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Expediting the Clean-Up and Redevelopment of Brownfields: Addressing the Major Barriers to Private Sector Involvement -- Real or Perceived

REPORT

This report has not been reviewed for approval by the U.S. Environmental Protection Agency; and hence, the views and opinions expressed in the report do not necessarily represent those of the Agency or any other agencies in the Federal Government.

December 1997

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Environmental Financial Advisory Board

DEC 12 1997

Honorable Carol M. Browner
Administrator
U.S. Environmental Protection Agency
Washington, D.C. 20460

Dear Administrator Browner:

On behalf of the Environmental Financial Advisory Board (the Board or EFAB), we are pleased to transmit to you our latest report, ***Expediting the Clean-Up and Redevelopment of Brownfields: Addressing the Major Barriers to Private Sector Involvement -- Real or Perceived.***

This report identifies what we believe are the major barriers (legal, financial, practical, real or perceived) that currently discourage or impede the private sector from participating in, and investing financial resources in the clean-up and redevelopment of, sites that are, or are potentially subject to, the legal jurisdiction of the Federal Superfund program pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

The report focuses on four concerns that we found were most frequently identified by the private sector (e.g., real estate developers, bankers) as barriers to participation in the redevelopment of "Brownfields" sites:

- Crucial Linked Issues: Delineating States' and EPA's Roles, and Determining Feasible Clean-Up Standards.
- Protecting Against Liability for Third-Party Claims.
- Utilizing Available Federal Financial Incentives.
- Obtaining Priority Clean-Ups.

Major recommendations in the report include:

* *EPA should take an expansive view of the categories or types of sites that could come within the "Brownfield" concept. The term "Brownfield" should include any site (whether urban or rural, industrial or non-industrial, abandoned, idled,*

under-used, or previously undeveloped) at which the timely use, expansion of the current usage, or redevelopment of the site is prevented by real or suspected environmental contamination -- regardless of the actual severity of any contamination. The term "Brownfield" even may include appropriate sites sufficiently contaminated to be placed on the National Priorities List (NPL).

* *EPA should encourage all regions to follow Region V's lead in entering into State Memoranda of Agreement (SMOA) which give the State the lead role in addressing the many sites that are not sufficiently contaminated to be placed on the National Priority List under the Superfund program.*

* *EPA should issue a clear policy statement that, on entering into a SMOA, EPA will honor a State's certification that a site has been adequately cleaned up. Each SMOA should specify as clearly as possible the circumstances under which EPA will "re-open" or intervene in the State's supervision of particular sites.*

* *EPA should encourage the development and use of risk-based clean-up standards to the maximum extent possible under current legal authority.*

* *EPA should encourage the use of no-action letters, "comfort letters", and similar legal or quasi-legal documents, especially at the State level, to reduce the likelihood that a third party may file a lawsuit that implicates the sufficiency of the clean-up standards or the planned remedial activities.*

* *State environmental agencies should utilize similar legal or quasi-legal documents for Brownfields clean-ups where the clean-up is conducted according to State standards and overseen by the State rather than EPA.*

* *EPA should provide financial assistance as needed to States that seek to develop and implement "model" comfort letters and similar documents.*

* *EPA should evaluate the various options for using available Federal funding, including EPA funding, for Brownfields purposes. EPA should allocate its funding in the most economically efficient manner feasible. EPA funding should be used to leverage other sources of funding, to obtain "the most bang for the buck" in promoting and achieving environmental clean-up and opportunities for economic redevelopment.*

* *EPA should pursue partnership efforts with the U.S. Department of Housing and Urban Development (HUD), the Economic Development Administration (EDA) in the U.S. Department of Commerce, and with the U.S. Departments of Labor and Transportation, to coordinate, target, and leverage Federal funding and other incentives for Brownfields redevelopment.*

* *EPA should encourage State and local governments to establish coordinated, "fast track" review and approval processes for redevelopment projects on Brownfields sites. EPA should amend its criteria for awarding Brownfields demonstration grants to give some preferential consideration to cities or towns that have some type of "fast track" process to facilitate crucial decisions and issuance of crucial permits.*

The Board requests that this report initiate an ongoing interaction between the Board and EPA policy-level management regarding Brownfields issues. To that end, we respectfully ask you to designate a senior EPA official to discuss with the Board EPA's reactions to the recommendations in the report.

I want to take this opportunity to thank Evan Henry, Chair of the Brownfields Workgroup, for his leadership in producing this report. We appreciate the opportunity to assist EPA in its work, and look forward to a continuing dialogue with EPA regarding how to facilitate Brownfields clean-up and redevelopment.

Sincerely,

Robert Lenna

Robert O. Lenna
Chair, Environmental Financial
Advisory Board

Expediting the Clean-Up and Redevelopment of Brownfields: Addressing the Major Barriers to Private Sector Involvement – Real or Perceived

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PRINCIPAL OBJECTIVES OF THIS PAPER

1. **Identify the major barriers** (whether legal, financial, practical, real or perceived) that **currently discourage or impede the private sector from becoming involved in, and investing financial resources in the clean-up and redevelopment of,** sites that are, or are potentially subject to, the legal jurisdiction of the Federal "Superfund" program pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

   - In this paper, the term "Brownfield" includes any site (whether urban or rural, industrial or non-industrial, and whether abandoned, idled, under-used, or previously undeveloped) at which the timely use, expansion of current usage, or redevelopment of the site is prevented by real or suspected environmental contamination -- regardless of the actual severity of any contamination.

