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REFORMATION OF MICHIGAN PART 201
STATEMENT OF OBJECTIVES, OUTCOMES SOUGHT
AND TOOLS TO ACHIEVE THEM

The Problem

Currently, both the pace and efficiency of cleanups of hazardous waste sites and the redevelopment of Brownfields sites in Michigan have fallen behind its previous achievements and that of other states. Meanwhile, many states across the country have been rethinking their approach to cleanups, and are achieving substantial progress. The Michigan Renewal Coalition, a group of local companies, non-profits, and associations, seeks to reform Part 201 of Michigan Law in order to promote faster and more efficient state remediation and redevelopment projects.

Background

The reasons for the slowdown in Michigan cleanups have been attributed by some to several causes such as the overall economic downturn, the lack of adequate staff and resources at MDEQ, and the tapering off of proceeds from the Clean Michigan Initiative bond initiative. However, many observers and stakeholders believe that the structure and administration of the state's regulatory process is also a substantial cause, one that is in the state's best interest to fix because it would remove barriers to private investment, encourage faster and more remediation for the benefit of the state economy, and protect human health and the environment. Successful reform would also avoid further "greenfields" development – generally defined as construction on undeveloped land – and the resulting loss of valuable natural resources.

At its core, the problem with the state regulatory process is the failure of state law to provide adequate instruction to regulators as to what degree of cleanup is sufficient or what procedures are adequate in the face of uncertainty. This had led to a culture of conservatism and risk aversion, trumping the imperatives of human health protection, land conservation and restoration, and economic development. As a result, Michigan regulators fail to endorse performance-based cleanup criteria that allow for a very small level of continued risk, which are seeing increasing use across the country. Similarly, MDEQ management often tends to discourage expedited cleanups through its rigid policies.

Regulators frequently point to isolated examples of environmental contamination as evidence of widespread ignorance of existing statutory due care obligations, yet are often unable to produce a study or data set demonstrating that the risks are widespread or otherwise indicative of a problem justifying major program reform. Without any clear guidance from policy makers, including those in the state legislature, the current

framework is not encouraging cleanups. In addition, no state regulator is ever criticized by the press or public for being over-protective. Rarely is a state regulator rewarded for creatively pursuing protection and development. Michigan regulators, especially in environmental protection, tend to adhere rigorously to a narrowly defined mandate. In the case of environmental remediation, the narrow mandate does not sufficiently incorporate the realities of the market for Brownfields development, and the very real notion that stalled cleanups do not protect public health. Expanding the mandate of regulators involved in environmental remediation to include the market considerations and economic impacts would contribute significantly to more immediate risk reduction while reducing the risk aversion currently exhibited in cleanup decisions.

This dynamic of risk aversion, of an inability to bring a cleanup review to closure, relegates to the sidelines private investment dollars, a precious thing in Michigan at this time, which could be brought to bear on both the cleanup itself as well as the subsequent redevelopment effort. Further, the inability to approve partial cleanups in the absence of an approved complete cleanup plan is not protective of the public health in the interim. Michigan has benefited from the conduct of over 12,500 baseline environmental assessments and resulting reuse of Brownfields properties since 1995, yet this well accepted and understood transactional tool and liability shield has been proposed to be eliminated under MDEQ's current rewrite of Part 201. The few lenders and investors left in the marketplace already are expressing great concern about the potential loss of one of the few competitive advantages that Michigan has to offer in a seriously challenged financial environment. There is no better time than the present to consider the economic recovery of Michigan as an essential element in the regulatory decision making framework.

Cleanup of contaminated sites, redevelopment of Brownfields, and protection of greenfields are important outcomes for the state of Michigan seeks to achieve. Yet, the programs are institutionally conflicted when it comes to critical decisions. The classic example is the desire to minimize risk and at the same time maximize the number of Brownfields sites redeveloped. Too often, inordinate risk minimization seems to trump the stated goal of Brownfields redevelopment. This results in paralysis in the process and frustration for potential investors in redevelopment. Whatever is done to reform the program, this issue must be resolved head on to allow more sites to move through the process and achieve larger cumulative reduction in risk for the citizens of the state.

In sum, legislative changes to Part 201 are needed to provide clear guidance, objectives and procedures that can be understood by regulators, the regulated community and the public. Such changes will allow for transparency, common understanding of the rules, and, hopefully, fewer court cases. This will serve to accelerate environmentally-protective and cost-effective cleanups, leading to increased Brownfields redevelopment. It will also relieve pressure on Michigan greenfields.

Key Outcomes

The key outcomes of this reform effort are to maximize the acreage of sites redeveloped, increase the overall level of risk reduction, create a faster and more efficient cleanup program, and enable efficient use of existing infrastructure in order to drive economic development and environmental protection.

Objectives

It is important to clearly identify the objectives of any reform initiative relative to Michigan's Part 201. The following is a provisional listing of objectives, although not intended to be exhaustive, will help Michigan achieve the key outcomes identified above.

1) Risk- and performance-based

Credible reduction in risk to human health and the environment through the implementation of cleanup actions, the performance of which are designed to achieve such purposes, is an essential part of Part 201 reform. The questions of "how clean is clean? (i.e. how fail-safe is the remedy?)" should involve the assessment of relative risks and the tradeoffs between cost and economic development in a risk-based framework.

2) Attending to the relative risks of "greenfields" development

Too often the discussion of hazardous waste cleanups and Brownfields redevelopment neglects to examine the relative risk of unnecessary development of uncontaminated sites in rural or greenfields areas which threatens comprehensive, strategic land use planning and displaces or negatively impacts agriculture, forestry, tourism, green space, biodiversity, water and air quality. Greenfields development also increases the cost of new infrastructure. Mitigating the incentives for greenspace development needs to hold a more prominent place in MDEQ's programmatic priorities.

