

Brownfield Basics

Paul J. Bruder, Esq.
Rhoads & Sinon LLP
Harrisburg, PA
PBruder@Rhoads-Sinon.com

Steven T. Miano, Esq.
Hangley Aronchick
Philadelphia, PA
smiano@hangley.com

Tom Mellott
PADEP
Harrisburg, PA
mtmellott@pa.gov

Introduction

- ▶ Panelists
- ▶ What is a Brownfield?
- ▶ Why are they important?
- ▶ Barriers to redevelopment

Overview of Legal Landscape

- ▶ Federal and state statutes impose liability for brownfields sites
- ▶ Liability issues for soils, groundwater, wastes, and other contaminants
- ▶ Enforcement (civil and criminal) for failure to comply with laws
- ▶ Liability concerns drove the passage of Act 2, Act 3 and Act 4

Overview of Legal Landscape – Federal Laws

Comprehensive Environmental Response Compensation and Liability Act (Superfund)

- ▶ Imposes retroactive, joint and several liability for owners/operators and those in chain of title
- ▶ Elaborate and expensive process if caught in CERCLA web – including cleanup costs and costs for natural resources damages
- ▶ Amendments created liability protections for:
 - Innocent Owners
 - Prospective Purchasers

RCRA Resource Conservation and Recovery Act

- ▶ Imposes “cradle to grave” regulation of “hazardous wastes”
- ▶ Regulates treatment, storage and disposal of hazardous wastes
- ▶ Typical hazardous wastes at sites include solvents, soils with heavy metals, certain structural debris with contaminants
- ▶ If hazardous wastes are present on sites, RCRA may impose additional obligations on remediators
- ▶ RCRA also contains requirements for USTs

TSCA Toxic Substances Control Act

- ▶ Imposes requirements on use, manufacturing, handling, treatment and disposal of certain substances that create “unreasonable risk” to health and the environment
- ▶ Typical TSCA substances found at sites include asbestos and polychlorinated biphenyls (PCBs)
- ▶ TSCA substances are subject to strict compliance with regulations

Clean Water Act

- ▶ CWA requires permits for discharges of pollutants to surface waters
- ▶ Section 402 requires NPDES permits for point source discharges
- ▶ Section 402 regulates stormwater from industrial activities and construction projects
- ▶ Section 404 requires permits for discharges to wetlands, including those associated with road crossings

Overview of Legal Landscape - State Laws

Clean Streams Law

- ▶ CSL is PA's version of the Clean Water Act.
- ▶ Requires permits for discharges of pollutants
- ▶ "Pollutant" defined very broadly.
- ▶ Erosion and sedimentation control; point source discharges,
- ▶ DEP's "catch-all" enforcement statute for unpermitted discharges
- ▶ Civil and criminal liability for violations
- ▶ Private rights of action - no damages available

Solid Waste Management Act

- ▶ Section 405 requires a description in every deed with a conveyance of property where hazardous waste has ever been disposed
- ▶ Description of surface area size, location and types of wastes disposed

Pennsylvania Storage Tank and Spill Prevention Act

- ▶ Regulates most underground and aboveground storage tanks
- ▶ Suspected or confirmed releases must follow the corrective action process ("CAP") in Chapter 245 of the Pennsylvania Storage Tank regulations
- ▶ Not classic "brownfield" scenario but ultimate liability protection is the same

Hazardous Sites Cleanup Act

- ▶ PA's version of federal Superfund Law
- ▶ Section 512 requires every deed for the conveyance of property on which a hazardous substance has ever been disposed to provide a description and acknowledgment of the hazardous substance disposal
- ▶ Should include surface area size and exact location and description of the type of hazardous substance disposed

Due Diligence and Environmental Disclosure

All Appropriate Inquiry

- ▶ CERCLA – Bona Fide Prospective Purchaser & Innocent Owner Defenses provide exclusion from owner/operator liability if:
 - Disposal occurred prior to purchase
 - **Purchaser complied with AAI standards (due diligence)**
 - Required notices provided by purchaser
 - Appropriate care exercised by purchaser
 - Cooperation by purchaser
 - Purchaser complies with institutional controls

