The Polanco Act Process

There are a variety of ways to use the Polanco Act in a redevelopment project. The following is one process that could be used to address a defined area within a City/County or a site-specific case:

1. Conduct a preliminary master environmental assessment (MEA), a modified Phase I, for the entire redevelopment area, City-wide or even County-wide.
2. Identify properties of environmental concern (PECs).
3. Conduct full Phase I Environmental Site Assessments (ESAs) for PECs.
4. Perform a receptor evaluation – water well impacts, sensitive populations.
5. Conduct a search of potential RPs for each contaminated facility.
6. Adjust land-use designation based upon environmental assessments.
7. Carve-out parcels that require long-term remediation activities.
8. Select the State oversight agency through the site designation process.
9. Develop an oversight (Polanco) agreement and Prospective Purchaser Agreements (PPAs) with the agency.
10. Develop a stakeholder/community outreach and education program.
11. Prepare a master environmental workplan (MEW) that covers all site investigations and likely remediation programs within the redevelopment area.
12. Develop a web-accessed Geographic Information System (GIS) for all environmental and redevelopment data, and other information.
13. Develop a schedule for remediation and redevelopment.
14. Provide 60-day notice to RPs, including:
    - A general scope of work;
    - An agreement for cooperation with the City/County in the cleanup process;
    - A list of pre-qualified environmental consultants; and
    - A list of pre-qualified environmental/land use/real estate attorneys.
15. Review and comment on RP submittals, negotiate final scope, and/or develop site investigation/remediation plans for City/County implementation.
16. File cost recovery actions against recalcitrant RPs (process can start earlier).
17. Implement Phase II environmental site investigations to (1) confirm releases; (2) delineate magnitude and extent of contamination; and (3) assess risk and establish cleanup endpoints (health risk assessment or HRA).
18. Implement Phase III remediation planning, including (1) remediation pilot testing and feasibility study (FS); (2) remedial action plan (RAP); and (3) remedial design and permitting.
19. Implement Phase IV active remediation programs, including (1) construction and installation; (2) ongoing system performance monitoring and maintenance; and (3) ongoing monitoring of contaminant conditions.
20. Obtain closure (No Further Action or NFA) letter from State agency.

The construction development can proceed parallel with, or subsequent to, investigation and remediation. Many of these steps can be moved up or down in sequence, as the project needs dictate.

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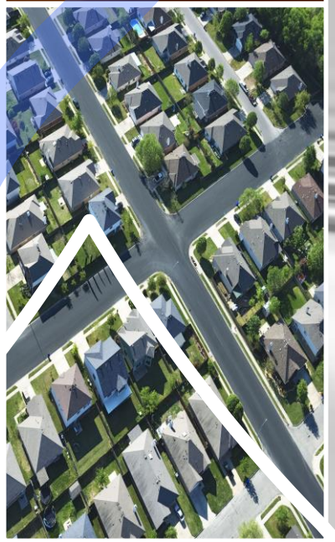

Brownfields, AB 440, and the Polanco Act

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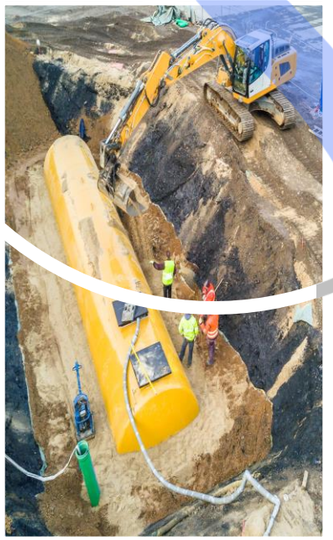

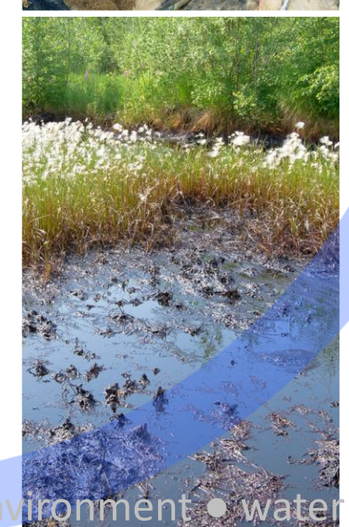

Brownfields, AB 440, and the Polanco Act

California's population continues to increase - 34 million in 2000, 36 million in 2006, 38 million in 2012, and projected at 42 million in 2020. These people need places to live, work, play and shop. The pressures on available land in California are increasing correspondingly, and have been exacerbated by the Great Recession, as virtually no new houses were built to accommodate the ever-increasing population between 2006 and 2012. Our urban areas are squeezed up against the ocean, mountains and deserts, and urban sprawl is eating up valuable agricultural land, open space and recreational areas, and ecological habitat. However, many inner cities are under-utilized or even blighted.

