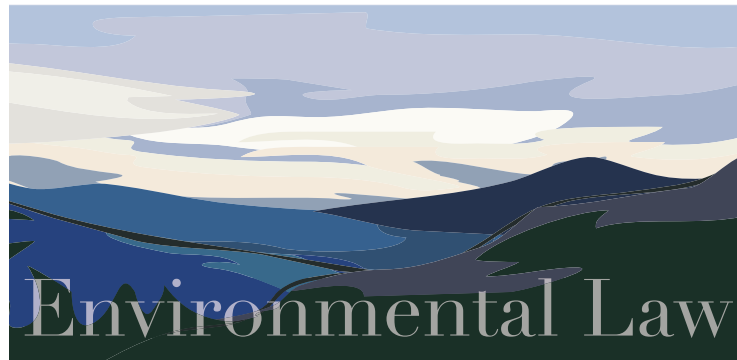


Special Report



MSDs CREATE NEW ALTERNATIVES FOR IMPACTED PROPERTIES

by DEBRA TSUCHIYAMA BAKER

For decades, properties with contaminated groundwater often faced long-term remediation, even if people would never use the groundwater for drinking, bathing, cooking or irrigating crops intended for human consumption. In cases where technology could never remove groundwater contamination completely, property owners commonly installed infrastructure to pump and treat the groundwater for indefinite periods, requiring long-term maintenance and the posting of financial assurance by the responsible parties. In many cases, these long-term groundwater remediation requirements and/or systems rendered these potentially valuable properties completely useless; they were unmarketable into the foreseeable future and not available for redevelopment.

Recently, potential relief from long-term cleanup requirements has become available, allowing those involved with real property to redevelop impacted properties while still protecting the public from potential exposure.

The Texas Legislature laid the groundwork for this relief back in 2003, when it passed a municipal setting designations statute (MSD) that creates an alternative to existing state regulation for addressing groundwater contamination. An

MSD is an official state designation given to property within a municipality that certifies that designated groundwater at the property is prohibited from current and future use as potable water, because the groundwater is contaminated in excess of allowable requirements.

The MSD law uses a municipal ordinance or restrictive covenant instead of Texas Commission on Environmental Quality (TCEQ) regulations to protect the public against exposure to contaminated groundwater.

Houston's city council passed an MSD ordinance in August that will become effective in November. Dallas passed its MSD ordinance in 2005 and already has processed a number of applications over the past few years.

In an MSD, the prohibition against using groundwater for potable purposes must be in the form of a city ordinance or restrictive covenant filed in the property records. To be eligible, the proposed MSD property must be within the corporate limits or extraterritorial jurisdiction of a municipality, there must be a public water supply system that meets state requirements for supplying drinking water to the MSD property and all properties within one-half mile of the MSD property, and the municipality must have adopted an ordinance or resolution that can prohibit potable use of the designated groundwater beneath the MSD property.

The TCEQ ultimately will decide whether to grant an MSD application; however, the TCEQ can only certify an MSD application if the municipality supports the application. An MSD application can be processed and precertified by the TCEQ if the other eligibility requirements are met but cannot be considered complete until the city adopts the ordinance or restrictive covenant in support of the application.

The cities of Dallas, Fort Worth and Houston have adopted procedural ordinances that require the submission of an application to the city, notification to third parties, participation in a public process, and the provision of technical information regarding the nature and extent of the impacted groundwater at the proposed MSD property. For example, Fort Worth's procedural ordinances for MSD applicants include a requirement that applicants directly contact the city and retail public utilities before they submit an application to determine whether there is municipal support for an MSD. Dallas requires the property to be in a TCEQ regulatory program before the city council will approve an MSD application, and it requires the payment of various processing fees and other costs, as well as requires the applicant's representative to schedule an informal pre-application meeting. The requirements and process may differ from city to city, so each city should be contacted directly to ensure compliance with its particular program.

Whether the municipality and TCEQ will deem a particular MSD application appropriate depends upon a combination of considerations, such as the nature of the contaminants, the expected behavior of groundwater over time and other technical issues.

Attorneys involved in real estate transactions, commercial development and environmental matters can assist applicants in evaluating whether a property is suitable for MSD consideration, assessing the regulatory requirements that will come into play to evaluate impacts, and meeting various legal notification and public notice requirements.

First, clients will need assistance in addressing the eligibility requirements of the MSD program, identifying various impacted properties, the whereabouts of nearby water wells, and the potentially onerous notice requirements and public hearing procedures. If the property appears to be a good candidate for the goals of the real estate transaction and the MSD program, lawyers and environmental consultants can assist in the legal and technical aspects of obtaining information regarding groundwater zones used for potable water, identifying zones that the project may impact, assessing the potential for future migration of contaminants, evaluating hydrology considerations, and assessing the nature and chemical and physical properties of the groundwater contaminants at issue. Lawyers can also

address these components in the MSD application submitted to the municipality and the TCEQ as a part of the process.

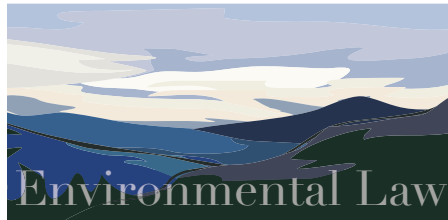
Lawyers also have a role in helping their clients comply with the statutory notification requirements, which include exercising due diligence in identifying property owners and other parties to whom the client must give notice. Lawyers can draft a notice letter identifying the location of the proposed MSD property,

explain the reason for the MSD certification, notify others of the opportunity for third parties to provide comments to the TCEQ, and identify the groundwater contaminants at issue and the party responsible for the contamination.

In addition to the TCEQ's notice-letter and application requirements, cities may establish their own procedures. These can involve requiring applicants to contact designated city officials for support and work with particular city departments to evaluate the suitability of a particular property for the MSD program. Complex legal and technical issues arise in a city's evaluation of MSD properties, so lawyers can ease the submission and evaluation process by responding promptly to additional questions and requirements identified by a particular city.

Once a client submits a completed application to the TCEQ and complies with all of the city's individual program requirements, the city can issue its local ordinance or restrictive covenant signifying its approval of the application to the TCEQ. At that time, the TCEQ can make its final determination on whether to grant the MSD.

Note that an MSD certificate issued by the TCEQ is conditioned upon the city's ordinance or restrictive covenant remaining in effect. To the extent that a city withdrew its support and repealed its ordinance, this would remove the prohibition against the potable use of the contaminated groundwater. The impact on a given real estate transaction of such a repeal and the resulting legal issues could be significant. Lawyers may be called upon to address such transactional issues as the use of municipal setting designations becomes more common. ■■■



Debra Tsuchiyama Baker is a founding partner in Connelly • Baker • Wotring • Jackson in Houston and a graduate of the Georgetown University Law Center. She has focused her practice on complex environmental law issues for more than 23 years and has an active practice associated with environmental impacts on real property and commercial real estate transactions. She spoke before the Houston City Council in favor of the municipal setting designation ordinance.