REQUEST FOR COUNCIL ACTION

Date: 05-11-2009
Item No.: 13.b

Department Approval | Acting City Manager Approval

Item Description: **Environmental Cost Recovery in Twin Lakes**

BACKGROUND

At the April 27th City Council meeting, Councilmember Ihlan requested that the City Council discuss the recovery of environmental clean up costs at Twin Lakes. On December 17, 2007, Larry Espel of Green Espel Law Firm prepared a memo regarding the laws regarding environmental cost recovery. The memo also reviewed the procedure for a party such as the City to compel previous property owners to pay for the costs of the clean up as well as providing an estimate on what it would cost to begin the process. The memo did note that the burden of proof would be on the City to prove that potentially responsible parties have caused or contributed to the environmental condition of the property. A copy of the memo is attached.

POLICY OBJECTIVE

The Twin Lakes Redevelopment Area has long been targeted for environmental cleanup. Any process that would generate funds to assist in the environmental cleanup would be beneficial.

FINANCIAL IMPACTS

The Espel memo estimates that initial costs that the City would need to conduct the environmental cost recovery would range from $35,000 to $70,000.

REQUESTED COUNCIL ACTION

The City Council should discuss whether or not the City should hire environmental consultants and attorneys to explore the possibility of recovering the costs for the clean-up within Twin Lakes.

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Attachments: A: Memo from Larry Espel dated December 17, 2007

GREENE ESPEL MEMORANDUM
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PRIVILEGED AND CONFIDENTIAL

TO: Roseville City Council

FROM: Larry D. Espel, Greene Espel PLLP

DATE: December 17, 2007

RE: *Environmental Cost Recovery*

Introduction

We have been requested to prepare, for the benefit of the Roseville City Council, an introductory summary describing the process by which the City could attempt to have current and/or previous property owners pay for any environmental contamination that they may have caused in the Roseville Twin Lakes Redevelopment Area.

The principal available options include various statutory or common law claims that can support private cost recovery, declaratory relief or injunctive relief. In some circumstances, federal or state agencies will take steps to mandate response actions by private parties. The following memorandum will outline the various alternatives.

RCRA

Under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6971, *et seq.*, the City could pursue injunctive relief (not cost recovery) against past or current generators or operators who contributed to environmental problems. Under 42 U.S.C. § 6972(a)(1)(B), "any person may commence a civil action on his own behalf * * * against any person, including any past or present generator . . . or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed . . . to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." RCRA allows injunctive relief to compel the past or present owner or operator to cease disposal or to take such other action as may be necessary. This is not a cost recovery remedy. However, courts can order responsible persons to pay future response costs.

As noted, RCRA claims depend upon an imminent and substantial endangerment to health or the environment. This entails a showing of a threat, and may be shown even if the impact will not be felt until later. The Eighth Circuit Court of Appeals has said that RCRA is limited to situations in which the potential for harm is great, but this is a fact-specific analysis that leaves room for interpretation. If remedies have already been performed, RCRA injunctions are generally not available and prior costs cannot be recovered. Conversely, in at least one Seventh Circuit case, a claim for an injunction under RCRA failed where the risks of off-site contamination would not materialize unless or until excavation was performed and there was no showing that the excavation was imminent.

Remedies under RCRA can be any form of injunctive relief necessary to prevent ongoing releases. RCRA remedies may not support clean-up of the offending site itself.

RCRA can reach any type of hazardous waste and there is no petroleum exclusion under RCRA.

Before a citizen (or any other person, such as the City) may bring a RCRA action, notice must be given to the EPA, the state and the alleged violator. RCRA actions will not be allowed to proceed if there is already a response action underway at the instigation of the federal or state authorities.

RCRA allows the recovery of attorneys' fees or other costs to the prevailing party.

