

Final Report of the New Brunswick Brownfield Development Working Group

**Options and Recommendations for Facilitating
Brownfield Redevelopment in New Brunswick**

April 2007

To be Submitted for Consideration by the Government of New Brunswick

About the New Brunswick Brownfield Development Working Group

The New Brunswick Brownfield Development Working Group (Working Group) initiative was undertaken as a broad-based consultation initiative by the Department of Environment (DENV), which both lead and facilitated the work of the committee. The Working Group included representation from the Canadian Bankers Association, the Canadian Petroleum Products Institute, the Canadian Bar Association, the Canada Mortgage and Housing Corporation, the Cities of New Brunswick Association, Irving Oil Ltd., and J. D. Irving Ltd. The provincial departments of Business New Brunswick and Finance have also provided valuable insight and assistance. All of these organizations share a common interest in facilitating the remediation and redevelopment of New Brunswick's brownfield properties. The Working Group was first established in September 2004, and has worked toward the completion of this document and its recommendations over the two years since.

The discussion that follows draws heavily from the experiences of New Brunswick's regulatory agencies, the business community, other provincial jurisdictions, the National Round Table on Environment and Economy (NRTEE), and from similar work undertaken by the Canadian Council of Ministers of Environment (CCME). The Working Group is also indebted to the creativity of a number of jurisdictions throughout the United States that are recognized for their progressive stance on brownfield redevelopment. Further information concerning the approaches taken by these other jurisdictions can be found in the attached Appendix "A".

Although the recommendations provided herein have their roots in various and disparate regulatory regimes across multiple jurisdictions, the Working Group has endeavoured to ensure that the resulting options and recommendations are appropriate for the New Brunswick context. The group feels that this has been accomplished, providing a unique mix of the most successful approaches currently in place across North America, but adapted specifically for New Brunswick. By seizing this opportunity the Working Group recognizes New Brunswick as potentially moving to the forefront on this issue in North America.

Introduction

By some estimates there may be as many as 30,000 abandoned, derelict, or otherwise underutilized developable properties in Canada. Of that number New Brunswick is thought to account for 1,000, and perhaps more. A large number of these sites are located in prime commercial and industrial real estate areas, and have easy access to transportation, electrical, water, and wastewater infrastructure. These properties nevertheless remain dormant, with developers preferring to site new industrial, commercial, and residential developments on previously undeveloped lands that carry few, if any, of these benefits. Why? Although there are many contributing and inter-related factors, contamination and associated liability risk stands out as the prime deterrent.

In New Brunswick, as in the rest of Canada, the past century of industrial and commercial development has provided innumerable benefits to society. However, this progress was not without a price, which has come in the form of an enduring legacy of contamination – spills, leaks, and even intentional discharges of contaminants. Although government and the private sector have made considerable progress toward preventing contamination, and in cleaning up New Brunswick's contaminated lands, there remains a daunting number of contaminated sites.

This is not to suggest that all of these underutilized properties are contaminated. Many are not, having never been subject to a spill or leak. Others have been remediated in accordance with established guidelines, either voluntarily, or in accordance with existing regulatory enforcement procedures. Some have been returned to a pre-development state. Nevertheless, the existence, or suspected existence, of contamination creates substantial problems with respect to potential redevelopment. Collectively, all such idle properties, contaminated or not, are commonly known as “brownfields”, and it is the purpose of this paper to identify the underlying issues that prevent brownfield redevelopment and recommend options for their redress.

It should be noted that the term “brownfield” can carry different meanings depending on the context of its use. Additional clarification about the term and its use within this paper is provided in the attached Appendix “B”.

The Benefits of Brownfield Redevelopment

Redeveloping brownfield properties brings significant public benefits as compared to similar developments on undeveloped lands. By way of explanation, greenfield development tends to occur at or near municipal boundaries, at the periphery and beyond. This contributes to urban sprawl and increases transportation and service infrastructure costs. It may also cause conflicts between land uses, placing industrial development near suburban or rural residential areas. Brownfield redevelopment, by comparison, focuses on restoring urban core properties. This stimulates and revitalizes the economic productivity of surrounding land, increases tax revenues, lowers municipal infrastructure costs, improves urban neighbourhoods, and helps preserve natural areas.

Brownfield redevelopment can also be an effective “tool” to promote environmental protection and protect human health. Considering that some of the Province's contaminated brownfields currently have no identifiable owner and have no reasonable expectation of being remediated, facilitating the adoption of these “orphaned sites” for redevelopment also serves to ensure that remediation occurs.

There are also properties where contamination exists or may exist, but property owners are loath to investigate, or report it to government or others for fear of costly remediation requirements and regulatory enforcement measures. By providing an environment that is more supportive of brownfield redevelopment, it is expected that market forces will drive remediation rather than relying on the threat of regulatory enforcement. In this way, promoting redevelopment serves not only to boost the provincial economy, but also to facilitate the continual discovery and clean up of historical contamination.

Challenges and Recommendations

The Working Group has identified the key challenges that are currently limiting brownfield redevelopment efforts in New Brunswick. These challenges are divided into four general categories as outlined below. The general categories are subdivided where appropriate and include the Working Group's recommendations for redress:

I. Regulatory Challenges

The term "brownfield" does not occur in New Brunswick legislation and there are no programs in place that recognize and address the unique issues and challenges associated with brownfield redevelopment. Rather, the Province regulates contamination, and the remediation of contaminated sites. As discussed above, although there are many brownfields that are not contaminated, contamination remains the underlying cause of most brownfield redevelopment issues. Thus, any discussion of the regulatory impediments to brownfield redevelopment is, by necessity, a discussion of contaminated sites management and regulation. As such, investigating the shortcomings of the contaminated sites management process is considered an important element in addressing brownfield regulatory issues. The following contaminated sites regulatory issues have been identified as the areas most in need of attention:

a) Enforcement-Based Regulation

Although the province has substantial involvement in the management of contaminated sites, and there is an active regulatory program regarding same, there is presently no legislation in the province that deals specifically with "contaminated site remediation". Current regulatory efforts are undertaken entirely within the "Ministerial Order" making authority provided under the *Clean Environment Act*, and to a lesser extent some specific regulatory requirements set out in the *Petroleum Product Storage and Handling Regulation* under that Act. As provided in the Act, this order making authority allows the Minister of Environment to order the clean up of contaminant spills, and to set conditions respecting clean up standards and methods.

Unfortunately, there is a common perception that orders are an enforcement measure rather than a normal regulatory compliance instrument. They are generally expected to be employed against those who refuse to cooperate with normal regulatory efforts. This view holds that responsible, compliant businesses should not have to be "ordered" to clean up a site. However, under existing legislation in New Brunswick there is little other recourse. The order, or threat of an order, is the only regulatory tool available.

This perception of the order as an enforcement tool can have serious consequences for business and remediation efforts. By way of example, regulatory compliance can significantly influence financing arrangements, causing businesses with environmental compliance issues (such as outstanding remediation orders) to be considered a greater investment risk than otherwise. Unfortunately, the overall effect of this situation is to limit access to funding for brownfield redevelopment, and thereby impede remediation efforts.

It has also been suggested that the punitive nature of the Ministerial Order process may be deterring some site owners from reporting known or suspected contamination. It is felt that in some cases the overall effect of such a “black mark” may be sufficient to lead site owners to wilfully disregard regulated reporting requirements. As such, the existing regulatory system is not only an impediment to redevelopment efforts, but is also somewhat self-defeating with respect to remediation.

Recommendation

1. The Working Group recommends instituting legislative changes that would create and support a “non-punitive” regulatory approach that includes appropriate incentives for brownfield redevelopment. The intent would be to encourage, rather than deter, redevelopment and remediation. This could be accomplished by implementing a system whereby the site owner or other interested party could apply to “voluntarily” undertake remediation in accordance with a process set out in regulation. The key ingredient in this process would be a legislated prohibition against issuing a Ministerial Order against the site upon Government’s acceptance of a suitable remediation plan.

This approach would encourage site owners to actively investigate contamination, develop remediation strategies, and proceed with redevelopment efforts. This encouragement comes in the form of the possibility of becoming shielded from orders and other enforcement measures, subject to terms and conditions.

b) Regulatory Certainty

The order making authority provided under the *Clean Environment Act* is recognized as a less than ideal legal basis for a contaminated sites management program. This is most noticeable in areas where the legislation is unclear, or where overly broad discretionary powers are provided. The key issues in this regard are:

(i) Determining Who is Responsible

Remediation orders issued under the *Clean Environment Act* can be levied against “anyone”, at the discretion of the Minister of Environment. There is no restriction or direction indicating that the person must have in some way been, or become responsible for the contamination of the property.

