Brownfields

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U.S. cities are home to hundreds of thousands of old, abandoned commercial and industrial sites called *brownfields*. Developers avoid these sites for fear that they might be contaminated and could fall under the jurisdiction of the federal Superfund law, which would demand expensive cleanup. Rather than risk Superfund liability, many firms choose to develop in the so-called greenfields—property in suburban and even more rural areas that have not been developed. To promote redevelopment of urban areas, many states have passed brownfield laws that attempt to release developers from liability for state cleanup laws. However, these programs have been of limited value because the sites have still been subject to federal Superfund liability. Congress attempted to fix that problem by its own Brownfields legislation. Unfortunately, rather than remove federal controls over the lands and thereby allow state-level cleanup and private development, the federal government set up a complicated and bureaucratic brownfield program.

State Successes

Most states have passed laws modeled after the federal Superfund program, and those laws have created problems similar to those caused by the federal law. Fortunately, state governments have made enormous strides in reforming their laws to allow more flexible standards[1]—

1. For more complete documentation of state successes, see Dana Joel Gattuso, *Revitalizing Urban America: Cleaning Up the Brownfields* (Washington, DC, Competitive Enterprise Institute, 2000), http://www.cei.org/pdf/1782.pdf.

producing 40,000 site cleanups, according to one estimate.[2] In recent years, states have begun passing brownfield laws that provide liability relief to parties that voluntarily clean sites, as well as flexible cleanup standards and financial incentives. Nearly all states operate some form of voluntary brownfield cleanup program.[3]

The Federal Brownfield Program

Initially, the U.S. Environmental Protection Agency (EPA) operated several brownfield programs under the authority of, and with some financial support from, the federal Superfund law. In addition, Congress had appropriated special funds for brownfield grants programs before passing a brownfield law. These programs accomplished little more than the creation of a few showcase communities that the EPA and politicians have used for political purposes.[4] Meanwhile, few sites were actually cleaned under these programs, funds were abused, and grant recipients found themselves bound in federal red tape.[5]

In January 2002, President George W. Bush signed the Small Business Liability Relief and Brownfields Revitalization Act. Despite some serious documented failures of the EPA brownfield program,[6] the law expands this program and federalizes brownfield development. The law authorizes spending $200 million a year—more than double past spending levels—for EPA brownfield grants of various kinds. Under the program, the EPA is required to produce guidance for grant applications, which basically allows the EPA to set standards for brownfield cleanups. Another section of the law specifically gives the EPA authority to apply any Superfund cleanup standards that the agency deems "necessary and appropriate" for grant recipients.

In addition to enabling the EPA to set standards at specific sites, the law basically pays, under yet another grant provision, state governments to implement uniform federal standards for brownfields rather than allow states to experiment with various approaches. To be eligible for a grant, states must either enter into a memorandum of agreement with the EPA regarding the structure of their programs or follow specific EPA regulations. The regulations demand that states create inventories of brownfield sites—creating lists comparable to Superfund's National Priority List (NPL). As has been the case with the NPL, listing brownfields could increase disincentives for cleanups at those sites because listing highlights potential liability concerns. In addition, states have to ensure that cleanups meet all relevant state and federal standards—which subjects these sites to Superfund's onerous standards rather than the more reasonable and flexible standards that states had applied in the past.

Also in the section on state programs is a provision that supposedly would prevent the EPA from taking enforcement actions at sites cleaned up under these programs. This provision has been marketed as an effort to turn

2. Environmental Law Institute, "Developments in State Programs," in *An Analysis of State Superfund Programs: 50-State Study*,(Washington, DC: Environmental Law Institute, October 1998).

3. Charlie Bartsch and Christine Anderson, *Matrix of Brownfield Programs by State* (Washington, DC: Northeast-Midwest Institute, September 1998).

4. For example, see Dana Joel Gattuso, "Father of Deception: Gore Is the Anti-reformer," *Washington Times*, August 31, 2000, A19.

5. For specifics, see Gattuso, *Revitalizing Urban America*.

6. See Gattuso, *Revitalizing Urban America*.

brownfield responsibilities over to the states and to spur private cleanups by providing federal recognition for state liability relief policies. Yet the exceptions in the law undermine the value of this provision.

The law notes that the EPA can intercede with an enforcement action if the agency determines that "a release or threatened release may present an imminent and substantial endangerment to public health, welfare, or the environment." The EPA uses this same standard to become involved in Superfund sites, which gives the EPA as much control over state-led brownfield cleanups as it has over cleanups under Superfund. Hence, the new law fails to provide what has been called "finality"—the assurance that a private party will gain liability relief if it voluntarily acquires and cleans a contaminated site.[7] Without such assurances, many private parties will not want to get into the business of cleaning brownfields.

