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ISSUES

The EPA's Brownfields Initiative: Will It Improve the Market for Contaminated Properties?

By Richard J. Roddewig, MAI

Over the past two years the U.S. Environmental Protection Agency (EPA) has been implementing a new brownfields initiative, first announced in 1995. The term "brownfields" is a catch-all word for a variety of contaminated sites around the country, typically located in older urban areas. Officially, the EPA defines the term as "abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination." There are between 400,000 and 650,000 such sites across the country. Brownfields typically are not "Superfund" sites, but are other types of properties with less serious contamination problems than properties being remediated under Superfund.

In January 1995, EPA Administrator Carol Browner announced a comprehensive new program to assist state and local governments in redeveloping brownfields. This came in response to intense political pressure from local governments, especially big city mayors, who believed that federal environmental policies were strangling their efforts to create jobs in older industrial and commercial areas. One reason for the dramatic loss of jobs to the suburbs, the urban leaders claimed, has been private sector (and even public sector) fear of the unknowns that accompany acquisition and redevelopment of inner city industrial sites contaminated by past uses.

The EPA's brownfields "Action Agenda," now in full swing, consists of the following components:

- pilot projects for brownfield clean-ups and redevelopment funded with up to \$200,000 in matching EPA grants for two years and intended to demonstrate creative environmental assessment activities that will lead to clean up and redevelopment solutions;
- clarification of clean-up standards and the liability of prospective purchasers, lessees, and lenders for past and potential future remediation costs and potential future health and damage claims;
- cooperation between federal agencies in promoting brownfield



redevelopment, and partnership arrangements with state and local governments to turn over more responsibility for remediation approval and clean up to state government and to foster state initiatives to encourage redevelopment; and

- a grab bag of other initiatives, including job development, training programs, and proposals to modify federal income tax laws to provide brownfield clean-up incentives.

Despite all of the media attention given to federal brownfields initiative, much of the impetus and creative work to assure redevelopment of the more contaminated sites is being done by the states.

Implementation of the Brownfields Initiative: Progress to Date

Pilot Projects: By the end of 1996, 76

pilot projects were up and running. The pilot projects were divided between national pilots selected by U.S. EPA headquarters staff in Washington, DC, and regional pilots selected by regional EPA offices. Among the cities with national pilots are Baltimore, Birmingham, AL, Cleveland, Detroit, Indianapolis, Louisville, Houston, St. Louis, Kansas City, Sacramento, CA, Stockton, CA, and Portland, OR. Regional pilots are under way in, among other places, Buffalo, NY, Atlanta, Clearwater, FL, Miami, Dallas, San Francisco, Chicago, and East St. Louis, IL, as well as Northwest Indiana, Colorado, and Utah.

The pilot projects are of various types. Some are designed to remediate and redevelop specific sites, others aim to enhance databases or site evaluation techniques, while still others are intended to improve cooperation between various public and private interest groups in finding solutions to neighborhood redevelopment problems stemming from contamination concerns.

A few of the pilot projects have been completed, or are nearing completion. An EPA evaluation of the first completed pilot in Cleveland indicates that the initiative leveraged more than \$4.5 million in environmental clean-up and property improvements at a bankrupt and abandoned property, resulting in more than 180 new jobs at the site and generating more than \$1 million for the

local economy. In the Minnesota regional pilot, of the 32 sites that have been targeted for voluntary clean-up, remediation had been completed at 10 of the sites by the spring of 1997. In Buffalo, financing has been secured for redevelopment of a former steel mill site, and buyers have been found for other pilot program properties in Tennessee and Virginia.

Clarification of Clean-up Standards and Liability: This portion of the Action Agenda is the most important to appraisers. Among the significant U.S. EPA policy statements on liability concerns issued since the January 1995 start of the brownfields initiative are the following:

- The Guidance on Agreements with Prospective Purchasers of Contaminated Property;
- EPA's Policy for Owners of Property Containing Contaminated Acquifers;
- The Land Use in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) Remedy Selection Process policy guidance;
- The Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily;
- Policy on the Issuance of Comfort/Status Letters.

All five of these policy statements are intended to lessen real estate and lending community fears of potential exposure to Superfund designation in purchasing or lending on contaminated properties that are not yet, but potentially could be, designated as Superfund sites.

The first policy statement expands EPA flexibility in signing specific clean-up agreements with potential buyers, lessees, or operators of property with known contamination. Under the earlier 1989 policy statement on this topic, the EPA was required to receive a substantial benefit from the purchaser, typically an agreement by the buyer to undertake specific site remediation or reimburse the EPA for clean-up costs. While there still must be a public "benefit," the EPA can now take into account "indirect benefits" to the community at large, such as the jobs that will be created after remediation. These clean-up agreements can be very significant to potential buyers because they contain a specific clean-up program and a promise by the EPA not to hold the buyer responsible for any past contamination on the site.