Although it is generally agreed that the Minister has exercised good judgment to date in issuing orders, the possibility remains that a person or company could be unfairly targeted. Thus, to become involved in a brownfield redevelopment project, even remotely, may expose a company or individual to liability for regulatory compliance should a contamination issue be identified. Also, the Act does not allow the Minister to

formally recognize certain parties as blameless, or provide them with any form of legal assurance that they will not be the targets of future enforcement action.

One existing means of overcoming such uncertainties is for the parties involved to enter into agreements respecting regulatory responsibility. However, such agreements are not binding on the Crown. As such, the Minister need not recognize the agreements, and may order a party to remediate regardless. Under such circumstances, it is left to the parties of the agreement to resolve the issue. Unfortunately, this approach can result in the party with the “deepest pockets” ultimately absorbing the remediation costs, rather than the party that is most at fault.

These issues have been identified as a deterrent to financial institutions (lending agencies), and developers from becoming in any way involved with brownfield sites, especially brownfields that are known to be contaminated or formerly contaminated.

Recommendations

2. The Working Group recommends that Legislative amendments be undertaken to more clearly define the parties that can be held accountable through the regulatory process. As a general principle, it is recommended that regulatory responsibility be tied to actions or inaction that caused or contributed to a contamination event.

Although property owners (past or present) could remain responsible, several types of participants would gain protection from regulatory liability provided that it could be shown that they did not cause or contribute to the contamination or its effects. Participants that are recommended to receive special consideration as being exempt from regulatory responsibility (barring their causing or contributing to the problem) include: lending institutions, creditors, receivers, trustees, administrators, tenants, contractors, and consultants (*eg.* consulting engineers).

3. It is further recommended that a dispute resolution mechanism be developed in legislation so as to provide a clear approach that must be followed when there are disagreements (involving the Crown and the parties) concerning whether or not a given party bears regulatory responsibility, and/or to what extent. The Working Group was of general agreement that such dispute resolution should not rely on the courts, but rather involve arbitration of some other form.
4. The Working Group recommends that legislative changes be pursued so as to allow the Crown to become bound, with respect to regulatory requirements, by multipartite agreements (such as purchase/sale agreements) involving the Crown and private interests. The intent of such agreements would be that following approval by all parties (including the Crown), the Minister would lose the authority to order, or otherwise compel through regulatory means, certain parties to undertake remediation activities.

It is recognized that such agreements may not be suitable for all sites, and should be reserved for special cases where remediation and/or redevelopment might not otherwise occur. As such, the Working Group recommends that the circumstances

under which the Crown might enter into such an agreement should be clearly detailed in the legislation.

As a minimum, it is recommended that the Crown should not enter into such an agreement (becoming bound by the transfer of regulatory responsibility) unless:

- a) The agreement includes a provision that the property must be remediated and that the transfer of liability would not be binding until the successful completion of the regulated remediation process.
- b) Such agreements would require full, complete and public disclosure of information relevant to the remediation process.
- c) Assurance that the party is financially capable of undertaking remediation or addressing other relevant expenses and risks.
- d) Such agreement may become null and void in the case of fraud, or failure to maintain necessary financial securities.

Further, it is recommended that such agreements only affect regulatory responsibility for contamination that occurred prior to the date of the agreement.

5. Notwithstanding the changes recommended above, the Working Group recommends that the Minister of Environment retain discretionary powers to issue emergency orders for site clean up, per the current approach, should a situation develop that requires fast action to avert significant environmental or human health impacts. Such an Order could not, however, be issued with respect to circumstances that were known to the Minister upon entering into a voluntary remediation agreement.
6. The Working Group further recommends that legislation be created or amended to provide the Minister of Environment with the authority to enter into agreements whereby certain parties could be recognized as blameless with respect to regulatory responsibility. The intent would be for the Minister to be able to entice participants (who had no prior involvement) to come forward to redevelop and/or remediate a brownfield property without fear of assuming regulatory responsibility for remediation of prior contamination.

(ii) Lack of Regulated Remediation Standards

The order making authority provided in the *Clean Environment Act* provides the Minister of Environment with complete discretion with respect to the standards and methods to be observed in the clean up of a contaminated site. From the regulator's perspective, this discretion provides a measure of confidence that government will be able to respond appropriately regardless of the circumstances of a particular spill or event. However, from the business community's perspective, this level of discretion represents substantial uncertainty and risk.

Although there was general agreement that DENV has acted responsibly and consistently to date (per the New Brunswick Guideline for the Remediation of Contaminated Sites – See Appendix “C”), it is nevertheless possible that the Minister may change policies dramatically, and without warning. As such, even with the existence of established guidelines respecting the clean up of contaminated sites, it is not

possible to predict with certainty the costs of remediating a property should contamination be discovered during a brownfield redevelopment project. This uncertainty and risk may act as a deterrent to the purchase or sale of impacted, or formerly impacted lands.

Recommendation

7. The Working Group recommends that the existing site remediation process and guidelines (based upon the Atlantic Risk-Based Corrective Action – RBCA or “Rebecca” model) be explicitly referenced or incorporated in legislation/regulation as the standard approach to establishing remediation criteria for contaminated sites in New Brunswick. The Working Group believes that the RBCA model and its reliance on a “site professional” to oversee remediation activities, audited by DENV, is a progressive approach that has proven successful, and it should continue into the future.

(iii) Permanent Site Closure

The Ministerial Order process does not provide legislative authority for final site closure. That is, the Minister is not empowered to declare a site “clean” or indemnify a party against further regulatory action. Although a responsible party may, in good faith, meet all of the guideline requirements currently in place, the party has no assurance that those guidelines will not change someday, triggering additional regulatory/enforcement action. Thus, there exists the potential for unlimited future regulatory activity. This uncertainty represents a significant deterrent to all parties that might otherwise undertake remediation or bring a remediated brownfield property back into productive use.

Recommendations

8. The Working Group recommends that legislative amendments be undertaken such that, except in the case of fraud, a site that has completed the regulatory process may be permanently “closed”. The intent would be to protect the responsible parties from future regulatory responsibility for undertaking additional remediation should clean up standards, policies, or regulatory requirements change after-the-fact. However, should the property owner wish to change the use of the property (*eg.* changing from industrial to residential), this would cause the regulatory process to “reopen” (restart), requiring the site to be remediated to the appropriate standard of the day (*eg.* the current RBCA standard). It is also recommended that failure to comply with a condition of closure be considered grounds for reopening the regulatory process.
9. It is further recommended that permanent site closure, if adopted, need not be automatic, but rather the proponent could be required to make special application for such closure. This could be accommodated through the application for, and issuance of, “certificates of remediation completion” (or similar) documents. Proponents could make application for such certificates following the completion of the remediation process, which would include a declaration that the site is remediated to a standard appropriate for its intended use. In the absence of the issuance of such a certificate the site could be targeted for regulatory action/enforcement should policy and regulatory requirements change.

Alternatively, the process could include “automatic” permanent closure for all sites following the remediation process.

10. The Working Group recommends that should permanent site closure be implemented per the recommendations outlined above, the effect of the closure should not be specific to the applicant. That is, any silencing of regulatory responsibility should be universal, extending to all potentially responsible parties to the contamination under consideration.
11. The Working Group recognizes that there may be instances in the future where a site has been granted permanent closure, but which nevertheless is identified as being in need of remediation. It is the recommendation of the Working Group that government should assume responsibility for such remediation. Thus, the responsible party could be required to remediate, or comply with government efforts to effect remediation, but all expenses for such activity should be borne by the Crown.

It is further recommended that necessary legislative changes be pursued to create an **assurance fund** to pay for these unforeseeable future clean-up costs. It is recommended that this system be funded by a system of fees associated with the application for and issuance of permanent site closure documents. The amount of such fees should be set on a sliding scale based on the financial risks involved for each site. As appropriate, additional consultations should be undertaken with the insurance sector to establish a workable fee structure.

