

**EPA BROWNFIELDS PROGRAM – ISSUES AND OPPORTUNITIES
PETROLEUM/UST BROWNFIELD CLEANUPS**

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This is the first in a series of reports by

NORTHEAST-MIDWEST INSTITUTE

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THE NATIONAL BROWNFIELDS COALITION

The National Brownfields Coalition Includes:

U.S. Conference of Mayors, National Association of Counties, Northeast-Midwest Institute, National Association of Local Government Environmental Professionals, National Conference of Black Mayors, International City/County Management Association, Local Initiatives Support Corporation, National Association of Towns and Townships, National Association of Development Organizations, International Council of Shopping Centers, Community Revitalization Alliance, The Real Estate Roundtable, National Association of Home Builders, National Association of Industrial & Office Properties, Environmental Bankers Association, National Brownfield Association, National Brownfield Nonprofit Network Initiative, Cherokee Investment Partners, LLC, Smart Growth America, Scenic America, Groundwork USA, and Trust for Public Land

THE GENESIS OF THIS REPORT

The Small Business Liability Relief and Brownfields Revitalization Act was passed by Congress and signed into law in January, 2002. The legislation had three primary elements:

- It established liability protections for “Bona Fide Prospective Purchasers;”
- It established an “enforcement bar” such the vast majority of cleanup decisions are made at the state level, and EPA may only be involved in these cleanup decisions under specific, narrowly-defined circumstances;
- It established the EPA Brownfields Program which funds site assessments and cleanups.

The Law and the resulting Brownfields Program have been successful in stimulating new investment in brownfields. Although not systematically tracked, the number of sites going through state Voluntary Cleanup Programs (VCP) programs has risen, now totaling almost 50,000 sites nationwide. The EPA Program reports a total investment of about \$800 million in the assessment and cleanup of brownfields since 1995. This investment has leveraged more than \$9.8 billion in cleanup and redevelopment monies – a return of more than ten to one. In addition, this investment has resulted in the assessment of more than 10,700 properties and helped to create more than 44,360 new jobs.

Yet, despite these successes there is still a vast reservoir of sites – as many as one million nationwide – that are continuing to blight communities and prevent revitalization efforts.

The EPA Brownfields Program reached the end of its five-year authority in 2006. Although the program is proposed for continuing funding, the need for reauthorization presents an opportunity to re-evaluate and propose improvements that will hasten cleanup and redevelopment of these contaminated and abandoned properties.

The organizations that are members of the Brownfields Coalition, listed on the front cover, have raised a series of issues and have proposed potential solutions. This series of reports, which will all be on the Northeast-Midwest Institute website at <http://www.nemw.org/brownfields.htm#Coalition>, will outline the issues, explore opportunities to improve the program, and make recommendations for policy makers to consider.

EPA Brownfields Program – Issues and Opportunities
PETROLEUM/UST BROWNFIELD CLEANUPS

SUMMARY - The petroleum/brownfields program has been successful in stimulating cleanup and redevelopment of numerous former gas stations and other petroleum sites and these cleanups have been strategically important to neighborhood revitalization efforts. While this record of success is impressive, the Brownfields Coalition calls attention to several issues that inhibit cleanup and redevelopment of petroleum and underground storage tank (UST) sites. To summarize, the Coalition recommends:

1. Eliminating the extra site eligibility hurdles that the site is “low risk” and that there is “no viable responsible party” connected with the site. Replace the “No Viable Responsible Party” language with a prohibition on using funds to pay for cleanup costs at a brownfield site for which the recipient of the grant is potentially liable under the petroleum statutes (parallels the language for non-petroleum brownfields sites).
2. Creating greater flexibility in use of grant funds by eliminating the currently defined 25% set-aside of total grant funding for petroleum brownfields. Substitute a new “Ranking Criteria” that gives weight to petroleum-contaminated sites.

Although the provisions in question were originally adopted by Congress to strengthen the petroleum program and fit it into other policy objectives, the result has been that these elements work to the detriment of petroleum/brownfields cleanups.

BACKGROUND – The EPA Brownfields Program, authorized in 2002 and now being considered for reauthorization, included provision for and funding for the assessment and cleanup of petroleum-contaminated sites. Congressional intent was to assure that the brownfields program worked for petroleum cleanups, as well as CERCLA/hazardous waste sites. As mandated, EPA has spent 25% of the site assessment and cleanup funds on petroleum sites.