   - Thus, in this paper, the term "Brownfield" may include appropriate sites that are sufficiently contaminated to be placed on the National Priorities List (NPL), or portions of such sites, or sites on the NPL because of special circumstances such as being located above a contaminated aquifer that is on the NPL.

   - Also, the term "Brownfield" can include previously-undeveloped land, for example, if use or development is deterred because the property is believed to be contaminated because it is adjacent to a contaminated property or it is believed to be the site of improper dumping.

2. **Identify program reforms that EPA can implement pursuant to existing legal authorities** (i.e., without seeking statutory amendments), which will **encourage, facilitate, or expedite private sector participation** in the clean-up and redevelopment of suitable sites.

   - **Also set forth certain recommendations that EPA does not have power itself to implement**, for example:

     - Recommendations that will require **statutory amendments**;

     - Recommendations for **actions that depend heavily upon satisfactory participation or implementation by other Federal agencies or State/ municipal governments**, for which EPA should use its "good offices", within the Administration and with the States, to urge or prod other agencies to act favorably towards encouraging private sector participation in Brownfields redevelopment.

3. **Discuss those barriers and suggested reforms and remedies in a plain-English format that can be used to educate various constituencies.** The target audiences are both inside and outside the EPA and State environmental agencies. The paper seeks also to inform audiences not conversant with the jargon of "Superfund" and environmental liability (i.e., the commercial real estate and banking communities, the press, most Members of Congress, and most Congressional staff).

4. **Initiate an ongoing interaction between the Environmental Financial Advisory Board (the Board) and EPA policy-level management regarding Brownfields issues.** Formally ask Administrator Browner to **provide the Board with a detailed reply to the recommendations** set forth in this report.

   Also **request that EPA advise the Board periodically regarding the Agency's implementation of its Brownfields program.** Matters upon which the Board maintains a continuing interest include:

   - The number and identity of the States with which EPA has entered into State Memoranda of Agreements (SMOAs);

   - Which States employ risk-based corrective action in their State clean-up programs, and which offer a redeveloper a choice of proceeding with a risk-based action or a pre-established set of clean-up standards; and

   - EPA's ongoing efforts, (a) to energize other Federal agencies to focus on Brownfields redevelopment as a priority, and (b) to educate the private sector regarding available governmental financial incentives for private investment in Brownfields redevelopment projects.

   Since this report is intended to be a means to an end, not an end in itself, request that EPA assist in setting up several "Brownfields progress report" hearings to be held under the joint auspices of the Board, interested EPA regions, and interested States. These regional hearings should be used to "showcase" EPA's Brownfields promotional efforts, including EPA resources that are available to the public, such as the "Outreach" staff in OSWER, the Great Lakes Environmental Finance Center at Cleveland State University, and EPA's Internet site for Brownfields.

BARRIER # 1: CRUCIAL LINKED ISSUES: DELINEATING STATES' AND EPA'S ROLES, AND DETERMINING FEASIBLE CLEAN-UP STANDARDS

The Perceived Problem:

The stringency of EPA Superfund clean-up standards is often cited as a major impedient to the clean-up and redevelopment of Brownfields sites. (Contaminated sites that are remediated under the Superfund program must meet standards known as "ARARs", "applicable or relevant and appropriate requirements". Also, CERCLA includes a strong preference that the remedial action be in the form of treatment to actively eliminate the contaminants or reduce them to the level specified in the ARAR for each contaminant.) Prospective redevelopers assert that the cost of meeting the stringent standards makes, or may make, the project economically infeasible. (Whether the cost of clean-up dominates the decision to proceed with a particular project is a project-specific matter; numerous other factors also significantly affect the "go - no go" decision.)

The stringent Superfund standards and preference for active treatment may be appropriate for cleaning up sites that are heavily contaminated and near residential areas where uncontrolled human exposure is likely. However, Superfund standards are perceived as inappropriate for many Brownfields sites that are not, or may not be, seriously contaminated and where human and environmental exposure can be limited through various mechanisms. Yet, CERCLA and the Superfund program as implemented provide little or no flexibility to set alternative clean-up standards based on reasonable distinctions among the levels of risk at each site (i.e., based upon the severity of the contamination, fate and effects information, and the likelihood of human or environmental exposure to the contamination).

A directly related problem is whether a clean-up standard will change in mid-project, particularly if the project begins under State supervision and then EPA intervenes.

Discussion and Remedy:

EPA may facilitate the clean-up and redevelopment of Brownfields sites through two interrelated actions.