(iv) Transfer of Title and Removal of Encumbrances

Under current property law legal title to brownfield properties can be encumbered by ownership issues, particularly with dissolved corporations, bankrupt companies, etc. Transfers and sales of brownfield properties can also be encumbered by outstanding property tax liens. To the extent that this occurs, these legal difficulties and liens can significantly increase the cost and complexity of redeveloping a brownfield site.

Recommendations

12. The Working Group recommends that the Province initiate discussions with the Federal Government to pursue legislative changes to facilitate timely resolution of brownfield title issues.
13. It is further recommended that the Province pursue legislative and policy changes to allow the removal of tax liens from brownfield properties. This would include developing a set of criteria for establishing eligibility. As general guidance, the Working Group suggests that only sites with a strong business case be considered eligible. Such removal of liens is intended primarily to benefit the purchaser of the site rather than the previous owner (if existing). If possible, liens should be removed but reassigned as a debt against the former owner. Further, the debt against the former owner should reattach to the property as a lien should that party regain ownership or control of the property at a later date.

c) Reporting Requirements

In New Brunswick it is a legal requirement, under certain circumstances, to report the discharge or spilling of a contaminant upon the environment to the Department of Environment. However, there is no comprehensive reporting provision and the legislation is somewhat unclear about whether or not and by whom persons other than the Minister (eg. neighbours and other “3rd parties”) should be notified. This is perhaps most noticeable with respect to what is termed “historic” contamination. That is, contamination that is newly discovered, but which was the result of activities occurring some time ago, perhaps even before New Brunswick’s environmental legislation came into force. This ambiguity has proven problematic, and has been flagged for attention by the Working Group.

The Working Group believes that environmental legislation should have clear provisions identifying when a person has a duty to report the release of a contaminant or the discovery of existing contamination to the Department of Environment. Any other persons entitled to receive notice should also be clearly identified in the legislation.

Recommendation

14. The statutory duty to report contamination should be clarified based on the following principles:

- (i) The responsibility for reporting should rest only with the property owner and persons that caused or contributed to the contamination or its effects.
- (ii) Contamination (either recent or historic) that has caused, or is expected in the near-term to cause, an “adverse effect” (to be defined in regulation) to the environment and/or to a 3rd party, should be immediately reported to DENV and to any other persons that have been or are likely to be affected.
- (iii) The discovery of historic contamination that has not, or is not expected to cause an adverse effect to the environment and/or to 3rd parties in the near-term, but which may (if unaddressed) cause an adverse effect at some later date, should be properly investigated and then reported to DENV.
- (iv) Release of contaminants that are unlikely to cause an adverse effect and/or historic contamination discovered in concentrations lower than that which government considers to be acceptable, should not have to be reported to government nor to other parties.
- (v) Although information that is reported to DENV should remain subject to the *Right to Information Act*, the Department should exercise discretion, where possible, in its active release or publication of information about minor spills, both recent and historic. The public’s “right to know” should be balanced against another (perhaps greater) public good, which is to avoid encumbering clean properties with the stigma of past contamination, in effect creating an unjustified “list of the damned”.

II. Civil Liability Challenges

The term “civil liability” refers to the actions (and consequent liabilities) taken to protect or enforce private rights or to obtain redress for the breach of a private right. Civil liability is usually created by common law, which is a system of judge made rules developed initially by the Queen’s courts to settle disputes between individual litigants. Civil disputes and their remedies are not typically associated with the regulatory actions taken by government. They are private matters between private parties that are arbitrated by the courts.

As contamination can result in severe impacts to human health, the environment, and private property, becoming the owner of a contaminated brownfield, or formerly contaminated brownfield, can cause the purchaser to become liable for any such impacts that occur. Developers, future tenants or other end-users (along with their financiers, contractors, consultants, etc.) are also subject to these civil liability risks. As a result, some may be reluctant to become involved, fearing they will be held responsible for the environmental, human health, or property impacts flowing from any contamination caused by former property uses. This may also result in indirect impacts such as higher interest rates, reduced resale values, and lower occupancy or rental rates.

This challenge is further aggravated by the tendency for those seeking restitution to target “deep pockets” (eg. banks, governments, and major investors) through their civil suits. The aim is to target the party most capable of paying, rather than the party that is most responsible. Thus, a “deep pocket” party may be required to pay damages even though their role in the contamination may have been minimal. It would then be up to that party to seek restitution from the other parties, which are often unable to pay. For this reason, lending institutions are particularly averse to financing remediation/redevelopment projects for fear they will be exposed to liability.

Civil liability risks have been cited as a deterrent to the sale of brownfield properties, as owners of remediated brownfields have shown reluctance to put such properties on the market. Even if the owner is entirely confident that the site no longer poses a threat, there is often no compelling reason to actively market or redevelop some properties. An empty property is unlikely to attract liability. From a risk management perspective, it may be prudent to leave a site perpetually empty rather than sell or redevelop it, especially in areas with low property values.

As has been described, the fear of civil liability is a significant impediment to brownfield redevelopment. It can prevent properties from being brought to market, deters would be redevelopers and future tenants, and limits access to financing capital. As such, the Working Group has devoted considerable attention to the issue in the hopes that these effects can be ameliorated to the greatest extent possible, without unduly impacting the rights of the public to be compensated for damages through the courts.

Recommendations

15. The Working Group recommends that legislation be developed that would allow and support contractual allocation of civil liability resulting from past contamination, which is binding on third party claims. That is, where there are a number of parties to a redevelopment project, the parties could enter into a contract or agreement whereby one or more of the parties would assume all civil liability for past contamination. This contract or agreement would then be binding on all other parties to the agreement and to third parties (eg. the general public), such that civil actions could only be brought against those named as responsible in the agreement.

It is further recommended that such agreements would require the approval of the Crown, and should not be possible without the completion of the regulated remediation process for the site in question. Additionally, it is recommended that such agreements should be required to be registered with the province, and subject to meaningful public notification prior to their final approval.

The Minister of Environment should be provided with the discretion to refuse approval of such agreements where it is not deemed to be in the public's best interests, or where they might result in "unjust enrichment" (eg. where a party may attempt to transfer liability to another party and then regain control of the property at a later date, or where a party attempts to transfer liability to a "dummy" corporation). Any agreements that are finalized and approved should be binding in perpetuity, unless amended by the signatories and re-approved, and barring discovery of fraud.

16. The Working Group recommends that legislation be developed to provide for the removal (silencing) of civil liability. Such legislation should be developed using the following principles:
 - (i) Only sites that are satisfactorily "permanently closed" per the regulated remediation process outlined above should be eligible.
 - (ii) Silencing of liability should not be automatic. Proponents wishing to have liability silenced for a permanently closed site should have to make special application. Confirmation of eligibility should be at the discretion of the Minister.
 - (iii) A significant period of time (6 to 10 years) should have passed since the application to silence liability is confirmed, without issues related to the contamination having arisen.
 - (iv) Meaningful public consultation about the remediation should have taken place at the time of permanent site closure and/or during the application process for silencing of liability.
 - (v) Silencing of liability should be universal, extending to all potentially responsible parties with respect to the contamination and remediation process.
 - (vi) Should a "silenced" site be "reopened" due to a change in land-use, the silencing should continue to apply with respect to the original parties to the remediation. However, the proponents of the "reopening" should become subject to any new liabilities created (ie. they start over from scratch with the silencing process).
 - (vii) Silencing of liability should be annulled for any party shown fraudulent in the remediation and silencing process.
 - (viii) A public insurance fund should be created against which future liability claims can be applied. This should be funded through a system of fees that should be instituted in relation to the regulated contaminated site management process and/or the permanent site closure process. This fund may be combined with the fund established with respect to permanent site closure, if considered appropriate.

17. Notwithstanding the preceding, the Working Group recommends that existing orphaned sites, sites that become orphaned (eg. as a result of bankruptcy), and private homeowners, be provided access to the public civil liability insurance system without having to complete the initial 10-year waiting period. The intent is to ensure that all potential claimants/litigants would either have access to the public fund or be able to sue a financially capable responsible party. Thus, should a civil liability suit be brought against a financially insecure responsible party, the public fund would "back-stop" the claim. This would ensure that claimants would

receive a reasonable measure of compensation even if the company were bankrupted as a result of the proceedings. Under no circumstances should lack of ability to pay result in a litigant receiving less compensation than would be received through a claim against the public fund for the same purpose.