3) Inculcating a culture of execution and completion

Again, given the lack of adequate policy guidance, and the social, political, and administrative dynamics driving regulators towards conservatism and risk aversion, any reform of Part 201 should include a greater emphasis on incentivizing the execution of cleanups and Brownfields redevelopment. Failure to accelerate these crucial activities creates negative opportunity costs, including reduced human health protection, economic development and investment, and natural resources preservation.

4) Cost-effectiveness

Judicious reform of Part 201 could yield greater social benefit by reducing the overall costs of cleanups and Brownfields redevelopment and simultaneously increasing the use of the program. In addition, it could save taxpayers and state government resources to the extent that private capital and resources could be mobilized in the service of these goals and in the resulting economic growth.

5) Finality and closure

Finality, and specifically the liability for and closure of cleanups, is a great concern from the perspective of the regulated community. This objective is one of the most challenging to achieve given the uncertainty of levels and range of contamination at any given site and the mission of MDEQ to provide continued oversight for the benefit of human health and the environment. Part 201 reform should provide a viable closure pathway for sites that have installed a durable remedy with acceptable land use controls.

6) Simplification

The current structure of Part 201 is overly complex and prescriptive. This complexity makes it difficult for even the experienced professional to navigate through the process to achieve compliance and finality. Reform is needed to re-construct the requirements so that they are clear, concise, flexible, and easier to navigate.

7) Openness and transparency

Currently, much of MDEQ's decision making is conducted without transparency to the regulated community or to the public. An entity seeking the MDEQ's approval is often given no opportunity to participate in, or respond to, complex issues that are under deliberation before being handed an effectively final decision. The MDEQ's decision-making processes should be open and transparent to ensure that the public's interest is fully served.

Metrics

Measuring outcomes, rather than simply inputs or activities, is a common challenge in the area of environmental policy. Hazardous waste cleanups and Brownfields redevelopment are no exception. Absent performance-based metrics, regulators must resort to measuring quantitative milestones of activities, no matter how unproductive, in a misguided attempt to gain some understanding of program effectiveness.

Further research on risk-based measurements regarding human health, environment, and landscapes is necessary. In the meantime, some observers and stakeholders suggest that MDEQ establish proxy measures such as rates of site/acres cleaned up to standards and site/acres of Brownfields redevelopment over time.

Part 201 reform should seek to establish goals and a transparent reporting process for these and other metrics of program performance as well as authorize funding for research on performance-based measures in the future.

Tools

Based on discussions to date, the following is a menu of new tools or mechanisms for inclusion in any reform of Part 201. As before, this listing is not exhaustive or carved in stone. Rather, it is a work in progress.

Checklist and Timelines

Require MDEQ to develop a checklist as a screening tool that would layout necessary requirements and steps to be taken by a cleanup applicant and use it as a means to document interim decisions, thus providing clarity and certainty. It should include a list of conditions and timelines the MDEQ would require (such as pathways, criteria, and screening levels) to obtain approval or signoff. A proposed detailed project checklist was included with the 2007 Part 201 Discussion Group report after being developed by members of the Complexity Subgroup, including MDEQ representatives (see recommendations 43-49 and Appendices H and I of the April 7, 2007 Report). It has not been implemented at this time.

Voluntary Party Liability Exemption/Liability Insurance

One approach to providing finality and closure to potentially responsible parties (PRPs) is to enact provisions similar to those of Wisconsin's Department of Natural Resources, which exempts PRPs from liability after the regulatory agency certifies the cleanup is completed. If future threats to human health emerge at the subject site, a state insurance policy covers the necessary remedial work. The insurance program offers a 10 percent discount off private policies.¹

Licensed Site Professionals (LSP) Program/Licensing Board

Massachusetts has utilized a privatized Waste Site Cleanup and Licensed Site Professional (LSP) Program since 1994. Today, private lenders have shown great trust in the system, which requires LSPs to be certified by a Hazardous Waste Site Cleanup Professionals Board of Registration.² Connecticut has also enjoyed success utilizing a similar approach.

Under such a system MDEQ will still undertake to monitor and audit work at sites and take enforcement actions when necessary. Basically, approvals for required submittals and permit applications are provided by an independent LSP, who can often complete these actions much faster than a state bureaucracy. Thus, the willingness of the private owner or developer largely drives the speed of remediation.

Definition of "Facility" and Site Specific Criteria

Some observers and stakeholders have suggested amending the definition of "facility" to exclude properties that meet certain criteria. Current policy can unfairly burden residential property.³

¹ For more details see The Horinko Group, *Integrated Cleanup Programs: Highlights of State Programs*, January 2009, p. 24

² For more details see The Horinko Group at p. 12.

³ For a discussion of the "stigmatizing effects" of the current definition, see Public Sector Consultants, Inc., *Michigan's Part 201 Environmental Remediation Program Review Final Report and Recommendations*, April 2, 2007, p. 9.

Closure Tools

Wisconsin uses a Certificate of Closure Program under which, once a cleanup has been completed to a level consistent with a property's designated land use, the PRP is given a complete release of liability. If a subsequent purchaser wishes to change the designated land use, that purchaser is liable for the additional increment of cleanup.

Self-Certification/Facility Lead Cleanup

The federal hazardous waste program has explored the use of self-certifications or "facility-lead" cleanups for relatively low-risk sites. This tool has expedited the remediation of sites that would otherwise not come to federal attention for decades.

Conclusion

The Michigan Renewal Coalition intends that this package of reforms will achieve more finality, improved risk-based decision-making, and a "culture of completion" within the State of Michigan in order to remediate and redevelop more land. All of these objectives will contribute to the key outcomes of increasing private investment, spurring economic development, and enhancing protection of public health and the environment.