1. Delineating States' and EPA's Roles: Memoranda of Agreement with States

First, ***we recommend that EPA encourage all regions to follow Region V's lead in entering into State Memoranda of Agreement (SMOA) which give the State the lead role in addressing the many sites that are not sufficiently contaminated to be placed on the National Priority List under the Superfund program.***

We also recommend that EPA issue a clear policy statement that, upon entering into a SMOA, EPA will honor a State's certification that a site has been adequately cleaned up. Each SMOA should specify as clearly as possible the circumstances under which EPA will "re-open" or intervene in the State's supervision of particular sites. We suggest that each SMOA say that clean-up at Brownfields-type sites will be subject to State supervision unless EPA first determines that: (1)(a) an "imminent and substantial danger to the public health or the environment" demonstrably exists, and (1)(b) the State has refused to take action; or (2) the State has requested EPA to intervene. However, we believe the existence of a "bright line" in the SMOA regarding the specific circumstances under which EPA will "re-open" its potential involvement in a site is of paramount importance. The private sector can make investment decisions and structure a real estate "deal" around clean-up standards of whatever stringency (some standards will be deal-killers, some will not). However, the circumstances under which the clean-up standards may change after the "deal" is struck must be clearly delineated or else the redevelopment "deal" will not happen in the first instance, due to the perceived uncontrollable risk that EPA will "move the goal posts" in the middle of the game. The "re-openers" authorizing EPA intervention at individual sites must be as clear and as limited as possible, if EPA, the Federal Government, States, and cities want to encourage private investment in Brownfields redevelopment.

Providing States and the redevelopment community with clearer guidance regarding the circumstances under which EPA may override or side-step a SMOA and intervene at a State-supervised clean-up site is crucial.

We view this recommendation as consistent with that stated in the Board's letter to Administrator Browner dated March 31, 1997, to ***"[e]ncourage and expand delegation of authority to State agencies to eliminate the uncertainties of multiple agency involvement."*** We recognize EPA has legal responsibilities under CERCLA and other Federal law that likely will preclude EPA from categorically disavowing any potential EPA involvement at a site; therefore, it is crucial that EPA adopt policies that clearly cede the lead role to the States (at least at non-NPL sites) and clearly specify the circumstances under which EPA will assert its jurisdiction at a State-lead clean-up site. For the redevelopment community, being able to identify in advance the circumstances under which EPA may intervene (and the clean-up standards may become more stringent) is as important as the actual substance of the clean-up standards to be applied.

We also note that the lack of an EPA-State SMOA in any particular State likely will add to the uncertainty or "discomfort level" expressed by the private redevelopment community regarding participation in Brownfields redevelopment in that State.

2. Implement Risk-Based Corrective Action as an Available Option

Secondly, ***we recommend that EPA encourage the development and use of risk-based clean-up standards to the maximum extent possible under current legal authority. We also urge EPA and States to recognize that, in certain time-sensitive Brownfields redevelopment***

projects involving private investment, there may be advantages to allowing regulatory flexibility to a redeveloper to choose between: (1) proceeding immediately to meet pre-established State-wide standard (fixed) clean-up standards deemed to be universally protective; and (2) going through the sometimes-lengthy process of determining protective, site-specific, risk-based clean-up standards. We recommend that EPA and the States strive to provide clean-up decision processes that recognize the need for both: (1) protection of human health and the environment; and (2) timely decisions in projects involving private investment.

We view this recommendation as consistent with that stated in the Board's letter to Administrator Browner dated March 31, 1997, to ***"[resolve legal and transactional uncertainties associated with use of Risk-Based Corrective Action (RBCA)."***

In the risk-based approach to clean-up, the intended future land use at the site is a major determining factor in the risk-assessment process, the establishment of clean-up standards, and the selection of the technical remedy in the clean-up.

For example, the American Society for Testing Materials' (ASTM) Risk-Based Corrective Action (RBCA) framework provides a possible "tiered" risk assessment approach in which risk levels and other variables, including exposures anticipated at the site based on expected future uses, can be "plugged in" to determine sufficiently protective clean-up standards and corresponding remedial actions on a site-specific basis. Risk-based standards also may allow the use of engineering controls and institutional controls in some instances in lieu of active, technical clean-up measures.

Although we take no position on adoption of any particular RBCA standards and framework, we urge EPA generally to allow use of risk-based clean-up standards if such standards both:

1. Offer greater opportunity for an economically feasible clean-up, facilitating the return of the property to productive use; and

2. Maintain reasonable assurance that human health and the environment will be protected, by assuring that the clean-up selected: (a) eliminates acute risks, (b) precludes any significant future human exposure, perhaps through use of institutional controls, and (c) assures that any contaminants remaining on-site will not migrate during the time frame when they may pose any significant risk.

We believe that using appropriately-implemented risk-based standards is sound national policy. In virtually every Brownfields project scenario, the absence of a viable redevelopment project results in the perpetuation of two environmentally undesirable trends: (1) urban decay (environmentally, and further deterioration of existing taxpayer-paid infrastructure, and lack of economic opportunity for nearby residents); and (2) destruction of "Greenfields" to build development that could locate on Brownfields sites.