18. In the interests of ensuring that the public insurance system is not bankrupted, it is recommended that the system incorporate liability caps to limit the amount that could be awarded to a claimant.
19. The Working Group recommends that the insurance fund scheme should ultimately become a national-level initiative, and encourages New Brunswick to take a lead role in encouraging other provincial jurisdictions and the federal government to follow the proposed New Brunswick example.

III. Expense Challenges

Developing a brownfield property carries considerable “up-front” costs as compared to a greenfield site. The site must be investigated to determine if there is contamination present, and if so, cleaned up in accordance with regulatory requirements. Depending on the size of the site, the types of contaminants involved, and the extent of the contamination, these costs can be quite burdensome. There are also numerous indirect and ongoing financial impacts associated with brownfields – lower overall property value, elevated insurance premiums, and site maintenance requirements. Taken together these costs can outweigh any advantages that a given brownfield site might offer, undermining the economic case for redevelopment.

One solution to these economic concerns would be for government to offer financial incentives to overcome the added costs and make brownfield redevelopment more economically attractive. Unfortunately, there are presently no provincial government programs in place to provide such incentives, and very little is available from the federal government. This lack of incentives may be the determining factor in preventing certain brownfield redevelopment projects from being undertaken. As such, many properties are expected to remain in a dormant state providing no social or economic benefit to society. It is therefore the position of the Working Group that government should take action to help overcome some of the more onerous financial disincentives.

The following is an overview of the main financial stumbling blocks that are presently undermining efforts to redevelop New Brunswick’s brownfield sites. Each of the challenges identified is followed by the Working Group’s recommendations regarding financial incentives and other measures that Government might take to overcome these issues. All recommendations have been crafted so as to ensure that polluters are not being rewarded for cleaning up contamination of their own creation. Care has also been taken to ensure that the system does not inadvertently encourage site contamination.

a) Site Assessment and remediation

Unlike greenfield sites, most brownfield properties are recognized as being at risk of historic contamination. Thus, when considering the purchase of a brownfield, it is incumbent upon the purchaser to ensure that a reasonable investigation of the physical and chemical characteristics of the site is undertaken. This function must be carried out by qualified professionals, and can be relatively expensive. Also, should the initial investigation reveal contamination, the

regulated remediation process is triggered, which typically results in additional costly surveys and testing.

Should a brownfield be identified as contaminated the clean up of that contamination can represent an additional significant expense. As with site assessment costs, such expenses can be entirely avoided at greenfield sites. Therefore, financial incentives would be helpful to promote brownfield over greenfield sites. It should also be noted that there are other longer-term costs associated with brownfield sites versus greenfields, however the Working Group believes that financial incentives are not the best approach to deal with those challenges.

Recommendation

20. In the interests of placing brownfield sites on equal footing with greenfield sites, the Working Group recommends that Government consider measures to establish financial incentives with respect to site assessment and remediation costs. Such measures should include establishing “brownfield” eligibility criteria for existing funding/incentive programs, but also creating new incentives, as appropriate. More specifically, it is suggested that government consider:

- (i) Providing direct financial assistance with respect to brownfield properties for the purposes of offsetting the costs of site assessment and remediation (*eg.* through non repayable loans), subject to review by Business New Brunswick, and the site being deemed eligible by DENV. As a minimum, eligibility would extend to all orphaned sites.
- (ii) Providing corporate/personal income tax relief with respect to site assessment and remediation expenses, subject to eligibility criteria (*eg.* the site being orphaned).
- (iii) Providing comparable assistance to municipalities with respect to municipally owned sites.

IV. Government Challenges

As indicated above, the Working Group recognizes Government as playing an important role in promoting brownfield remediation and redevelopment - as environmental regulator, and as financial facilitator. There are, however, potential additional roles for Government in this area. The Province is also the owner of many brownfield sites. As such, many of the recommendations outlined above will affect Government not only as a regulator and facilitator but also as holder of the public trust. Additionally, the Province plays a role at the national level, affecting and promoting change across jurisdictions and with the federal government. Considering these roles there are several additional issues facing Government that remain to be discussed.

a) Property Management

Through government operations the Crown has, and will continue to increase its portfolio of impacted lands. As discussed previously, the existence of tax liens on these properties to a large extent prevents these properties from being sold and redeveloped. Also, government has met with little success, to date, in attracting buyers for such properties. The Working Group is of the opinion that government could help the cause of brownfield redevelopment by making these properties better known to potential redevelopers. This would have the

additional benefits of reducing the number of government owned properties that are in need of costly remediation, and for which it is exposed to civil liability.

Recommendation

21. The Working Group recommends that government establish an inventory of the brownfield sites for which it is responsible. Further, a review of these properties should be undertaken so that sites with significant economic potential could be made publicly available and advertised (perhaps through a dedicated internet service) as development opportunities to the business community. In this way, the government may reduce its compliment of sites, thereby reducing its potential liability and avoiding the cost of remediation by allowing market forces to find remedies. It is expected that some sites would fetch significant sums based upon location and other factors.

b) Orphaned Sites

The Working Group recognizes that there are many orphaned and government owned brownfield sites in the province that are contaminated to such an extent that redevelopment is not economically feasible. That is, there is no business case for it, with the cost of remediating grossly exceeding the expected economic return from the investment. Such sites have no reasonable expectation for remediation or redevelopment, and it is not foreseeable that anyone would wish to take ownership of such a property.

Recommendation

22. The Working Group recommends that the Province continue to deliver its existing Orphan Sites Program, which has been ongoing for more than a decade. Moreover, Government should consider increasing its financial support for the program. The program could build upon its past success in assisting with the cleanup of contamination in hardship cases, and allowing remediation and redevelopment where there would be no economic or business case otherwise.

This approach recognizes that although the other recommendations outlined in this report would remove the most significant impediments to brownfield redevelopment, there would remain a number of sites that would nevertheless remain unaddressed. A reinvigorated Orphaned Sites Program would provide a means of resolving such difficult cases.

c) Regulatory Harmonization

The Working Group has identified discrepancies in regulatory requirements at the provincial and federal level, and between provincial jurisdictions, as contributing to unnecessary red tape, which acts as a deterrent to brownfield development.

Recommendation

23. The Working Group Recommends that the Government of New Brunswick advocate, to the greatest extent possible, for the harmonization of regulatory requirements across provincial jurisdictions and between the provinces and the federal government.

d) Taxation Harmonization

The Working Group recognizes that the provincial personal and corporate income taxation system is integrally linked to federal tax law. As such, many of the financial incentives outlined in the previous sections would be difficult, if not impossible, for a provincial government to pursue unilaterally.

Recommendation

24. The Working Group recommends that the New Brunswick Government initiate dialogue with the Federal Government to realize the intent of the taxation-oriented recommendations listed above.

Conclusion

Although much has been stated in this report about the need to improve New Brunswick's environmental legislation, the Working Group nevertheless recognizes New Brunswick as a leader in contaminated sites management. New Brunswick, in concert with the other Atlantic provinces, has demonstrated its willingness to think progressively in this area, adopting a risk-based corrective action remediation system (RBCA). Moreover, RBCA has proven extremely successful since its adoption, and has demonstrated its utility as an appropriate technical basis upon which further advances in remediation and brownfield policy can be developed. Indeed, it is the soundness of the RBCA model that provides the necessary confidence to address the key impediments to unlocking the potential of New Brunswick's brownfields, which are regulatory and civil liability.

The Working Group feels that the recommendations outlined herein represent a reasonable and measured approach to facilitating brownfield redevelopment throughout New Brunswick, addressing the key liability issues, but also resolving many other important concerns. Although many of the proposed recommendations could be pursued individually and to great benefit, there is an underlying cohesiveness to the recommendations that, taken together, will allow the whole to accomplish much more than the sum of its parts. Moving forward, the Working Group expects that these recommendations, if adopted, will allow New Brunswick to maintain its reputation as a progressive environmental regulator, but also earn the province an unparalleled reputation in the brownfield arena both nationally and internationally.

The Working Group appreciates the opportunity to provide input to the New Brunswick Government on this important initiative. The group would also recommend that an effective stakeholder dialogue continue throughout the development of any resulting legislative and regulatory proposals.

Appendix “A”

Brownfield and Contaminated Site Management Approaches in other Selected Jurisdictions

The following comprises an overview of relevant brownfield and contaminated site management approaches undertaken in other jurisdictions. The list does not attempt to provide a comprehensive understanding of all programs and related legislation in the jurisdictions considered, but rather focuses on elements deemed noteworthy by the Working Group.