CERCLA

Under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 to 9675, the City can pursue a cost recovery claim against owners, operators or transporters who are responsible for sites or facilities from which there is a release, or a threatened release, which causes the incurrence of response costs for a hazardous substance. The cost recovery statute is set forth at 42 U.S.C. § 9607. The plaintiff can recover any "necessary costs of response ... consistent with the national contingency plan." *Id.*

CERCLA claims are available for "hazardous substances," which are defined somewhat differently than RCRA's "hazardous wastes." In some respects, CERCLA's reach is broader than RCRA's but in other respects CERCLA is more limited. A significant difference is that CERCLA does not reach petroleum spills.

In contrast to RCRA, which is primarily a preventative statute, CERCLA is designed to address situations in which harm has already occurred in addition to preventing threats. The remedy in CERCLA is, in the first instance, cost recovery. This means that parties seek to recover sums that have already been expended on the recovery. However, courts have also coupled cost recovery awards with additional relief such declaratory relief and injunctions addressing ongoing or future obligations. CERCLA does not allow recovery of attorneys' fees for the prosecution of cost recovery claims (although fees can be recovered if incurred as part of the response action itself).

Private cost recovery (including claims by parties such as the City) depend upon a showing that the sums expended were necessary and consistent with the National Contingency Plan ("NCP").

The NCP has certain requirements for action. Those requirements depend upon whether a response action is a "removal" action or a "remedial" action.

For a removal action, the steps included are limited and expeditious. They include a Removal Site Evaluation (400 CFR 300.410) and a Removal Action (400 CFR 300.415). A removal site evaluation consists of a removal preliminary assessment and, if warranted, a removal site inspection. 400 CFR 300.410(a). A removal site evaluation shall be undertaken "as promptly as possible." 400 CFR 300.410(b). The removal preliminary assessment shall be based on readily available information. If removal action is not required, [1] but remedial action under 300.430 may be necessary, a remedial site evaluation shall be initiated. 400 CFR 300.410(i).

Removal actions are to "begin as soon as possible to abate, prevent, minimize, stabilize, mitigate, or eliminate the threat to public health or welfare of the United States or the environment." 400 CFR 300.415(b)(3).[2] Under 400 CFR 300.415(b)(5), removal actions shall be terminated after $2 million has been obligated for the action or 12 months have elapsed from the date that removal activities begin on-site, unless there is a determination that (i) there is an immediate risk to public health or the environment; and continued response actions are immediately required to prevent, limit, or mitigate an emergency, and such assistance will not otherwise be provided; or (ii) continued response action is otherwise appropriate and consistent with the remedial action to be taken. Under 40 CFR 300.415(g), if a removal action will not fully address the threat and the release may require remedial action, there shall be an orderly transition from removal to remedial response activities.

In contrast to the relatively expeditious and preliminary nature of a removal assessment, an investigation for a remedial action includes many more formal and fully developed investigation, planning and implementation steps. These include a Remedial Preliminary Assessment (PA) (40 CFR 300.420(b)), a Remedial Site Inspection (SI) (40 CFR 300.420(c)) and a Remedial Investigation/Feasibility Study (RI/FS) (40 CFR 300.430). "Remedial actions are to be

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[1] The NCP provides a listing of factors to be considered in determining the appropriateness of a removal action. 400 CFR 300.415(b)(1). These include:

Exposure to nearby human populations, animals or the food chain
Contamination of drinking water supplies or sensitive ecosystems
Hazardous substances in drums, barrels, tanks, or other bulk storage containers, that may pose a threat of release
High levels of hazardous substances largely near the surface
Weather conditions that may cause migration or releases
Threat of fire or explosion
Availability of other mechanisms to respond
Other situations or factors that may pose threats

[2] A list of removal actions is provided at (e)(1)-(8), such as fences, drainage controls, stabilization of berms, capping to reduce migration, using chemicals to retard or mitigate spread, excavation or removal of highly contaminated soils from drainage areas to reduce spread or direct contact,

implemented as soon as site data and information make it possible to do so." 40 CFR 300.430(a)(1). The NCP provides program management principles, including: "Sites should generally be remediated in operable units when early actions are necessary or appropriate to achieve significant risk reduction quickly, when phased analysis and response is necessary or appropriate to achieve significant risk reduction quickly, when phased analysis and response is necessary or appropriate given the size or complexity of the site, or to expedite the completion of the total site cleanup." 40 CFR 300.430(a)(1)(ii).

