

**ENVIRONMENTAL BUSINESS COMMITTEE
WHITE PAPER**

BROWNFIELD CLEAN UP

Position

The ACEC Environmental Business Committee (EBC) supports the cleanup and redevelopment of brownfield sites as part of a nationwide strategy of urban revitalization and economic development. ACEC and EBC believe that the future of brownfields revitalization is in private investment. Removal of current barriers would permit investors to enter the brownfield market and rehabilitate contaminated properties. The first barrier to brownfields clean up is “second-guessing” on the part of the EPA that results in costly site rework at a later date to reach a different site cleanup standard. Ideally states should be able to self-certify that they have enacted a brownfield program protective of human health and the environment and should have the final word on the sufficiency of cleanup. Second, brownfields cleanup should rely more heavily on engineering professional judgment and not on legislated mandates such as the American Society for Testing and Materials (ASTM) Standard E1527-97. Third it is unfair to allow cleanup contractors to be placed on the same strict liability footing as polluters with direct responsibility for contamination of sites as is currently allowed by the courts. Liability protection should be provided to cleanup contractors to facilitate the prompt cleanup of brownfields

Background

Over the last several years, ACEC and EBC have closely monitored the progress in brownfield cleanup and reutilization. In 1998, EBC released a survey indicating that among all groups of respondents, it was anticipated that there would be an average 27 percent increase in brownfields clean ups over next five years. State government officials identified the highest expectations for brownfields -- hoping that cleanup would grow by 57 percent. However, the rate of cleanup and redevelopment of brownfield sites has not reached this level of growth.

A U.S. Conference of Mayors report released in the year 2000 sheds further light on EBC’s findings. This report indicates that in a survey of 210 cities, there are over 21,000 underutilized brownfield sites. The report further points out that the largest obstacles to brownfield clean ups are; (1) funding problems; (2) liability concerns associated with redevelopment; and (3) the need to determine the extent of contamination at the sites identified.

The Mayor’s report indicates that funding is a problem, however, increased federal funding is not the total answer. While increased federal funding may be useful in targeted cases for site assessment and for moving specific projects forward, the federal government will never be able to appropriate enough dollars to make a dent in the brownfields cleanup and reuse nationwide. Ultimately, the future of brownfields revitalization is in private investment.

The real barrier to private investment in brownfields rehabilitation is liability concerns. Issues regarding liability being faced by the owner, the cleanup firms and developers are drying up the private capital that is necessary to fund cleanups nationwide. Without significant change in the current federal policy, it is unlikely that the pace of brownfield clean up and urban redevelopment will accelerate. Three major issues that Congress should address in the near term are: (1) state finality; (2) standards of practice; and (3) cleanup contractor liability. Elimination of these barriers would permit investors to enter the brownfield market, rehabilitate contaminated properties and convert them into economic and social contributors to our quality of life. Although not discussed in this paper, a fourth item that Congress may want to consider would be a tax incentive for brownfields development.

State Finality

The biggest obstacle to brownfield clean up is that the EPA will “second-guess” brownfields cleanups, and require costly site rework at a later date to reach a different site cleanup standard. Therefore, the owner “holds onto” lightly contaminated parcels instead of turning them over to beneficial reuse. Moreover, there remains the potential downstream liability associated with reuse that further retards the process. These concerns result in owners of such property not undertaking redevelopment efforts at viable brownfields sites. While EPA has indicated a willingness to enter into, on a case-by-case basis, prospective purchaser agreements at brownfields sites, the process to enter into those agreements is quite time consuming and there is no certainty in the end that EPA will agree to a prospective purchaser agreement.

The finality in brownfield cleanup decisions is truly needed if actual cleanups are to accelerate. States should be able to self-certify that they have enacted a brownfield program that is adequately funded and appropriately staffed, and will result in cleanups that are protective of human health and the environment. Brownfield decisions made by certified states would not be subject to second-guessing by EPA under the authority of either the federal Superfund law or the federal RCRA law. This provision is very important to spurring increased voluntary cleanup actions at brownfield sites across the country and reducing possible risks to nearby populations that are currently not addressed, *expressly because of the fear of federal liability.*

Standards of Practice

“Innocent landowners” should not be mandated to undertake environmental site assessments “in accordance with the standards set forth in the American Society for Testing and Materials (ASTM) Standard E1527-94, titled ‘Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.’” ACEC, EBC and other professional organizations strongly disagree with the premise that the so-called ASTM Phase I “standard” is actually a “standard.” A practice labeled as a

“standard” implies that it is a “tried and true” practice that, if followed, yields reliable and trustworthy results and is endorsed by the professionals who use it. Nothing could be further from the truth. The scientists and engineers who, for the last several decades, have investigated contaminated sites know that it is foolish, even dangerous, to assume that using “cookbook” assessment procedures will uncover all significant contamination. Except for a few simple sites, the technology required to peer underground and locate all significant sources of contamination has not been invented.

Left with these uncertainties, the right thing to do is let the practitioners apply professional judgment to what is truly needed for responsible site cleanup. We recommend any requirement for using ASTM Standard E1527-94 not be inserted in any brownfields legislation. If some kind of assessment guidelines is deemed necessary, then they should be developed by EPA, using an open, transparent process, and incorporating substantial input from the licensed engineers who practice in this field.

Cleanup Contractor Liability

Under the current law, courts have allowed parties with brownfield liability to bring suits against cleanup contractors¹, drawing cleanup firms into the liability net without regard to fault or negligence in cleanup activities. Cleanup contractors are a critical part of the solution to hazardous waste problems; they are not the PRPs who own or operate the sites where the cleanups are performed. Cleanup contractors are the resource that employs highly trained, technically experienced staff to identify and prescribe remedies for waste at sites and to clean them up. It is unfair to allow cleanup contractors to be placed on the same strict liability footing as polluters with direct responsibility for contamination of sites. Liability protection should be provided to cleanup contractors to facilitate the prompt cleanup of hazardous waste sites, including brownfields and voluntary cleanup actions, in an expeditious, innovative and cost-effective manner.

¹ Known in CERCLA/Superfund language as Response Action Contractors (RACs).