Selected Provincial Jurisdictions

NOVA SCOTIA

- Main act in place is the *Environment Act*, S.N.S. 1994-95
- Secured Creditors of contaminated sites are responsible for rehabilitation if they exercise management or control or become the registered owner
- Where the Minister of Environment believes on reasonable and probable grounds that a person has or will contravene the Act, the Minister may order a person at that person’s expense to: stop, carry out clean up, provide security, hire an expert to prepare a report, etc.
- Where an order is directed to a person who is acting in the capacity of administrator, receiver, trustee, etc., the liability of that person is limited to the value of assets administered, less reasonable administration costs.
- The Act indicates in the definition for "Person responsible for the contaminated site" that the person responsible can be any person that the Minister considers to be responsible. However, it is rather clear from the Act that the intent is that Minister would not target "anyone" but rather that the responsible party would have to be demonstrably responsible.
- The Nova Scotia *Environment Act* provides the Minister with the authority to set guidelines, standards, etc. with respect to remediation. The Act provides the Minister with the ability to give force of law to the Atlantic RBCA process and associated clean-up levels.
- The Nova Scotia Environment Act allows the transfer of regulatory liability via agreement between responsible parties and the Minister. However, it would appear that it was not the intent of the Act to specifically address the transfer of liability during the transfer of property.
- In Nova Scotia, the Minister can establish standards with respect to when a site is considered "rehabilitated", and issue "certificates of compliance" when those standards have been met, but the legislation is silent with respect to whether or not such actions constitute an end to regulatory liability.
- Nova Scotia has the ability (90(e) of the *Environment Act*) to compile a list of parties or classes of parties that are "not responsible for rehabilitation".
- Although Nova Scotia has no specific method of facilitating discovery, its regulatory system is non-punitive, in that all remediation is conducted through a regulated system of remedial action plans and agreements. Although the Minister has order making authority, they are not required to initiate the remediation process.

- The Nova Scotia *Environment Act* contains provisions for a due diligence defence (section 160).
- It is understood that many of the legislated powers provided to the Minister with respect to contaminated sites in Nova Scotia are presently untested.

ONTARIO

- Main act is *Environmental Protection Act*, R.S.O. 1990
- Provides for orders to be directed against the previous owner of the source of contaminant, owner of pollutant and anyone who had been in possession or control of source of contaminant
- Secured creditors are exempted from:
 - conducting, or completing or confirming an investigation relating to the secured property; and,
 - action taken to preserve or protect the property including, services, security, insurance, property taxes and collect rents
- If a secured creditor becomes the owner of the property under foreclosure, the Minister will not issue an order under the Provision of the EPA for 5 years and may extend the five year period.
- The Province has established requirements on conducting Phase I and II ESAs (CSA standards) and qualifications for those undertaking Phase I and II ESAs
- Under the Ontario *Environmental Protection Act* (EPA), a clean-up order can be issued to a variety of parties depending on the type of event (spill, contravention, etc). (Sections 7, 8, 12, 17, 18, 97, 157, and 157.1). Except under special circumstances, such orders are linked to ownership, former ownership, or having control of property.
- The Ontario *Record of Site Condition Regulation* - EPA stipulates that sites must be remediated to achieve the standards set out in the "Soil, Ground Water and Sediment Standards for Use under Part XV.1 of the Environmental Protection Act" published by the Ministry and dated March 9, 2004".
- Under the EPA and *Record of Site Condition Regulation*, indemnity against regulatory liability (orders) is extended to prior owners and other parties whenever a RSC is filed. Thus, it would be possible to make (private) arrangements with respect to who would file the RSC. However, there are reopeners for the RSC process whereby any party could receive an order. The RSC is not a mechanism for allocating or transferring liability.
- Although the RSC process does not include the final "declaring of a site to be clean", it nevertheless provides substantial protection from regulatory liability once the process is complete and the RSC is filed. However, there is a reopener whereby the Ministry can issue an order against a "closed" file where necessary to protect human health. There is also a reopener where changes in land use are involved.
- Ontario does not appear to identify any particular parties as blameless; however their order making authority is limited such that insurers, financiers, etc would not generally be held liable unless they took ownership of the property.
- Although Ontario's RSC model appears non-punitive on the surface, it is in fact only marginally less threatening than New Brunswick's. The protection from prosecution offered by

filing an RSC does not come into effect until after the site has been remediated. Thus, it could be argued that the entire process is driven under threat of ministerial order.

- There is no indication of a due diligence defence under the EPA. Absolute liability is assumed even though it is not explicitly stated.
- General Ontario Model: 1. Prohibition against spills/contamination. 2. Threat of Order but can be avoided if an RSC is submitted. 3. The RSC cannot be submitted until a remediation process, consistent with regulation is followed.
- The Brownfields Tax Incentive Program allows municipalities to provide municipal tax assistance for eligible properties. The Minister of Finance may match that contribution with education property tax assistance to parties that want to rehabilitate brownfield properties and that meet the eligible criteria. The total value of the matching education property tax assistance is based on a percentage value of the tax assistance awarded by the host municipality, on an annual basis during each taxation year for the total length of the rehabilitation and development periods.

MANITOBA

- Main act is *Environment Act* (E.A.)
- Provides for director to have “Reason to Believe” that a situation exists that does or is likely to result in unsafe conditions or irreparable damage to the environment.
- The director can order person in authority to take such action as deemed necessary to restore the environment to a condition satisfactory to the director.
- The responsible party for a contaminated site or “Person in authority” is not defined in the EA and may include a lender who has ownership, management or control of a facility.
- The director may order one or more owners or occupiers of the site to investigate and clean the site. This could include a creditor.
- The *Manitoba Contaminated Sites Remediation Act* lists all of the persons and types/classes of person that can be held accountable for site remediation. Although the list (and exemptions) is quite broad, it stops short of potentially holding "any person". The act also provides a process for notifying all persons who are being held responsible, and allows for appeal of such designation.
- The Act does not provide for site clean-up standards. It instead specifies that sites that must be remediated (subject to a remediation order) to a level considered appropriate by the Department (director).
- Although the Act contains many provisions for the fair and judicious allocation of responsibility, it does not allow private allocation of responsibility without the department's consent. It should also be noted that the Act only speaks to such activities that occur once the regulatory process has already been initiated. It is silent on matters concerning allocation of responsibility for lands that have not yet been identified as needing remediation.
- The Act provides that the director may issue a certificate of compliance that indicates that a remediation order has been complied with (ie. that the responsible parties cleaned-up the site in accordance with the order). The Act does not appear to prohibit the site being considered "contaminated" again at a later date (eg. if standards changed), regardless of the issuance of a certificate of compliance.

- The Act provides opportunity for a person to enter into an agreement with the Department whereby they would not be considered a responsible party for becoming involved with a contaminated site after-the-fact.
- The Manitoba model is a "punitive" model, consistent with the New Brunswick approach. The system is centered around the issuance of an order.
- There is no due diligence defence for violations under the Act. However, certain potentially responsible parties can become exempted from responsibility through exercise, and demonstration, of due diligence.
- General Manitoba model: Not "voluntary". The Department becomes aware of contamination, orders investigation, determines responsibility (substantial process), issues remediation order,

ALBERTA

- The principal governing statute is the "*Environmental Protection & Enhancement Act*"
- May order responsible person, owner, any previous owners, administrator, etc. to take any measures necessary to restore/secure a site.
- The *Oil & Gas Conservation Act* also plays a key role.
- No scheme for the processing or underground storage of gas or storage or disposal of any fluid or other substance to an underground formation through a well or the storage, treatment or processing of waste, can proceed without approval of the Minister
- *Environmental Protection and Enhancement Act* has provisions limiting the liability of receivers and trustees, but there is no similar provision in the *Oil & Gas Conservation Act*.
- Under the *Alberta Environmental Protection and Enhancement Act* the "Director" can issue an "environmental protection order" to have a contaminated site remediated. Such orders can be issued to any person "that is responsible for the contaminated site". However the "person responsible" is defined in the Act so as to list the classes of person that could be held accountable, and specifically exempts certain parties from responsibility.
- The Act appears to give discretion to set policy with respect to clean-up standards. There is no reference to regulated standards, nor is there a regulation under the Act specifying any standards.
- The Act contains provisions whereby responsibility can be allocated via agreement between parties, if such agreement is endorsed by the "Director".
- The final step of the Alberta remediation system is the issuance of a "Remediation Certificate". Once such a certificate is issued, an Order cannot be issued against the site. However, such certificates do not provide finality, as they can contain conditions, can be amended, or revoked.
- Under the Act, there are specific exemptions provided for municipalities and for the consultants or other persons that become involved with a site exclusively to do sampling and testing. There appears to be no means for the Department to indemnify other parties (however, it could be accomplished through an agreement between parties that is endorsed by the director).
- The Alberta model relies on the threat of an Order being issued. However, it is not entirely a "punitive" system, as the responsible parties are provided with a system whereby if they

operate in good faith, they can receive a closure document without ever having been issued an order.

