EPA AND STATE BROWNFIELDS PROGRAMS

by:

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I. INTRODUCTION.

Under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"),[1] and similar state laws,[2] the owner or operator of a contaminated site is potentially responsible for all costs of responding to hazardous substances that are present. 42 U.S.C. §9607(a). Predicting the costs of the cleanup with any certainty is often difficult, even where the problems are reasonably well defined. Unknown problems present another significant concern, creating additional uncertainty. Known or unknown, the costs of environmental cleanups can be enormous, and the owner or operator of a contaminated site has a real risk of incurring liability for these costs.

The uncertainty associated with environmental liabilities often creates a major deterrent to the improvement or redevelopment of existing industrial properties. Not surprisingly, prospective purchasers, developers, investors and financial institutions avoid any investment in property where there is some real or perceived risk, however remote, of incurring environmental liability. As a result, thousands of properties across the United States have become underutilized. Recent initiatives at the federal and state levels are attempting to bring these "Brownfield" properties back into productive use.

EPA defines "Brownfields" as "abandoned, idled, or under-used industrial and commercial facilities where expansion and redevelopment is complicated by real or perceived environmental contamination."[3] In order to revitalize these Brownfields, EPA and the state initiative seek to relieve developers of the risk of incurring uncertain, and potentially enormous, liabilities. Efforts to develop methods and procedures for redeveloping Brownfields grew substantially when U.S. EPA Administrator Carol Browner first announced the federal "Brownfields Action Agenda" at a press conference held on January 25, 1995. Since that time, EPA and the states have rushed into developing and improving various "Brownfields Initiatives." Along the way, many states have also developed "voluntary cleanup programs."

If defined with reasonable certainty, cleanup costs represent an additional project cost that can be evaluated by a prospective developer. To the extent the costs can be quantified, the risks become manageable. With costs defined and risks managed, Brownfields transactions are transposed into a form that is more typical to traditional real estate transaction analysis. For example, in competitive real estate markets, cleanup costs can be counterbalanced by the value of some other attribute of the property and/or by some form of subsidy or benefit. The time frame within which public regulators act is

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1 / 42 U.S.C. §9601 et seq.

2 / See e.g. Pennsylvania Hazardous Sites Cleanup Act, 35 Pa. Stat. §6020.101 et seq.; Massachusetts Oil and Hazardous Material Release Prevention and Response Act, M.G.L. c. 21E.

3 / EPA Policy on the Issuance of Comfort/Status Letters (Jan. 30, 1997).

also extremely important to brownfields redevelopment. Time represents money to developers and investors alike. Coordination and cooperation between different levels of governments and different agencies at each level is critical if brownfields projects are to be competitive with other real estate development opportunities.

This paper provides a brief review and summary of some of the significant Brownfields initiatives.

II. THE PROBLEMS ~ OWNER AND OPERATOR LIABILITY FOR UNKNOWN CLEANUP COSTS

Commencing with the enactment of CERCLA at the end of 1980, a revolution in the nature of environmental liability occurred. For federal purposes, the term "Superfund" means The Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). By the end of 1988, fully 38 states had adopted their own Superfunds.

Superfund, and its state equivalents, impose liability on broad classes of responsible parties, including current and past owners and operators of facilities contaminated by hazardous substances. Superfund imposes strict, joint and several liability. This means that owners who acquire property after contamination took place may be held liable for the entire cost of cleanup, without regard to actual fault. Liability as an "operator" occurs under CERCLA when a party, irrespective of ownership, exercises "control" over operations at the site where contamination occurs. These laws draw on the no-fault concept applied to minor motor vehicle collisions.

Most Superfund laws create liens on the properties that are the subject of cleanup efforts. Some state programs impose “Super-liens” that have priority over all other liens, whenever recorded. Due to conflicting judicial interpretations of the scope of liability for secured creditors, many lenders and other investors take a very conservative and cautious approach, avoiding properties with any potential liabilities.

Recognizing that the bill for Superfund and similar cleanups are estimated to have exceeded $50 billion for the years prior to 1993, the threat is substantial.

III. THE SOLUTION ~ FEDERAL AND STATE BROWNFIELDS INITIATIVES

Brownfields initiatives take a number of forms, and some are more successful than others. An overview of federal and state initiatives is provided here.

A. FEDERAL PROSPECTIVE PURCHASER AGREEMENTS.

A "Prospective Purchaser Agreement" ("PPA") with EPA provides, arguably, the greatest certainty, protection, and comfort for developers and investors. Under a PPA a prospective purchaser of a contaminated property enters into an agreement with the EPA to resolve potential cleanup liability in return for financing or undertaking some portion of the response actions at the site.

