

A supplement to:

The Legal Intelligencer
PENNSYLVANIA
LawWeekly
www.pennsylvania-lawweekly.com

REAL ESTATE

March 2008

ALM

The Voluntary PRP Developer: Risk, Reward and Challenge

BY ARNON E. GARONZIK
AND MICHAEL C. GROSS

Special to the Legal, PLW

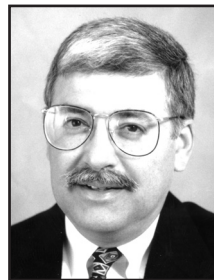
Under the Comprehensive Environmental Response and Cleanup Liability Act (CERCLA or Superfund), a potentially responsible party (PRP) is broadly defined to include any individuals, companies or other parties that are potentially liable for payment of Superfund cleanup costs. Under CERCLA's draconian liability scheme, PRPs are jointly and severally liable for all costs associated with remediating Superfund sites.

The prospect of becoming a PRP is a shuddering concept, and participants in transactions involving contaminated property have historically gone to great lengths to insulate themselves from such liability, especially where an acquiring party has no responsibility for the disposal of hazardous substances at the property. But what happens when a party voluntarily assumes PRP status with the goal of efficiently undertaking the cleanup of a Superfund site?

This article will address the challenges faced by entities seeking to remediate and redevelop Superfund sites and the lessons that can be learned from the experience of site owners, developers, consultants and their counsel.

THE FOOTE MINERAL SITE

From 1942 to 1991, the Foote Mineral Site in Chester County played an important role in producing lithium products for the United States, including for the Department of Defense. The site owners undertook the crushing and sizing of min-



GARONZIK

ARNON E. GARONZIK is the president and CEO of ECOR Solutions Inc., a full service self-performing environmental construction, remediation, decontamination, demolition, operations and maintenance, and residuals management company based in West Chester, Pa. He can be reached at 610-840-9200 or garonzik@ecor-solutions.com.



GROSS

MICHAEL C. GROSS is an attorney at Manko Gold Katcher & Fox in Bala Cynwyd, Pa., where he focuses his practice on Brownfields redevelopment, transactional and regulatory compliance matters. He can be reached at 484-430-2321 or mgross@mgk-flaw.com.

erals and ores, manufacturing of lithium chemicals — both solid and liquid forms — and the processing of lithium metals.

These operations generated large amounts of waste, which was placed in one of the two quarries located at the site and also resulted in extensive soil and groundwater contamination at the site. In 1992, the site was added to the National Priorities List and thus became a Superfund site with the former owners of the site becoming PRPs.

In 1998, a newly created local real estate development partnership, Frazer Exton Development (FED), recognized the potential redevelopment opportunities presented by 79 contiguous unused acres of land in the heart of Chester

County and commenced negotiations with the site owner. Under the terms of the site transfer agreement, FED was paid \$3 million to acquire the site and assume PRP status with the obligation of completing the Superfund cleanup process.

To facilitate the remediation, FED purchased a "cost cap" environmental insurance policy from Kemper Environmental to ensure against cost-overruns during the investigation and cleanup of the site. The \$16.5 million Kemper policy had a self-insured retention of \$3.5 million. At the time FED acquired the site and the policy was issued, it was anticipated that the investigation and remediation would cost approximately \$2.6 million. The purchase of the cost-cap policy was essential to the deal, as the U.S. Environmental Protection Agency had yet to issue a record of decision (ROD) setting forth its required cleanup remedy for the site.

DISCOVERY OF CONTAMINATION

It would not take long before FED encountered unanticipated roadblocks in its effort to remediate the site. In 2001 during its investigation of the site, FED's environmental consultants encountered the presence of a previously undiscovered constituent in groundwater samples at the site that was ultimately detected in several residential wells adjacent to the site. To address these impacts, FED entered into a consent order with the EPA in September 2002, whereby FED agreed to design, construct and install a public water main extension downgradient of the site and connect the impacted residences to the public water supply.