- The Act provides for a due diligence defence for some (but not all) provisions respecting contaminated site remediation. (Primarily initial reporting requirements, the prohibition against creating a contaminated site, and the taking of immediate action to prevent impacts from a spill).
- The Alberta remediation process is vary similar to Ontario's: prohibition against contamination, declaration of site as contaminated, threat of order causes people to submit remedial action plans, remedial action plans can result in a remediation certificate being issued, and the remediation certificate is a shield against orders.

BRITISH COLUMBIA

- The principal governing statute is the “*Waste Management Act*, R.S.B.C. 1996”
- A secured creditor is responsible for remediation at a contaminated site if the secured creditor at any time exercised control over or imposed requirements on any person regarding the manner of treatment, disposal or handling of a substance and the control or requirements in whole or in part, caused the site to become a contaminated site, or if the secured creditor becomes the registered owner in fee simple of the real property at the contaminated site, but a secured creditor is not responsible for remediation where it acts primarily to protect its security interest, including without limitation where the secured creditor participates only in purely financial matters related to the site.
- A secured creditor is not responsible for remediation on the basis that the secured creditor exercised control or imposed requirements on any person if the secured creditor does any of the following:
 - Imposes requirements on any person to comply with environmental laws, standards, policies or codes of practice of government or industry, including requirements to perform monitoring tests, scientific studies or to remediate contaminated sites;
 - Participates in loan work out actions, including the giving of financial or other advice to a financially distressed borrower, restructuring or renegotiating the terms of a security interest, requiring additional payments or consideration, or exercising forbearance;
 - Takes steps, whether or not they are part of realization proceedings, to preserve, protect or enhance the value of the secured assets or to reduce or prevent future contamination of the migration of existing contaminants or otherwise conduct any independent remediation; and,
 - Undertake realization proceedings.
- A previous owner or operator, or a current owner or operator who holds a valid and subsisting bond for an exploration site (as defined) under the *Mines Act*, who carries out mineral or coal exploration activities at the exploration site is not responsible for remediation at the site if the owner or operator;
 - Obtains a transfer agreement that excludes the owner or operator from the contaminated site or
 - Obtains indemnification under the *Financial Administration Act*, (subsections 28.91(2), 28.92(2)).

- A person is not responsible for remediation at a historic mine site (as defined) if (a) indemnification has been provided to the person for that site under the *Financial Administration Act* or (b) the person has acquired the mineral or coal exploration activities and the exploration activities have not exacerbated any contamination that existed at the site at the time the person acquired those mineral or coal rights (section 28.93).
- The liability of a secured creditor who becomes a registered owner in fee simple of real property at a contaminated site exists and endures only while the secured creditor is the registered owner in fee simple of the real property, unless the secured creditor is the registered owner in fee simple of the real property, unless the secured creditor at any time exercised control over or imposed requirements on any person regarding the manner of treatment, disposal or handling of a substance and the control or requirements, in whole or in part, caused the site to become a contaminated site.
- A receiver (meaning a current or previous receiver, receiver-manager, liquidator or bankruptcy trustee who is an owner or operator) is not personally responsible for remediation at a contaminated site, including a site that was a contaminated site on the date that the receiver became an owner or operator at that site.
- BC has regulated remediation standards (for soil and water) and criteria (for sediments). Their *Contaminated Sites Regulation* provides a definition for "contaminated site" that makes reference to several attached schedules that stipulate threshold levels for various contaminants. When remediating, all contaminant levels have to be reduced to below the threshold levels (note: there is a risk-based component to these levels).
- BC has adopted a "list" approach to contaminated site regulatory liability. Their *Environmental Management Act* lists a number of circumstances under which a person can be held liable. Further, the BC *Contaminated Sites Regulation* provides a list of exceptions or "persons not responsible". Their list of potentially responsible parties, and the list of exceptions was compiled in accordance with a 1993 CCME report "*Contaminated Site Liability Report. Recommended Principles for a Consistent Approach Across Canada*".
- BC's legislation does not provide for the transfer of liability. The original property owner remains subject to regulatory liability.
- BC legislation does not provide any Minister with the ability to declare a party blameless. Instead the BC *Environmental Management Act* and *Contaminated Sites Regulation* contain a number of provisions clarifying those persons who are not responsible for remediation.
- BC has adopted a screening tool called a site profile, which is required to be submitted to the ministry when a person applies for a development permit, application for zoning or rezoning, demolition, and soil removal, for example. These provisions appear in section 40 of the *Environmental Management Act* and Part 2 of the *Contaminated Sites Regulation*. About 25% of the sites identified to the ministry come from site profiles, and they receive 15 - 20 per month.
- BC has adopted an absolute liability regime.

Selected American States

MAINE

- Under Maine legislation, directed enforcement measures (eg. orders) must be levied against the "responsible party" (ie. they are not free to target "anyone").
- Maine has no regulated remediation standards. Their standards are in policy, and enforced through their Voluntary Response Action Program (VRAP).
- There is no provision in Maine's statutes to allow the transfer of regulatory liability. Liability is always "joint and several".
- Although the VRAP process provides immunity from various enforcement processes, and the VRAP is transferable between owners, there is never finality.

- The VRAP process provides extensive provisions for various parties to be exempt from regulatory responsibility. However, it stops short of providing discretion to declare a party blameless - only those listed explicitly in the statute are exempt.
- Their voluntary remediation program is non-punitive. Although it does rely on the threat of an order; no order is required in order for the system to function. Thus, parties can come forward with the confidence to know that if they participate in good faith, they will not be the target of punitive action.
- Maine has no specific due diligence provisions in its environmental statutes.
- Maine's "voluntary" remediation regime provides an enforcement shield to compliant responsible parties.

MASSACHUSETTS

- Has a Voluntary Cleanup Program (VCT)
- Cleanups are tied to reuse, activity, and use limitations, as well as land use restrictions, and sites can be transferred prior to completion, provided cleanup continues and is completed
- Has a State backed insurance program
- Insurance policy covers unanticipated costs associated with cleanup, third party liability, business interruption, and cleanup of previously existing unknowns. Protects lenders from default on private loans made for clean-up and redevelopment while environmental conditions remain on site. Lender is covered for a period of 10 years
- Lenders are exempt unless they cause the contamination or cause the borrower to contaminate
- State Tax Incentives - The Brownfields Tax Credit Program provides a tax credit of up to 50% after cleanup is completed, and 25% for a cleanup that uses an Activity and Use Limitation (AUL). An AUL protects owners and operators from liability for future violations when they transfer the property to a new owner. Cleanup costs must be greater than 15% of the assessed value of the property prior to remediation. The tax credit can be carried over for 5 years.
- Tax credit for remediation of 25% (with reuse restrictions; 50% without)
- Municipal Tax Allotment – gives municipalities permission to negotiate back taxes on contaminated sites in exchange for commitment by new owner to cleanup
- Office for Brownfields Revitalization – Provides assistance assessing all Brownfield and Economic Development programs

- Economic Development Incentive Program- Menu of tax options including:
 - Negotiate prospective municipal property taxes on all value or enhanced value, up to 20 years
 - Exemption from personal property taxes
 - 5% state investment tax credit
 - 10% abandoned buildings tax deduction
- Their approach is recognized as being highly effective
- On January 2, 2002, the Massachusetts legislature enacted *An Act Returning Tax Title Properties to Productive Use*. This is the result of a report that analyzed the tax title process in Massachusetts and made recommendations on how to improve the speed and the number of successful outcomes within the present system. Recommendations included suggestions for legislative changes with the goal of returning tax title properties to productive use, particularly for affordable housing. The intent is to reduce the number of tax title properties and to allow communities that choose to do so the opportunity to use tax title properties for affordable housing.