Because it misses opportunities to spur private cleanup efforts, the new grant program is exclusive to government-led cleanups. The parties eligible for grants include state and local governmental entities, quasi-governmental entities, and nonprofit organizations. The only private parties that can obtain grants are Native Americans. This public emphasis goes against the main goal of state-level brownfield programs. States recognized that the private sector has the greatest resources for site cleanup and development. Hence, state programs wisely focused on spurring private investment by removing government-created barriers to redevelopment.

Unclear Liability "Clarifications"

The 2002 brownfield law includes several provisions that are supposed to provide liability relief to some parties who assume ownership of a contaminated site or whose land is contaminated by an adjoining property. Again, the goal is to spur cleanup efforts by both public and private groups, but the exceptions greatly undermine the usefulness of the provisions.

In question is whether this new scheme will, on balance, prove more just and whether it will reduce distortions in the marketplace such as the perverse incentives that prevent development. It is difficult to measure the complete impacts of this new law; some developers have already cited it as inadequate in their decisions not to develop brownfield sites.[8]

One legal analysis notes the potential downsides:

> This relief does not come without strings attached. In fact, so significant are these 'strings' that they raise serious questions about the ability of the amendments to achieve their intended purpose.... The amendments could actually serve to increase liability risks or other problems for parties involved in brownfield transactions by creating a new due care standard that may be used to impose Superfund liability where it could not have been imposed previously.[9]

7. For more discussion on the finality issue, see Dana Joel Gattuso, "Senate Brownfields Bill Needs a Clean-Up," *CEI OnPoint* no. 79, Competitive Enterprise Institute, Washington, DC, April 23, 2001, http://www.cei.org/gencon/004,02019.cfm, and Dana Joel Gattuso "Superfund Legislation: True Reform or a Hazardous Waste?" *OnPoint* 51, Competitive Enterprise Institute, Washington, DC, November 23, 1999, http://www.cei.org/gencon/004,02411.cfm.

8. For example, see "Brownfields Redevelopment Hampered by Poor Economic Viability for Owners," *Hazardous Waste News* 24, no. 16 (2002).

9. Steven L. Humphreys, "Taming the Superfund Juggernaut: Impacts of the Small Business Liability Relief

Before the brownfield law passed, Superfund already included a provision to protect "innocent landowners." However, requirements for demonstrating such innocence have made the defense nearly impossible to use successfully. Key among those mandates was that the party had to demonstrate that it was not responsible for the release in any way and that it was not, and could not have been, aware of the release. The new law adds "clarifications" for the innocent owner defense that actually raise the bar—requiring the innocent purchaser to meet additional obligations.

The law also adds two new liability relief claims for "owners of contiguous properties" and "bonafide prospective purchasers."[10] The bonafide prospective purchaser defense allows purchasers to be aware of the contamination and still not be liable when they obtain the land. All three parties—innocent owners, bonafide prospective purchasers, and owners of contiguous properties—must meet numerous requirements to qualify, some of which demand ongoing activities in order to retain liability relief. Unfortunately, these criteria may make these three defenses more complex than the innocent landowner defense under the old law.[11] As a result, the liability changes may not do much to create the stable and secure business environment that is necessary for efficiently functioning markets.

For example, to obtain liability relief, purchasers must not only show that all disposal and contamination occurred before they took ownership, they must also demonstrate that they made all "appropriate inquiries" into the previous ownership and uses of the property in conformance with existing commercial standards. The EPA promulgated regulations to define "appropriate inquiries" in November 2005.[12] The new rule may clarify when the bonafide prospective purchaser defense applies, but the defense will likely remain difficult and certainly is bureaucratic.

In addition, some of the mandates require ongoing efforts to maintain liability. For example, to use any of the three defenses, the owner must show that he or she provides all legally mandated notices related to any discovered hazardous substances or releases on the property. Hence, simple failure to meet a paperwork mandate could undermine a liability claim. Given the myriad laws and regulations in this area, it is not unlikely that at least some paperwork errors would result. Similarly, the purchaser must take "appropriate care" to stop, prevent, and limit human exposure and environmental impact from any substance or release discovered on the property—a new mandate that seems to go far beyond the requirements of the old law.

Despite all these and other concerns, the EPA says in its guidance on prospective purchaser provisions that this liability exemption reduces, if not eliminates, the need for prospective purchaser agreements. The EPA began issuing such agreements in 1989. These legal documents granted permanent liability relief from existing contamination to parties that purchased contaminated land. But unlike prospective purchaser agreements, the bonafide

and Brownfields Revitalization Act, Part I," *Metropolitan Corporate Counsel* 10, no. 5 (2002), 5.