In our view, those two undesirable trends are not sustainable in the long term as a matter of national environmental or economic policy. We believe that requiring clean-ups to meet appropriately-protective risk-based standards will both: (1) protect the public health and the environment; and (2) help to avoid the perpetuation of those two environmentally undesirable trends.

Addressing Feasible Clean-Up Standards Through New Legislation:

1. Delineating States' and EPA's Roles: Memoranda of Agreement with States

There may always be States with which EPA does not have a SMOA setting forth the circumstances in which EPA may "re-open" or intervene in a State's supervision of clean-up of particular sites (for example, pursuant to a State voluntary clean-up program). With regard to such "non-SMOA" States, new Federal legislation setting forth (1) the circumstances in which EPA must recognize a clean-up completed through a State voluntary clean-up program, and (2) the circumstances in which EPA could "re-open" or intervene at that site, would provide the private redevelopment community with some assurances and thus would increase opportunities for private participation in clean-up and redevelopment of Brownfields.

It may be necessary to include in such legislation the criteria that an "acceptable" State voluntary clean-up program must meet before EPA would be obligated to honor the State's finding that the site has been acceptably cleaned-up or is being acceptably addressed by an ongoing, long-term remedial action.

It also may be necessary to limit the authority of the Department of Justice to either intervene, or to compel EPA to intervene, at any site that is being cleaned up pursuant to an "acceptable" State voluntary clean-up program, unless an "imminent and substantial danger to the public health or the environment" demonstrably exists, and the State has refused to take action.

2. Implement Risk-Based Corrective Action as an Available Option

If EPA determines that the agency needs new legal authority to use -- or to allow State agencies (pursuant to SMOAs, or otherwise) to use -- risk-based clean-up standards at any site that is, or potentially is, subject to clean-up pursuant to Superfund program standards, then EPA should seek explicit statutory authority from the Congress.

BARRIER # 2: PROTECTING AGAINST LIABILITY FOR THIRD-PARTY CLAIMS

The Perceived Problem:

Redevelopers, their financial backers, or other major participants in a Brownfields redevelopment may incur liability to a third party that claims to be injured in some manner (whether personal injury or diminution of value of adjoining property) by contaminants that originate on the Brownfields site.

Discussion and Remedy:

Major participants in a Brownfields project will have several distinct concerns about possible liability -- from several sources. In some but not all instances, a redeveloper (and perhaps other associated financial stakeholders) can obtain, from Federal and State government officials, an appropriate release from possible liability to the government or clarification of potentially-disputable legal or factual matters. These releases or clarifications may be incorporated into "prospective purchaser agreements", "covenants-not-to-sue", "no-action letters", "comfort letters", and the like. These documents likely will be tailored to the specific facts of the specific site, and likely will be contingent upon the redeveloper adhering to certain specific conditions or commitments.

Accordingly, such documents may provide some legal comfort to the major Brownfields participants, but they may not always be available on acceptable terms, they are not uniform from site to site, and they provide comfort only against possible liability to the Federal and/or State governments who co-sign the agreement.

If a Brownfields redevelopment participant was in some way legally liable for the original contamination at the site, it may be possible to enter into a CERCLA settlement with the EPA, which can provide protection against claims by third parties for further financial contribution towards clean-up of the site. Similar protection may be available under corresponding "State Superfund" laws.

New statutory provisions (in Public Law 104-208) insulate financial institutions from liability unless they become active managers of the property in which they hold a security interest. This statutory protection should help to alleviate certain concerns that lenders have had about potential CERCLA liability since the *Fleet Factors* decision in 1990.

The legal mechanisms described above can: (1) provide some security to the redeveloper and its financial partners regarding the circumstances in which the Federal and/or State

government agrees not to intervene with the redevelopment project; and (2) provide protection against clean-up contribution claims by third parties.

However, one type of third-party liability evidently poses a special concern. No legal mechanism exists at present (at either the Federal or State level) to totally insulate the redeveloper, its financial backers, or other major participant in a Brownfields redevelopment from ***possible liability to a third party who claims to be injured by contaminants that originate on the Brownfields site***. Such an injured third party may exercise legal rights under CERCLA or applicable State law to seek damages or another remedy against the redeveloper.

We do not suggest that "total insulation" against liability is necessary or even appropriate to spur Brownfields redevelopment. Developers should be required to continue to exercise due diligence and due care in investigating and constructing a Brownfields redevelopment project. However, we believe that reasonably responsible parties (that is, in the dictionary sense of a generally good citizen, not the CERCLA "Potentially Responsible Party" or "PRP" sense of "responsible") should not be required to risk extraordinary legal liability exposure simply because redevelopment at the site is subject, or potentially subject, to CERCLA.

Perhaps fortunately, concerns about possible liability to third parties have remained, in the "real world", only concerns, which have not matured into actual documented legal and financial liability. In the Brownfields program (to date), there has been no known significant instance of environmental damage claims being brought against the redeveloper by an allegedly-harmed third party. With the exercise of a few precautions, financial stakeholders in a Brownfields project should be able to manage this risk such that the likelihood of its occurrence becomes quite remote.