On May 25, 1995, EPA issued its most recent Guidance on Agreements with Prospective Purchasers of Contaminated Property ("Guidance"). This document directs EPA regional offices to enter into flexible and "fast track" agreements not to sue Brownfield developers who offer to undertake (or finance the cost of) some remediation of contaminated property. 60 Fed. Reg. 34790 (July 3, 1995). By providing a mechanism for creating protection from liability under Superfund, the Guidance represents one of the more important steps under EPA's "Brownfields Action Agenda."

Under the criteria established in the Guidance, EPA will only consider entering into a Prospective Purchasers Agreement in the limited circumstances where:

1. **An EPA action at the facility has been taken, is ongoing or is anticipated by the agency, so as to create a realistic probability of incurring Superfund expenses; and**

2. **The agency receives a substantial benefit, either in the form of a direct contribution to the cleanup, or an indirect public benefit in the form of job creation and other community benefits.**

Under the criteria, EPA must also be satisfied that the redevelopment project will not create risks to human health or the environment, and that the prospective purchaser is financially viable.

If a project satisfies EPA's criteria under the Guidance, EPA will proceed with negotiating a Prospective Purchasers Agreement. The nature and scope of the agreements will vary substantially based upon site-specific considerations.

B. EPA COMFORT LETTERS.

The circumstances under which EPA will contemplate a prospective purchaser's agreement are, regrettably, fairly limited. EPA does offer an alternative form of "relief" in the form of a "Comfort" letter. EPA will issue these letters in accordance with its Policy on the Issuance of Comfort/Status Letters (Policy), which was published on January 30, 1997, 62 Fed. Reg. 4,624, pursuant to EPA's Brownfields Action Agenda. Comfort letters are designed to assist parties interested in Brownfield sites by providing them the information needed to evaluate EPA's actual or potential involvement in a cleanup at a particular site.

The Policy limits the circumstances in which EPA will issue a Comfort letter to only those situations where:

1. **Additional information may facilitate the cleanup and redevelopment of a site;**

2. **There is a realistic perception or probability of incurring Superfund liability; and**

3. **There is no other mechanism available to adequately address the parties' concerns.**

The letters provide neither a release of CERCLA liability nor do they limit EPA's enforcement authority. The policy includes four model comfort/status letters for the applicable situations summarized below:

- No Previous Federal Superfund Interest Letter -- Issued when there has been no federal Superfund program involvement at the site. The letter would indicate that the site has never been listed on the Comprehensive Environmental Response, Compensation and Liability Act Information System (CERCLIS) or otherwise addressed by EPA under Superfund and that the EPA has no current plans to take any such action.

- Previous Federal Superfund Interest Letter -- Issued when the site either has been delisted from the CERCLIS or the NPL or is situated near a Superfund site. With respect to delisted CERCLIS or NPL sites, the letter would state that EPA believes no further federal response is warranted based on current information. It would, however, add that the site may be relisted as new information becomes available. With respect to a site that is near a Superfund site, the letter would provide that the site is not presently considered part of the Superfund site. It would add that the EPA anticipates no need to take any action at the site unless new information, indicating otherwise, becomes available.

- ❑ Federal Superfund Interest Letter -- Issued for sites where the EPA either is already responding or plans to. The letter would provide the current status of EPA's activities at the site and intended future actions. If appropriate, the letter would also state that based on currently available information, the EPA believes that a specific EPA enforcement policy or statutory or regulatory defense applies to the parties' situation. The letter would expressly state that the letter is for informational purposes only and does not constitute a release of CERCLA liability.

- ❑ State Action Letter -- Issued at sites where there is no current federal Superfund involvement or EPA is providing a secondary role to a lead state agency. The letter would provide that EPA does not intend to take federal action under CERCLA at the site so long as the state has the lead and the parties performing the cleanup are cooperating. The letter would also state that the EPA may take action if it receives additional information indicating federal action is necessary or that the PRPs no longer are cooperating.

C. STATE PROGRAMS.

Over three dozen states have announced Brownfields programs during the last several years. Also, in many states, "voluntary cleanup" programs provide another mechanism for prospective redevelopers to obtain relief from the uncertainty of cleanup liability.

