

# Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property,

Edited by Todd S. Davis and Kevin D. Margolis

REVIEWED BY LARRY SCHNAPF

**I**n my 15 years of practicing environmental law, I do not recall seeing an environmental issue that has received as much attention as brownfields. In the past three years, barely a month seems to have gone by without a seminar or article that is devoted exclusively to the redevelopment of contaminated properties.

The interest in brownfields can be traced back to two reports issued by the United States General Accounting Office in 1995 and 1996.<sup>1</sup> These reports indicated that the principal obstacles to redevelopment of former industrial properties have been the existence of state and federal environmental laws like the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Superfund")<sup>2</sup> and the Resource Conservation and Recovery Act<sup>3</sup> (RCRA), which impose strict liability on owners and operators of contaminated property. The reports also stated that although most of these properties were not sufficiently contaminated to be drawn into the federal Superfund program, the mere perception of contamination was enough to hinder development. In response, federal and state environmental author-

ities have pushed through regulatory reforms to stimulate redevelopment of contaminated properties.

The most sweeping changes have taken place at the state level where over 40 states have enacted voluntary cleanup programs (VCP) or brownfields programs. The VCPs vary from state to state, but they generally include liability protection to prospective purchasers and lenders, establish streamlined cleanup procedures, authorize the use of risk-based cleanup standards that take the future land use into account and also provide for the issuance of No Further Action (NFA) letters and/or Covenants Not To Sue after a cleanup has been satisfactorily completed.

The regulatory reforms have not eliminated all of the major roadblocks to brownfield redevelopment since a cleanup will still have to be performed that may render the transaction financially unattractive to both the developer and its lender. Moreover, these agreements often contain re-openers for unknown environmental conditions and for contamination that migrates off-site. The uncertainty created by these re-openers is exacerbated by the fact that even where a state approves a cleanup under its VCP, there is no assurance that the EPA may not require an additional cleanup if it subsequently determines that the state approved cleanup does not meet federal standards. Because

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of the re-openers, many lenders are continuing to insist as a condition of the loan that the contamination be remediated using the traditional or residential cleanup standards, which increase the remediation costs.

Until *Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property* was published, there was no single source that lawyers or investors could turn to learn about the issues associated with brownfield redevelopment. Editors Todd S. Davis and Kevin D. Margolis have done a commendable job collecting information about the issues affecting brownfields and assembling experts from a variety of disciplines to discuss those issues. The book was certainly a pioneer in its field but unfortunately, parts of it are now outdated. Moreover, the individual chapters were not as detailed as the recent brownfield publication *Brownfield Law and Practice: The Cleanup and Redevelopment of Contaminated Land*, published by Matthew Bender and edited by Michael Gerrard. The latter book has already issued a supplement and also contains numerous forms that were lacking in the Davis and Margolis publication. As a result, I feel that the Gerrard book is more useful for practitioners.

The Davis and Margolis book is divided into four parts with Parts I-III comprising the first third of the book and Part IV encompassing the final two-thirds. Part I consists of Chapters 1-3 and provides background information on the nature of the brownfield problem. Chapter 2 is an overview of federal and state laws governing brownfield cleanups and the reforms that have been adopted to encourage brownfield redevelopment. The focus of this chapter is on the federal reforms that have been adopted since 1995, including the publication of new innocent landowner guidance to expand the use of prospective purchaser agreements as well as new guidance documents allowing the land use to be taken into account when developing cleanup remedies.<sup>4</sup>

Chapter 3 discusses the Clinton Administration's Brownfield Initiative and is largely a more detailed discussion of the federal reforms contained in Chapter 2. While the EPA is an important player for encouraging brownfield redevelopment, there are a number of other federal agencies, particularly the Department of Housing and Urban Development (HUD) that are playing a very important role in providing financial assistance for brownfield redevelopment. Readers probably would have been better served if this chapter had

discussed the programs of those other agencies in more detail instead of expanding on the EPA reforms that had been discussed in the preceding chapter.

Part II describes important legal, business, financial, and political issues associated with brownfield redevelopment and consists of Chapters 4-15. The first few chapters deal with financial issues, which have become of paramount importance for brownfield redevelopment. A number of brownfield investment funds have been built upon the model that was used in the early 1990s for the Resolution Trust Corporation properties. These funds look for deeply discounted properties that can provide 20 to 30 percent rates of return. Some contaminated properties are located in such desirable areas that environmental issues will not have an impact on development.

However, many other contaminated properties are just marginally profitable because of their location or the extent of the contamination and therefore are unattractive to the brownfield investment funds. For these properties, regulatory relief is generally not enough to attract investors. As a result, many states have established financial assistance programs in the form of loans, grants, or tax abatements/credits that can be used to help lower the costs of developing contaminated properties.

