

The Maryland Voluntary Cleanup Program

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As the state's economy has changed, some of those properties have been shuttered and abandoned; others have become prime redevelopment sites, like those in the Inner Harbor. Historically, development of these brownfield properties has been impeded due both to the cost of clean-ups, and also due to concerns over potential environmental liability. Under some federal and state environmental laws, parties attempting redevelopment could be held liable for the contamination, even if it was caused by other parties years, or even generations, ago. Since under existing law it was difficult to get the government to determine how clean a site had to be to avoid enforcement, developers avoided these properties.

Many state governments realized that programs were necessary to provide for overseeing voluntary brownfield cleanups. In 1997, Maryland enacted the Voluntary Cleanup Program (VCP) to encourage and accelerate the clean-up of property contaminated with hazardous waste while protecting the public health and environment. The VCP also aims to provide predictability and finality to these clean-ups.

Under the VCP, the applicant and the state work together to design an appropriate environmental investigation of the target property. If

the state determines that the property needs to be remediated, the applicant proposes a clean-up plan. If the state approves the plan and it is implemented to the state's satisfaction, the property owner generally will have no further requirements. The ultimate reward for participating in the VCP is the state's issuance of a legally binding liability release. In many cases, the receipt of the state's sign-off document will provide the necessary comfort to lenders, equity participants and tenants to participate in developments built on once-contaminated properties.

The law establishing Maryland's VCP is codified at Maryland Code §§ 7-501 to -516 of the Environment Article; the program is administered by Environmental Restoration and Redevelopment Program in the Waste Management Administration of the Maryland Department of the Environment. To date the VCP has received more than 530 applications, ranging from single dry cleaners and gas stations to marquee sites like the former American Can Company site, a well-known Baltimore urban development project. Some properties are basically clean; others have limited amounts of contamination; and still others involve a toxic brew of multiple chemicals from various sources.

Eligibility

The VCP program is inclusive when it comes to eligibility; with a few exceptions, sites are eligible whether they are contaminated or merely perceived to be contaminated. Ineligible properties include those on the Federal Superfund list and those under active enforcement where the applicant caused the contamination. Previously, oil-contaminated sites were barred from the program, but a 2004 statutory amendment removed that prohibition.

As with voluntary clean-up

programs in other states, Maryland draws a distinction between applicants who are responsible for the contamination ("responsible" persons), and those such as potential purchasers who neither contaminated the property, nor had an ownership interest in the property at the time of the application to the VCP program. Although both types of parties may participate in the program, the law provides additional liability protections to this non-responsible ("inculpable") group. If possible, the applicant should submit its application to the program before taking title to the property to ensure receiving inculpable status.

Application Process

The VCP application form requires information about the applicant, the current and proposed use of the property, and the environmental status of the site. One important set of questions deals with the intended future use of the property. Whether the property will be used for residential, commercial or industrial purposes will determine, in part, the amount and type of remediation required by the MDE.

If the property is contaminated, both a Phase I environmental assessment (performed in accordance with current ASTM standards) and a Phase II environmental investigation are required. If the Phase I report indicates that the property is not impacted, the MDE may determine that a Phase II is not required. There is a fee of \$6,000 for all initial applications; subsequent applications for a contiguous property that is part of the same development plan cost \$2,000.

If one party submits an application for a parcel (the owner, for example), and a different party (such as a potential purchaser, or a tenant) subsequently submits an application for the same parcel, the second application fee is \$2,000. Finally, MDE

will issue an "expedited" determination of an applicant's inculpable party status for \$2,000.

The Department encourages applicants to schedule pre-application meetings, especially those unfamiliar with the VCP process. It can be particularly helpful to discuss the Phase II scope of work before an environmental consultant begins that investigation, to ensure that the consultant and agency are on the same wavelength.

According to the statute, MDE will either accept or deny a party's application within 45 days. The Department will provide the applicant with a written response stating the applicant's status as an inculpable party or a responsible party, whether the application was approved, and if denied, the reasons for its denial. Subject to certain deadlines, applicants may resubmit rejected applications.

In cases where the application indicates that no additional cleanup is required, and MDE agrees, the state may issue a No Further Requirements Determination (NFRD). If the applicant receives an NFRD, the process stops here and the applicant does not need to implement a response action plan for the site. The NFRD provides the same liability protection as if the applicant had completed the VCP and obtained a Certificate of Completion (discussed below).

Preparing the Response Action Plan

Once accepted into the VCP, the participant must develop a proposed Response Action Plan (RAP). The RAP, among other things, identifies the work necessary to remediate the site, including any long term monitoring and maintenance. Maryland uses a number of criteria to determine the required remediation,



including published soil and groundwater clean-up standards, and site-specific risk based standards. The risk based approach recognizes that subsurface contamination at a site in downtown Baltimore or Silver Spring, where groundwater has not been used for drinking water purposes for generations, presents a different risk scenario than it would in an Eastern Shore community whose water comes from public wells.