Extensive guidance is given for remedial investigations and related work. "The purpose of the remedial investigation/feasibility study (RI/FS) is to assess site conditions and evaluate alternatives to the extent necessary to select a remedy." 40 CFR 300.430(a)(2). An RI/FS generally includes project scoping, data collection, risk assessment, treatability studies, and analysis of alternatives. *Id.* The NCP addresses numerous topics for an RI/FS, including Project Scoping (40 CFR 300.430(b)), Community Relations (40 CFR 300.430(c)), Remedial Investigations (RI) (40 CFR 300.430(d)) and Feasibility Studies (40 CFR 300.430(e)). The Remedial Design/Remedial Action (RD/RA) stage includes the development of the actual design of the selected remedy and the implementation of the remedy through construction. A period of operation and maintenance may follow the Remedial Action activities. 40 CFR 300.435(a).[3]

MERLA

Minnesota has its own cost recovery statute, the Minnesota Environmental Response and Liability Act ("MERLA"), found at Minn. Stat. §§ 115B.01, *et seq.* MERLA is similar to CERCLA in some respects although there are many differences. MERLA allows cost recovery for response actions necessary as a result of releases or threatened releases of hazardous substances, but also allows recovery of lost profits and other damages in certain circumstances. MERLA allows a prevailing plaintiff to recovery attorneys' fees. However, MERLA is subject to certain defenses on retroactivity depending upon the date of the releases of hazardous substances. But, the City is in a better position that private parties to pursue claims for historical releases. Also, the City is allowed to recovery any "reasonable and necessary response costs," whereas private parties could recover only removal costs. Minn. Stat. § 115.B.04, subd. 1.

Under Minn. Stat. § 115B.04, subd. 1, "any person" who is responsible for a release or threatened release of a hazardous substance from a facility is strictly liable, joint and severally, for, among other things, "all reasonable and necessary response costs incurred by the state, a political subdivision of the state or the United states" and "all reasonable and necessary removal costs incurred by any person." Minn. Stat. § 115B.04, subd. 1(1) and (2). A responsible person (RP), however, may assert as a defense against such claims that the hazardous substance released from the facility in question was placed or came to be located in or on the facility before April 1, 1982 and

[3] In addition to the provisions presented in the NCP, the EPA has provided a library full of other guidance documents addressing removal actions, remedial actions, and the types of documents one needs to prepare to address different steps in either type of process. In general, the EPA tends to refer to removal actions as immediate, short-term responses, whereas remedial actions are long term actions.

that the MPCA did not authorize the response action(s) taken by the political subdivision or the private person pursuant to Minn. Stat. § 115B.04, subd. 6.

MERA

Minnesota also has a Minnesota Environmental Rights Act ("MERA"), Minn. Stat. §§ 116B.01, *et seq.* This statute allows "civil action in the district court for declaratory or equitable relief in the name of the state of Minnesota against any person, for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction." Minn. Stat. § 116B.03. A claim under MERA depends upon a showing of actual or threatened pollution, impairment or destruction. The statute allows injunctive relief, but not damages, and does not provide for recovery of attorneys' fees.

Common Law Claims

Various common law claims can be invoked in some circumstances. Typical claims include claims for nuisance, trespass, negligence, strict liability for ultrahazardous activities, contribution or indemnity. These common law claims do not materially augment the available claims or remedies and are largely superseded by the statutory claims mentioned above. However, if there is litigation, parties customarily invoke such claims in addition to the statutory claims mentioned above.

