owner, operator, arranger, or transporter for a particular site is liable for its cleanup
Several liability

= any one liable party can be held responsible for the entire cost of cleanup, no matter how small their contribution to the contamination
• Minnesota state superfund statute, MERLA, also establishes strict, joint, and several liability for owners, operators, arrangers, transporters

• Owner liability is narrower under MERLA than CERCLA, but an owner is liable if it:

  “knowingly permitted any person to use the facility for disposal of a hazardous substance”
RCRA

- RCRA liability can attach if a person:

  (1) has contributed or is contributing to
  (2) past or present handling, storage, treatment, transport, disposal of
  (3) any solid or hazardous waste (including petroleum) which
  (4) presents an imminent and substantial endangerment to health or the environment
RCRA

- Private actions more restricted under RCRA than under CERCLA or MERLA:
  - Can sue to force corrective action, but not for $$
  - 90-day notice requirement
  - Only in absence of governmental action
  - Must have “imminent and substantial endangerment” (conformance with regulatory standards relevant)
Torts and Common Law Liability

• Negligence
• Nuisance
• Trespass
• Strict Liability

Utilized by plaintiffs, e.g., to obtain compensation for personal injury or property damage where not available under CERCLA or MERLA
So how significant is the risk of legal liability?

It depends.
Factors to consider when evaluating liability risk:

(1) Physical state of the importing site

- How much is known about the historical use of the importing site?
- Is there sampling data providing a baseline for the site?
- What are the potential exposure pathways at the site?
(2) Future use of the importing site

- Who owns the importing site?
- What types of uses will occupy the site?
- Is there potential for changes in the type of use (i.e. commercial to residential)?
- Will hazardous materials be used or stored on the site, and will hazardous wastes be generated?
- Where on the site will the imported soils be placed?
Risk Factors

(3) Characteristics of the soils being reused

- What types and concentrations of contaminants have been identified?
- How extensively will the soils be sampled?
- Are there similar contaminants existing on the importing site, or similar wastes generated there?
Addressing the Risks

(1) Analyze whether the risk presented is within your zone of risk tolerance

(2) Document soil sampling and baseline data – and keep that documentation

(3) Allocate risk or liability in a written agreement?

(4) Assurance from state regulators?
Regulatory Approaches

- Pennsylvania (discussed previously)
- New York
- Colorado
- Ohio
Colorado guidance document:

Off-site reuse of petroleum-contaminated soils evaluated on case-by-case basis:

- Site specific and waste-specific risks must be evaluated
- Must demonstrate that off-site reuse would not pose unacceptable threat to human health or the environment
- Receiving property owner must give explicit approval
- Local governing body must give approval
New York guidance document:

- Petroleum-contaminated soils meeting guidance values can be reused off-site at pre-approved locations
- Generator responsible for “accurate and precise characterization” and “safe and proper reuse”
- Responsible party must maintain records for 3 years
- Off-site reuse allowed only on:
  - industrial sites
  - authorized construction and demolition debris landfills
  - petroleum storage facilities
  - authorized landfills
  - locations where public access is limited
Ohio regulation (Ohio Admin. Code 1301:7-9-16)

- Petroleum-contaminated soils sampled as required that do not exceed action levels may be used “for any lawful purpose.”
- Petroleum-contaminated soils exceeding action levels require treatment pursuant to a pre-approved plan prior to off-site reuse
Options for the Minnesota approach:

- Guidance document
- Assurances:
  - no action determination
  - limited no association determination
  - other?
- Contribution protection for exporter
- Financial incentive for importers
- MERLA amendment
Questions?
Comments?