Chapters 5, 6, and 9 address this issue and are probably the best chapters in the book, containing information that was not available in the Gerrard book. They provide readers with formulae for valuing contaminated properties and explain how to use these calculations as part of an investment strategy. Chapter 9 gave one of the best explanations I have ever read on the deductibility of remediation costs. This chapter provides readers with a succinct summary of the state of the law with good case history studies. The principles set forth in this chapter were also applied to four types of brownfield scenarios.

Chapter 7, which is entitled "Creative Financing Strategies for Redeveloping Brownfields," contained good background material on

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the private and public financing alternatives available to brownfield developers. Like other parts of the book, I finished this chapter wishing the author had provided more detail about the various financing mechanisms, rather than just a summary. For example, the chapter only briefly talked about securitized loans and real estate investment trusts (REITS), which are becoming increasingly important for brownfield financing. There also was no mention of the

increasingly important role of nonprofit corporations for marginally profitable properties.

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One of the recent developments that have helped stimulate interest in contaminated properties has been the availability of new insurance products, which can help minimize the environmental risks associated with those properties. Chapter 11 summarizes the principal elements of the various insurance products as well as the limitations of those policies. The authors explain that the cost and scope of these products can vary. Indeed, one of the more significant costs can be the scope of the

information that the carriers require during the underwriting process. I would have liked the authors to describe in more detail the kind of information that the insurance companies are requiring before writing these policies.

One of the tools that may be used to help recover the remediation costs of contaminated properties is using old insurance policies. Some brownfield developers have been working out arrangements with sellers of contaminated property to pursue claims under old policies; or, the purchaser may assume the liability and then provide the sellers with a portion of the proceeds that are recovered. The process of determining what policies existed in the past is referred to as "insurance archeology." Chapter 12 discusses the various ways to obtain and build information about past coverage in addition to an excellent synopsis on the various legal obstacles to recovering under these old policies.

Successful brownfield redevelopment is difficult to achieve without the consent of the local community, who may be concerned about the existence of residual contamination. If the local community opposes a project, they can engage in delaying

tactics that could kill a project. On the other hand, when projects bring jobs to a community, the local governing powers can be extremely helpful in streamlining the approval process. Chapters 10, 14, and 15 provide invaluable advice on how to work with the community to build consensus on these projects.

Part III of the book addresses scientific concepts that are used to address contaminated properties. One of the principal regulatory changes that have made brownfield redevelopment possible has been the use of risk-based cleanups. In the past, states would establish cleanup standards that were based on very conservative risk exposure assumptions and that did not take the actual use of the site into account. Many of the state VCPs have more flexible cleanup standards, in addition to streamlined site investigative processes, to cut down the time it takes to characterize the contamination at a site. This section contains information on the scientific principles that are used for remediating sites and provides some useful case histories of how risk-based cleanups work.

However, with the exception of Chapter 20, I found this section to be disappointing because it really did not target brownfields but simply discussed general remediation concepts. For example, there was little discussion on how to use these regulatory reforms to reduce risk during the design phase of a project, how to coordinate construction and remedial activities in a cost-effective manner, or how to use engineering controls such as caps (e.g., parking lots), which can minimize remediation costs and reduce the time needed to complete the environmental work.

Part IV, which encompasses nearly two-thirds of the book, discusses the principal elements of the various state VCPs. This was the first attempt to collect information on the various state programs in one publication, and these state chapters were generally well written. However, as the editors noted in their introduction, brownfields are an evolving area, and much of the information contained in this section is now outdated. For example, in the two years since the book was written, over a dozen states have established financial incentives in the forms of grants, loans, and tax abatements or credits to help defray remediation costs associated with these sites. Since brownfields are primarily addressed on the state level, this book

should be updated in order to continue to serve the needs of its readers. ■

**Notes**

<sup>1</sup> "Reuse of Urban Industrial Sites," GAO/RCED-95-172, June 1995; "Superfund Barriers to Brownfield Redevelopment," GAO/RCED-96-125, June 1996

<sup>2</sup> 42 USC §§ 9601, et seq.

<sup>3</sup> 42 USC §§ 6901, et seq.

<sup>4</sup> See e.g., "Final Policy Towards Owners of Property Containing Contaminated Aquifers," 60 Fed. Reg. 34790 (July 3, 1995); "Guidance on Agreements With Prospective Purchasers of Contaminated Property," 60 Fed. Reg. 34792 (July 3, 1995); "Land Use in the CERCLA Remedy Selection Process," 60 Fed. Reg. 29, 595 (June 5, 1995); and "Policy on the Issuance of Comfort/Status Letters," 62 Fed. Reg. 4624, (January 30, 1997).