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## The Benefits and Risks of Going It Alone

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# The Benefits and Risks of Going It Alone

Michael B. Gerrard

**B**rownfield projects are essentially real estate developments with a twist, and the old real estate adage certainly applies: "Location, location, location." But if time is the fourth dimension, then time is also the fourth element in a successful brownfield project—preferably, spending as little of it as possible.

The timing of standard governmental cleanup processes is simply incompatible with many kinds of real estate projects. Forget about cleanups of National Priorities List (NPL) sites under the U.S. Environmental Protection Agency's National Contingency Plan (NCP); those take on average almost twenty years to complete. But even many state voluntary cleanup programs, despite their aspirations to speed, can take many months or even years of paperwork. The multiple steps—work plans, sampling reports, cleanup method selection, completion reports—and the governmental review of each add up to long delays. While you're waiting, the proposed real estate project may well have missed its market or found another site.

There is sometimes an alternative: do it yourself. Just go in, clean up, and build, without stopping for environmental agency approval along the way. This article describes the advantages and disadvantages of "going it alone"—investigating and remediating a contaminated property without government oversight or approval.

## Eligibility

The ability to go it alone is limited. There are many projects where this method is not legally permissible. For example, sites on the NPL, or on most of the state "mini Superfund" lists, cannot be cleaned up without government approval. Likewise, corrective action sites under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*, and federal facility cleanups, must undergo formal processes. Some states have laws that require governmental approval for the cleanup of *any* quantity of petroleum or certain other substances. In states with an environmental impact statement (EIS) law, the EIS process may well embroil

cleanup projects requiring discretionary approvals (such as changes in zoning classification) in detailed governmental review.

Many other sites, however, are contaminated but are not subject to a listing that prohibits their unsupervised cleanup. They may be known to the government, and may appear in EPA's CERCLIS (Comprehensive Environmental Response, Compensation and Liability Information System), a list of sites with known or suspected tanks, substance releases, or other issues that were not deemed so hazardous that they justified a high cleanup priority. Those sites may not be known to the government at all, because the finding of contamination did not trigger a mandatory reporting requirement. In such instances, no official sanction for the cleanup may be required. State laws vary widely, of course, and it is essential to check federal, state and local laws carefully before concluding that no governmental approval is necessary.

A do-it-yourself cleanup is most suitable for sites that have a discrete contamination location (such as a mound of dirt or a stack of drums) that can simply be picked up and moved away. If groundwater is contaminated, the problems rise exponentially; public health problems may be implicated, treatment activities may take months or years to complete and may themselves require governmental approval (such as discharge of treated water back into the ground or into a stream), and the geographic scope of the problem may extend beyond the site's borders.

## Precautions

Even where the cleanup itself does not require governmental supervision, there are still likely to be applicable regulations that must be observed. Most prominent of these are under RCRA and the Occupational Safety and Health Act (OSH Act).

RCRA governs the treatment, storage, transportation and disposal of hazardous waste. Anyone cleaning up a site must determine if they are digging up, pumping out, or otherwise bringing forth materials that fall within EPA's definition of hazardous waste, either because it meets one of several defined characteristics (corrosivity, ignitability, reactivity, and toxicity), or because it appears on a list of generic or process-specific hazardous wastes.

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Many states have their own definitions of hazardous waste that sometimes expand upon EPA's definition. By no means does all excavated contamination meet the RCRA definition of "hazardous waste."

If the excavated contamination being dug up or moved around is "hazardous waste," RCRA ordinarily applies. The entity performing the cleanup will likely be considered the "generator" of this waste (even if it was created years earlier by someone else). The generator must call EPA or the state for a generator identification number. (The government is pleased to give out these numbers on request.) This number is the foundation of the RCRA "cradle to grave" tracking system. It accompanies the waste wherever it goes so that EPA can know who handled it and where it ended up.

If hazardous waste is dug up, it should not be allowed to accumulate for too long. The maximum period is usually ninety days, but it is sometimes shorter and sometimes longer, depending mostly on state requirements and on the quantity involved. If the maximum accumulation period is exceeded, the site could be deemed a "storage" facility and require a very difficult to obtain RCRA permit, thus defeating the whole purpose of the do-it-yourself exercise.

If the hazardous waste, once dug up, is to be transported off the site, RCRA and the Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101 *et seq.*, require that it be taken away by a company that is specifically licensed to handle hazardous waste. An ordinary garbage truck is generally not authorized for this purpose.

Once the waste is taken away, it must be treated or disposed in a facility that is permitted to take this kind of waste. Treatment and disposal facilities do not have blanket licenses to take in anything and everything. Their permits specify the kinds of waste they may accept, and it is important to match the nature of the waste against what the particular facility's permit allows.

The consequences of violating any of the above RCRA requirements can be quite severe. It can be a felony to handle hazardous waste in an unauthorized manner. However, observing the RCRA rules does not necessarily attract attention by the government and does not automatically bring the cleanup within any of the formal, time-consuming programs discussed above.

The other very important set of rules that must be observed derive from the OSH Act. The Occupational Safety and Health Administration (OSHA) has promulgated regulations for the cleanup of contaminated sites to protect cleanup workers. 29 U.S.C. § 1910.120, App. C. These guidelines require the employer to establish a

written program to facilitate coordination and communication of health and safety issues among site personnel. Employers also are required to provide worker training programs; establish decontamination procedures in case of worker exposure; prepare an emergency response plan; require the use of personal protective equipment; employ medical surveillance programs; and implement a spill containment system.

RCRA and the OSH Act are the main federal requirements that apply to many do-it-yourself cleanups. If during the cleanup a release of a reportable quantity of a hazardous substance is discovered, the release must be reported. Some states may have additional reporting requirements.