MICHIGAN

- Michigan has a Voluntary Cleanup Program
- Unique program as state has created causation liability legislation that prevents prospective purchasers from being held liable for contamination, at sites they acquire if they did not cause it.
- The State has implemented a Revitalization Revolving Loan Fund for cities for site assessment, demolition, and removal actions (low interest rate 2.25% repayable over 15 yrs., 5 yr. Payment deferral).
- State authorizes cities and counties to establish Brownfield Redevelopment Authorities which have Tax Increment Financing, who can then set up a site remediation revolving fund from tax increments captured after remedial actions are paid for.
- Tax incentives via tax credits that can carry forward 10 years
- Brownfield credit, allowing for abatement of up to 100% of taxes on real property for upwards to 12 years in certain uses.
- The program is considered effective.
- The Brownfield Authority Single Business Tax (SBT) is a financial credit against the single business tax, for any eligible taxpayer / lessee. The credit can be in an amount of up to 10% of eligible investments made on eligible property. The SBT credit cannot exceed \$30 million and will be issued at the completion of the project. This credit is intended to provide a significant financial incentive for developers and investors of eligible property.

PENNSYLVANIA

- Pennsylvania has a remediation program outlined in regulation that allows for "voluntary" adoption or "enforced" adoption. The requirements are the same in either case. A responsible party either volunteers to participate on their own initiative, or they are required to participate as a result of enforcement action. Their process allows remediation over long time spans -

allowing budgetary flexibility. They do not dictate methodologies that must be employed – relying instead on performance based standards.

- Created Land Recycling Program in 1995, which offers clients release from liability for approved cleanups.
- Identifies risk-based standards for cleanup, simplifies approval process, and limits future liability when standards are attained.
- Industrial Sites Reuse Program – provides loans and grants to municipalities and private entities for site assessment and remediation (max \$200M site assessment; \$1MM per year for remediation, require a 25% match, with loans @ 2% for assessment terms up to 5 years and 15 for remediation.
- Infrastructure – Development Program – provides public and private developers with grants and loans for site remediation, clearance and new construction. (\$1.25million per project @ 3% up to 15 years).
- Brownfield Inventory Grant program - Grants up to \$50M to cities and development authorities to carry out Brownfield inventories.
- Also provides for certain sites, for municipalities and economic development agencies, state funded contractors to conduct site assessments, prepare cost estimates and remediation plans for abandoned properties.
- Tax incentives for certain sites to forgive taxes for up to 12 years.
- The program is considered effective.
- The person that caused the contamination, the owner, past owner, persons related to the activity that caused the contamination are considered responsible.
- Pennsylvania has regulated standards (standards documents are referenced by name in regulation). They have standards in regulation.
- They have "buyer seller agreements" that allow the buyer to remain free of liability (three way agreement). They have agreements between developers and the Department to allow developers to be absolved of liability.
- Limited and specific reopeners in statute (also reopeners are not automatic - state may decide not to reopen based on risk of negative effects).
- The State has an absolute liability regime.

CALIFORNIA

- California has a Voluntary Clean-Up Program.
- Established in 1993 allows California Department of Toxic Substances Control to provide oversight to motivated parties to assess and/or cleanup lower priority sites
- An additional pilot voluntary cleanup program provides numerous incentives to accelerate environmental cleanup work
- Financial Assurances and Insurance for Redevelopment Program (FAIR)
 - A pre-negotiated package of discounted environmental insurance products including Pollution Legal Liability Insurance, Cost Overrun Insurance and Secured Creditor Insurance

- Subsidies available for the costs of premiums and deductibles (up to 50% of the cost of environmental insurance products and up to 80% of the self insured retention of the cost overrun (up to \$500,000))
- “Approval of a Partial Site Clean up” - Allows the State to issue “clean parcel letter” for sites where designated portion of the property has been cleaned up.
- Local redevelopment agencies are granted qualified immunity from State or local laws if cleanup is conducted in accordance with a remedial action plan approved by a state agency, liability immunity extends to lenders and property successors
- Clean Up Loans and Environmental Assistance to Neighbours (CLEAN) program:
 - Provides low interest loans up to \$100,000 to conduct preliminary endangerment assessments. If redevelopment is determined not to be economically feasible, up to 75% of the loan amount can be waived
 - Provides low interest loans of up to \$2.5 million for the clean up or removal of hazardous materials where redevelopment is likely to have a beneficial effect on property value, economic viability and quality of life of a community
 - Program considered extremely effective.

FLORIDA

- Florida has a Voluntary Clean-Up Program.
- Liability Protection is provided to lenders or developers who agree to clean-up sites.
- A Voluntary Clean-Up Tax Credit is in place to encourage voluntary cleanup of dry cleaning solvent contaminated areas and designated Brownfields. Applicants are eligible for up to 35% of the costs of voluntary cleanup activity not to exceed \$250,000 in tax credits per year, which can be applied toward Corporate Income Tax or Intangible Personal Property Tax in Florida. There is an additional 10% tax credit during the last year of cleanup.
- Job Creation Bonus Refund of up to \$2500 for each job created in a Brownfield Area by an eligible business.
- Sales Tax Credit on Building Materials used in Brownfield or Urban Infill Area.
- State Loan Guarantees for Loan Loss Reserves for up to 5 yrs.

NEW MEXICO

- New Mexico has a voluntary remediation program whereby an applicant can enter into a voluntary remediation agreement with the state. Once finalized the agreement is a shield against further enforcement action with respect to the contamination. Once complete, a "certificate of completion" is issued, followed by a "covenant not to sue".
- Under New Mexico State law, all compliance orders must be issued against those deemed to have violated their Act. There is no possibility for ordering "any person". They must be linked to the offence.
- New Mexico has some regulated remediation standards. However the regulated standards are not complete (ie. there are standards for some parameters but not others) However, there is statutory authority for setting standards, either generally, or on a case-by-case basis, as required.

- Where regulatory liability remains (ie. is not removed through the exercise of a covenant not to sue), liability remains joint and several.
- Their voluntary remediation process shields participants from enforcement. Moreover, their "covenants not to sue" protect owners from future regulatory liability. However, the process includes "reopeners" that can effectively annul the "covenant not to sue".
- There is no mechanism (other than through a covenant not to sue) to identify certain parties as "not responsible". It should be noted that only certain parties are eligible to participate in the voluntary remediation process (primarily owners). State law is basically written to preclude third parties such as lenders from regulatory liability considerations - however, such protection is not explicit.
- The voluntary remediation program is non-punitive. Although it does rely on the threat of enforcement, no order is required in order for the system to function. Thus, parties can come forward with the confidence to know that if they participate in good faith, they will not be the target of punitive action.
- There appears to be no "due diligence" defence under New Mexico environmental statutes.

NORTH CAROLINA

- Qualifying improvements on brownfield properties are designated a special class of property in the North Carolina Constitution, and are appraised, assessed and taxed accordingly. A landowner is entitled to a partial exclusion for the first five taxable years beginning after the completion of quality improvements. The percentage of the appraised value of the qualified improvements that is excluded is: year one, 90%; year two, 75%; year three, 50%; year four, 30%, and year five 10%.

NEW JERSEY

- The state has a community development initiative that facilitates the redevelopment of abandoned properties through the purchase of tax liens coupled with targeted local property tax relief. As part of this program, the Economic Development Authority will use \$300 million in bond revenue to purchase tax liens on privately held properties. This will recapture the redevelopment rights on the property for the municipality and state. The state will purchase the redevelopment rights to only those properties that have strategic redevelopment potential or are part of a local redevelopment plan.

INDIANA

- Indiana's Voluntary Remediation Tax Credit (VRTC) is available to taxpayers that meet the statutory requirements. The VRTC amount is the lesser of 10% of the total cost of the remediation, or \$100,000. Costs identified during the final state certification of the project must be consistent with the remediation cost estimates that are submitted and approved in the application process.

Noteworthy Municipal Initiatives

CITY OF ATLANTA

The City of Atlanta and Fulton County are working to address the issue of property tax delinquency in many of Atlanta's neighborhoods, based on an acknowledgement that restoring properties to the tax rolls will enhance local government collection, as well as improve the neighborhoods. The implementation of several new legislative measures since 1990 has streamlined the property disposition in Atlanta significantly.