Urban Redevelopment

To promote urban redevelopment and economic growth, particularly in blighted inner-urban cores, many cities created community redevelopment agencies (CRAs or RDAs). However, the CRAs were faced with the problem of addressing many contaminated properties, often referred to as Brownfields. These properties must be cleaned up expeditiously and effectively to allow redevelopment to proceed on schedule. Alas, the normal regulatory oversight structure may not facilitate expediency. Therefore, in 1990, language was added to California's Health and Safety (H&S) Code by State Senator Polanco (Assembly Bill [AB] 3193) to address the problems associated with redevelopment of Brownfields and provide protection to CRAs (and even subsequent developers).

Dissolution of CRAs

In light of the economic difficulties facing California resulting from the Great Recession of 2008 to 2011, the legislature took steps to dissolve CRAs in October 2011 under AB 26. The intent of this action was to direct critical State and local public funds to schools, police and other essential services, rather than toward urban redevelopment. The dissolution faced several legal challenges, but the legislative action was ratified by Court-ruling in February 2012.

AB 440

As the California economy improved in 2012 and 2013, legislators recognized the need for urban redevelopment as a means to provide adequate housing and amenities to a growing population, and stimulate job growth and the local economy. They also recognized that contamination posed one of the most significant obstacles to such redevelopment. Therefore, AB 440 was drafted to allow local public entities; that is, Cities, Counties and their respective public agencies (e.g. Housing Authorities), to use the powers in the Polanco Act. The bill was signed by the Governor on October 5, 2013.

The Polanco Act

To summarize, the Polanco Act includes measures authorizing CRAs (now Cities and Counties) to direct cleanup of contaminated properties within their jurisdictions and obtain immunity for liability under State law if such cleanups are conducted in a certain manner. Under Polanco, the CRA (now City/County) can take the following courses of action whether it intends to acquire the property or not:

1. Request a remediation plan from the Responsible Party (RP);
2. Propose a remediation cleanup plan to the RP in the first instance; and
3. Implement the plan, if the RP fails to submit a plan or respond to the proposed plan within 60 days. The redevelopment agency can then recover these costs, and any attorney fees, through a cause of action against the RP(s).

Under the Polanco Act, H&S § 33459.1(b)(2), a CRA (now City/County) has the discretion to determine the key components of the cleanup (H&S § 33003). First, the cleanup must be consistent with the schedule for redevelopment. Second, the City/County plays a significant role in determining appropriate cleanup guidelines by (1) determining future land uses; (2) setting deed restrictions; and (3) reviewing and approving any risk-based remediation end-points. Third, the City/County has the authority to determine whether investigation and remediation programs are consistent with the guidelines contained in the National Contingency Plan (NCP) (40 Code of Federal Regulations [CFR] Part 300).

The Fee-Shifting Provision

The Polanco process starts by the City/County providing written notice to a RP that a remedial action plan (RAP) is required. This is supported by a "fee-shifting" provision that allows a City/County to recover its consultant and attorney's fees as part of its reimbursable "response costs". The RP must respond to the written notice within 60 days with a RAP. As stated, if timely response to is not received, the City/County may itself undertake investigation and cleanup with the approval of an appropriate regulatory oversight agency (e.g. Department of Toxic Substances Control [DTSC]), and subsequently recover its costs.

The Polanco Act Advantage

The Polanco Act provides the following potential advantages:

- Provides a more effective, expeditious cleanup;
- Tackles multi-parcel, multi-party, multi-contaminant issues too large to be addressed by individual property owners;
- Allows cleanup to be conducted in the public arena through increased community outreach, and freedom of access to documentation, information and data;
- Improves the chances that most, if not all, stakeholders will be satisfied with the cleanup;
- Provides economies of scale from concurrent or consecutive multi-parcel remediation;
- Allows for reduced environmental insurance premiums;
- Casts a positive public light on the City/County; that is, they are perceived as being proactive on environmental justice issues as opposed to solely redevelopment focused;
- Improves the chances of cost recovery for investigation/remediation programs from RPs;
- Limits the potential that the City/County will be named a RP;
- Provides immunity from State law (and even federal environmental law, if negotiated up front) for the cleanup to the City/County, developer and future property owners/occupants, and their successors;
- Allows for carve-out of contaminated areas, leaving "clean" land available for immediate redevelopment;
- Allows the redevelopment and cleanup to progress along a common schedule;
- Reduces the effect that actions, or inactions, of a State oversight agency can have on redevelopment;
- Allows for greater cost certainty in the remediation and construction programs;
- Allows cost savings by "co-mingling" remediation and construction activities (e.g. excavation of contaminated soil and construction of subterranean parking);
- Improves the chances of receiving Federal and State Brownfield grants; and
- Improves the chances that the final redevelopment will be acceptable to the community and all stakeholders.

Continued overleaf

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