

I. Summary:

There are several reasons why it would be beneficial for the State to adopt a charitable trust fund mechanism to relieve the owners' of potentially contaminated sites environmental liabilities. By adopting a charitable trust fund model as an environmental liability relief mechanism, the State may be able to encourage more brownfields redevelopment. Subsequently, if there is an increase in brownfields redevelopment, the communities that house the currently contaminated properties could benefit both economically as well as from a health standpoint.

The trust fund approach takes a new look at environmental liability. Once implemented, the trust fund should be self sustaining and able to last in perpetuity. Furthermore, the trust fund would accept the environmental liabilities from landowners and remediate and monitor the sites as long as needed. Because environmental liabilities and monitoring needs can last much longer than initially expected, a charitable trust fund would be the ideal mechanism to accept environmental liabilities. In essence, if one entity were addressing all environmental aspects of a contaminated site, remediation, re-openers, and monitoring would be less complicated and less expensive in the long run, which would benefit the community as a result.

II. Introduction:

Environmental liability has been, and continues to be, a serious problem for owners of contaminated properties. Often times, the owners of contaminated properties cannot afford to remediate the properties, or are afraid of the potential liability surrounding the properties. As a result, the owners of contaminated properties are unable to, or simply refuse to, do anything with the properties.¹ Currently, owners have few options. The owners can: do nothing, remediate the site, try to escape from liability in a buyer seller agreement, or sell the potential liability on the site to an Environmental Liability Transfer Company.² The problem with each of these options is that the liability is never truly dispatched.

¹ Michael P. McCartney, *Environmental Liability Transfer Lecture*, 15th Annual Fall Section Meeting of the American Bar Association's Section of Environment, Energy and Recourses (Sept. 2007)

² Lee D. Hoffman, Diane W. Whitney, *Now May Be Time To Sell Mothballed Property*, The Connecticut Law Tribune, (March, 2005).

This report will propose a new way for the States to approach environmental liability.³ The model that should be followed is that of a charitable trust fund used as a liability relief mechanism. If adopted, the proposed model may encourage the owners of currently contaminated, but undisclosed, properties to either place the properties on the market, or to remediate the sites by providing an incentive for them to do so. This model can apply to many environmental liability issues and to many different types of contaminated properties.

In the following sections, this report will give a brief summary of environmental liability, explain why the trust fund model is the model that is being recommended, how the trust fund model would work, and also recommend a path to follow in the future.

III. Environmental Liability:

Environmental liability can be vast and far-reaching. If a person owns, or has owned, a piece of contaminated property, that person could be responsible for cleanup expenses. Oftentimes, a person does not even have to own the contaminated property to be held responsible for cleanup expenses. For example, pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), potentially responsible parties (PRP) include: 1) current owners or operators of a facility; 2) past owners or operators who owned or operated the facility at the time hazardous substances were disposed at the facility; 3) generators, anyone who arranged for the disposal of hazardous substances; and 4) transporters, anyone who transported hazardous substances and selected the site for disposal.⁴ With CERCLA's far-reaching liability, it is no wonder why some owners of potentially contaminated properties would rather keep the contamination concealed than attempt to do anything else with the property. They could be "on the hook:" for a very long time at a very steep price.⁵

To be a PRP in the eyes of CERCLA can mean many different things. If a person is classified as a PRP, it does not matter if that person, or their property, actually contributed to the release, or threatened release, of the hazardous substance in question. The U.S. Environmental Protection Agency (EPA) can force

³ This report does not recommend that the trust fund approach be the sole approach of the states. There are times when a carrot is not the correct tool for the job at hand.

⁴ Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(a) (2007).

⁵ It is noted that not all contaminated landowners mothball their properties because of the liability issue. The reasons that a site is mothballed are probably as unique as the site itself and can range from development concerns to an illness in the family.

any PRP to take clean up actions, or expend funds for the reimbursement of such.⁶ The real threat to a PRP is that if the PRP refuses the EPA's §106 clean up order, the PRP can be liable for the cost of the clean up plus treble damages, which would be the cost of the clean up plus three times the cost of the clean up.⁷ The threat of treble damages is only one tool that CERCLA has at its disposal.

