415.956.2828 (t)
415.956.6457 (f)
Robert Dollar Building
311 California Street, 10th Flr.
San Francisco CA 94104

202.777.8950 (t)
202.347.8429 (f)
Victor Building
750 9th Street, NW, Suite 710
Washington DC 20001

ROGERS JOSEPH O'DONNELL
www.rjo.com

RJO Update: Environmental Law

January 2014

Local Agencies in California Given New Powers to Investigate and Clean Up Blighted Property: What it Means for Property Owners and the Regulated Community

By Robert C. Goodman and D. Kevin Shipp

INTRODUCTION

On January 1, 2014, California's 481 cities, 57 counties and single city and county (San Francisco) were provided with sweeping new powers to compel the investigation and cleanup of properties that they deem to be "blighted" – meaning that there has been a release of hazardous material, or the "perceived presence of a release," that "contributes to the vacancies, abandonment of property or reduction or lack of proper utilization of property." (Health and Safety Code § 25403(b).) A "housing authority" may also be able to exercise these powers for certain properties if it is assuming the housing functions of a former redevelopment agency. (Health and Safety Code § 25403(l)(2).) AB 440 adds Health and Safety Code sections 25403-25403.8 to Division 20 (Miscellaneous Health and Safety Code Provisions).

AB 440 is likely to add more expense and confusion for property owners and the regulated community. AB 440 inserts 539 local agencies into California's already complex and decentralized regulatory approach to addressing the cleanup of contaminated property, which already involves 9 Regional Water Quality Control Boards, the State Water Resources Control Board, the Department of Toxic Substance Control and its four regional offices, and 21 cities and counties who are certified as "local oversight programs" for overseeing cleanup of underground storage tank releases. And it potentially undermines recent efforts to bring state-wide consistency to the cleanup of contaminated sites.

BACKGROUND

According to its author, the purpose of this bill was to renew the Polanco Redevelopment Act (Health and Safety Code §§ 33459-33459.8) and transfer powers previously held by dissolved redevelopment agencies ("RDAs") to cities, counties, and successor housing authorities ("local agencies"). (Hazardous Materials: Releases: Local Agency Cleanup: Hearing on AB 440 Before Senate Committee on Environmental Quality, at 4, 2013-2014 Regular Session (Sept 12, 2013).)

The Polanco Redevelopment Act was enacted to provide redevelopment agencies with powers that were to assist in the cleanup of brownfield areas within the designated

redevelopment areas. (http://www.calepa.ca.gov/brownfields/PolancoAct.htm.) It allowed the RDAs to clean up or compel the cleanup of releases of hazardous substances and provided specified immunities from liability for cleaned up properties. (*Id.*; Health and Safety Code § 33459.4(f).)

In February 2011 California dissolved all 400 RDAs created by local governments and redirected most of their financial resources. The dissolution legislation did not clearly provide authority for successor agencies to initiate new remedial activities under the Polanco Act, or to continue to pursue pending or new litigation under the Polanco Act.

AB 440 is the self-described "policy successor" to the Polanco Act and "shall be interpreted and implemented consistent with that act." (Health and Safety Code § 25403.8.) Yet there are many significant differences between AB 440 and the Polanco Act that are likely to require judicial interpretation in the years ahead.

POWERS GIVEN TO LOCAL AGENCIES

Like the Polanco Act, AB 440 allows a local agency to take "any actions" that it "determines are necessary and that are consistent with other state and federal laws" to address a "release" if the "responsible party" fails to take action. Like the Polanco Act, the local agency need not own the property to take action. (Health and Safety Code §§ 25403.1(a)(1)(A); 33459.1(a)(1).) And both the Polanco Act and AB 440 address "blighted areas."

Geographic Area Covered

Under the Polanco Act, the hazardous substance release must have been within a formally designated redevelopment project area, and within an "urbanized" area that had been found to be blighted. In contrast, AB 440 allows for cleanup actions on any property that a local agency determines is "blighted" and "within a blighted area"; the property need not be designated a project area and need not be in a "predominantly urbanized area." Whether a local agency's threshold "blight" determination was valid is sure to be a focus of future litigation under AB 440.