1. Pennsylvania.

On May 19, 1995, Governor Tom Ridge signed into law a three-bill package creating the Land Recycling Program. Pennsylvania's Act 2 of 1995, the "Land Recycling and Environmental Remediation Act," 35 Pa. Stat. §6026.101 et seq., provides an excellent example of a dual redevelopment-voluntary cleanup program. Act 2 provides significant protection from further liability for environmental contamination to "Any person demonstrating compliance with the environmental remediation standards established [under the Act]." 35 Pa. Stat. §6026.501(a). This protection is expressly afforded to the "current owner." 35 Pa. Stat. §6026.501(a)(1). Thus, current occupants can and, in many cases should, take advantage of the protections afforded by the Act 2 program. A more detailed review of Act 2 follows:

a) *Cleanup standards.* Act 2 establishes three acceptable cleanup categories:

(1) Background - "Background" is defined as the level of regulated substances present in the area of the site that are not attributable to releases from the site. Cleanup must remove regulated substances to the level that would be present were it not for releases from the site. Thus, the Background standard provides relief for contaminant derived from other sources.

(2) Statewide health standards - The statewide health standards were established by regulations adopted in July 1997. The standards establish cleanup goals for soil and groundwater. Two sets of standards were adopted, to take into account residential and non-residential usages. Parties using the non-residential standards will be required to restrict the future use of the property by filing a deed restriction.

(3) Site-specific risk-based standards - Site-specific risk-based standards are established on a case-by-case basis, using risk assessment techniques. Under Act 2, the risk assessment must use reasonable assumptions to predict exposure and risk. Unlike the two previous standards, the site-specific standards may use "institutional controls" to limit exposure and risk. For example, fencing and capping can be used to substantially limit exposure pathways, thereby substantially relaxing the necessary cleanup requirements.

(4) Special industrial sites - Act 2 provides additional incentives for the cleanup and redevelopment of "special industrial sites," which are properties that are abandoned or in state-designated "enterprise zones." For these sites, DEP will relieve the purchaser from all cleanup liability, except for those actions necessary to eliminate immediate, direct or imminent threats to public health or the environment, such as drummed waste, which would prevent the property from being used for its intended purpose." 35 Pa. Stat. §6026.902(b).

The cleanup standards apply to all sites under all relevant regulatory programs, including federal response actions under CERCLA.

b) *Cleanup liability protection.* Any person demonstrating compliance with the remediation standards of Act 2 is relieved of further liability under the applicable statutes for **any contamination identified in reports submitted to and approved by the Department to demonstrate compliance with these standards**. The protection extends to citizens suits. The Cleanup Liability Protection applies to the following:

(1) The current or future owner of the identified property or any other person who participated in the remediation.

(2) The person who develops or otherwise occupies the site.

(3) A successor or assign of any person to whom the liability protection applies.

(4) A public utility to the extent the public utility performs activities on the site.

c) *Cleanup procedures.*

(1) Cleanups that will be completed within 90 days of a release and that use the background or statewide standards may proceed without prior notice to the state. The party performing the cleanup must submit to the state appropriate documentation of the site investigation activities, remediation, and attainment of the cleanup standard.

(2) All other cleanups must proceed as follows:

(1) Parties must first submit a notice of intent ("NOI") to DEP and the local municipality. DEP is required to publish the NOI in the Pennsylvania Bulletin and the party conducting the cleanup must arrange for publication in a local paper.

(2) For site-specific cleanup standards, the following reports and studies are required:

- If requested by the municipality, a "public involvement plan" is required.

- A remedial investigation must be performed, to identify areas of contamination.
- A fate and transport analysis may be performed to show that no exposure pathways exist.
- If exposure pathways exist, a risk assessment must be performed to set appropriate cleanup standards.
- A cleanup plan, including a discussion of options to achieve risk-based standards, must be prepared.

These reports can be prepared and submitted to DEP at one time.

(3) For special industrial sites, the following reports are required:

- If requested by the municipality, a "public involvement plan" is required.
- A baseline environmental report must be prepared to identify existing contamination, necessary remedial measures, and proposed beneficial uses.

(4) For all sites, a final report, documenting all remediation activities and the attainment of the cleanup standards must be prepared and submitted to DEP and the municipality. A public notice must be published in the Pennsylvania Bulletin and in a local paper.

(3) For background and statewide standards, DEP has 60 days to review the final report and note any deficiencies. If deficiencies are not noted within 60 days, the report is deemed approved. DEP has 90 days to review the final report for a site-specific cleanup standard or a special industrial area.

(4) Deed notice of contamination is not required if background or residential cleanup standards are achieved. If any contamination is left in place above background levels or residential cleanup standards, deed notice must be recorded.

2. <u>New Jersey.</u>

On January 6, 1998, Governor Christine Whitman signed into law the "Brownfields and Contaminated Site Remediation Act" (BCSRA). P.L. 1997, c.278. As with "Brownfields" initiatives in other states, the BCSRA is intended to facilitate the redevelopment of "abandoned, idled, or under-used industrial and commercial facilities where expansion and redevelopment is complicated by real or perceived environmental contamination."