Statutes of Limitation

We have not looked closely enough at the facts to evaluate the application of potential statutes of limitation. However, we do not believe that most available claims would be cut-off.

In general, if there is an ongoing imminent and substantial endangerment, RCRA claims will be available, because the statute of limitations will not cut off ongoing claims.

CERCLA claims are likewise generally available where the response actions remain incomplete. Claims for a removal action are to be brought within 3 years after completion of the removal action and claims for a remedial action must be brought within 6 years after initiation of physical on-site construction of the remedial action. It does not appear, from information we have received, that the City has conducted a removal action or initiated a remedial action. So, the statute of limitations is unlikely to have expired.

MERLA claims for cost recovery are probably available. A 1998 amendment to Minn. Stat. § 115B.11, specifies:

> Subd. 2. Action for recovery of costs.
>
> (a) An action for recovery of response costs under section 115B.04 * * * may be commenced any time after costs and expenses have been incurred but must be commenced no later than six years after initiation of physical on-site construction of a response action."

> (b) A party prevailing in an action commenced within the time required under paragraph (a) shall be entitled to a declaratory judgment of liability for all future reasonable and necessary costs incurred by that party to respond to the release or threatened release * * *.

The availability of the tort-style damages available under Section 115B.05 depend upon the time of placement. Under Minn. Stat. § 115B.06, "Section 115B.05 does not apply to any claim for damages arising out of the release of a hazardous substance which was placed or came to be located in or on the facility wholly before July 1, 1983."

There are other provisions limiting the retroactivity of MERLA. For example, Section 115B.15 provides:

> Sections 115B.01 to 115B.14 apply to any release or threatened release of a hazardous substance occurring on or after July 1, 1983, including any release which began before July 1, 1983, and continued after that date. Sections 115B.01 to 115B.14 do not apply to a release or threatened release which occurred wholly before July 1, 1983, regardless of the date of discovery of any injury or loss caused by the release or threatened release.

Similarly, Section 115B.04, subd. 6, states:

> Defense to certain claims by political subdivisions and private persons. It is a defense to a claim by a * * * private person for recover of the costs of its response actions under this section that the hazardous substance released from the facility was placed or came to be located in or on the facility before April 1, 1982, and that the response actions of the political subdivision or private person were not authorized by the agency as provided in section 115B.17, subdivision 12. This defense applies only to response costs incurred on or after July 1, 1983.

Minn. Stat. § 115B.17, subd. 12 states that the MPCA <u>may</u> authorize a political subdivision to undertake a response action or a private party to undertake a removal action with respect to a pre-April 1, 1982 hazardous substance release <u>if</u> the action qualifies for authorization under rules developed under Minn. Stat. § 115B.17, subd. 13. The MPCA's authorization must be consistent with this authorization criteria established under subdivision 13. Subdivision 12 does not prohibit a political subdivision or a private person from undertaking a removal or remedial action without MPCA authorization. Presumably, however, such action would be done without the ability to recover the costs from an RP.

The MPCA, under Minn. Stat. § 115B.17, subd. 13, is required to maintain rules "establishing state criteria for determining priorities among releases and threatened releases." In addition to promulgating the criteria for determining priorities, the MPCA is also to maintain a Permanent List of Priorities (PLP) which reflects "priorities among releases or threatened releases for the purpose of taking remedial action and, to the extent practicable consistent with the urgency of the action, for taking removal action" under Minn. Stat. § 115B.17. The MPCA is to modify the PLP

"from time to time, according to the criteria set forth in the rules." The list of priorities and the rules promulgated pursuant to this subdivision:

> shall be based upon the relative risk or danger to public health or welfare or the environment, taking into account to the extent possible the population at risk, the hazardous potential of the hazardous substances at the facilities, the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive ecosystems, the administrative and financial capabilities of the [MPCA], and other appropriate factors.

