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Real Estate Trends

Fees a Developer May Encounter When Generating Hazardous Waste

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In New York City alone, it has been estimated that 7,600 acres of real property (an area more than nine times the size of Central Park) are contaminated with urban fill material and various other human-transported or anthropogenic deposits, some of which are considered "hazardous" under New York law. Add to this total the countless acres of property throughout the state that are be impacted by contaminants from former industrial processes, petroleum storage, accidental releases of contaminants and unlawful dumping activities. These properties can often present lucrative acquisition and development opportunities if environmental conditions are properly assessed and managed. Through the assistance of counsel and skilled consultants, owners and developers can often quantify to a reasonable degree the liabilities and costs associated with acquiring and redeveloping contaminated properties. However, in addition to the commonly anticipated and often considerable costs of managing environmental conditions as part of a development project, there are potentially quite large and frequently overlooked expenses that could land a fatal blow to a project budget.

Two programs that may burden the unsuspecting developer and can greatly impact the project owner's bottom line are the New York State Hazardous Waste Program Fees and the New York State Special Assessments on Hazardous Waste Generated. Both of these programs may add significant costs that were not contemplated by the owners or developers of property contaminated with hazardous waste. These programs each require the payment of annual fees—as much as $800,000 for very large quantity generators—based upon the amount of hazardous waste that is generated within the state during any calendar year. Developers do not typically consider themselves generators of hazardous waste and, therefore, are often not aware of these additional costs. However, site development activities, such as excavation and dewatering, may generate large quantities of contaminated soils and wastewater that must be characterized, manifested, transported, and disposed of properly. To the extent that these materials contain constituents that render them "hazardous" under New York law, the fees and assessments may be payable.

Owners and developers should, therefore, be armed with the knowledge to avoid these fees and assessment whenever possible and when not, must be prepared to incorporate the costs into their project budgets.

Program Fees

The Hazardous Waste Regulatory Program Fee (Regulatory Program Fee) (New York State Environmental Conservation Law (ECL) Art. 72, Title 4) was enacted in 1983 as a means of providing a source of funding for certain New York State Department of Environmental Conservation (DEC) administered programs, such as the state "Superfund." Under ECL Article 72, all "generators" of 15 tons or more per calendar year of hazardous waste must pay to the DEC annually a fee based upon the quantity of hazardous waste generated. ECL §72-0402. For waste generated after Jan. 1, 2010, the fee is calculated at the rate of $130 per ton of hazardous waste generated and can range from as little as $1,950 for generators of only 15 tons of hazardous waste, up to a maximum of $800,000 for generators of more than 10,000 tons. A "generator" is defined by the statute as any person, by site, *whose act or process produces hazardous waste or whose act first causes a hazardous waste to become subject to regulation*. §72-0401 (emphasis added). A "generator" will include not only industrial producers of hazardous waste, but also property owners and developers that remove contaminated media from a property for disposal. The fee applies only to that portion of the material generated that qualifies as "hazardous," which, while not including all contaminated soil, debris or wastewater, includes any "waste identified or listed as hazardous pursuant to title nine of article twenty-seven of" the ECL. ECL §72-0401. Hazardous waste can include soil or construction debris containing heavy metals such as lead and chromium, compounds related to historic industrial operations or soil and groundwater containing dry cleaning solvents, gasoline constituents, such as benzene, and other hazardous substances.[1]

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Owners and developers may have acquired sites believing that they have adequately quantified the costs of dealing with the environmental conditions that will be encountered during development, such as the costs of investigation, excavation, treatment, disposal and environmental consultants. The Program Fees and Special Assessment, however, are often overlooked and are omitted

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from that calculation. Accordingly, to the extent that remediation and/or construction activities result in the removal and transportation of significant quantities of hazardous waste, owners and developers are often surprised, to say the very least, when an invoice arrives from the state, sometimes many months after remediation is complete, for as much as $300,000, $400,000 or even $800,000—amounts that can easily sink a project.

Special Assessment

In addition to the regulatory Program Fees, generators of hazardous waste may be required to pay a Special Assessment on hazardous waste generated (the Special Assessment) (ECL §27-0923). The Special Assessment is also based upon the quantity of hazardous waste generated and the manner in which the waste is managed. Specifically, the Special Assessment is imposed as follows: (1) $27/ton of hazardous waste removed from the site of generation and ultimately disposed of in a landfill; (2) $9/ton of hazardous waste removed from the site of generation and ultimately incinerated; (3) $2/ton of hazardous waste that is incinerated on site; and (4) $16/ton of hazardous waste removed from the site of generation and ultimately treated or disposed of off site. The Special Assessment, also called a "generator tax," is due on a quarterly basis and is payable to the New York State Department of Taxation and Finance.