The result has been that numerous abandoned gas stations have been cleaned up and redeveloped; underground storage tanks have been removed as an impediment to new investment, and sites with mixed petroleum and hazardous waste have cleaned up. Petroleum sites have often been key elements of neighborhood revitalization strategies. Cleaning up the corner gas station and turning an eyesore into an asset – a coffee shop or a pocket park – is often strategically important to neighborhood revitalization efforts. Similarly, a string of vacant gas stations, such as those left behind on the renowned Route 66 in Arizona, can visually blight an entire region OR they can be cleaned up and function to symbolize a revitalized economy. Numerous petroleum/brownfields successes are cited in Northeast-Midwest Institute reports - see <http://www.nemw.org/brownfields.htm#petro>.

ISSUES – There are three issues that have been identified with the current program, which, taken together, discourage interest in the petroleum/UST cleanups. These are:

- Petroleum sites must be demonstrated to be “low risk;”
- Petroleum sites are not eligible if there is a “viable responsible party;”

- There is a 25% set-aside for petroleum which was intended to encourage petroleum cleanups but in fact has the opposite effect.

Low-risk. The current statute establishes a high bar for petroleum site eligibility for brownfields funding - it must be “of relatively low risk, as compared with other petroleum-only sites in the State” This requirement resulted from a concern that brownfields funding would supplant LUST funding which is designed to address higher risk sites. However, the requirement is not needed, as EPA is barred from using brownfields funds on sites that are being assisted by LUST. Further, the requirement burdens applicants with extra steps (not required in the hazardous waste side of the program), including the difficult task of estimating the risk at the site before a brownfields assessment is performed.

No Viable Responsible Party. The current statute allows petroleum funding only for a “site for which there is no viable Responsible Party (RP) and which will be assessed, investigated or cleaned up by a person that is not potentially liable for cleaning up the site.” This requirement is an extension of the “Polluter Pays” philosophy. However, the effect of the policy is that the only sites that are clearly eligible are so-called orphan sites – ones where all responsible persons are defunct or not viable.

The “No viable RP” requirement places a heavy burden on applicants, requiring knowledge of three things: knowledge of who were past owners and operators; identification of which owner/operator was involved when there was a release; and determination of whether or not the responsible entity is currently financially viable or even reachable. Resolving each of these items requires a heavy investment of time and resources, and many cities have been either unwilling to make the investment (remembering that the highest grant amount is \$200,000) or they have been unable to satisfy the requirements and their applications have been determined to be ineligible.

The “No Viable RP” requirement is also inconsistent with the CERCLA/hazardous waste side of the brownfields program which forbids any funds going directly to an RP, i.e. it is the PERSON that is ineligible, not the SITE.

It should also be noted that most state brownfields incentives are structured so that funding cannot go directly to RP’s, but they can assist the innocent purchaser of virtually any site, as long as the site is not on the NPL or subject to enforcement actions.

25% Set-Aside. The current Brownfields Revitalization Act specifies that \$50,000,000 or 25 percent of annually appropriated EPA brownfield grant funding (whichever is less) shall be used for assessment and cleanup of low-risk petroleum-contaminated sites. To implement this “petroleum set-aside” directive, U.S. EPA has established a two-track grant application, award, and administration process, with one track for non-petroleum hazardous waste sites, and the second for petroleum sites. Grant applicants must file a separate application for petroleum assessment funding. EPA and the grantees must maintain separate administration accounting for these sites.

Congressional intent in establishing the 25% set-aside was to boost petroleum cleanups, especially smaller corner gas station-type sites, which may not rank very high on the economic

development ranking criteria. The Brownfields Coalition contends that the set-aside inadvertently DISCOURAGES petroleum cleanups because it creates bureaucratic barriers to the use of the funds:

- **Paperwork Burdens** – Grantees convey that it is burdensome to be required to file and manage separate grants for hazardous waste versus petroleum waste sites. Contractors must carefully allocate all site costs to hazardous waste and petroleum, even though in most cases the same remedial measures (e.g. site capping) are addressing both kinds of contamination.
- **Lack of Flexibility** – Localities often apply for a cleanup grant under one category, for example under petroleum, but later discover the presence of hazardous waste, as well. Because they cannot switch even a portion of the EPA funding to hazardous waste, the site may get stuck. Another common occurrence is that cities with both kinds of assessment grants will deplete one category (e.g. hazardous waste) but cannot switch available funds from the other category (petroleum), with the result that sites needing hazardous waste assessment funding may go begging, while petroleum assessment funds go unused for the lack of eligible sites. Also, the current segregation of petroleum and hazardous assessment funding limits flexibility in areas where there is a mix of petroleum and hazardous substance contamination.