In order to increase the potential for redevelopment of Brownfields, the BCSRA provides protection from environmental cleanup liability for parties that did not cause the contamination. A party that completes a cleanup under the BCSRA, to the satisfaction of the state, will receive a Covenant Not to Sue from the Department of Environmental Protection. The Covenant runs to lessees, operators and successors.

The BCSRA increases flexibility in the remedy selection process by, among other things, eliminating the need for an alternatives analysis and expanding the possible use of engineering and institutional controls to achieve the applicable health risk and environmental standards. A number of financial incentives are also included in the Act.

3. <u>New York.</u>

The New York State Department of Environmental Conservation (DEC) implemented a Voluntary Remedial Program in 1994. While DEC's Program promotes the redevelopment of contaminated parcels, it is not based on a statutory program. Rather, it is an informal process implemented under DEC's enforcement discretion under existing statutes.

Under the Program, DEC hopes to create greater certainty in cleanup costs, provide comfort to financial institutions and other investors, allow the reuse of contaminated sites with appropriate protection for public health and community needs, and provide notice to potential purchasers and lenders regarding the type of use that has been approved for a remediated property.

1. <u>Massachusetts.</u>

The Commonwealth of Massachusetts has been working to encourage the cleanup and redevelopment of Brownfields since the early 1990s. There are essentially two components to the Massachusetts Brownfields program: the Massachusetts Contingency Plan; and the Massachusetts Brownfields Act.

In 1993, the regulations governing the cleanup of oil and hazardous materials release were substantially revised by the Massachusetts Department of Environmental Protection ("DEP") in order to streamline and privatize the cleanup of contaminated properties. These regulations are commonly known as the Massachusetts Contingency Plan (the "MCP") and serve as a detailed blueprint for cleaning up releases of pollutants without a great deal of government involvement. Rather than overseeing every phase of a cleanup, DEP relies on private environmental consultants – licensed site professionals ("LSPs") to determine whether cleanup standards have been met.

On August 5, 1998 Governor Cellucci signed into law the "Brownfields Act".[4] The Brownfields Act complements the MCP process by protecting many "innocent" parties who may be interested in cleaning up and redeveloping contaminated property from liability under the Commonwealth's superfund statute.[5] The Act also provides new tax credits and two new funding vehicles to jump start redevelopment of these properties.

a) *Liability relief.* The Brownfields Act modifies Chapter 21E by providing various parties with specific liability protection to encourage these types of parties to take on Brownfields. These parties include:

(1) Eligible Persons: owners or operators who did not cause the relevant release and did not own or operate at the time of the release are not liable under Chapter 21E or under common law for response action costs or property damage;

(2) Eligible Tenants: Persons acquiring occupancy, possession or control of a site after a release has been reported to DEP and who did not contribute to the release are not liable under Chapter 21E or under common law for response action costs or property damage;

(3) Secured Lenders: Expands the prior exemption language -- lenders are not liable under 21E unless they cause or contribute to a release or exacerbate the release. Also,

[4] Chapter 206 of the Massachusetts Acts of 1998.

[5] The Massachusetts Oil and Hazardous Material Release Prevention and Response Act ("Chapter 21E"), M.G.L. c. 21E.

clarifies how to maintain the exemption after taking ownership/possession of contaminated properties, such as acting diligently to divest; and

(4) Downgradient Property Owners/Operators: Liability protection provided if they did not cause or contribute to the relevant release. If the source of the off-site contamination is known, the downgradient property owner/operator is exempt from liability. If the source of the off-site contamination is unknown, a defense is provided resulting in a shift in the burden of proof.

b) *Covenants Not to Sue.* The Brownfields Act authorizes the Commonwealth to enter into a covenant not to sue agreement with any current or prospective owner or operator of contaminated property. The Commonwealth may only enter into such a covenant in the event the proposed redevelopment of the property:

(1) Will contribute to the economic or physical revitalization of the community in which it is located; and

(2) Will provide one or more public benefits including new permanent jobs, affordable housing benefits, historic preservation, or creation of open space.

In addition, all parties, except Eligible Persons, entering into a such a covenant must agree to achieve and maintain a permanent solution or remedy operation at the site.

c) *Financial Incentives.* The Brownfields Act creates three funding vehicles for Brownfields sites:

(1) Redevelopment Access to Capital Program: Designed to address lenders concerns that cost overruns incurred during cleanup may impede the borrower' ability to repay the loan, and that contaminated land is "impaired collateral" with reduced value. The program backs up private sector loans with environmental insurance to ensure cleanup is completed, the loan is repaid and the collateral is restored. The program is available to borrowers seeking to fund a site assessment or cleanup at 21E sites. The Commonwealth appropriated $15 Million to this program.