An individual from U.S. Steel's Real Estate Department summed this concept up best. He said that the "regulators had it beat into them that environmental contamination is theirs from cradle to grave." Essentially, if someone owns, or owned, property that has environmental contaminations on it, whether or not they placed it there, they could be a PRP. If a person is an operator of a facility that is the perceived source of the environmental contamination on a piece of property he/she could be a PRP. If someone arranged for the disposal of a hazardous substance and they chose the site location, they could be a PRP. If someone is the transporter of a hazardous substance and takes it to a landfill and the regulators decide that the landfill needs cleaned up, that person could be a PRP. PRP is a very bad distinction to have bestowed upon anyone; it is best to avoid it.

Currently, as mentioned above, there is no way to escape environmental liability. Most often parties attempt to pass off liability contractually between the parties. While this looks good on paper, a party's protection from liability is only as solid as the party offering the protection. If a property owner includes a release from environmental liability for itself in a buyer seller agreement and the buyer of the property is later unable to fulfill the agreement, the liability would fall back on the original owner.

The private sector, via Environmental Liability Transfer Companies (ELTCs), has attempted to come up with a solution for some of the many troubles surrounding environmental liability.⁸ What an ELTC does is that it, as a third party, takes ownership of potential environmental liabilities and responsibilities at a given site for a fee.⁹ By taking the potential environmental liability, the ELTC effectively frees the land and the

⁶ 42 U.S.C. § 9606 (2007).

⁷ *id.*

⁸ Here is a partial list of ELTCs: TerraSure, Environmental Liability Transfer Inc., TRC "Exit Strategy Program," Environmental Risk Solutions, Weston Solutions and many more.

⁹ David W. Bennink, *Environmental Liability Buyouts: A Developing Option*, International Risk Management Institute (Aug. 2004). available at: <http://www.irmi.com/Expert/Articles/2004/Slivka08.aspx>

buyer and seller of the land from the looming threat of the liability. The ELTC effectively neutralizes the risks involved in a contaminated land transaction. However, unlike environmental contaminations, most companies will not last forever.

ELTCs operate by accepting liability contractually. The ELTCs accept the environmental liability from the owners of contaminated properties for a fee. The ELTC agrees, by contract, to stand in the shoes of the owner of the property when dealing with the regulatory agency. The ELTC agrees to pay all fees associated with the remediation and maintenance of the contaminated property as well. This contract does not include the state or federal government as parties. It is simply a contract between private parties. If the ELTC goes out of business, that contract cannot, and will not, prevent the overseeing regulatory entity from pursuing the current or prior owners of the contaminated property for any unsatisfied remediations, monitoring, or re-openers.

ELTCs play a vital role in contaminated land transactions, but they are also unwittingly providing potential future liabilities to their customers. In the future, after an ELTC and its customers go their separate ways, it is foreseeable that the ELTC could go out of business. At that point, there is nothing stopping the state or federal regulatory agencies from returning to the original parties for any unsatisfied remediations or future re-openers. If the ELTC were to go out of business, the parties could be in danger of having to pay for the liabilities twice; once to have the ELTC take the liability in the first place and again to the regulatory agencies if there is more work to be done on the property. Environmental Liability, being what it is, tends to throw a wrench in the workings of a land transaction where the land has potential environmental contaminations on it. This is the wrench that ELTCs so effectively remove from contaminated property transactions thus allowing the transaction to go through as though the land were uncontaminated. This wrench could easily be thrown back at the parties however, if the ELTC ever goes out of business.

The private sector ELTC model, that is currently meeting everyone's needs, can be improved upon by taking the ELTC model and adapting it so that it lasts in perpetuity in the form of a private/state funded charitable trust fund.

