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Environmental Protection Agency Introduces New Incentives to Encourage Sustainable Development of Contaminated Sites

Real estate developers are being offered incentives to include “sustainable development” practices during redevelopment of contaminated property as part of an initiative by the United States Environmental Protection Agency (U.S. EPA). The U.S. EPA defines sustainable development as a long-term approach that balances economically sound development with environmental protection and social responsibility. Examples of sustainable development include use of green building technologies; ecological enhancements to improve wildlife habitat, and incorporation of “smart growth” principles. Smart growth principles include infill development, transit-oriented development, pedestrian-friendly development, and other measures to reduce dependency on automobiles and urban sprawl.

Types of Incentives

EPA intends to offer developers three types of incentives to induce them to use sustainable development concepts in redeveloping contaminated sites:

- ◆Prospective purchaser agreements.
- ◆Comfort letters.
- ◆Green Building Supplement Environmental Projects.

Prospective purchaser agreements

These are contracts between U.S. EPA and the prospective purchaser of a contaminated site, by which the responsibilities and liabilities of the purchaser for pre-purchase contamination on the property is defined. U.S. EPA will enter into prospective purchaser agreements when U.S. EPA believes that there are “significant benefits to the community and the environment.” For a variety of reasons, U.S. EPA has been reluctant to enter into prospective purchaser agreements, and relatively few have been entered into. U.S. EPA will consider prospective purchaser agreements in cases where such agreements would not necessarily be “appropriate or neces-

sary” (in U.S. EPA’s opinion) where the purchaser adds sustainable development features to the redevelopment project, resulting in “environmentally responsible performance.”

Comfort letters

Comfort letters are a written statement of U.S. EPA’s current understanding of the existing environmental and regulatory status of a contaminated site. Generally, U.S. EPA will provide a comfort letter if (1) it will facilitate cleanup and reuse of a contaminated property, (2) there is a realistic perception that EPA will initiate a cleanup action, and (3) there is no other adequate mechanism to address parties’ concerns. As part of its new initiative, U.S. EPA will consider issuing comfort letters in situations where not all of these conditions have been met (e.g., there is no realistic probability that EPA will initiate a cleanup at the site). Comfort letters have no effect on a party’s liability for pre-existing contamination at a site.

Green building

The most intriguing incentive is the use of green building supplemental Environmental Projects. In general, a party that is the subject of an enforcement action by U.S. EPA may agree to perform a supplemental environmental project (“SEP”) in lieu of paying all or part of a fine. An SEP is a project that produces a positive environmental impact and goes beyond any legal requirement. For example, a party accused of a Clean Water Act violation, may (in addition to fixing whatever problem it caused) perform additional water quality improvement projects not required by law in lieu of paying a fine to U.S. EPA. As part of its new initiative, U.S. EPA will consider use of green building technologies at the redevelopment of nearby contaminated sites in exchange for penalty mitigation credits.

Green building technologies include energy and water conservation, waste reduction, and use of environmentally friendly materials. Other examples include the City of Chicago's ordinance requiring recycling of construction waste.¹

One commentator suggested that the use of green building SEPs might be a clever way to finance the incorporation of green building technologies into a redevelopment project. The alleged violator might finance the incorporation of green building technologies at a nearby project being developed by a non-profit or public entity, mitigate any fine and reap the public relations benefits of the green building project.

The initiative, recently announced in the Federal Register, is now seeking statements of interest from organizations that have expertise in sustainable development and are interested in participating in U.S. EPA's initiative. Such statements of interest are due no later than June 21, 2005. In addition, U.S. EPA regional offices have taken several steps to promote use of sustainable development.

Endnotes

¹ The ordinance, passed in December 2004, requires that by January 1, 2007, 25% of all construction waste be recycled; the requirement increases to 59% on January 1, 2007. The recycling requirement applies to all residential projects of four units or more at which new structures are constructed or existing structures substantially rehabilitated; the rule also applies to demolition projects for which the total costs exceeds \$10,000..

Questions regarding these incentives and their implications should contact an attorney in the Environmental, Safety and Toxic Torts practice group.

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