(2) Brownfields Redevelopment Fund: Provides low-interest loans and grants for site assessment and cleanup in economically distressed areas. The Commonwealth appropriated $30 Million with a condition that 30% of all loans and grants be used to fund site assessments. The maximum loan/grant per non-priority project is $50,000 for a site assessment and $500,000 for cleanups. A priority project may receive up to $2 Million in assistance.

(3) Brownfields Tax Credit: A tax credit of 25% - 50% of cleanup costs is available upon completion of the cleanup of contaminated sites located in economically distressed areas. Cleanup costs must be incurred between August 1, 1998 and January 1, 2005.

2. Connecticut.

Connecticut's Urban Sites Remedial Action Program was established in 1992 and operates in conjunction with the state's Property Transfer Act. The program is administered by the Connecticut Department of Environmental Protection ("DEP") and the Department of Economic and Community Development ("DECD").

In 1996, Connecticut adopted uniform standards for the cleanup of contaminated properties. These regulations also take into account different levels of cleanup based upon the reuse of the property.

Under the Urban Sites Remedial Action Program, site cleanup can occur in three ways: a) sites that receive expedited review and approval of voluntary cleanup proposals; b) sites that involve more state participation in the development of cleanup proposals; and c) sites that are purchased by the state for cleanup, allowing the state to remediate itself, to lease or sell the rehabilitated property and to use the lease or sale payment to fund the cleanup.

In addition, the Urban Sites Remedial Action Program has $30.5 million in state bonds available for site investigation and remediation for brownfields sites located in a distressed community or a target investment community which have a high economic development potential.

D. COORDINATION OF FEDERAL AND STATE AUTHORITIES

As is clear from the discussions above, both federal and state cleanup programs create barriers to Brownfield redevelopment. The concurrent and overlapping jurisdiction of states and EPA creates yet another barrier. While state Brownfields programs and voluntary cleanup programs may provide relief from liability at the state level, there is no guarantee that EPA will not seek to impose liability under the federal programs after a state cleanup is completed.

In an effort to address this problem, on September 9, 1997, EPA published "Final Draft Guidance for Developing Superfund Memorandum of Agreement (MOA) Language Concerning State Voluntary Cleanup Programs." 62 Fed. Reg. 47495 (the "MOA Policy"). Unfortunately, many objected to EPA's Guidance because it infringed upon the authority of the states that is necessary to effectively develop and implement voluntary cleanup programs and other "Brownfields Initiatives." See "State Official Voices Opposition to Guidance on Cleanup Agreements" BNA Environment Reporter, p. 841 (Sept. 9, 1997).[6]

EPA's MOA Policy established six baseline criteria that must be met before EPA will enter into an agreement with a state. In summary, to be acceptable for EPA approval of a MOA, a state program must: (i) Provide for meaningful community involvement; (ii) Insure that voluntary response actions are protective of human health and the environment; (iii) Provide adequate state technical and staffing assistance to assure that voluntary response actions are conducted in an appropriate and timely manner; (iv) Provide for written approval of response action plans and certification of completion; (v) Provide adequate oversight; and (vi) Assure adequate resources through enforcement or other authorities to provide for completion of approved response actions if the volunteer fails or refuses to perform (including operation and maintenance or long-term monitoring activities).

If these criteria are met, state programs quality for funding and for state MOA's. Model language offered for inclusion in the MOA would provide:

> Although nothing in this MOA constitutes a release from liability under applicable federal law, generally EPA does not anticipate taking removal or remedial action at sites involved in this voluntary clean-up program unless EPA determines that there may

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[6] EPA subsequently withdrew its MOA Policy due to objections from the states and other parties. Nonetheless, EPA continues to entertain requests from the states for Voluntary Cleanup Program Agreements. While EPA has withdrawn its policy, the discussions that follow demonstrate some of the continuing difficulties that arise due to the overlap of state and federal programs, and the failure to develop a workable means to coordinate those programs.

> be an imminent and substantial endangerment to public health, welfare, or the environment.

If a state's program passes muster under the MOA Policy, EPA will enter into a Memorandum of Agreement with the state that includes this heart warming language. Unfortunately, it seems clear that the exceptions could easily swallow the agreement.

Nonetheless, under an earlier version of the MOA Policy, at least ten states (including, Maryland, Rhode Island, Colorado, Illinois, Indiana, Wisconsin, Michigan, Minnesota and Texas) have entered into a Memorandum of Agreement with EPA, providing some certainty that EPA will not seek to perform response actions at sites cleaned up in accordance with the state voluntary cleanup program.

