

Lessons Learned From Ashley

II

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The Cast

- Planter Fertilizer & Phosphate Company/ Ross Development (1906 to 1966)
- Columbia Nitrogen Corp/PCS (1966 to 1972)
- Holcombe and Fair (1987-2002)
- Robin Hood II (1992 to present)
- Allwaste Tank Cleaning (1989-2008)-2.99 acres
- Ashley II (2003- 27.62 acres)
- Ashley II(2008-2.99 acres)

Ashley Players

- Joint Venture Partners
 - Cherokee Investment Partners (\$51MM)
 - Greenhawk Partners
 - Craig Briner
 - Jim Lumsden
 - Robert Clement
- \$28MM Line of Credit Lender- Bank of America
- Invoices issued to Cherokee Investment Partners/Ashley II and submitted to NC HQ

Site Operations

- sulfuric acid manufactured in acid chambers and piped to southern portion of facility to react with phosphate rock
- Pyrite ore used as fuel stock for sulfuric acid
- Acid chambers lined with lead with hole in bottom for cleanouts

Site Operations Cont'd

- Pyrite slag used for road stabilization
- Lead sludge from acid chambers rinsed onto land and washed into ditches and marsh
- Sulfuric acid leaks from piping
- Fluorosilic acid and lead effluent discharged to ditches
- 1963 fire destroyed portion of acid plant
- 1971 storm damaged roof of new acid plant
- Allwaste rinse water from cleaning bays held in sumps and trenches prior to treatment and discharge

Environmental Conditions

- Widespread lead and arsenic
- Carcinogenic PAHs
- Low pH conditions throughout site that mobilized metals
- Site covered with limestone run of crusher (ROC) in phases

Environmental Investigations

- GEL 1990 Report detects metals in test pits and potential for contaminated stormwater. Disclosed to RHCE but not DHEC
- 1992 H&F design detention plans w/o DHEC approval
- 1993-98 EPA PA/SI identifies need for remedial actions
- 1996-2000 Ross begins selling assets and distributes proceeds to shareholders

Environmental Cont'd

- 1999 H&F implement surface water management plan to avoid removal action. Not submitted to EPA for approval but EPA says improved conditions
- 1999-2001 EPA RI
- 2002 EPA FS
- 8/2003 GEL Phase 1 incorporates FS
- 11/2003 Ashley notifies EPA of pending sale and requests if EPA desires any cooperation

Environmental Cont'd

- 2004 GEL pre-design and characterization
- 2004 Responds to EPA Information Request
- 2006 Scott Freeman walks Allwaste site and observes staining and debris piles
- 2007 Ashley grants EPA access
- 2007 GEL Investigation of Allwaste parcel
- 2008 GEL “update”
- 2008 PCS expert observes eroded ROC
- 2008 Ashley demolishes structures at Allwaste parcel

Environmental Cont'd

- 2008 Ashley does not follow its protocols for concrete slabs
- 2008- Ashley removes debris piles
- 2008- Ashley sends letter to EPA on Cherokee letterhead that:
 - pursuing claim agst H&F would discourage future development
 - Emphasized its resources
 - Cost recovery action by Ashley should provide adequate consideration to secure release of H&F

Environmental Cont'd

- 2009 evaluation of sumps and cracks of concrete pads is later found to be insufficient by court
- 2009 Ashley removal action estimate is \$8.021MM

Notable Findings of Law

- Court rejects divisibility argument
- Ashley response actions found consistent with NCP despite absence of formal agreement with EPA or state
- Current operators do not need to direct operations related to pollution to be liable for response costs
- Exercise of due care includes informing authorities of discovery of contamination

Allocation

- Ross 45% (\$87.4K to Ashley)
- PCS 30% (\$58.3K to Ashley)
 - H & F 16%
 - RHCE 1% (\$2K to Ashley)
 - Allwaste 3%
 - Ashley 5%

Ashley BFPP defense

- Investigation satisfied AAI
- Ashley did not exercise appropriate care for
 - sumps,
 - debris pile
 - maintenance of ROC
 - Removal of pumps exacerbated conditions
- Satisfied cooperation, compliance with requests and access