All Appropriate Inquiry

- ▶ Purpose is to identify:
 - Current/past land uses
 - Current/past uses of hazardous substances
 - Prior activities that may have caused releases of hazardous substances
 - Current/past remediation to address past and on-going releases of hazardous substances
 - Engineering and institutional Controls
 - Nearby properties that could impact the property

All Appropriate Inquiry

- ▶ Environmental Professional (EP) EP must conduct or oversee AAI
- ▶ AAI Report components:
 - Compare Fair Market Value to Purchase Price
 - Search for recorded cleanup liens
 - Search for deed restrictions and institutional controls
 - EP Opinion and Declaration
 - Interviews of past/present owners, operators & occupants
 - Review site history/records
 - Visual site inspection
 - Consider commonly-known/reasonably ascertainable information
 - Identify and address data gaps
 - Some components are client responsibilities

Phase I Assessments

- ▶ Non-intrusive snap shot of property.
- ▶ File reviews, site reconnaissance, interviews
- ▶ Neighboring properties
- ▶ Leaking storage tanks in the area
- ▶ Cost \$2,500-\$3,500
- ▶ Required by most lenders

Phase II Assessments

- ▶ More intrusive
- ▶ Soil and/or groundwater sampling
- ▶ Possibly vapor intrusion testing
- ▶ Determine the presence of contamination.
- ▶ If found and above appropriate standards, then next step is to characterize site to determine how deep and how wide.

PA's Brownfields Program

Overview of Act 2

- ▶ Acts 2, 3 & 4 passed in 1995
- ▶ Act 2 – Land Recycling and Environmental Remediation Standards Act provides for cost effective cleanups to uniform standards
 - Dependant on future use
- ▶ 3 cleanup standards
- ▶ Cleanups may rely on:
 - Engineering controls (e.g. caps)
 - Institutional controls (e.g. land/GW restrictions)
 - UECA secures these restrictions

Overview of Act 2

- ▶ Contains notification and reporting requirements (including public notice)
- ▶ Provides broad liability protections
- ▶ Act 2 cleanup standards apply to all PA cleanups
- ▶ Key documents include:
 - Regulations found at 25 PA Code Chapter 250
 - DEP's Technical Guidance Manual

Liability Protections of Act 2

- ▶ Act 2 protections by operation of law upon approval of Final Report
- ▶ Confers liability protection upon remediators and future owners and operators
- ▶ Liability relief includes claims for:
 - Remediation under state law for identified contamination
 - Suits for further cleanup for identified contamination

Limitations of Liability Protection in Act 2

- ▶ Does not specifically cover federal statutes
 - MOU with Region III provides additional protection for EPA claims
- ▶ Doesn't cover third party common law suits
 - Toxic torts
- ▶ Doesn't cover substances not identified/approved by DEP in Final Report

Reopeners in Act 2

- ▶ Protection revocable if:
 - Fraud
 - Previously unknown contamination discovered
 - Remediation method failed
 - Level of risk changes (changed exposure/uses)
 - Engineering or institutional controls fail
 - Change in regulations/cleanup standards (?)

Act 2 Cleanup Standards

- ▶ Three standards...Background, Statewide Health and Site-Specific
- ▶ Standards are used for “voluntary” or “required” remediation
- ▶ Remediator may choose one or any combination of cleanup standards

Act 2 Process

- ▶ Notice of Intent to Remediate (NIR)
 - To DEP and municipality/publication in newspaper and PA Bulletin
- ▶ Site Characterization
- ▶ Remediation
- ▶ Final Report
 - Interim reports for some cleanups
 - Public notice of final report submission
- ▶ DEP review
 - Deemed approved
 - Environmental Hearing Board

Background Standard

- ▶ What is background?
- ▶ Common Situations
- ▶ Engineering controls
- ▶ No deed notice

Statewide Health Standard

- ▶ Medium-specific concentrations
- ▶ Residential vs. nonresidential
- ▶ Point of compliance
- ▶ Engineering controls
- ▶ Deed notice may be required