IV. Why the trust fund model?

There are entire law school courses centered solely on the topic of trusts. Needless to say, for the purposes of this research summary, this explanation of trust funds will only touch on the basics. "The trust agreement is the written document that spells out the rules for use and management of property and clarifies the relations among different actors and organizations."¹⁰ Five elements are required to create a trust: 1) Intent of the settlor to create a trust: 2) a settlor: 3) trust property: 4) A beneficiary: and 5) a trustee—if the trust does not establish a trustee then the court will appoint one.¹¹

The charitable trust fund model would be the best model to apply because it is the most flexible of the trust models.¹² For regular trusts, the beneficiaries have to be clearly named or the trust will be found to be invalid.¹³ This is not the case with a charitable trust. A charitable trust operates by meeting the general charitable purpose that the settlor sets forth when the trust is established.¹⁴ For example, if the purpose of the trust is to remediate and accept the environmental liabilities of mothballed properties for a fee in order to benefit the community at large, then it will not matter that Joe's mothballed Gas Station was not named as a specific beneficiary in the trust. The trust will still be valid and apply to the remediation of Joe's mothballed Gas Station so long as it benefits the community at large.

The second reason that the charitable trust fund model should be used is that charitable trust funds can last in perpetuity.¹⁵ As long as the trust's purpose can still be achieved, so long as it is not illegal, and it

¹⁰ Carl Bauer, Katherine N. Probst, *Lon-Term Stewardship of Contaminated Sites: Trust Funds as Mechanisms For Financing and Oversight*, Resources For The Future, at 32 (Dec. 2000).

¹¹ AMJUR TRUSTS § 40 (2007).

¹² REST 3d TRUSTS § 28 Charitable Purposes (2007).

¹³ AMJUR TRUSTS § 40 (2007).

¹⁴ REST 3d TRUSTS § 28 Charitable Purposes (2007).

¹⁵ *id.*

has funds in it, the trust can legally last forever.¹⁶ In this example, the purpose of the trust is to remediate and accept the environmental liabilities of contaminated properties for a fee in order to benefit the community at large. It is fairly safe to assume that the trust could accomplish this purpose for some time to come. In the event that the purpose can no longer be achieved, the court would have the authority to change the purpose to a closely conforming purpose.¹⁷ In the end, it is highly unlikely that a charitable trust fund, as long as it has funds in it and the purpose of the trust is not illegal, would be extinguished unless its purpose is no longer achievable.¹⁸

One other benefit of a charitable trust fund model is that if there are any irregularities in the trust the State Attorney General's would have the authority to investigate the trust and force it to act if need be.¹⁹ For example if a landowner paid into the trust fund and the trust fund did nothing to remediate the property, the Pennsylvania State Attorney General would have the authority to investigate the trust and force it to act.

V. How the Charitable Trust Fund Model Would Work:

A. Trust Activities/Functions:

The trust would be organized in such a way that it would be able to accept environmental liabilities, and be able to buy, sell, and manage property. The trust would be organized in such a way that it would be able to take an adaptive management approach to certain sites. Adaptive management of sites adopts the view that not all contamination has a one-time fix and that most contaminated sites require long term monitoring. Adaptive management also recognizes that advances in time and technology can change our view of what "clean" really means; and that those changes can influence future actions on previously remediated sites. For an entity to employ the adaptive management approach to contaminated sites, the entity would have to be very flexible. Adaptive management is basically trial and error and observing actions and

¹⁶ *id.*

¹⁷ *id.* This is known as the doctrine of *Cy Pres.*

¹⁸ *id.*

¹⁹ *id.*

reactions.²⁰ Adaptive management would require constant and active participation in a site, and a charitable trust fund model would be able to manage this approach.

B. The Money:

The trust would need initial seed money, the corpus, from the State. Just as an example, the State would contribute a one-time sum of 15 million dollars. After this initial influx, the trust should be self-sustaining. When a landowner approaches the trustees with the intent to buy into the trust, the trustees would retain the services of an environmental remediation firm to estimate the cost of the remediation and any future monitoring. This estimate would be the foundation of what would become the buy in price for the landowner. The trustees would then add an additional 20% to 30% of the estimated remediation costs to get the actual buy in price. The extra money would be used to buy Environmental Legal Liability Insurance on the site that would cover any third party claims. The remaining funds would go back into the trust to create an insurance pool that would be accessible to all properties that participated in the trust. The danger of the trust running out of funds once it starts accepting liabilities is slim. Combined with the initial seed money from the state, the extra funds from remediations that come in under budget should more than compensate for the few remediations that run over budget.

