

ENVIRONMENTAL LAW UPDATE

The Texas Natural Resource Conservation Commission (TNRCC) recently implemented a change in its control of underground petroleum storage tank releases involving off-site impacts. The TNRCC will now, in appropriate circumstances, issue a no further action directive for remediation on impacted, off-site property before authorizing closure of remediation on the petroleum storage tank site. This recent change is accomplished, in part, through use of the 1995 law that created the Voluntary Cleanup Program in Texas.

And, effective September 1, 1997, the Texas Legislature enacted a little known law that specifically exempts innocent owners of properties impacted by off-site migration of contaminants from liability for investigation and remediation of those impacts. Besides eliminating concerns an innocent property owner may have over possible liability for any required remediation, this law is another means (in addition to the Voluntary Cleanup Program) by which the TNRCC can issue a no further action directive on an impacted, off-site property before authorizing closure of the petroleum storage tank site.

A Change in Strategy for the TNRCC

In 1995, the Texas Legislature passed a law creating the Voluntary Cleanup Program (the VCP) for the purpose of encouraging redevelopment of brownfields sites – abandoned commercial locations having environmental problems that hindered recycling of those sites into productive uses.

The term “brownfields” typically brings to mind old warehouses and manufacturing facilities along the Texas Gulf Coast and abandoned plants and factories in the “industrial” sections of Texas’ cities. But under the brownfields legislation, the term means more than these industrial plants. Brownfields is, in fact, most any property that has environmental problems, regardless of its current use, including former gas stations and impacted properties adjacent to existing gas stations.

The VCP provides a mechanism whereby a person interested in redeveloping a brownfields site can commit to the TNRCC to remediate any environmental problems on the property. In return, the person receives a prompt response to its remediation proposal and is provided a limited release of liability for the environmental problems being remediated on that property. A new law also allows tax exemptions for property entered into the VCP. The applicant must sign a remediation agreement with the TNRCC, pay the initial application fee and any review and oversight costs, and complete any required remediation.

The VCP is significant here because the VCP Section of the

TNRCC has recently decided to allow an owner of property impacted by a release from an underground petroleum storage tank site to include its off-site property in the VCP independent of the petroleum storage tank site. This enables the property owner, where contaminant levels allow, to obtain an early (or even immediate) release from liability for the environmental impacts to its off-site property and a directive from the TNRCC that no further remedial action is necessary for those impacts. This release and no further action directive are issued even though the responsible party continues to remediate the petroleum storage tank release under the direction of the Petroleum Storage Tank (PST) Section of the TNRCC and even though the PST Section may continue to require that monitor wells remain open on the impacted, off-site parcel.

The PST Section of the TNRCC has long refused to give separate closure notices on petroleum storage tank sites and impacted, off-site parcels. Instead, it has taken the view that closure can be obtained on a petroleum storage tank release only after remediation of all necessary impacts has occurred, regardless of property boundaries. Owners of impacted, off-site parcels have complained of this inability to obtain early closure on their property and of the sometimes-lengthy delay before the PST section grants closure for the entire release. These complaints by adjacent property owners, because they could not be satisfied, have led to lawsuits based upon the argument that no one will buy, lease or lend on environmentally impacted property.

According to the TNRCC, no change of policy or direction at the agency led to this change in regulatory strategy. Rather, because the PST Section continues to direct the remediation by the responsible party, and so long as the impacted, off-site property satisfies applicable closure requirements, the VCP Section will issue a release and a no further action directive to the owner of the impacted, off-site property once it has been admitted to the VCP.

With this change in course at the TNRCC, petroleum marketers now have a mechanism by which they can provide the owner of

an impacted, off-site property with a release of liability and a directive that no further action need be taken to remediate environmental impacts as to that person's property as soon as that property meets applicable closure requirements. This release and no further action directive should be obtainable much earlier than a final closure letter from the PST Section on the entire impacted area. Additionally, this release and no further action directive should alleviate any concerns that the off-site property owner might have over being held responsible to remediate any impact to its property and will go a long way toward mending relations with an affected off-site property owner.

