
Introduction to Brownfields

In the United States, real property is one of the most valuable economic assets. While this country puts most real property into productive use, some properties lie abandoned or idled. These properties, called “brownfields,” may remain unused or underutilized because of actual contamination from past commercial or industrial use or because people fear the property’s previous use may have left contamination. This fear may result in relatively clean property remaining idle because parties, who otherwise would redevelop brownfields, may search out unused property, or “greenfields,” to avoid the costs associated with the cleanup of contamination.

The Environmental Protection Agency (“EPA” or “Agency”) believes that the cleanup of contaminated property, including brownfields, and the clarification of federal environmental cleanup liability, are the foundation for sustainable reuse of previously used property. By fostering the cleanup and appropriate reuse of brownfields, EPA fulfills its mission to protect human health and the environment as well as to conserve greenfields from development that leads to environmental degradation.

EPA recognizes that some private parties believe federal environmental laws and policies have created roadblocks to reusing property. The federal environmental laws that most affect the cleanup and reuse of brownfields are CERCLA (often referred to as Superfund) and RCRA. The cleanup provisions of these

Statutory Definition of “Brownfields”

The Small Business Liability Relief and Brownfields Revitalization Act of 2002 defines a ‘brownfield site’ as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous waste substance, pollutant, or contaminant.”

laws require EPA to focus its attention first on cleaning up the nation's most toxic waste sites in order to protect human health and the environment. Under CERCLA or RCRA, the current owner or operator of a contaminated property may be held responsible for the cleanup. Although potential liability is a valid and serious concern for landowners, it is important to keep this concern within context. For example, in 1995, the Office of Technology Assessment estimated that 450,000 brownfields existed nationwide. A more recent report from the January 2000 U.S. Conference of Mayors provides a national tally of 600,000. Only about 8% of all brownfields are considered for Superfund's National Priorities List (NPL) (a list of the nation's worst hazardous waste sites) with less than 1% actually placed. Therefore, at least 99% of all the potential brownfield properties across the country will not require federal EPA action. **Although the existence and applicability of federal environmental cleanup laws and regula-**

The Local Nature of Reuse Projects

By its very nature, property reuse is a local activity. Parties with the greatest stake in the economic and environmental benefits of a reuse project are the owner(s), surrounding property owners, local citizens, developer(s), local government, and state government. Because of their stake in the project, these parties are generally in the best position to plan, implement, and oversee required cleanup and reuse activities.

There are many issues that affect property reuse; federal environmental cleanup liability is only one. After a party has a clear understanding of its federal environmental cleanup liability risks and the ways it can minimize them, that party may work primarily or exclusively with state government, local government, and community interests in addressing non-federal issues and planning and implementing its reuse project.

tions could have an impact on development, the reality is that EPA has taken action at very few brownfield properties.

The relatively small number of these brownfield sites on the NPL is just one fact illustrating that federal environmental cleanup liability risks associated with brownfields are not nearly as large as one might imagine. Even for risks that could be significant, both Congress and EPA have developed mechanisms that can help parties minimize and manage the risks of reusing brownfields.

The fact that private parties, states, tribes, municipalities, communities, and federal agencies collaborate to effectively clean up and reuse property indicates that these tools are working. Evidence of growth and interest in brownfields reuse is demonstrated by several initiatives EPA has recently undertaken. Superfund Redevelopment Initiative (SRI), RCRA Brownfields Prevention Initiative, and USTfields are

three such efforts to more broadly integrate brownfields approaches into remedial cleanup programs.

New Initiatives

Superfund Redevelopment Initiative

In an effort to help communities return Superfund sites to productive use, EPA launched SRI. The goal of SRI is to make sure that the Agency and its partners have the necessary tools to fully explore and implement land use opportunities at every site. This coordinated program uses a wide variety of tools, such as facilitation services, that bring liable parties, community groups, and local government leaders together to determine the future use of a Superfund site once it is clean. The site-specific nature of Superfund remedy decisions allow EPA regional staff to work with stakeholders to determine the best cleanup approach to ensure successful reuse.

A cornerstone of SRI is the pilot program. Since the summer of 1999, EPA an-

nounced 50 pilots that would receive national recognition through the development of reuse plans; use of local government and Agency cooperative agreements; workshops that bring together pilot participants to exchange information and share ideas; and a partnership conference where pilot participants meet with private organizations to develop alliances.