Site-Specific Standard

- ▶ Remediator develops standard based upon site specific information and risk assessment
- ▶ Engineering and institutional controls may be used
- ▶ Deed notice is required

Special Industrial Areas

- ▶ Orphaned sites, Enterprise Zones or Keystone Opportunity Zones
- ▶ Baseline remedial investigation
- ▶ Address immediate, direct or imminent threats
- ▶ Deed notice is required

Act 3 – Economic Development Agency, Fudiciary and Lender Environmental Liability Protection Act

- ▶ Limits environmental liability of:
 - Lenders
 - Economic development agencies (EDAs/IDAs)
 - Fiduciaries
 - Non-profits created by EDA's (and conservancies)
 - Municipalities
- ▶ Liability typically limited to only that which was directly caused or made worse entity
- ▶ Cooperation and maintenance requirements
- ▶ EPA- recent clarification regarding "voluntary actions" pursuant to an "involuntary" acquisition

Recent Amendments to Act 3

- ▶ Enhancements include:
 - Liability protections for:
 - Claims under common law
 - Property damages
 - Diminution of property claims
 - Natural resources damages
 - Economic loss
 - Bodily injury or death (e.g., toxic torts)
 - Protections cover officers, directors, agents, members, employees and consultants specifically protected

**Act 4 – Industrial Sites
Environmental Assessment Act**

- ▶ Not a liability protection statute

- ▶ DEP provide grants to municipal entities to assess industrial sites

- ▶ Loans available to “innocent” applicants for remedial actions

Doing the Deal

Valuing the property

- ▶ Q. What is something worth?
- ▶ A. What someone will pay for it.

- ▶ Items to Consider Which Could Affect Value:
 - ▶ -Assessment costs
 - ▶ -Interference with current operations on property
 - ▶ -Stigma
 - ▶ -Potential remediation costs
 - ▶ -Effect of remediation activities on current property use
 - ▶ - Use restrictions

Managing Risk – Buyer–Seller Agreement – Consent Order

- ▶ 3 party Consent Order and Agreement
- ▶ But, still a DEP Order
 - Seller – remediation obligations with deadlines
 - Buyer – allow access, maintain engineering controls, record agreement and restrictions with the deed
- ▶ Buyer gets limited liability protection prior to the remediation being complete through a covenant not to sue
- ▶ Once remediation complete, all parties receive full Act 2 protection

Managing Risk – Buyer–Seller Agreement – Consent Order

- ▶ Downsides:
 - Only protection is DEP's covenant not to take enforcement action against new owner
 - Does not encompass third party statutory suits
 - Act 2 defenses not valid until full Act 2 protection is conferred through approval of Final Report

Managing Risk – Sales Agreements

- ▶ CONTRACTUAL PROTECTIONS
 - Indemnifications and releases from seller
 - Indemnifications and releases from subsequent purchaser
 - Does not affect liability to government
 - Only as good as the party providing
 - Most developers set up single purpose entities with limited liability/assets
 - Conduct due diligence on party providing indemnification
 - Corporate/other guarantees

Managing Risk – Environmental Insurance

- ▶ Types of insurable risks
 - Known vs. unknown
 - Regulatory changes
 - Costs beyond Act 2
 - Risks during construction/development
 - Third-party risks (torts/property damage)
 - NRDs
 - Defense costs
 - Indemnifications
- ▶ Types of policies
 - Pollution Liability Policy
 - Covers remediation expenses beyond that required by Act 2
 - Losses from "pollution conditions" (e.g., migration/offsite disposal/general liability/torts)
 - Contractor Liability
 - Cost Cap Policy
 - Typically covers costs of remediation in excess of estimated amounts
- ▶ Limitations
 - Claims made for 10 years
 - Policy limits (depends on contract)
 - Large deductibles (depends on contract – \$100,000 range)
 - Typically asbestos exclusions for building materials

Long Term Stewardship

- ▶ What are activity and use limitations (AULs)
 - Engineering controls
 - Institutional controls
- ▶ Pros and Cons of AUL's
- ▶ Role of environmental covenants
 - Uniform Environmental Covenants Act (UECA)
 - Chapter 253
 - PA Activity and Use Registry

Questions???????