While EPA has entered into MOA's with some states, officials in Pennsylvania and EPA Region III have indicated at informal gatherings, on several occasions, that there is no movement toward entering into a MOA. Considering the restrictive criteria that must be satisfied in order for a state program to be considered for a MOA, Pennsylvania's program would probably require some refinements before EPA would approve it. Furthermore, for any state that does enter into a MOA, it is difficult to measure the true benefits that are gained, considering the exceptions to EPA's agreement not to pursue parties for response costs.

E. LENDER LIABILITY RELIEF.

On September 30th, 1996 President Clinton signed into law the Omnibus Consolidated Appropriation Act of 1996 which contains (under subtitle E) an amendment to the Federal Superfund Law ("Amendment") extending protection to secured creditors and fiduciaries with respect to environmental liability during the loan term and following foreclosure. The Amendment provides that a non-foreclosing lender will be within this exemption so long as it does not engage in any of three forms of conduct which are deemed to constitute "participation in management": (i) exercise of decision-making control over the borrowers hazardous substance handling or disposal practices; or (ii) exercising control at a level comparable to that of a manager of the borrowers enterprise so as to assume day-to-day decision-making authority over the enterprise; or (iii) exercise control over all or substantially all of the operational aspects of the enterprise other than environmental compliance, see also Kelley et al. v. Manufacturer's National Bank of Detroit et al., 810 F. Supp. 901 (W.D. Mich. 1993).

The Amendment adopts clarifying language originally contained in an August 1996 EPA fact sheet entitled "Affect of Superfund on Lenders that Hold Security Interest in Contaminated Property." The fact sheet indicated that the Agency will not seek enforcement action against a lender that undertakes a response action at a contaminated site under the auspices of CERCLA or under the direction of an on-scene coordinator designated under the federal National Contingency Plan. The fact sheet and Amendment also provide that the secured creditor exemption will continue in force when a lender forecloses on contaminated property and then leases the property under a sale-leaseback form of financing.

IV. DOING THE BROWNFIELD TRANSACTION ~ PRACTICAL TIPS

A. THE PENNSYLVANIA PROSPECTIVE PURCHASER AGREEMENT - RESOLVING THE TENSION BETWEEN CLEANUP CRITERIA AND TRANSACTION TIMING.

The Pennsylvania program creates a tension between cleanup standards and the speed of the remedial process. Under the site-specific standards, remedial goals can be significantly relaxed. However, performing the necessary investigations and studies requires time. Also, the provisions allowing for public involvement can cause further delays.

Fortunately, DEP will often provide the impatient purchaser with a solution that can relieve the tension. Specifically, using its discretionary enforcement authority, DEP will enter into a "Buyer-Seller" agreement that provides a prospective purchase with a Covenant Not to Sue in return for the purchasers agreement to achieve predefined cleanup standards, such as the site-specific standards. The Covenant Not to Sue provides protection for state enforcement actions, but, unlike a complete Act 2 cleanup, it does not provide protection from citizens suits. Once the cleanup is complete, however, the purchaser will achieve the full protection of Act 2.

B. MOVING QUICKLY - BE PREPARED AND MEET EARLY.

Brownfields redevelopment is political hay making. It can create jobs, enhance the real estate tax bases, and revitalizes communities. As such, the state and federal governments take great pride in completing Brownfields transactions. Getting the agency involved early, and getting the agency excited is the best way to speed the process along. It can be done.

C. INVESTIGATE THOROUGHLY - ENVIRONMENTAL DUE DILIGENCE.

It is said that knowledge is power. But in the environmental field, knowledge is the only real way to reduce risk to an acceptable level, even for the

true entrepreneur. Note, for example, that the release under Pennsylvania's Act 2 applies only to known environmental conditions. If something truly unexpected arises after the transaction, Act 2 will not provide protection.

Environmental due diligence has been recognized as an essential element of business transactions for some time. Due diligence should be one of the early steps in evaluating properties. Fortunately, with the development of Brownfields it does not have to be the last step if a problems is detected or suspected.

In 1993, much to the benefit of all concerned, "standard practices" for conducting environmental due diligence were established by the American Society for Testing and Materials ("ASTM"). Prior to the ASTM standards, the scope and depth of environmental investigations varied enormously. The ASTM standards were specifically designed in the context of and to provide protection from CERCLA liability. While "owners" of contaminated property are, by definition, liable under CERCLA, an "innocent purchaser" can avoid liability. To use the "innocent purchaser" defense to CERCLA liability, an owner must show, among other things, that:

> At the time [he/she] acquired the facility [he/she] did not know and had no reason to know that any hazardous substance ... was disposed of on, in, or at the facility.... To establish that [there was] no reason to know, [he/she] must have undertaken, at the time of the acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability..., tak[ing] into account ... commonly known or reasonably ascertainable information [and other factors].