10. For more details on this topic, see Steven L. Humphreys, "Taming the Superfund Juggernaut."

11. Jeffrey Alan Bolin and Allan Clifford Lawton "'All Appropriate Inquiries' —New ... and Improved?" *Michigan Lawyers Weekly*, February 13, 2006.

12. *Federal Register* 70, no. 210 (November 1, 2005): 66070–113.

prospective purchaser standard offers no guarantee of relief.[13]

Another concern for bonafide prospective purchasers is that the new law gives the EPA a windfall lien on brownfield properties that it cleans.[14] This provision requires that bonafide prospective purchasers pay the EPA an amount equal to the value added from EPA's cleanup when the EPA cannot locate a responsible party to cover those costs. This policy substantially adds to investment risk and increases transaction costs—both of which will create redevelopment disincentives.

Uncertainties result because it is unclear how this policy will work and how it will affect profits. In particular, whether and when the EPA would seek compensation is unknown to potential buyers. The lien remains in effect until the EPA recovers all its costs. Potential developers are basically in the dark regarding whether or when the EPA will make a claim and how much it might cost. For example, an innocent party could purchase an EPA-cleaned brownfield while the EPA is suing other parties for cleanup costs. The EPA might collect from other parties and leave the new owner alone. If, however, it failed to collect from the other parties, it could then demand compensation from the new owner. But exactly how will the EPA and the courts determine the value of an EPA cleanup? Could it be enough to absorb all profits from developing the property?

Prospective purchasers could invest time and money to investigate whether the EPA had already recovered costs at a site and, if so, try to settle the lien with the agency before buying the site. Such agreements may prove difficult in the future because the EPA has recently stated that it is less likely to enter into similar prospective purchaser agreements. If a company cannot come to an agreement with the EPA, it may find that it incurred a substantial transaction cost for nothing. The other option for a purchaser is to buy the site and risk having to pay the EPA a windfall lien that could eventually wipe out the profits.

Other transaction costs related to obtaining and developing EPA-cleaned sites may add to disincentives for redevelopment. Lenders may be reluctant to extend financing when such liens are present and may require additional paperwork and investigations. The cost and time necessary to obtain title insurance also may increase because title companies will also want to assess the likelihood that EPA will claim a lien.

Special Liability Exemptions

The new law provides special exemptions for two categories of parties: de minimis contributors and small businesses. The de minimis exemption covers transporters and generators of fewer than 110 gallons of liquid waste or 200 pounds of solid waste to sites that subsequently were added to the NPL. After all, it does not make much sense to hold generators and transporters responsible when they disposed of the waste legally and did not manage the property or disposal. However, the law includes some exceptions to this exemption that could undermine it completely. For example, the EPA can still bring an action against these parties if it deems that the parties' waste "significantly

13. For further discussion of the pitfalls of eliminating prospective purchaser agreements under the new law, see Stacy A. Mitchell, "Prospective Purchaser Agreements May Become a Thing of the Past," *The Legal Intelligencer* 227, no. 11 (2002), 5.

14. For more information on liens, see Kermit L. Rader, "New Brownfield Windfall Liens: Pitfalls for Developers?" *The Legal Intelligencer* 227, no. 33 (August 15, 2002), 5.

contributed or could have significantly contributed" to the cost of the response action—an exception that gives the EPA broad discretion to pursue actions against *di minimis* contributors.

The liability exemption for small businesses applies to generators of municipal solid waste (basically household waste) in the following categories: residential property owners, small businesses with 100 or fewer full-time employees, and nonprofit organizations that employed 100 or fewer full-time people at the site where the waste was generated.

These provisions do provide some justice for those parties that legally generated or transported relatively small amounts of waste to disposal sites. After all, those parties are not responsible if someone mismanaged the waste at the disposal site. However, many other parties are subject to Superfund liability unjustly. Skimming out certain parties only shifts the burden to other innocent parties. A just liability scheme would focus solely on parties that mismanaged waste. Although such provisions do make the law more just for some, they make the law less just for others, who end up bearing a larger share of the costs.

Conclusion

It is true that brownfields are being redeveloped under the new program—despite its many flaws. But the transaction costs of the program are quite high, and the amount of redevelopment is likely much lower than it would have been in a truly free market. In the future, problems associated with the many exemptions to liability relief could come back to haunt those who decided to risk doing business under this program.

Unfortunately, the federal law represents a missed opportunity to fix problems created by the Superfund law. Because the brownfield problem is simply a government-created problem, the obvious solution is to remove federal impediments to cleanup (where necessary) and to development of brownfields. To that end, Congress could have simply relinquished control of the properties, thereby allowing states to address liability issues and allowing private parties to do the development. The costs of this solution to the federal government would have been zero, and the costs of redevelopment would have been much lower than under the current federal program; hence, there would have been more cleanups and redevelopment had the federal government simply removed the obstacles to development that it had created.

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Recommended Readings

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