SRI has created a climate where liable parties, local governments, communities, developers, and others are rethinking the value of Superfund sites. They are now more likely to consider these sites for a variety of new uses - from golf courses and parks to national retail stores and transportation hubs. To date, 260 NPL sites are now,

Private Tools

Although not addressed in this handbook, various private tools can be used to manage environmental liability risks associated with brownfields and other properties. These tools may include the following:

- **Indemnification Provisions** - These are private contractual mechanisms in which one party promises to shield another from liability. Indemnification provisions provide prospective buyers, lenders, insurers, and developers with a means of assigning responsibility for cleanup costs, and encourage negotiations between private parties without government involvement.
- **Environmental Insurance Policies** - The insurance industry offers products intended to allocate and minimize liability exposures among parties involved in brownfields redevelopment. These products include cost cap, pollution legal liability, and secured creditor policies. Insurance products may serve as a tool to manage environmental liability risks, however, many factors affect their utility including the types of coverage available, the dollar limits on claims, the policy time limits, site assessment requirements, and costs for available products. Parties involved in brownfields redevelopment considering environmental insurance should always secure the assistance of skilled brokers and lawyers to help select appropriate coverage.

or soon will be, in reuse; on-site businesses employ over 15,000 people with an annual income of half a billion dollars; and over 60,000 acres have some ecological or recreational reuse.

RCRA Brownfields Prevention Initiative

The first brownfields assessment pilots highlighted the need to address environmental issues beyond the Superfund context. In June 1998, EPA announced the RCRA Brownfields Prevention Initiative. The objective of the Initiative is to prevent future Superfund sites or brownfields by using brownfields tools to clean up and provide long-term sustainable reuse of RCRA facilities. Through the Initiative, EPA is exploring opportunities within the existing statutory and regulatory framework to facilitate the reuse of RCRA sites. The goal is to foster a “brownfields” culture in RCRA cleanup programs by working together across EPA, states, tribes, industry, and communities to tap the redevelopment potential of RCRA

sites. To date, the Initiative components include outreach workshops; industry and community stakeholder dialogue sessions to identify reuse impediments; informational documents; and, nine pilots.

USTfields Initiative

The Office of Underground Storage Tanks (OUST) defines USTfields as “abandoned or underused industrial and commercial properties where redevelopment is complicated by real or perceived environmental contamination from federally-regulated underground storage tanks (USTs).” Of the estimated 450,000 to 600,000 brownfields sites in the United States, approximately 100,000 to 200,000 contain abandoned USTs or are impacted by petroleum tank leaks. The Brownfields program, however, is unable to devote funds toward USTfields because CERCLA prohibits the use of Trust Fund money on most petroleum sites.

The USTfields Initiative plans to use the same kind of prob-

lem-solving methods implemented by the Brownfields program. This new program will provide 50 grants to states and tribes for community pilot projects. EPA will allot each pilot up to \$100,000 to assess and/or clean up sites to ready them for reuse. The pilots are intended to supplement or coordinate with existing EPA cleanup and redevelopment pilots, such as brownfields assessment pilots. The USTfields pilots must involve corrective action with respect to petroleum releases from underground storage tanks and address the future reuse of sites. OUST believes the Initiative will demonstrate how to effectively assess and clean up petroleum-impacted sites and foster reuse using limited resources.

New Legislation

The Small Business Liability Relief and Brownfields Revitalization Act, P.L. 107-118 ("SBLRBRA" or "the Act") signed into law by the President on January 11, 2002, creates new exemptions from Superfund liability, authorizes brownfields revitalization funding, and provides assistance to state and local site clean-up programs.

The SBLRBRA consists of two titles. Title I addresses liability exemptions for parties who generate and transport small quantities of hazardous substances and certain generators of municipal solid waste. Title I also provides for expedited settlements with certain parties that can demonstrate a limited or inability to pay their share of response costs. The Title II amendments focus on facilitating the responsible cleanup and re-use of contaminated properties. The amendments provide specific statutory authority for the U.S. Environmental Protection Agency's (EPA or Agency) brownfields program and authorize appropriations to fund brownfields grants and grants for state and tribal response programs. Title II also provides conditional exemptions from CERCLA liability for contiguous property

clarifies the pre-existing innocent landowner defense. Finally, the amendments place certain limits on EPA's use of its enforcement and cost recovery authorities at low-risk sites where a person is conducting a response action in compliance with a state program.

The complete text of SBLRBRA may be found at <http://www.epa.gov/brownfields/html-doc/hr2869.htm>. A summary of SBLRBRA may be found at <http://www.epa.gov/swerosps/bf/html-doc/2869sum.htm>. A summary of the liability provisions may be found in Appendix B.