INDIANAPOLIS AND MARION COUNTY

The City of Indianapolis and Marion County seek to return unproductive land to revenue generating status and to advance the redevelopment efforts of community development organizations through a property disposition model built upon enabling legislation and a cooperative relationship between government entities. The expected tax-sale assemblage and transfer of property to community development corporation (CDCs) with specific redevelopment plans, and a state statute authorizing the transfer of property from the City to CDCs for development purposes, promotes this agenda.

CITY OF BALTIMORE

Up to 70% of the increases in property tax due to improvements following a voluntary cleanup are eligible to be credited. Improvements during a five-year period following the cleanup are eligible. The credit is 50% or 70% of the increase in assessments - the higher amount requires a \$250,000 minimum investment in purchase price and cleanup costs.

CITY OF NEW YORK

The City of New York has made great strides in an ongoing effort to put lien encumbered residential buildings back on the tax rolls and back to good use. While tax liens against relatively stable properties are packaged and sold to investors, the Third Party Transfer Initiative was created to ensure the expeditious transfer of distressed, tax delinquent properties to responsible third parties, accompanied by development assistance from the City for third parties receiving properties. In the South Bronx, where a third party transfer program is in its final stages, the positive impact of the new system is already evident.

THE CLEVELAND LAND BANK

This program serves as the primary vehicle for the acquisition and disposition of tax-delinquent properties to community based organizations in the City of Cleveland. A statute allows any Ohio municipality to establish a Land Reutilization Program, or, a land bank, for the purpose of acquiring, managing and disposing of delinquent land to reinstate such properties to tax revenue status.

Other Items of Note

TAX INCREMENT FUNDING IN THE UNITED STATES

Tax Increment Funding (TIF) is a subsidy originally intended to help redevelop areas that are deemed blighted or distressed. TIF is now used in 47 states. The area to be redeveloped should result in higher property values and increased revenues. The revenue gets split into two streams. The first stream is pegged to the original value before redevelopment. This amount continues to go to the city, county, and other taxing body as before. The second stream consists of the increase in

tax revenue. This is paid to a special fund, which in turn pays for the redevelopment of the TIF district. The diversion of tax payments continues for a period of between 7 and 30 years.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Under the federal Brownfields Tax Incentive, environmental cleanup costs are fully deductible in the year they are incurred, rather than having to be capitalized. The government estimates that while the tax initiative costs approximately \$300 million in annual tax revenue, the tax incentive is expected to leverage \$3.4 billion in private investment, and return 8,000 brownfields to productive use. The tax incentive is not a tax credit, but reduces tax burden indirectly by lowering taxable income.

PROPERTY TAXATION IN NEW BRUNSWICK AND PEI

Taxes on real property are administered and collected by the province on behalf of the municipalities. In the case of bankruptcy, the secured portion is limited to taxes assessed or levied within the two years immediately preceding the bankruptcy. Any remaining amount owing to the province is considered unsecured.

PROPERTY TAXATION IN ALL CANADIAN PROVINCES EXCEPT NB AND PEI

Taxes on real property are levied and collected by the municipalities. A municipality that has a lien for overdue taxes on a bankrupt property is a secured creditor and can proceed to follow the steps set out to enforce the lien. If the taxpayer does not pay the arrears, the municipality can have the property transferred into its name as owner.

Appendix “B”

A Word on Definitions

The National Round Table on the Environment and the Economy (NRT) and the Canadian Council of Ministers of the Environment (CCME) have defined “brownfields” as follows:

“Abandoned, idle or underutilized commercial or industrial properties where past actions have caused known or suspected environmental contamination, but where there is an active potential for redevelopment.”

While the New Brunswick Brownfield Working Group (NBBWG) agrees with the spirit and intent of this definition, for the purposes of this paper the definition is considered overly narrow and would be problematic. More specifically, there are two areas where this definition falls short:

1. The definition excludes non-commercial and non-industrial properties.

For the purposes of the NBBWG, a property’s former use is largely irrelevant. If a site is derelict, and remains so due to past contamination (or suspected contamination), then it is a property that should be captured within this effort, and its redevelopment issues ultimately resolved. Thus, the former use of the property need not constitute a point of discrimination within the definition of “brownfield” adopted for this paper. Nevertheless, it is accurate to say that the majority of brownfield sites are former industrial and commercial properties.

2. The definition excludes properties where there is no “active potential for redevelopment”.

There are many properties that are lacking redevelopment potential, but which would become viable were certain issues to be resolved. As it is the intention of the NBBWG to discuss those issues and make recommendations to see them resolved, classification on that basis is problematic. More to the point, there may be sites without active potential for redevelopment (not fitting the NRT/CCME definition for “brownfield”) that could gain redevelopment potential as a result of the recommendations proposed in this document (thus “becoming” NRT/CCME brownfields as a result of the proposed recommendations). Drawing a distinction between these property types would necessitate the introduction of another term to describe these “properties that would be brownfields but for their lacking redevelopment potential”, which would complicate the language and could be confusing for many readers. Thus, no distinction is drawn in this paper. Which is to say, there are properties with active redevelopment potential, and properties without. Both fall within the definition of “brownfield” for the purposes of this paper.

It has also been suggested that all sites have redevelopment potential, to a lesser or greater extent. From this perspective, the exclusion of redevelopment potential as a point of discrimination in this paper would not conflict with the NRT/CCME definition. However, such interpretation would also render that portion of the NRT/CCME definition meaningless.

“Contaminated Site” vs. “Brownfield”

As described above, the NBBWG uses the term “brownfield” to describe a parcel of land that is not pristine, having previously been used or developed in some way. This typically includes industrial lands and similar sites where potential contaminants were routinely stored or handled. The term includes such lands that are (or are expected to be) contaminated as a result of those former uses. In this respect, the term “contaminated site” is often (though erroneously) used synonymously with “brownfield”. The key difference is that not all brownfields are, in fact, contaminated.

In the interests of clarity, the NBBWG uses the term “contaminated site” to describe properties that have been, and are presently, contaminated beyond acceptable levels. Thus, a formerly developed site that is known to be contaminated would bear both descriptors – being a contaminated site that is also a brownfield (or a “contaminated brownfield”). The corollary to “brownfield”, “greenfield”, will describe unimpacted land that has never been built upon.

Examples

- a) A property that once housed a large industrial facility, such as a pulp mill, that operated onsite chemical storage, and petroleum storage tanks. Although no site assessment work has ever been undertaken at the site, given the common operating practices at the time of operation, it is assumed by many that there may be residual contamination on the property. The suspicion of contamination to some extent prevents would-be developers from acquiring and redeveloping the property. This property is considered a **brownfield**, but is not a contaminated site.
- b) The property identified in example a) undergoes a site assessment, and it is determined that the property is not contaminated. Nevertheless, suspicion that the property might nevertheless harbour some undetected contaminant, even in trace amounts, hinders redevelopment. This property is considered a **brownfield**, but is not considered a contaminated site, even though it carries the stigma of contamination.
- c) The property identified in example a) undergoes a site assessment, and it is determined that the property is grossly contaminated. The direct remediation expenses associated with the clean-up bankrupts the original owner, making the site “orphaned”. The site is undevelopable because of human health risks associated with the contaminants present. This property is considered a **brownfield**, and is also a **contaminated site**.
- d) The property identified in example c) undergoes site remediation. Nevertheless, suspicion that the property might nevertheless harbour some undetected contaminant, even in trace amounts, hinders redevelopment. This property is considered a **brownfield**, but is no longer considered a contaminated site, even though it carries the stigma of contamination.
- e) A large fuel spill occurs at a small, family-run, gas station. The spilled fuel escapes containment, and large quantities seep into the ground, contaminating the groundwater. The business continues operations while undertaking to comply with regulatory efforts to clean-up the contamination. The property is a **contaminated site**, but is not a brownfield, as the property is not derelict.
- f) A fuel spill occurs at a residential property. The fuel is contained and all impacted soil is removed from the site. Although the site was once contaminated, as there was no industrial operation at the site, the property is viewed by all as being “clean” (it being extremely unlikely that there were pockets of contamination at the property other than that which was the subject of the remediation). The site is neither a contaminated site nor a brownfield.

Appendix “C”

New Brunswick’s Guideline
for the
Management of Contaminated Sites