Minn. R. Ch. 7044 includes the MPCA rules created pursuant to Minn. Stat. § 115B.17, subd. 13. As will be seen, however, while Chapter 7044 establishes how it is that the MPCA will create and maintain the PLP, it is silent in terms of explaining exactly how it is that the MPCA uses these rules (if at all) to "authorize" pre-April 1, 1982 response actions under Minn. Stat. § 115B.17, subd. 12. Indeed, Minn. R. 7044.0100 ("Scope") says nothing about providing guidance for such authorizations. Instead, the "scope" of the Chapter 7044 rules is to establish release classifications, to describe the procedures for the creation and maintenance of the state's Permanent List of Priorities and Project List, to establish funding priorities for the Project List and to specify a ranking system to be used in scoring sites. Minn. R. 7044.0100. Furthermore, the rules leave many gaps about, e.g., what the MPCA does with a site's HRS ranking and what criteria it uses to classify releases or threatened releases.

The MPCA does not have any objective standards that it uses when it considers a cleanup authorization under subdivision 12. The few MPCA subdivision 12 authorizations that exist typically lack at lot of detail or rationale.

Practical Considerations

Any consideration of efforts to compel past or current parties to pay for historical or ongoing contamination is tied to the ability to identify past or current polluters who have viable assets or funding. The information provided to us suggests that Indianhead Trucking was a prior owner for a significant portion of the Roseville Twin Lakes Redevelopment Area. We have not checked into the historical records closely, but we believe that Indianhead has long ago filed for bankruptcy and is defunct. We are unaware that Indianhead has any viable successors who assumed Indianhead's liability. Thus, evidence that might tie existing contamination to prior activities of Indianhead will not, as a practical matter, support claims either for cost recovery or injunctive relief.

On the other hand, where various hazardous substances or wastes have become commingled, one party can be called upon to pay jointly and severally for an entire liability, unless the polluter can establish the divisibility of its own releases. So, if the evidence establishes that there are viable parties who are responsible for past or ongoing releases, those parties might be called upon to pay far more than their share of liability. A long-standing debate in environmental law relates to responsibility for "orphan shares," that is, those shares attributable to defunct parties. There are some cases that suggest that a plaintiff bears responsibility for such shares, but there has been considerable re-shuffling of the case law by recent United States Supreme Court cases and those cases could lead to re-examination of the "orphan share" allocation.

The first steps in any formal program to compel others to address contamination include the following:

1. An environmental consultant should be engaged to examine available reports with the specific charge of identifying

    a. Reasonable and necessary response actions associated with imminent and substantial threats or releases, and

    b. Responsible persons, past and present (viable or not).

    c. Without checking with any consultants, but based upon the general nature of the existing available reports, we anticipate that the costs for this analysis would be in the $20-$40,000 range.

2. An attorney should be engaged to evaluate the viability of any specific claims against identified responsible persons.

    a. In general, the costs associated with this analysis would be in the $15-30,000 range.

3. The attorney and consultant should work with the City to develop a plan relating to

    a. A specific plan to identify any work that the City considers necessary and reasonable under applicable environmental standards, including a timetable and rationale for when the steps need to be taken;

    b. A plan for communications with the MPCA (or, less likely, the EPA) to see if the MPCA will prompt actions by the responsible persons or will authorize the City to take any response actions with anticipated cost recovery;

    c. Ensuring that any steps taken in which the City would advance costs would comply with the NCP to ensure eligibility for cost recovery;

    d. Attending to any notices to EPA, the State and responsible parties if any injunctive relief is contemplated under RCRA.

    e. It is premature to estimate costs associated with the costs of work or implementation of this plan. These costs could be better identified in connection with the work that is outlined in steps 1 and 2.

As noted above, it is possible that the costs incurred in connection with this work would be recoverable from responsible parties. However, this would depend upon a valid showing that potentially responsible parties have caused or contributed to past or ongoing releases of hazardous wastes or hazardous materials and that the relief proposed is consistent with one or more of the applicable statutes that allow such recoveries.