The policy statement relating to contaminated aquifers was issued in November 1995. According to the EPA, about 85% of the sites on the National Priorities List (the Superfund list) contain groundwater contamination, and it is often difficult to trace the groundwater contamination to its source. CERCLA, the Superfund law, requires owners of designated Superfund sites to clean up the groundwater contamination problem whether the source of the contamination was on the site or not, creating considerable uncertainty about clean-up liability for owners of land containing contaminated aquifers. According to the EPA, "(t)his uncertainty makes potential buyers and lenders hesitant to invest in property containing contaminated groundwater." Under the new policy, owners of property with contaminated groundwater will not be held responsible for clean-up costs if 1) the source of the contamination is off-site, and 2) the landowner did not cause,

contribute to, or aggravate the problem. In addition, if the owners are threatened with third-party lawsuits as part of complications from a widespread groundwater contamination problem, the EPA will enter into de minimis settlements with the owners if they meet the two criteria.

The third policy statement is a further elaboration of the "risk based corrective actions" (RBCA) concept that tries to match an appropriate remediation program and clean-up standard for Superfund sites with the likely future use of the property. Under the RBCA standard, the clean up will be more complete, for example, if the property is likely to be used for future residential development for families with small children than if it will continue to be an industrial site. EPA's new land use and Superfund policy statement clarifies the types of information, public inputs, and discussions that are necessary to reach consensus on reasonably anticipated future land uses and therefore on appropriate clean-up goals.

The fourth statement on enforcement of Superfund against lenders, prepared in conjunction with the Department of Justice (DOJ), was issued to give legal weight to the substance of a previously issued EPA rule that had been vacated by the federal courts. The two departments believed this new policy statement was necessary for the following reason: "EPA and DOJ recognize CERCLA's unintended effects on lenders and government entities and the relative concern from these parties regarding the consequences of potential enforcement. In light of these concerns, lenders may refuse to lend money to an owner or developer of a contaminated or potentially contaminated property or they may hesitate in exercising their rights as secured parties if such loans are made. Additionally, government entities that involuntarily acquire property may be reluctant to perform certain actions related to contaminated or potentially contaminated property."

Even more comfort was given lenders when Congress enacted the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, further limiting the situations in which lenders will bear Superfund liabilities. Under the new policy statement and legislation, lenders can be more certain that they will not be responsible for Superfund clean-up liabilities simply because they foreclose on a loan on such a site.

The EPA issued further explanation of this fourth policy statement in December 1995 in a quick reference fact sheet titled "The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities." In question-and-answer format, this statement clarifies some of the key concerns of state and local governments about their potential Superfund liability if and when they acquire property by such means as tax foreclosure sales, eminent domain, or through bequests.

Finally, the fifth policy statement related to "comfort letters" is designed to give more assurance to purchasers of brownfields that they will not be responsible for costs to clean up contamination resulting from prior uses of the property.

In addition to the various policy statements, the EPA also has

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taken a significant step in eliminating the uncertainty about potential Superfund clean-up requirements for 27,000 properties around the country. In 1995 and 1996 EPA Administrator Browner removed these properties from the Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS), the official list of 40,000 properties that might potentially be eligible to become part of the Superfund program. By removing those sites from the CERCLIS list, the EPA is indicating to all potential buyers and lenders that no further federal action is contemplated and hopes to reduce "any stigma associated with federal involvement at these sites and remove potential obstacles to their clean up and redevelopment."

Cooperation with the States: Because most of the hundreds of thousands of brownfield sites are more likely to be subject to state clean-up programs, the U.S. EPA is working with state officials to clarify procedures for eliminating potential duplication of federal and state remediation review and approval. The U.S. EPA formed a work group to devise ways to assure EPA sign-off on more state clean-up programs, thereby eliminating the need for "site-specific federal sign-off at sites cleaned up under a state voluntary clean-up program." As a result, the U.S. EPA has recently been more willing to issue either site-specific "comfort letters" indicating no intention to get involved in the clean-up or remediation process or, with a few states, statewide Superfund Memoranda of Agreements ("SMOAs") indicating that the U.S. EPA will not use its Superfund authority at brownfield sites in those states that are cleaned up under the states' voluntary clean-up programs.