Requiring Property Owners to Assess the Environmental Condition of their Property

Of particular concern to property owners, AB 440 authorizes local agencies to compel "the owner or operator of a site" to produce "all existing environmental information pertaining to the site" that is not privileged and is in that person's possession and control. (Health and Safety Code § 25403.1(f).) If such information is not available, the local agency can require or perform a Phase I or Phase II environmental assessment. (Health and Safety Code § 25403.1(f)(2).) This has the potential to impose significant costs on property owners throughout the State.

Identifying "Responsible Parties" and Demanding an Investigation and Cleanup

AB 440, like the Polanco Act, gives local agencies the ability to demand that "responsible parties" develop plans to clean up "blighted properties." AB 440 requires the local agency to provide a 60-day notice to the responsible party, although the required contents and acceptable methods of providing that notice are unstated. Unlike the Polanco Act, AB 440 includes a process for including state agencies (the Regional Water Boards and the DTSC), depending upon whether the property at issue is currently under the jurisdiction of one of those agencies. For an underground storage tank site, a certified unified program agency ("CUPA") may provide oversight.

AB 440 also gives responsible parties the right to appeal a local agency's 60-day notice to the local agency's "governing body." Such an appeal must be made within 30 days of receipt of a 60-day notice. AB 440 provides that the decision of the governing body is not appealable until any subsequent cost recovery action is brought by the local agency.

INVESTIGATION AND CLEANUP

Like the Polanco Act, AB 440 provides for an investigation and cleanup to be conducted either by the local agency or a responsible party. After receiving a notice, and exhausting any appeals, a responsible party is required to submit plans to the local agency for further investigation or cleanup. If the responsible party does not take action (or there is an imminent or substantial endangerment) the local agency may proceed with an investigation or cleanup on its own. However, the most likely outcome if a responsible party does not take action is that the local agency will file suit and seek injunctive relief.

Oversight by the DTSC, Regional Water Board, or a CUPA

The investigation and cleanup plans prepared by the local agency would be subject to approval by the DTSC, Regional Water Board, or for an underground storage tank site, a CUPA. While not explicit, it appears that one of these agencies would also need to approve plans prepared by a responsible party.

LITIGATION UNDER AB 440

Action by the Local Agency to Compel Work by the Responsible Party

Section 25403.5(a) of the Health and Safety Code provides that the if the local agency undertakes an investigation and cleanup, or requires others to take such action, the local agency can recover its attorneys' fees and costs incurred, including fees and costs in bringing an action for a "civil injunction." The local agency can also recover interest on costs accrued from the date of expenditure. It can be expected that local agencies will use AB 440 to seek injunctive relief and cost recovery, as they did under the Polanco Act.

Defenses Available to a Responsible Party

Like the Polanco Act, AB 440 purports to limit the defenses of responsible parties in litigation to the limited defenses under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). (Health and Safety Code § 25403.5(b).) However, responsible parties should have other defenses available to them; for example, a local agency's failure to comply with the specific procedures of AB 440, and issues raised before a local agency's governing body.

AB 440's POLICY IMPLICATIONS

Over the past several years the State Water Resources Control Board has tried to bring consistency to the cleanup of contaminated sites, particularly those involving petroleum releases. In 2012 the State Water Board adopted the Low Threat Closure Policy, which establishes state wide criteria for when a petroleum site could be "closed." AB 440 provides for ongoing involvement by regulatory agencies with environmental expertise, and those designated as "responsible parties" will want to make sure to seek the involvement of the Regional Water Boards, and the State Water Board, where local agency activities are inconsistent with the Low Threat Closure Policy.

If you have questions about your company's obligations or any other environmental matter, please contact the Rogers Joseph O'Donnell attorney with whom you regularly work, or any member of our Environmental Law Practice Group.

The content of this article is intended to provide a general guide to the subject matter, and is not a substitute for legal advice in specific circumstances.