Typically, the details of the RAP will be the subject of detailed (and occasionally heated) discussions between VCP staff and the applicant's

environmental consultant. It helps to have a consultant who is familiar with VCP processes and procedures, or who can learn quickly.

Prior to implementing the RAP, the applicant must post a performance bond to provide a source of funds to secure the site if the applicant withdraws from the program or otherwise fails to complete the remediation. The MDE cannot force an inculpable applicant to complete the cleanup if the applicant changes its mind in mid-stream; it is, after all, a voluntary program. However, if the clean-up involves performing soil excavation,

and the applicant stops work leaving a large and dangerous excavation, the MDE will look to the bond to fund the cost of restoring the site to a safe condition.

Response Action Plan Implementation

Once MDE accepts the participant's RAP and the participant posts the performance bond, the participant can begin implementing the RAP. During this process, a VCP participant may decide to withdraw from the program. As stated above, if the participant is inculpable, MDE may not require the party to cleanup the eligible property. However, MDE may take enforcement action against responsible parties.

Once the participant completes the RAP, the participant must send

written notice to MDE. Within 30 days, MDE will review the implementation of the RAP at the eligible property. If it determines that the applicant has achieved the clean-up criteria to its satisfaction, MDE will issue a Certificate of Completion (COC). MDE may condition the COC on permissible uses of the property. Both the COC and the NFRD must be filed in the land records of the applicable jurisdiction.

Liability Protection

The Certificate of Completion marks the end of the participant's journey through the VCP. Both the COC and the NFRD provide a qualified guarantee that the Department will not bring an enforcement action against the participant at the eligible

property. In both cases, the state releases the participant from further liability for any contamination identified in the environmental assessment at that site, and protects the participant from any contribution action brought by a responsible person.

A COC and an NFRD also provide some comfort concerning federal liability. MDE and EPA Region III entered into a Memorandum of Agreement (MOA) which provides that EPA Region III will consider sites in Maryland's VCP "of no federal interest." There are limitations on this liability protection, but most of these limitations overlap with the Maryland statutory carve-outs.

The Maryland statute provides some notable limitations on the NFRD and COC liability protections. Neither a COC nor an NFRD prevents the state from taking action against any person to prevent or abate an imminent and substantial danger to the public health or environment. Neither document protects the applicant from liability for new contamination or the exacerbation of existing contamination. The documents also do not protect the participant from previously undiscovered contamination on site. However, even with this qualified liability protection, the Maryland VCP provides substantial security to property owners wishing to revitalize brownfields.

Public Participation

The Maryland VCP law includes several public participation components. When the applicant first submits its application, MDE will post a notice of the application on MDE's website. Additionally, the applicant must post a notice at the eligible property. Both the applicant's sign and MDE's notice must contain contact information for the Department from which the public

can obtain information and to which the public can submit written comments. The Department must consider written comments for at least 10 days before approving or denying an application.

Additionally, when the participant submits its proposed RAP, it also must post a notice at the property and publish a newspaper notice for two consecutive weeks. After the newspaper notices, MDE will schedule a public informational meeting to discuss the proposed RAP. MDE must consider any public comments it receives when determining whether to accept or deny the applicant's proposed RAP.

Administrative Requirements

The VCP is an administrative program with its own nomenclature, processes and requirements. Certain actions have to be taken within specified time periods, public notices have to be provided in a certain form, and the Department has its own templates for items such as the performance bond, the NFRD and the COC. Third parties with an interest in a site, such as lenders who may be used to dictating the form of transactional documents, need to understand that the MDE's administrative requirements are difficult to modify.

Institutional Controls

Like many other states, Maryland has increasingly moved to requiring "institutional controls" at VCP sites, such as deed restrictions or engineering controls, to restrict the subsequent use of a brownfield site to protect human health or the environment. These may range from a prohibition on using groundwater under a property as a source of potable water, to a requirement that the asphalt in a parking lot, which

covers contaminated soil, be inspected on a periodic basis for cracks. In some cases these controls are a quid pro quo for the state allowing limited amounts of impacted soil or groundwater to remain on a site, as long as doing so will have no negative environmental impacts.

In 2005, Maryland enacted the Uniform Environmental Covenants Act (UECA), a law which governs the creation and implementation of the documents which implement such institutional controls. In some cases, the VCP program has begun requiring that applicants comply with UECA as well as the underlying VCP statute. Although a discussion of UECA is beyond the scope of this article, it is necessary to understand both the benefits and burdens of the new law for brownfields developments.

Incentives

Dirty sites are more expensive to develop than clean ones. Recognizing this, both Maryland and the federal government have provided, at different times, various economic incentives to private and governmental

entities involved in brownfields sites. Participants in Maryland's VCP may be eligible for financial incentives from both MDE and the Department of Business and Economic Development (DBED). DBED offers grants and loans through its Brownfields Redevelopment Incentive Program (BRIP) to help fund environmental site assessments and portions of site remediation. In some cases, projects may also be eligible for property tax credits. The types and amounts of these incentives vary with changes in appropriations and budget allocations.



Courtesy of The Maryland State Bar Association