42 U.S.C. §9601(35) (emphasis added). See also 42 U.S.C.§9607(b)(3).[7]

The ASTM standards were intended to establish the procedures that purchaser must follow in order to qualify for the "innocent purchaser" exemption under CERCLA. While the ASTM standards were developed within the context of CERCLA's "innocent purchaser" defense, there utility and applicability clearly extend beyond this. In particular, the ASTM standards provide

[7] The "innocent purchaser" defense to CERCLA liability is, more accurately, a form of the "third-party" defense provided for in 42 U.S.C. §9607(b)(3). The "third-party" defense is available only to persons that have no contractual relationship with the party responsible for the release. CERCLA defines "contractual relationships" to include land purchase agreements, unless a party can establish the elements for the "innocent purchaser" defense. 42 U.S.C. §9601(35)(A) (defining "contractual relationship").

purchasers and investors with the tools to assess and, if necessary, manage a variety of environmental risks.

D. OVERVIEW OF THE ASTM STANDARD PRACTICES FOR ENVIRONMENTAL DUE DILIGENCE.

ASTM established two, separate standards for the environmental due diligence process in the purchase of commercial real estate: (i) the "Transaction Screen Process" ("TSP") and (ii) the "Phase I Environmental Site Assessment" ("Phase I ESA"). The user is responsible for deciding which standard to apply, depending upon transaction-specific circumstances. For larger transactions, or transactions involving property with "risky" businesses, users should probably proceed with a complete Phase I ESA, skipping the Transaction Screen. For smaller transactions, or transactions that appear to be "safe," users can elect to perform a Transaction Screen and, if no questions or concerns are raised by the Transaction Screen, the user may be able to conclude that no further investigation is necessary.

The Transaction Screen Process (ASTM Standard E 1528-93) allows users to quickly and efficiently identify and assess environmental conditions at the property. If it is obvious that a Phase I will be needed or the size of the transaction warrants, a TSP would not be performed and the process would begin with a Phase I. ASTM specifies that the Transaction Screen Process can either be performed by the company itself (the prospective purchaser, lender or underwriter) referred to by ASTM as the "User," or by an environmental professional retained by the User. The Transaction Screen Process must result in one of three conclusions:

- ❑ No further inquiry is needed (the Transaction Screen Process includes a presumption that if any question about a potential environmental condition is answered in the affirmative or the answer is not known, then further inquiry is required. Standard E-1528-93 Section 5.7);

- ❑ Limited further inquiry is needed (once it is determined that some form of further inquiry is needed, the ASTM standard pushes the User toward a Phase I. Any company that performs only a limited further inquiry does so at the risk of losing its claim to innocent purchaser status. Standard E-1528-93 Section 4.3.4.); or

- ❑ Phase I Environmental Site Assessment is needed.

If a Phase I Environmental Site Assessment is needed, it can be conducted in accordance with ASTM Standard E-1527-94. The ASTM Phase I Environmental Site Assessment must be performed by an environmental professional and must include a "Findings and Conclusions" section that either

lists all of the environmental conditions identified during the assessment, or states that no environmental conditions were revealed.

After the completion of the foregoing inquiry, the parties can either consummate the contemplated property transaction, renegotiate or abort the transaction, or, if more environmental information is needed, proceed to a Phase II environmental site assessment. Phase II assessments involve sampling and analysis and are beyond the scope of the ASTM standards.

V. FINANCIAL TOOLS AND INCENTIVES ~ WAYS TO MOVE THE DEAL FORWARD

While the initiatives discussed above allow for a more reasoned, economic evaluation of environmental cleanup costs as part of a projects overall costs, redevelopment of Brownfields will only occur if projects make economic sense. Financial incentives or risk shifting can, in many cases, shift the economic equation in favor of Brownfield redevelopment. While this paper cannot provide a complete review of the numerous financial incentives and tools that can be used in Brownfields projects, a few examples are provided below:

E. INDUSTRIAL REDEVELOPMENT FUNDS.

Many states, cities and towns have established economic development programs, that can be a source of funds for Brownfields redevelopment. In many areas, these funds are well established and familiar development tools. Pennsylvania's program established the Industrial Sites Cleanup Fund to provide for grants and loans for voluntary remediation of sites. Outright grants for cleanup costs can be made to political subdivisions, instrumentalities, or economic development authorities, if the grantee owns the site and oversees the cleanup. Grants for investigation costs, and low interest loans are more widely available.

