



Legal Liability and the Reuse of Contaminated Soil

Minnesota Brownfields Forum

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April 17, 2008



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**



CERCLA

**The federal Superfund statute establishes
“strict, joint, and several liability” for:**

- **owners**
- **operators**
- **arrangers**
- **transporters**



CERCLA

Strict liability

=

**liability regardless of
compliance with laws or
lack of negligence**



CERCLA

Joint liability

=

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



CERCLA

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**



MERLA

- **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



Risk Factors

***So how significant is the
risk of legal liability?***

It depends.



Risk Factors

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?**



Risk Factors

(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**



Regulatory Approaches

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**



Regulatory Approaches

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**



Regulatory Approaches

- **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?