- Competent site assessment and due diligence before initiating clean-up and construction activities can minimize the risk of third-party claims, by determining the facts about the nature and extent of contamination of the property, and prospects for historical or prospective migration of contaminants to off-site locations. Redevelopers should engage a well-qualified remediation contractor and an experienced legal advisor to help minimize the risk of third-party claims resulting from release and/or exposure caused by remediation activities.

- Indemnification provisions and/or releases from liability under specified circumstances, often contained in major commercial contracts, also may provide some legal and financial comfort to the major participants. (We note that the value of an indemnity is only as good as the balance sheet of the party giving the indemnity, unless a separate escrow account is established to assure funds will be available if the indemnified conditions arise. We note also that the State or the EPA generally need not honor such an indemnification agreement among private parties, and can ignore the agreement and impose liability against the original, liability-transferring party.)

- Insurance coverage also is commercially available, to cover third-party environmental damage claims and expenses resulting from such claims.

In any major construction project, third-party claims for personal injury or property damage occurring off-site as a result of the construction cannot be precluded; however, the incremental risk of environmental claims can be managed as described above.

We believe that EPA lacks legal authority to create a legal shield to insulate a redeveloper against third-party liability. However, because we believe the fear of third-party claims is an important perceived barrier, EPA should take reasonable steps to try to dispel the perceived concerns.

We believe that EPA could help in some ways to deter a third party from filing a liability claim against an "innocent redeveloper" who has satisfactorily cleaned up a site to EPA-approved or State-approved standards for that site, or is making satisfactory progress towards clean-up.

We recommend that EPA encourage the use of no-action letters, "comfort letters", and similar legal or quasi-legal documents, especially at the State level, to reduce the likelihood that a third party may file a lawsuit that implicates the sufficiency of the clean-up standards or the planned remedial activities. We also recommend that State environmental agencies utilize similar documents for Brownfields clean-ups where the clean-up is conducted according to State standards and overseen by the State rather than EPA.

Assuming that such a third party would make its claims of injury or harm known to the redeveloper before actually filing a lawsuit for damages, a redeveloper having such documents from EPA or the State in hand would be in a better position to expeditiously assure the complaining third party that EPA or the State had approved the health-related adequacy of the clean-up standards and the planned clean-up activities, thereby helping to deter the third-party from pursuing any claims.

We recommend that EPA check and confirm our understanding that there has been no known significant instance of environmental damage claims being asserted (or being asserted successfully, as the case may be) against the redeveloper by an allegedly-harmed third party. If that is correct, EPA should disseminate that information to the private redevelopment and banking communities, to help alleviate fears.

We recommend that EPA continue to work with the States to develop and implement "model" comfort letters and similar documents for use with Brownfields redevelopers, in order to make the documents as uniform and consistent as possible from site to site, State to State, and Region to Region. To encourage uniformity (both in the use of covenants and comfort letters generally, and in the specific terms therein) such "model" documents should be referenced in the SMOAs.

We recognize that encouraging the use of uniform "model" documents may well encounter some resistance from States that will wish to (and in some instances of State law, will be required to) include provisions addressing individual State programs or policies. However, we urge EPA

to strive for uniformity to the extent possible, because that will reduce the transaction costs and uncertainties, and will raise the "comfort level", for the private redevelopment and investment communities.

We also recommend that EPA provide financial assistance as needed to States that seek to develop and implement "model" comfort letters and similar documents, because: (1) we recognize that preparing such documents requires a case-by-case assessment of the realities of the particular site and situation; and (2) the theoretical availability of such documents that facilitate private-sector participation in redevelopment of Brownfields properties is of no real-world benefit if States lack resources to assess the site-specific situation and actually write such documents.

Addressing Potential Liability to Third Parties Through New Legislation:

As stated in the Board's letter to Administrator Browner dated March 31, 1997, ***we also recommend that EPA actively support legislative reforms that would exclude innocent purchasers from liability***, thereby eliminating the need for prospective purchasers to negotiate liability relief through covenants-not-to-sue and the like. (In this context, we use the term "innocent purchaser" in its non-CERCLA, dictionary sense, meaning someone who purchases the property, perhaps with knowledge of the existing contamination on the property, but who has no legally binding relationship/privity with anyone who caused the contamination.)

Also, it may be politically feasible to establish, at the Federal or State level, legislation insulating an "innocent redeveloper" against claims by third parties. Such legislation could include a fund to which an injured third party must apply for compensation in lieu of seeking compensation from an "innocent redeveloper". Such a legal shield and alternative compensation fund should provide additional comfort to prospective redevelopers and their financial backers.

We recognize that legislation that provides protection from liability for new purchasers may need to distinguish between protection from: (1) liability for third-party claims regarding consequences of pre-existing, perhaps off-site, contamination for which the new purchaser was not in fact responsible; and (2) liability for appropriate clean-up of the site pursuant to conditions agreed to by the State (or EPA) and the new purchaser. We do not suggest that the new purchaser should be totally immune from all environmental liability in all circumstances.

BARRIER # 3: UTILIZING AVAILABLE FEDERAL FINANCIAL INCENTIVES [1]

The Perceived Problem:

Many members of the private sector commercial real estate industry (which necessarily would provide many or most of the developers who can undertake Brownfields projects) view redevelopment of environmentally contaminated urban properties as insufficiently likely to return a satisfactory profit on the capital investment involved.