These various state initiatives are truly the most important part of the brownfields story since they involve a variety of reform measures to generate new interest in purchase and redevelopment of contaminated properties. Although the state initiatives vary from state to state, most involve one or more of the following features:¹

- written agreements with property owners concerning specific clean-up programs;
- appropriation of additional sources of funds for clean up;
- expedited consideration of clean-up programs when the private sector pays for agency oversight and management costs;
- "privatization" of some of the site investigation and remediation oversight responsibilities through licensing of "certified" clean-up specialists who oversee site clean up in place of state enforcement agency staffs;
- grants, low interest loans, property tax abatements, tax credits, and other incentives on selected types of brownfields;
- lessening of the clean-up and damage liability standard from

the onerous retroactive, strict, joint, and severable liability model of Superfund;

- comfort letters, no further action letters, good neighbor letters, and other types of state assurances that a buyer or lender will not be held responsible for some types of remediation and liability costs and risks; and
- RBCA clean-up standards based upon risks for varying types of future land uses.

Tax Incentives for Clean Up: In 1996 the Clinton Administration proposed changes to the Income Tax Code to reduce the effective after-tax cost of brownfields remediation. Environmental remediation costs in designated economically depressed areas would be deductible in the year in which they were expended. Under current law, such costs must be capitalized over a longer period of time. If and when this legislation is passed, it will further reduce the effective cost of brownfields remediation

Brownfields, Stigma, and the Real Estate Appraisal Process Real estate appraisers need to monitor and understand these various brownfield initiatives for a number of reasons. All of the federal and state initiatives have a common goal: reduce the legal and regulatory risks associated with owning contaminated sites, thereby encouraging creative approaches to their clean up and productive redevelopment. In effect, therefore, the brownfield initiatives are intended to reduce the "stigma" associated with owning contaminated properties.² Any appraiser who has appraised a contaminated property, or even a property in close proximity to one, knows that analysis of the degree of stigma that affects the site is a key component of the appraisal process.

What should appraisers be doing? First, check to see if the site you are appraising is subject to any federal or state brownfield initiatives. If the site actually is, or is adjacent to one of the 76 pilot project sites—some of the sites are quite large—there may be a detailed action agenda, and even some financial or tax incentives that can substantially lower the risk for owners of such property.

Even if the property you are appraising is not specifically affected by one of the pilot projects, the risks and therefore the "stigma" associated with its ownership may eventually be reduced by one or more of the other brownfield initiatives. The "archiving" of 27,000 properties from the CERCLIS list is a significant EPA step in reducing the stigma risks associated with owning these properties. If the appraised property has been archived, stigma may have been substantially reduced.

Second, estimate the implications of the new willingness at both the federal and state levels to lessen clean-up standards based on risk-based assessment techniques. Appraisers will have to carefully

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1. For a good discussion of these various state initiatives, see Jennifer L. Hernandez, Kimberley M. McMorrow, and Laurie G. Ballenger, "Joining the National Brownfields Bandwagon: New Options in Contaminated Property Redevelopment," in *Land Development* (National Association of Home Builders, Fall 1996).
2. For a recent article discussing stigma, see Richard J. Roddewig, MAI, "Stigma, Environmental Risk and Property Value: 10 Critical Inquiries," *The Appraisal Journal* (October 1996): 375-387.

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ever replacing traditional delivery methods for banking services. It simply offers the small business owner and individuals more options. "In our view, on-line banking will complement and enhance the overall customer experience, not eclipse other delivery channels," he said.

If you do not choose to use on-line banking services for your appraisal business now, you probably will later. Whereas on-line banking is offered by only about 100 banks today, by the year

2000 we will likely see most of the nation's 10,000 financial service institutions offering on-line banking services.

"Within five or 10 years, essentially all banks will offer direct banking, and customers will have multiple means of direct access," offered Lewis Levin, general manager of Microsoft Corp.'s desktop finance division. "Nearly all bank products and services will be available directly to the customer. Direct banking will be the avenue of choice for most people and most products, most of the time." ▲

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consider the appropriateness of potential future uses in terms of the higher or lower clean-up costs that might be imposed as part of the analysis of the "legally permissible" and "financially feasible" prongs of highest and best use analysis.

Finally, appraisers need to watch three developments with utmost care. First, keep your eye on Congressional progress in approving the proposed income tax incentive for deduction of clean-up costs. If clean-up costs on some types of properties can be "expensed" rather than "capitalized" it may effectively reduce the capital cost of clean up. On properties with limited clean-up cost risks, it could potentially offset some of the stigma on brownfield properties.

Second, monitor how the lending community is responding to the new brownfield initiatives. To the extent there is an increase in the number of

lenders who perceive a reduction in risk and therefore show a greater willingness to loan on some types of brownfield properties, stigma may be dramatically reduced.

But third, and most importantly, become familiar with the state and local programs and innovations implemented in the wake of the EPA's brownfields Action Agenda. The states have generally been much more creative than the U.S. EPA in devising voluntary clean-up programs for contaminated sites, and about 25 states now have such initiatives. Check with state and local environmental officials in the community in which the property you are appraising is located to determine the type of programmatic elements in place and how effective they are in reducing the stigma that often affects the market value of contaminated property. ▲

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