Once it became clear that FED's investigation costs had exceeded previously budgeted amounts and the deductible of the cost-cap policy would likely be exceeded, FED placed its insurer on notice of a potential claim under the policy. Kemper promptly balked at FED's claim, taking an extremely narrow view of the coverage afforded by the policy.

Specifically, Kemper argued that: FED had only narrowly insured a specific "probable remedy" that was provided to Kemper's underwriting department during policy negotiations; and the policy's cost-cap coverage did not cover FED's investigation costs. Conversely, FED contended that the Kemper policy was purchased to broadly cover any cost overruns it incurred to investigate the site and implement whatever remedy EPA would ultimately require in the ROD. FED ultimately sued Kemper, seeking inter alia a declaratory judgment regarding its prospective coverage.

Following a four-day trial, in the first federal decision regarding the scope of coverage provided by a cost-cap policy, Judge Harold Baer of the Southern District of New York held in *Frazer Exton Development L.P. v. Kemper Environmental Ltd.* that the Kemper policy "was set to cover any remediation the EPA would eventually mandate" and that the policy unambiguously covered FED's investigation costs. FED similarly prevailed on Kemper's appeal to the 2nd U.S. Circuit Court of Appeals.

ENHANCED REMEDY REQUIRED

Despite its victories in court, FED encountered yet another significant challenge in its effort to remediate and redevelop the site when the EPA issued its Proposed Remedial Action Plan (PRAP) for the site in October 2005 (the issuance of the PRAP is the final stage in the

Superfund process prior to the issuance of the ROD). For the first time, the EPA required that FED undertake a new remedy at the site. This new remedy, In-Situ Soil Stabilization (ISS) required FED to undertake the stabilization of all wastes in the south quarry of the site, using cement to mix into the waste to create overlapping solid columns of mixed "soilcrete" within the surrounding bedrock of the South Quarry walls.

By mandating ISS and other requirements previously not contemplated by FED at the time of site acquisition, the total remedy for the site was projected to cost in excess of \$13.9 million at the time of ROD issuance in March 2006. All the while, FED continues to actively coordinate the extensive remediation work at the site with EPA, the Pennsylvania Department of Environmental Protection (PADEP) and the two townships which straddle the site to further expedite the remediation process. For environmental agencies not accustomed to proactive PRPs desiring to remediate a site as quickly and efficiently as possible, this too has presented multiple challenges.

LESSONS LEARNED

Brownfields sites have long been recognized as tremendous assets to both developers and municipalities. The Foote Mineral site is no exception: once completed, the blighted and vacant site will be transformed into a state-of-the-art continuing care retirement community. However, the experiences of FED make clear that redevelopment of Superfund sites should not be approached lightly, as such sites present a distinct set of challenges, apart and unique from other Brownfield sites. Even the most well-conceived remedial plans are likely to encounter setbacks as the site investigation process unfolds.

While the EPA has made significant strides in recognizing the benefits of Brownfields redevelopment, the strict statutory and regulatory confines imposed by CERCLA (even after the Brownfields Amendments of 2001) render this task a difficult one. The critical importance of keeping the community, regulators and government representatives at all levels apprised throughout the investigation and remediation phases cannot be overstated. And if nothing else, the experiences of FED clearly demonstrate the limits of environmental insurance.

While these policies are certainly critical to facilitating Brownfields projects in many instances, they are not a panacea to the multiple challenges that exist at Brownfields sites, especially Superfund sites. Environmental counsel should be involved in every stage of the underwriting and policy drafting processes so that the interest of the developer is sufficiently protected in the event of cost-overruns or the discovery of new contaminants. And policyholders must aggressively pursue their claims under such policies, rather than waiting for the lengthy claims process to unfold.

As Pennsylvania's Land Recycling and Environmental Remediation Standards Act (Act 2) turns 12 years old in 2007 and the "low lying fruit" Brownfields sites have already been redeveloped, participants in the real estate community will increasingly look to complex Superfund sites as attractive redevelopment options. By keeping the experiences of FED in mind, developers, their counsel, lenders and consultants can embark on these projects with a full appreciation of the challenges ahead. •