

Private Investment as a Catalyst for Remediation and Redevelopment of Superfund Sites

with ELT Case Study of Purchase of Two Superfund Sites in California

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INTRODUCTION

List, sample, design, remediate, delist. This is how the process for sites formally designated as Superfund sites was originally envisioned. One thing never considered in the early days of the Superfund program was the possible reuse of these sites; after all, these sites represented those that the U.S. Environmental Protection Agency (EPA) concluded posed the greatest potential risk to human health and the environment.

The reuse of contaminated sites is subject to many factors, including the type and extent of contamination, the cost of cleanup, the length of time to complete the cleanup, the best and highest use of the site, the location, and others. For brownfield redevelopers like Commercial Development Company, Inc. (CDC), these criteria are rigorously evaluated to determine the viability of new development potential.

In June 2018, CDC purchased two Superfund sites in California after determining that there was a viable opportunity to reposition them for long-term reuse. It is the type of plan that EPA's Superfund Task Force believed could occur more frequently when it set out to improve the Superfund program in 2017, by encouraging private investment, promoting redevelopment and community revitalization, and strengthening partnerships. As discussed below, the successful acquisition of these two sites highlights the feasibility of achieving these goals through the environmental liability transfer process, resulting in a speedy resolution to two long-standing cleanups that will no longer require EPA enforcement action to effectuate the statutory cleanup responsibilities of the previous owners.

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Above: ELT assumed environmental liabilities at California Superfund Site, facilitated property transfer, remediation, redevelopment

CDC BUYS TWO CALIFORNIA SUPERFUND SITES

Since 1990, CDC has been acquiring environmentally impacted real estate across North America--power plants, warehouses, manufacturing plants, breweries, and any other site where development was precluded by environmental contamination. Environmental remediation was conducted at sites under a number of federal and state programs, putting them back into productive use for a wide range of purposes, including renewable energy industrial parks, business centers, hotels and apartments, assisted living centers, and other new utilizations that fit into the preexisting real estate framework. CDC and other brownfield redevelopment companies operate in a high-risk environment, but few developers have ever been successful in the acquisition and development of a Superfund site listed on the National Priorities List (NPL) absent a Superfund Ready for Reuse Determination from EPA.

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In June 2018, CDC closed the deal on a seven-year process to acquire two Superfund sites in California--the Valley Wood Preserving Superfund site and Coast Wood Preserving

Superfund site located in the cities of Turlock and Ukiah, respectively. The asset purchase and liability assumption of these Superfund sites (obtained via company stock transfer) were not entered into lightly. These sites were the locations of family-run businesses in which the owners wanted to get out of the wood processing business and to live out their remaining years without Superfund liability hanging over their heads. A CDC affiliate acquired 100 percent of all outstanding stock of Valley Wood and Coast Wood and entered into Consent Decrees with regulatory agencies to guarantee the complete cleanup of both sites. Under this framework, those agencies agreed to stop pursuing the former stockholders of Valley Wood and Coast Wood.

SITE BACKGROUNDS

EPA listed the Valley Wood Superfund site on the NPL in 1989 and issued an initial Record of Decision (ROD) for the site in 1991. Prior to listing, EPA had removed 1,500 cubic yards of contaminated soil and treated 70 million gallons of chromium- and arsenic-contaminated groundwater through an electrochemical process that was formalized in the ROD. Revisions to the ROD later allowed for in-place groundwater treatment, which effectively reduced the levels of these metals in the groundwater. In 2007, EPA approved monitored natural attenuation (MNA) of the low levels of site contaminants that then remained in groundwater. MNA remains ongoing at the site.

Like Valley Wood, Coast Wood's past operations resulted in chromium and arsenic contamination of the soil and groundwater. After EPA listed the site in 1983 on the NPL, it took immediate action to extract contaminated groundwater and to build a slurry wall and interceptor trench for the prevention of off-site migration of groundwater. The site's remaining actions include the in-place treatment of hexavalent chromium in the groundwater and excavation and off-site disposal of contaminated soil. CDC's affiliated entities will now continue the ongoing environmental remediation plan at each site.

WORKING WITH REGULATORY AGENCIES TO FACILITATE SUPERFUND LIABILITY TRANSFER

In addition to EPA Region 9 and the U.S. Department of Justice (DOJ), CDC worked with the California Department of Toxic Substances and Control and the California North Coast Regional Water Quality Control Board to effectuate the transfer. With the extensive cleanup timeline and the realistic potential to privately fund the completion of remediation at two long-standing Superfund sites, these agencies did not hesitate to assist in facilitating the transaction.

However, the agencies did have concerns that the Superfund sites could ultimately revert back to EPA and fall on publicly funded cleanup doles due to CDC's future insolvency or unwillingness to fully complete the cleanup. It is for this reason that taking over a Superfund cleanup, or any other cleanup entrusted to government to ultimate-

ly fund, is a difficult task, not just for the private sector, but for the government agencies as well.