C. What the landowner receives:

Once the landowner has paid into the trust, the State would waive any environmental liability that the landowner may have had in connection with the property, even third party claims. The State would waive this liability because the State would be participating in the management of the trust. The State would appoint a panel of experts to govern the trust. In theory, the State appointed panel of experts would help to ensure that no single interest would ever control the trust and that the State's concerns would be met at each individual site.

There can be no release of liability on the federal level for a landowner participating in a trust system such as this. However, the trust would enter into a contractual agreement with the landowner. That contract

²⁰ Jonathan Z. Cannon, *Adaptive Management in Superfund: Learning to Think Like A Contaminated Site*. N.Y.U. Environmental Law Journal, Vol. 13 at 569 (Oct. 28, 2005).

would require the trust to shield the landowner from any federal environmental liability stemming from the site.

D. What the community receives:

The community would hopefully benefit from local brownfields remediations as a result of landowners participating in the trust. The trust should encourage the owners of contaminated sites to either put the properties back on the market, or remediate the sites in order to benefit the communities in which they are located. If the mothballed properties are released for sale, the environmental concerns on the properties can be remediated and the land can be put to a much more productive use. In addition, recycling mothballed properties, and putting them back to productive uses once again, can help to preserve more green space. A system such as this could breath new life into many seemingly dead areas in a community.

E. Potential problems with this model:

The first potential problem is that it may be difficult to convince the State to contribute the seed money to start the trust. However, I have no information on this topic, as this is only research at this time I have not yet inquired.

The next potential problem is one of public perception. The public may view a landowner's participation in the trust as an easy way for that landowner to get "off the hook." This of course would not be the case because the landowner would be paying for the remediation and future monitoring of the site. The hitch for some of the public will most likely be that the landowner would be released from liability forever by participating in this trust. The idea that the landowner can be released from liability permanently is contrary to current environmental legislation. It may take people a little while to accept a model that releases landowner liability completely.

Another potential problem may be that the model, as applied, could pit cleanup standards against the allotted budget for a site. This is simply speculation. It should be noted however, that the life of the trust depends in part on some of the property remediations coming in under budget so that the extra money creates an "insurance pool." If the properties do not come in under budget, the trust would slowly run out of funds.

By the very nature of the model, it is conceivable that there could be competing interests between the remediation budgets and the need to keep the “insurance pool” healthy.

The most troubling potential problem could be that the owners of sites that are “upside down” may not be able to participate in the trust. An upside down site is one in which the cost of remediation would be more than the land is worth. If the landowner did not have the money to pay the buy in price, the owner would not be able to participate in the trust. If the trust were to accept upside down properties, the trust may not be able to keep up the insurance pool. The trust would leave out a large number of contaminated sites by not being able to address the concerns of landowners with little or no funds.

VI. Future Steps:

The Trust fund option could assist many communities and landowners across the state. Going forward however, instead of a trust fund based entity it may be more beneficial to have a state wide regional redevelopment authority (RDA). This RDA would also be partnered with the State. It may be able to work similarly to the trust fund mechanism. The RDA may be able to better assist the owners of contaminated sites that are upside down, or have little funding.

The RDA model would be more flexible. The RDA would not be dependant upon the “insurance pool” as the trust fund would. The ideal setup would be one in which the RDA receives funding from the State. Outside funding would enable the RDA to take the higher risks that come with obtaining upside down properties. Being able to turn around upside down properties, would also be very beneficial to communities across the State. Some examples of worthwhile models that come to mind could be the Urban Redevelopment Authority of Pittsburgh and the Regional Industrial Development Corporation.