Discussion and Remedy:

There are two principal categories of Federal finance-related issues affecting Brownfields cleanup and redevelopment. The first concerns "up front" or near-term funding and financial incentives for initiating and implementing a Brownfields project. The second concerns the long-term financial consequences such as tax treatment of the redeveloped property upon later sale.

"Up Front" Federal Financial Incentives

1. Funding Through EPA

We recommend that EPA evaluate the various options for using available Federal funding, including EPA funding, for Brownfields purposes. EPA should allocate its funding in the most economically efficient manner feasible. EPA funding should be used to leverage other sources of funding, to obtain "the most bang for the buck" in promoting and achieving environmental clean-up and opportunities for economic redevelopment.

As the Brownfields program matures, the issue of what level of EPA funding is appropriate will be under debate. In the 105th Congress, bills including up-front funding mechanisms (grants and loans) to assist Brownfields redevelopment have been introduced by both the Senate Republican leadership (S. 8) and the Senate Democratic leadership (S. 18, introduced by Sen. Lautenberg). The authorization levels proposed in S. 8 for a package of grants and loans to aid in characterizing and remediating Brownfields may be a good indicator of what is currently feasible:

- $15 million in annual grants to identify and characterize contamination at Brownfields sites;

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[1]Note: This paper addresses Federal-level issues only. Comparable issues exist at the State and local levels, including prospects for the availability of local industrial development bond financing, deferral or forgiveness of local real estate taxes, etc.

- $25 million in annual grants to remediate Brownfields sites;
- Grants may be leveraged with funds from other sources and used to capitalize local revolving loan programs; and
- $25 million in annual funding for States to create or improve voluntary clean-up programs.

2. Other EPA "Financial" Functions: Coordinating, Leveraging, Educating

We recommend that EPA pursue partnership efforts with the U.S. Department of Housing and Urban Development (HUD), the Economic Development Administration (EDA) in the U.S. Department of Commerce, and with the U.S. Departments of Labor and Transportation, to coordinate, target, and leverage Federal funding and other incentives for Brownfields redevelopment, as part of a Clinton Administration "urban initiative".

To that end, we recommend that EPA undertake to monitor and report periodically to the Board and to the public upon the implementation -- including specific results -- of the "Brownfields National Partnership" announced in May 1997 by Vice President Gore.

EPA should encourage, at both the national and EPA Regional level, formation of inter-agency coordinating committees or other mechanisms to harness, target, and leverage available resources towards Brownfields projects. For example, HUD and EDA, in all regions, should be urged to make Brownfields projects a priority or preferred recipient of Federal financial assistance.

Grant monies provided by other agencies, such as the HUD Community Development Block Grant Program (CDBG), and EDA Title I public works grants (for industrial parks and infrastructure), could be other sources of funds for activities such as site assessment and clean-up, with concurrence from those agencies and the local governments. Also, ***we recommend that EPA urge all Federal agencies with programs providing incentives for investing in redevelopment in Enterprise Communities and Empowerment Zones to give appropriate priority to Brownfields sites and not disregard their redevelopment potential.***

Another category of "up front" assistance (although it is perhaps less desirable than actual Federal dollars for site assessment and/or clean-up) is mortgage loan guarantees such as HUD recently initiated for a project in the Chicago area under the "Section 108" loan guarantee program, using the CDBG grant as collateral.

Also, EPA and the U.S. Department of Transportation should explore ways and opportunities to encourage States to use "ISTEA" funding for renewing highway and road infrastructure or mass transit to serve Brownfields redevelopment areas.

Road and highway construction is another potential source of environmental liability if the construction is near known contaminated sites, so private developers will tend to be reluctant to undertake that construction due to concerns about incurring environmental liability as well as the capital cost.

We recommend that EPA initiate and coordinate an inter-agency effort to catalog the available sources for Federal financial assistance that can be targeted to Brownfields redevelopment, and then undertake intensive efforts to publicize the availability of those Federal resources to the commercial real estate industry. Cataloging Federal financial assistance programs would be a logical first step towards developing the more comprehensive "clearinghouse" described below.

We recommend that EPA establish a "Brownfields Redevelopment Clearinghouse" to educate developers and interested cities and others around the country. The Clearinghouse should include financial and technical information, success case studies, etc. Disseminating this "how to" information will promote the transferability of Brownfields successes.

We note that EPA now has the OSWER Outreach office, the Internet site, the Regional Brownfields contacts, and the EPA-sponsored network of six university-based Environmental Finance Centers (EFCs). In particular, the Great Lakes EFC at Cleveland State University devotes nearly all of its time and activities currently to Brownfields. We believe that EPA needs to carefully coordinate, focus, maximize the value of, and minimize potential dispersion of, its Brownfields resources (meaning both valuable information resources and databases, and knowledgeable staff), at existing EPA centers for Brownfields information and advice.