With this in mind, over the course of seven years, the parties worked with EPA and the state to structure the deal to ensure that the cleanup would be done expeditiously, to the same standard as EPA would perform, and would be financially guaranteed.

Due to the critical importance of the sellers' desire to resolve all their environmental liability to EPA and the state, CDC engaged Environmental Liability Transfer, Inc. (ELT), an affiliate under common ownership that specializes in assuming environmental liabilities. ELT helped to craft a deal that would allow all parties involved to be comfortable with the deal terms and financially covered as the assets and liabilities transferred from the sellers to the buyer.

For each Superfund site, the major components of the deal included:

- *Entering into a new DOJ-approved Consent Decree that obligated the buyer for the cleanup and no longer the sellers;*
- *Adhering to the Superfund cleanup process, complying with the ROD through to the Certificate of Completion;*
- *Meeting the cleanup standards established as applicable or relevant and appropriate requirements (ARARs);*
- *Adhering to the established remediation time line;*
- *Posting a financial performance guarantee;*
- *Being subject to stipulated penalties (for late or non-performance);*
- *Paying federal and state response costs for overseeing the private cleanup;*
- *Performing studies or investigations to support EPA development of its five-year reviews; and*
- *Conducting activities associated with “reopeners” if the remedy is deemed to no longer be protective.*

PROMOTING THE SUPERFUND TASK FORCE GOALS

EPA understands the benefit that can come from investing time and resources in cleaning up contaminated sites. In its recently released report, Superfund Program Accomplishments Fiscal Year 2018, EPA identified the significant economic benefits to communities that Superfund cleanups provide. Through FY 2018, 529 Superfund sites were put back into reuse,

which supported over 8600 businesses employing more than 195,000 people who earned a combined income in excess of \$13 billion. EPA also reports that residential property values within three miles of a Superfund site increase 19 to 24 percent after the cleanup is completed.

In 1998, the first half of the existence of the Superfund program, the U.S. Government Accountability Office issued a report, Superfund: Information on the Program Funding and Status, which identified nearly 1,400 sites on the NPL. This figure is not that far off from where we are today: according to the Superfund Task Force Recommendation 2018 Update, as of July 2018, there are 1,346 sites on the NPL, 1,189 of which are private, non-federal facilities. For a portion of these Superfund sites, EPA has obtained approximately \$1.2 billion in commitments from potentially responsible parties (PRPs) to clean up, billed PRPs approximately \$99 million in oversight costs associated with cleanup work, and received PRP commitments to reimburse EPA approximately \$143 million for past costs associated with cleanup work. Despite 60 percent of ongoing remedial construction underway by PRPs, it is not enough to meet the overwhelming challenge of Superfund sites not yet remediated.

Since the NPL's inception, only 412 sites have completed the Superfund process and been delisted--a process that is further complicated by continued shortfalls in federal funding. For example, in EPA's FY2018, EPA was unable to fund the implementation of remedies at 20 NPL sites that were approved and ready to start. Unfunded Superfund construction projects result when a PRP is not found or cannot pay, and no other funding sources are available.

The acquisition of the Valley Wood Preserving and Coast Wood Preserving sites are successful examples of how to encourage private investment through the environmental liability transfer process. EPA should be credited with the foresight to recognize that it is possible to do things differently and achieve the same level of environmental protection. The transactions could not have occurred without the approval of federal and state agencies. By permitting the transfer of environmental liability at these Superfund sites, EPA and the State of California facilitated transactions that will allow CDC to now move forward with expeditious and responsible cleanup plans designed to return these sites back to productive reuse, and to generate new job creation and new local tax revenue as a result.

ABOUT THE AUTHOR

With over 30 years of environmental regulatory experience with the New Jersey Department of Environmental Protection (NJDEP), Colleen Kokas is recognized across the country as a top tier expert in brownfield redevelopment and remediation. She was recently awarded the “Lifetime Achievement Award in Brownfields 2017” by the Brownfield Coalition of the Northeast. Today she is Executive Vice President at Environmental Liability Transfer, Inc. (ELT), where she educates the redevelopment community and government agencies on the advantages of using environmental liability transfers during sustainable redevelopment projects.



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ABOUT ELT

Environmental Liability Transfer, Inc. (ELT) is a comprehensive environmental liability assumption company providing clients complete and final environmental liability transference services since 2004. With strong financial backing and a unique blend of expertise – real estate, environmental, demolition, liquidation, legal, insurance, and sustainable redevelopment planning – ELT has successfully assumed over \$1.5 billion USD in corporate environmental liability for its clients throughout North America.

For more information about this white paper or to schedule a confidential discussion regarding your environmental liabilities, please contact us.



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