Just like the Program Fees, the Special Assessment is commonly overlooked and, while a much smaller financial burden, can be a rude awakening to an unsuspecting developer or owner.

Exemptions

The statutes contain certain exemptions which may provide ways of possibly avoiding the Program Fees and Special Assessment if proper planning is done ahead of time. Under ECL §72-0402, the Program Fees are not payable on waste resulting from services that are provided under: (i) an agreement with DEC, or with the DEC's approval and in accordance with DEC regulations or under an order of DEC, the federal government or a court related to a hazardous materials cleanup; (ii) an agreement with DEC for the cleanup and removal of a petroleum spill under the New York Navigation Law; (iii) an order of a court, DEC, the New York State Department of Health or the USEPA related to an inactive hazardous waste disposal site under the New York state or the federal Superfund laws; (iv) a permit or order requiring corrective action pursuant to the federal Resource Conservation and Recovery Act; or (v) a DEC environmental restoration project state assistance contract. An exemption also applies to waste resulting from services that are provided "voluntarily and without expectation of compensation" in response to an accidental or threatened release of hazardous substances.

The exemptions applicable to Special Assessment are more narrow, but also include the resource recovery or recycling of any hazardous waste by "any method, technique, or process utilized to separate, process, modify, convert, treat or otherwise prepare hazardous waste so that the component materials or substances thereof may be beneficially used or reused as raw materials, exclusive of usable energy." ECL §27-0901. The Program Fees used to have a similar "recycling" exemption for generators that recycled at least 90 percent of the waste generated, but that exemption was removed as part of earlier revisions to the statute.

The foregoing exemptions are specific and are strictly construed. For example, work performed pursuant to an agreement with a municipality, such as work performed pursuant to the New York City Brownfield Program, will not qualify for an exemption if the state is not also involved. Accordingly, while it may be beneficial for a developer to participate in the New York City Brownfield Program, the developer should first assess whether the remedial efforts required in connection with the development of the property are likely to generate large quantities of hazardous waste that will be subject to the Program Fees and Special Assessment. If so, the developer may want to consider the state Brownfield Cleanup Program.

Moreover, any waste generated prior to entering into an agreement with the DEC, even if an agreement is ultimately made, will not qualify for an exemption. Therefore, waste generated as part of site investigation activities performed prior to entering into an agreement with the state will be subject to the Program Fees and Special Assessment. Accordingly, as a critical part of any proposed development project, an assessment must be made early on as to whether (a) hazardous wastes will be encountered as part of remediation or development activities, and, if so, (b) whether steps can be taken to qualify for one of the statutorily provided exemptions.

If work must be performed outside of one of the ECL §§27-0923 or 72-0402 exemptions, steps may also be taken to minimize the burden of the Program Fees. Pursuant to ECL §72-0402, the maximum fee that may be imposed on generators of up to 4,000 tons of hazardous waste in any calendar year is $300,000 and the maximum fee that may be imposed on generators of between 4,001 tons and 10,000 tons is $400,000. Accordingly, if a single development project were to generate 3,600 tons of hazardous waste during any one calendar year, the total Program Fee payable on that waste would be $300,000. However, if 1,800 tons of hazardous waste were excavated and disposed of during one calendar year and the remaining 1,800 were excavated and disposed of the following year, the developer would be subject to Program Fees totaling $234,000 in each year for a total of $468,000 for the same quantity of hazardous waste. Accordingly, depending on the total amount of hazardous waste that is anticipated to be generated, excavation and disposal activities must be planned and scheduled accordingly.

Conclusion

Commonly overlooked costs associated with the generation and disposal of hazardous wastes in New York State can deliver a disastrous blow to the budget of a development project. Properly informed owners and developers, however, can takes steps to avoid or to properly budget for often very costly fees and assessments before irretrievable resources are committed to a project.

1. In 2011, the DEC began to invoice generators for an additional fee based upon the average quantity of hazardous waste generated for the years 2007 though 2009. The DEC justified this double billing based upon its interpretation of 2010 revisions to the ECL. These three year averaging invoices, can also amount to hundreds of thousands of dollars, are currently being challenged as unauthorized by the statute. However, if the challenges are unsuccessful, unpaid fees will have generated substantial interest and penalties.

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