In recommending that the petroleum set-aside be eliminated, the Brownfields Coalition is fully cognizant of the concern that this will lead to fewer petroleum sites (particularly corner gas station sites) being cleaned up because they will not rank as high on economic development criteria. To this concern the Coalition points out that economic development is only one of ten ranking criteria that EPA must consider in ranking applications. The Coalition is also recommending a new, strongly worded ranking criteria that mandates the Administrator to give special consideration to applications for petroleum-contaminated sites to ensure that a representative number of such sites receive funding.

LOCAL EXAMPLES

- A rural Pennsylvania community has established a “Land Recycling Initiative” to support redevelopment of targeted brownfield areas. The community has received both a hazardous waste assessment grant and a petroleum assessment grant. This county reports that it has been hindered from using these funds in an effective and cost-efficient manner, because of the difficulties in leveraging and co-mingling these segregated funds. The community also reports a substantial bureaucratic burden associated with management and accounting for these segregated funds.
- Baltimore’s Brownfields Director indicated that Baltimore never applied for a petroleum grant (despite numerous potential sites) because the “No Viable RP” test and the extra administrative burdens made it a poor investment of time. “These applications are all difficult, but when you layer that ‘low risk, viable RP test’ on top of everything else, then you factor in the greater likelihood of being turned down because of these tests, plus there is the extra administrative headaches of keeping separate petroleum records, the bottom line was we just could not justify the investment of time and

resources in a petroleum application.” (Evans Paull, former Director of Baltimore’s Brownfields Initiative)

- The State of Michigan reports that a site in Washtenaw County was ruled ineligible for assessment funds because the previous owner could not be located, and therefore could not be measured for “viability.”
- An official of the Washington Department of Community, Trade, and Economic Development states: “I find that hundreds of gas stations may benefit from a change in this law. While it was intended to remove the Exxon and Chrevon's from benefiting, the rural communities are suffering.... The ... rural communities are faced with a legacy of old petroleum sites. The town of Aberdeen had 241 former petroleum sites”
- The South Carolina Department of Health & Environmental Control reports that a former BP Station in Greenville, South Carolina was ruled ineligible. The property was a key piece of a masterplan developed by the City and the neighborhood that called for mixed income residential development. The property is owned by Dorothy Chapman and the Kimiko Chapman Rife Living Trust.

RECOMMENDED APPROACH

1. ***Eliminate the extra site eligibility hurdles for petroleum sites.*** Grantees that seek to use assessment, cleanup or multi-purpose grants on sites with petroleum contamination should not be required to make the difficult demonstrations that the site is “low risk” and that there is “no viable responsible party” connected with the site. Replace the “No Viable Responsible Party” language with a prohibition on using funds to pay for cleanup costs at a brownfield site for which the recipient of the grant is potentially liable under the petroleum statutes (parallels the CERCLA/hazardous waste side of the brownfields program)
2. ***Eliminate the currently defined set-aside and substitute a new ranking criterion.*** Eliminate the 25% set-aside of total grant funding for petroleum brownfields and substitute a new “Ranking Criterion” that gives weight to petroleum-contaminated sites and other smaller sites. The Administrator should be directed to give special consideration to applications related to petroleum-contaminated sites to ensure that a representative number of such sites receive funding.

EPA should establish one unified system for assessment, cleanup and revolving loan fund grants that allows applicants to combine hazardous waste and petroleum brownfields activities. Grantees should be required by EPA to report what portion of grant funding is directed toward petroleum assessment and cleanup activities, so that EPA and Congress will understand the demands for such petroleum funding. This can be conducted by grantees within a single grants management and paperwork process, reducing administrative burden on both applicants and EPA.

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