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### *Benefits and Risks*

A cleanup without governmental supervision has real advantages and just as real disadvantages. The most important advantage, of course, is speed. After deciding how to clean up the site, the site owner can (once having fulfilled any applicable requirements of RCRA, the OSH Act and the like) just call in the bulldozers and do the cleanup. The months or years of waiting for governmental approval are eliminated. Where the contamination can simply be picked up and taken away, the cleanup may be finished in a matter of days.

This approach also can be very inexpensive. After counsel has determined that this method is lawful, transaction costs can be next to nothing. There is no negotiating with the government, no community meetings, no writing of reports, and no paying for certified laboratories to prepare reams of quality assurance/quality control data.

Flexibility also is maximized. The site owner can pick the level of cleanup desired and the technology to achieve it, and carry out these choices without having to get anyone's approval. Once the cleanup is completed, the property is not burdened by deed restrictions or other institutional controls that often accompany approved brownfields cleanups.

When the owner wishes to put up a building quickly, this method can prevent environmental conditions from standing in the way of swift completion and occupancy. For many brownfields projects, this advantage will be compelling.

There are real disadvantages, however, that must be weighed in the balance. To start, it will probably not be possible to seek reimbursement for the cleanup costs from anyone else. A cost recovery or contribution action under CERCLA against potentially responsible

parties will be precluded because the cleanup will not have been performed consistently with the NCP, a prerequisite to CERCLA recovery. Insurance recovery is also likely to be denied (if otherwise available) because of the short-circuited procedure. Those states that offer financial assistance to brownfields developers will probably not pay for do-it-yourself cleanups; these programs tend to require rather elaborate application and decision-making procedures.

Some lenders also will not want to finance projects where cleanups were conducted outside normal procedures. Many banks and other institutional lenders, in particular, continue to be very risk averse when it comes to environmental problems (despite the protections afforded them by the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996), and they may want an official governmental signoff.

A do-it-yourself cleanup also will not yield a release, no further action letter, covenant not-to-sue or other form of comfort from the government. The owner will have no assurance that the government will be satisfied with the cleanup and forego any further action. Along the same lines, some may be concerned that the government, if it finds out about the cleanup, will be annoyed that it took place without official supervision.

Having stated these disadvantages, it is appropriate to put them in context. First, the unavailability of third-party reimbursement (whether by CERCLA actions, insurance recovery or governmental assistance) is rendered less troublesome by the fact that most do-it-yourself cleanups probably cost in the tens or low hundreds of thousands of dollars (chiefly dig-up and haul-away projects without fancy engineering or technology), and it is usually not worth litigating a CERCLA or insurance recovery action unless more than that is at stake. Moreover, the financial advantage of faster construction can far exceed the foregone reimbursement.

As to the financing difficulties, a project that is likely to be profitable can almost always find money, at least in the present strong economy. Many sources of venture capital, and even some more traditional lenders, are willing to take reasonable risks for good returns. For added comfort, the developer could hire a consultant to do a Phase I study after the cleanup and opine on the condition of the property. Moreover, companies that can self-finance will not have this worry at all. Lending concerns are likely to be lowest where the property is to be used for industrial or commercial use. If a residential use is planned, where there

is a much greater likelihood of exposure to residual contamination, lenders, developers and future tenants will have much greater worries.

The pain of doing without a governmental release must be tempered by the limited nature of these releases in the first place. Most governmental releases or covenants not to sue issued after hazardous waste cleanups are completed contain numerous qualifiers. As a general matter, they are subject to reopeners if new contamination is found or conditions otherwise change. Natural resource damage claims are often pre-

served. The releases sometimes do and sometimes do not afford contribution protection that shield against third-party claims. In any event, the sites where a do-it-yourself cleanup is most suitable are where that cleanup really removed something that was genuinely troublesome, and whatever is left behind is unlikely to trigger a future governmental cleanup action.

As to whether the government will be annoyed at not having been consulted, and at the risk of over-generalizing, it is probably safe to say that government environmental agencies are almost always over-worked, and are not looking for unnecessary tasks. In fact, they like to see people voluntarily improve

the environment. The regulatory climate will vary from place to place, but in general if the site owner behaved lawfully and responsibly it is unlikely that the government will be displeased—at least enough to do anything about it. The importance of this factor may depend in part on whether the site owner is an industrial facility that must interact with the government agency constantly, and stay well within its good graces, or is a real estate owner or developer who has much more limited contact with the agency.

An advantage that government-supervised cleanups do offer is reasonable assurance that a thorough site investigation is carried out, and that the cleanup is carefully planned to address what the investigation discovers. An owner who forgoes this process should make sure to do an appropriately thorough investigation and a sufficiently thoughtful remedy selection on his own, to avoid the difficulties that can arise if more contamination is discovered, or if that which was already known was not well remediated.

A mid-way program between total and zero government supervision was adopted in 1992 in Massachusetts. The state licenses hazardous waste professionals who are hired by site owners or other potentially responsible parties. These professionals are then

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## Going It Alone

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authorized to issue "waste site cleanup activity opinions" that certify that site investigations and cleanups have been done in accordance with established procedures. The state randomly audits these opinions, and can discipline professionals who have given inappropriate certifications. The Massachusetts Department of Environmental Protection and the board that registers these professionals completed an evaluation of the program in June 1998 and concluded that it is working reasonably well and that very few disciplinary actions have been necessary.

Such a self-certification program might yield many of the benefits of a totally do-it-yourself effort with few of the risks. Until other states emulate Massachusetts, however, this mixed method will not be available outside of that state.

Brownfields development is hardly a one-size-fits-all proposition. Circumstances, opportunities and procedures vary widely from site to site and state to state. Under the right combination of conditions, a do-it-yourself cleanup may offer benefits that far exceed the risks.

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