To that end, we recommend that EPA senior management commission an internal "Brownfields Information Management Review": i.e., determine how best to harness and make available to the private sector, interested States, and others the multiple, substantial sources of Brownfields-related information currently extant at EPA. We envision a management review that would seek to coordinate and synergize -- rather than disrupt -- the operations of these several EPA entities, in the effort to establish the suggested Brownfields Redevelopment Clearinghouse. EPA may conclude that the "Clearinghouse" <u>function</u> can be performed best by coordinating the existing information centers and staff rather than by designating one entity as "The Clearinghouse".

We also recommend that EPA more actively or more broadly promote the OSWER Outreach office, the Internet site, and the EFCs to the intended audiences or "customers", including members of the commercial banking and real estate development communities, to educate the "customers" about the existence, purpose, and resources of the EPA Brownfields program.

We recommend that EPA include State and local governments and economic development agencies and other governmental entities, and their financial resources and incentives, in all these efforts wherever possible.

3. Reaching Private Financial Sources: Federal Banking Regulatory Agencies

We recommend that EPA encourage the Federal banking regulatory agencies (the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Federal Reserve Bank) to: (1) elevate the visibility of the Brownfields program within those agencies; (2) assure that the regulations implementing the Community Reinvestment Act (CRA) give banks and other Federally-regulated lenders who make loans to clean up and/or redevelop Brownfields properties (i.e., on-site clean-up or redevelopment) substantial credit for purposes of meeting compliance requirements of the CRA; and (3) educate bankers about the availability of the CRA credit.

We recommend that EPA work with senior officials and communicators at the OCC, OTS, FDIC, NCUA, and the Fed to educate the Government's bank examiners and other regulators who are in frequent contact with private banking executives to emphasize the national economic policy benefits (as well as environmental benefits) of facilitating investment in Brownfields redevelopment projects.

The "lender liability" provisions of Pub. L. 104-208 should help to make financing of private site investigation and clean-up more feasible by substantially shielding lenders from liability under CERCLA (Superfund) and RCRA Subtitle I (underground storage tanks) to which lenders have been exposed merely by holding a security interest in real property.

We recommend that EPA work with senior officials and communicators at the OCC, OTS, FDIC, NCUA, and the Fed to educate senior executives in the banking and financial industry that the new statutory liability protections exist.

4. Near-Term Tax Benefits

Tax benefits and other incentives to developers and/or employers are currently available for investments in qualified redevelopment and job-creation in designated Enterprise Communities and Empowerment Zones. These incentives should help to stimulate Brownfields activity.

Additional financial incentives that would have a positive, "up-front" or "near term" impact on individual Brownfields redevelopment projects have recently been enacted into law.

The Clinton Administration proposed a $2 billion tax incentive in early 1996, designed to encourage clean-up and redevelopment of Brownfields sites. The Treasury estimates the tax package would leverage $10 billion in private investment and could revive 30,000 Brownfields

sites. Among other things, the Administration's proposal would allow developers to deduct fully from their Federal taxes the costs of environmental investigation and clean-up at designated Brownfields sites during the year the costs are incurred, instead of capitalizing the cost and deducting it over some period of years on an amortized basis.

The tax relief bill signed by President Clinton on August 5, 1997 contains provisions that essentially enact the President's proposal, for three years. (The "Taxpayer Relief Act of 1997", Public Law 105-34, formerly H.R. 2014, at Title IX, Subtitles E and F.) The new law allows redevelopers of certain, qualified Brownfields properties to deduct certain environmental remediation expenditures in the year paid or incurred, rather than charge them to a capital account and amortize them over many years. The deduction is available for abatement or control of hazardous substances at a "qualified" site, which can include sites in Empowerment Zones, Enterprise Communities, at the 76 EPA Brownfields pilot projects that were underway by early 1997, or in Census tracts that have a poverty rate of 20% or more and in certain industrial and commercial areas that are adjacent to such Census tracts.

Both urban and rural sites may qualify for the deduction, if they meet the above geographic criteria. Sites on the National Priorities List are not eligible.

The law requires the taxpayer to obtain, from the appropriate State environmental agency, a statement that the property is in a targeted area and is eligible for the clean-up deduction due to release or disposal of hazardous substances at the property.

The new law limits the availability of the deduction to a 3-year period, to eligible expenditures incurred after the date of enactment and before January 1, 2001. The new law also requires that the deductions for environmental remediation expenses would be subject to recapture as ordinary income upon sale or other disposition of the property.

As noted above, the Clinton Administration had sought a permanent deduction, but in the budget negotiations with Congress the decision was made to provide only a three-year deduction, because of the need to balance the budget, i.e., to not forego too much revenue due to this and other tax incentives. The incentive in the new law is estimated to be worth up to $1.5 billion, and is expected to leverage about $6 billion in private investment, to return an estimated 14,000 Brownfields sites back to productive use.

We are advised that the Internal Revenue Service likely will issue some regulations to implement these new Brownfields-related tax incentives. However, noting that the deduction of eligible remedial expenses is available only through the year 2000, we also are advised that the general view is that the statutory language is sufficiently clear that the private development community can and should begin now to "do deals" that take advantage of the new deduction, there is no need to wait for the IRS regulations.