F. TAX INCENTIVES.

On August 5, 1997, President Clinton signed the Taxpayer Relief Act (HR 2014/PL 105-34), which included a new tax incentive to spur the cleanup and redevelopment of brownfields in distressed urban and rural areas. EPA Fact Sheet (EPA 500-F-97-155, August 1997). Generally, federal tax law requires that expenditures that extend the useful life of a property, or that adapt the property to a different use, be capitalized. If the property is depreciable, the costs can be depreciated of the life of the property. The full costs may not be deducted from income in the year that the expenditure occurs. In contrast, repair and maintenance costs can be treated as expenditures. The IRS has maintained that most cleanup costs are capital costs that cannot be deducted.

The Brownfields Tax Incentive allows cleanup costs for properties in targeted areas to be fully deductible in the year in which they are incurred, rather

than having to be capitalized. Any expenditures paid for or incurred between August 5, 1997 and January 1, 2001, that meet all other criteria, are eligible. The incentive is applicable to properties located in one of the following areas:

1. **EPA Brownfields Pilot Grant areas designated prior to February 1997;**

2. **Census tracts where 20% or more of the population is below the poverty level;**

3. **Census tracts that have a population under 2,000, have 75% or more of their land zoned for industrial or commercial use, and are adjacent to one or more census tracts with a poverty rate of 20% or more; and**

4. **Any Empowerment Zone or Enterprise Community (and any supplemental zone designated on December 21, 1994).**

Both urban and rural sites may qualify for the tax incentive. To obtain the favorable treatment, the taxpayer must get a certification from the state environmental agency that the property is located in a targeted area.

In addition, many states have adopted similar tax incentives concerning the costs associated with the cleanup of contaminated properties. For instance, Massachusetts adopted the Environmental Response Action Tax Credit as part of its Brownfields legislation in 1998.[8] Under this provision, one can receive a tax credit of 25% - 50% of cleanup costs upon completion of the cleanup provided the site is located in an economically distressed area. In order to receive the tax credit, the taxpayer must also comply with the following requirements:

1. The taxpayer must commence and diligently pursue an environmental response action within three years of August 5, 1998;

2. The taxpayer must achieve and maintain a permanent solution or remedy operation status in compliance with M.G.L. c. 21E;

3. The property can not be the subject to any enforcement action;

4. The site must have been reported to the DEP; and

5. The maximum amount of tax credits otherwise allowable may not exceed 50% of its excise imposed, however, the taxpayer may carry over and apply to its tax liability for any subsequent taxable year(s) for

[8] See M.G.L. c. 62, §6(j)(1) and c. 63, §38Q.

up to five years the portion of those tax credits which were not allowed.

Massachusetts also provides a tax deduction known as the Abandoned Building Tax Deduction whereby one may deduct up to 10% of the renovation costs associated with buildings that have been at least 75% vacant for two years or more provided the property is located in an economic target area.[9]

G. INSURANCE.

Insurance products provide a new and extremely useful mechanism for managing the risk of environmental cleanup cost-overruns, and other risks, in Brownfield redevelopment projects. Numerous new insurance products exist that can further minimize the risks associated with acquiring contaminated property. Available insurance products range from insured cleanup-cost caps, lender liability, loan guarantees, and changes in applicable laws, or other specific risks. The market is growing, and competitive, creating great flexibility at reasonable costs.

1) Cost Cap Insurance – covers expenses above a planned remediation and covers costs associated with unknown, pre-existing environmental conditions discovered as part of said planned remediation.
2) Pollution Liability Insurance – covers third-party claims, bodily injury, property damage and cleanup as well as legal defense expenses associated with planned remediation.
3) Loan Guarantee / Secured Lender Insurance – covers principal and interest on the loan made in conjunction with the cleanup, rehabilitation, development or acquisition of a Brownfields site in the event of loan default due to the presence of contamination.

VI. CONCLUSION

The state and federal initiatives discussed above provide for significant opportunities for parties that understand and effectively manage the risks of Brownfield redevelopment. Several companies have been formed with the sole purpose of pursuing Brownfields redevelopment. No doubt, opportunities exist for the entrepreneurial at heart. More importantly, the real estate market should begin to understand, as a general matter, that environmental cleanup costs can, with reasonable certainty, be predicted. And the risk of incurring additional environmental costs are manageable. As such, environmental issues should become only one of the many factors to consider in evaluating any real estate investment.

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[9] See M.G.L. c. 62, §3B(a)(10) and c. 63, §38O.