Ashley is PRP

- Ashley did not prove that no disposals occurred after its acquisition
- Effort to discourage EPA from pursuing H & F was improper “affiliation”

Robertshaw Controls

- Nov 2006-acquired site
- May 2007-Enter VCP and UST Sampled
- Sept 2007-TCE Detected
- Oct 2007- UST drained and drums removed
- 2009- 9 USTs excavated
- Ct Says took reasonable steps by draining USTs. Not unreasonable to leave in ground

500 Assoc v Vermont American Corp

2011 U.S. Dist. LEXIS 11724 (W.D.KY 2/4/11)

- 1986 Purchase- cursory ESA detects metals (chromium)
- 1991 ESA detects metals and VOCs
 - No disclosure
 - Sale falls through
- 1998 Enforcement Action
- 2002 KY ALJ Finds Joint Liability
- 2006 Ky Ct Appeal Holds No Due Care
 - no precautions when demolishing buildings
 - Left exposed soils
 - Failure to secure property
 - No disclosure to state

Lessons

- LLPs are legal defenses
- State VCPs
- Recommendations in Phase 1 Reports
- Disclosure
- Self-Implementing Nature of BFPP
- Look For Sensitive Receptors
- Exercise Extreme Care For Grading Actions
- Discuss Remedial Schedule With Lender
- Impact of Due Care on Apportionment

Post Ashley CO BMPs for Brownfield Redevelopment Projects

- BMP 1: Don't Scrimp on the Environmental Lawyers
- BMP 2: Convene Pre-closing Construction Choreography Meeting
 - Participants
 - Architect
 - Planner
 - Civil Engineer
 - Environmental Consultant
 - Environmental Lawyer
 - General Contractor
 - Landscape Architect

Post Ashley CO BMPs for Brownfield Redevelopment Projects

- BMP 3: Create CO Redevelopment Roadmap
 - Identification Analysis of BFPP CO Termination Opportunities
 - Subsurface Structures & Containments Vessels
 - Natural Features
 - Impacted Media
 - Construction Methodologies
 - Soil Fate: Geotechnical & Grading Considerations
 - Design Criteria & Constraints
 - Access Issues & Constraints (pre & post construction)
 - Soil Management Plan
 - Construction Dewatering Plan

Post Ashley CO BMPs for Brownfield Redevelopment Projects

- BMP 3: Create CO Redevelopment Roadmap (cont)
 - Stormwater System Construction & Management Plan
 - Siting
 - Mechanics
 - Hydraulics
 - Long Term Stewardship Plan
 - Environmental Construction Specs for GC
 - Continuing Obligations ("CO") Checklist
 - ASTM E 2790-11: Standard Guide for Identifying & Complying with Continuing Obligations
 - Continuing Obligations Plan defined at Sec. 9.4
 - Recommended TOC and Format at Appendix X4

Post Ashley CO BMPs for Brownfield Redevelopment Projects

- BMP 4: Faithfully Implement CO Redevelopment Roadmap
 - Plans Verification
 - CO Checklist
 - Frequency
 - Responsibility & Qualifications
 - Chain of Reporting/Command
 - ASTM E2790-11 CO Monitoring & Evaluation Report
 - Sec. 9.5: Defined
 - Appendix X5: Recommended TOC and Report Format
 - Sample Forms for CO Field Investigation Simple (App. X6) & Complex Sites (App. X7)

BFPP Defense

- No Affiliation
 - Indemnity?
- AAI
 - Substantial compliance?
- Post-Closing Continuing Obligations
 - Appropriate Care
 - Cooperation
 - Compliance
 - Notification

Allocation

- Exercise of Due Care Element of “Gore” Factors

EPA Guidance

- Revise Common Elements Guidance
 - What is Due Care/Appropriate Care
 - Meaning of No Affiliation
- Revise BFPP Guidance
- Bring Back PPAs?

Phase 1 Recommendations

- ASTM E1527
 - Opinion and Conclusion On RECs
 - RECs vs BERs
 - Sensitive Receptors
- Recommendations
 - Not Required
 - Make Sure Implement Recommendations
- Coordinate Schedule With Lender