Long-Term Financial Incentives

Congress should evaluate the various options for using Federal funding and tax incentives for Brownfields purposes, and should utilize the most economically efficient techniques. Such tax incentives may turn out to be essential incentives to sweeten the deal for commercial developers who have alternatives to build on non-Brownfields sites.

Among other things, Congress also should consider preferential long-term tax benefits for Brownfields redevelopers, such as: (1) preferential treatment regarding (accelerated) depreciation/amortization schedules; (2) imposition of lower capital gains taxes upon sale of the Brownfields property; and (3) foregoing the recapture (recapture is currently required by Pub. L. 105-34), at sale or disposition of the property, of environmental clean-up costs that are allowed to be deducted in the year incurred or paid.

Addressing Federal Financial Incentives Through New Legislation:

Many of the discussions above regarding Federal financial incentives for Brownfields clean-up and redevelopment address (a) the possible use of EPA appropriations for various Brownfields purposes and (b) the tailoring of Federal financial incentives such as the Internal Revenue Code to encourage private investment in Brownfields. As those discussions inherently involve either appropriations legislation or tax legislation, our recommendations for remedying this perceived barrier through new legislation were provided above.

Congress also should consider, in effect, how it defines "Brownfields" for purposes of the financial incentives. The new statutory tax benefits are targeted at designated Enterprise Communities, Empowerment Zones, areas having greater than a 20% poverty rate and certain adjacent industrial and commercial areas, and sites included as an EPA Brownfield pilot project before February 1, 1997. Congress should consider whether "Brownfields" sites in other geographic areas warrant similar special financial incentives for redevelopment. ***We recommend that the Federal tax incentives be available to as wide a range of "Brownfields" properties, as defined above at page iii of this paper, as is politically feasible.***

BARRIER # 4: OBTAINING PRIORITY CLEAN-UPS

The Perceived Problem:

To some of the main participants in a Brownfields redevelopment project, notably a private-sector developer and its lender, "Time Is Money". The risk or fear of encountering delays in cleaning up and redeveloping a site that is believed or known to be contaminated poses a serious disincentive to becoming involved at any Brownfields site. One source of potential delay is governmental inertia and other bureaucratic problems that delay the making of crucial decisions such as approving zoning changes and issuing necessary permits.

Discussion and Remedy:

Many commercial real estate developers and financial sources are very wary of environmental risk. "Horror story" anecdotes about companies becoming saddled with clean-up liabilities under CERCLA/Superfund through innocent, routine corporate transactions definitely have impacted business executives' thinking.

Also, all developers will know of delays caused by, for example, wetlands permitting problems, and will be averse to any site that has delay-inducing environmental problems. Even if the actual cost of addressing or "planning around" an environmental condition is not great, the delay component is an independent factor in the developer's assessment of the viability of the project.

Private developers and investors have other places to invest their time and money: Greenfields projects. In the Brownfields context, the perceived environmental risks make it even more important to control -- preferably, eliminate -- other common risks of encountering delay in approval or construction of the project.

Particularly after the first round of Brownfields planning grants, many cities should be in a position to develop a preferred wish-list for which sites get assessed, cleaned and re-developed first. If funding can be made available for "Phase 1" and "Phase 2" site assessments, the process of identifying desirable candidate sites should accelerate as sites that are confirmed to be clean or minimally contaminated are identified.

Because Brownfields sites that are, or become, attractive economic redevelopment properties are generally (but not always) not severely contaminated and because the economic redevelopment of urban sites is presumably a high political priority, municipalities and States should be able to commit to giving the Brownfields site redeveloper an expedited processing of major elements of the project, such as:

- Review and approval of any zoning or variance required for the project;
- Review and issuance of the building permit;
- Determination of the clean-up standard for the site; and
- Selection of the remedy required for the clean-up.

Any measures that EPA and all other involved agencies can implement to expedite the decision processes regarding site/project/permits review and approval (for example, the use of an ombudsman, or "one-stop shopping" for permits) should facilitate the project by reducing delay, cost, and paperwork.

Also, for properties that are already owned by municipal governments, an accelerated review process would expedite, for example, the sale of the land to a private redeveloper. This would bring in immediate revenue to the municipality, facilitate economic redevelopment, and enhance the city's long-term tax base. Also, the city would receive collateral benefits more quickly, for example, if the redevelopment project included an associated restored park or "greenway".

We recommend that EPA encourage State and local governments to establish coordinated, "fast track" review and approval processes for redevelopment projects on Brownfields sites. EPA should amend its criteria for awarding Brownfields demonstration grants (whether for planning, assessment, revolving loan funds, etc.) to give some preferential consideration to cities or towns that have some type of "fast track" process to facilitate crucial decisions and issuance of crucial permits. We recommend that the existence of a "fast track" be a consideration in, but not a prerequisite to, awarding a grant.

Addressing Obtaining Priority Clean-Ups Through New Legislation:

Because the procedures and processes that hinder expeditious redevelopment are principally local land-use and regulatory laws, we see little if any opportunity for Federal legislative relief for this perceived barrier.