This release and no further action directive will also provide off-site property owners with documentation that should be sufficient to satisfy any purchaser, lender, or tenant who may be concerned over subsurface impacts to that property. If the property owner later sues for damages, the release and no further action directive will also help to refute the argument that no one will buy, lease or lend on impacted property, and establish that the impacted property owner should not be entitled to recover damages for any claimed lost ability to sell, lend or lease its property. While the petroleum marketer would likely have to pay the application fee and the oversight costs, those amounts would be well spent if a lawsuit is avoided.

The Innocent Landowner Program

Effective September 1, 1997, Texas adopted a law that specifically exempts innocent property owners from liability for environmental problems on their property. Under the new law:

(a) An innocent owner or operator of property is not liable under this code or the Water Code [that portion of Texas law that regulates underground petroleum storage tanks] for investigation, monitoring, remediation, or corrective or other response action regarding the conditions attributable to a release or migration of a contaminant or otherwise liable regarding those conditions.

This exemption has been limited somewhat for persons who have acquired property from the person responsible for the environmental impact:

(b) A person that acquires a portion of the tract on which the source of a release of contaminants is located from the person that caused the release is eligible for immunity under Subsection (a) only if, after appropriate inquiry consistent with good commercial or customary practice, the person did not know or have reason to know of the contamination at the time the person acquired the property.

In addition to being exempt by law from any investigation or remediation obligation, an innocent owner can obtain a certificate from the TNRCC confirming that he or she is an innocent landowner under (a) above. To obtain the certificate of non-liability, the owner must (1) submit a site investigation report that establishes the property has been impacted as a result of an off-site source, the owner did not cause or contribute to the impact, and the owner is eligible for immunity as an innocent landowner, and (2) pay a \$1,000.00 application fee and any additional plan review and oversight costs of the TNRCC, if any.

The TNRCC has a limited period of time to issue or deny the certificate or decide that additional information is necessary before it can issue the certificate. Once issued, the certificate evidences the owner's immunity from liability for any investiga-

tion or remediation obligation.

This program, like the VCP, is an excellent tool for an innocent landowner to alleviate any possible problem in selling or leasing property or using property as collateral that may be caused by the environmental impact. An innocent landowner certificate provides the lender with hard proof that the lender faces no risk due to the environmental impact on the property. The certificate also provides comparable proof to the owner who is attempting to sell the property and any future owner of the property.

As with the VCP, an innocent landowner certificate may also prove valuable in connection with civil lawsuits brought by owners of impacted, off-site properties. The petroleum marketer responsible for the release can offer to perform the necessary work and pay all of the costs involved in obtaining an innocent landowner certificate for the off-site property owner. The certificate will also alleviate any concerns that the off-site property owner might have over being held responsible to remediate any impact to his or her property.

The innocent landowner statute also eliminates any argument that no one will buy, lend or lease impacted property. As a result, the off-site property owner no longer has an argument for recovering damages in excess of whatever damage to the property, if any, the environmental impact might have caused. An innocent landowner certificate provides documentation establishing this lack of risk.

The innocent landowner program can offer advantages over the VCP. The innocent landowner need only establish it was not responsible for the environmental impact; no remediation by the innocent landowner is required even if the off-site property does not meet closure requirements. The VCP, on the other hand, requires a detailed analysis of the off-site property to establish that closure is proper or, if closure standards have not been met, what remediation is required before closure can be obtained. Because remediation may be required, an innocent landowner certificate might also be obtained at an earlier date than a release and no further action directive under the VCP.

Conclusion

Petroleum marketers, particularly those who have incurred a release that has impacted off-site property, should be aware of these two recent developments in Texas' environmental regulatory scheme. Besides providing the owner of an impacted, off-site property with relief in the form of a certificate of no liability or a release of liability and no further action directive, these two developments can provide petroleum marketers with opportunities to provide early relief to an owner of impacted property and, potentially, minimize a claim by an impacted property owner for monetary damages because of a purported inability to sell, lease or use his or her land as collateral.

Before proceeding, however, a petroleum marketer should analyze each law carefully to determine which option best meets his or her objectives and the adjacent property owner's needs. ■

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