

BROWNFIELDS TRANSACTIONS

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WHAT DO YOU SEE?

- Property Owner
- Buyer/Developer
- Regulator(s)
- City
- Lender
- Environmental Justice Group
- Neighbors
- Developer



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BACKGROUND: WHAT IS A BROWNFIELD?

Brownfields are real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.

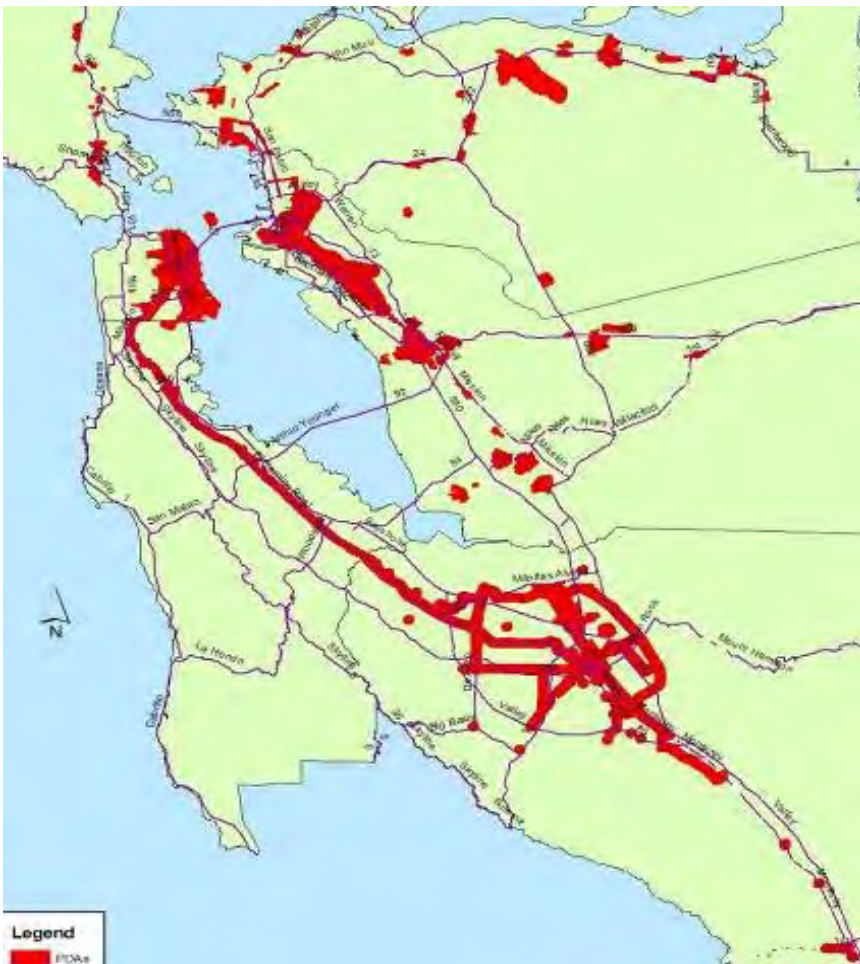
USEPA Definition

BACKGROUND: WHY BROWNFIELDS?

- Approximately 450,000 contaminated commercial and industrial sites.
- Cost of cleanup is around \$650 billion.
- Cost measured in lost opportunity, unrealized jobs, health impacts, pressure on greenfields, and Greenhouse Gas emissions.
- Approximately 81,000 acres of brownfields in 21,000 sites in 232 cities across the US.

BACKGROUND: WHY BROWNFIELDS?

Priority Development Areas



Federal HazWaste NPL Sites



REGULATORY AGENCIES

- **Federal**

- U.S. Environmental Protection Agency

- **State**

- Department of Toxic Substances Control
- Regional Water Quality Control Board
- Cal/Recycle (Landfill Issues)

- **Regional**

- Air Quality Management District (Asbestos Issues)

- **Local**

- Certified Unified Program Agencies (CUPA)

FEDERAL ENVIRONMENTAL STATUTES: PRIMARILY IMPLEMENTED/ENFORCED BY USEPA

Primary Federal Statutes:

- **CERCLA** (Comprehensive Environmental Response, Compensation Liability Act, Superfund)
- **RCRA** (Resource Conservation and Recovery Act)

Also,

- **Toxics Substances Control Act** (PCBs)
- **Clean Air Act** (especially asbestos)
- **Clean Water Act** (especially wetlands)

STATE ENVIRONMENTAL STATUTES

Primary State Statutes:

- Hazardous Substance Account Act (Cal. Superfund)
- Hazardous Waste Control Law (Cal. RCRA)
- Porter-Cologne Water Quality Control Act
- State Underground Tank Laws
- California Environmental Quality Act (CEQA)
- California Civil Code §§ 1102 and 1102.6 (Sale of residential property)

FEDERAL (CERCLA) LIABILITY SCHEME

CERCLA Liability

- Primarily retrospective/retroactive
- Strict liability
- Joint and several liability
 - NB: Apportionment of liability is the trend
- Cost recovery by private parties

STATUTORY CONTEXT: FEDERAL LIABILITY SCHEME

CERCLA Liability: Parties Responsible

- Current "owner," "operator" of a facility
- "Owner" or "operator" at time of disposal
- Transporters
- Arrangers (e.g., who directed the disposal, including contractors undertaking cleanup)

STATUTORY CONTEXT: FEDERAL LIABILITY SCHEME

CERCLA Liability Covers:

- Response costs of: government (e.g., EPA) and private party costs for necessary actions consistent with the National Contingency Plan (NCP)
- Natural Resource Damages

STATUTORY CONTEXT: FEDERAL AND STATE LIABILITY SCHEME

Brownfields Transaction



Buyer can't be entirely sure what's in the box, but may soon own it.

Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, et seq.

RISK MANAGEMENT TOOLS

Due Diligence	Contract Terms	Insurance	Regulatory Program	Clean-up Strategy	Funding
<p>Phase I Assessment</p> <p>Phase II Assessment</p> <p>Permit/Litigation Checks</p>	<p>Reps and Warrantees</p> <p>Cost Sharing</p> <p>Releases/Indemnities</p> <p>Special Purpose Entity (SPE)</p>	<p>Pollution Limited Liability</p> <p>Cost Cap</p>	<p>Choice of Oversight Agency</p> <p>Selection of Regulatory Program</p> <p>CEQA Analysis</p>	<p>Background or Risk-based</p> <p>Institutional Controls</p> <p>Engineering Controls</p> <p>Sequencing</p>	<p>Grants/Loans</p> <p>Special Use District</p> <p>Tax Increment Financing</p>

RISK MANAGEMENT: DUE DILIGENCE (BASIC BROWNFIELD HYGIENE)

CERCLA Defense to Liability:

- Acts of War/Acts of God
- Lender not acting as manager while loan was performing, and who takes by foreclosure or deed in lieu of foreclosure
- Government taking by eminent domain or foreclosure
- Bona Fide Prospective Purchaser (BFPP)
- Contiguous Land Owners
- Innocent Land Owners (unaware of conditions)
- Owners of Property Contaminated Aquifers

RISK MANAGEMENT: DUE DILIGENCE (BASIC BROWNFIELD HYGIENE)

Phase I Assessment: Identifying the Risks

- EPA's Final All Appropriate Inquiries (AII) Rule (69 *Fed. Reg.* 66,070) or Updated American Society of Testing and Materials (ASTM) Standard Practice on Phase I Environmental Site Assessment (ESAs).
- ASTM sets minimum criteria for Phase I Report: criteria for credentials, file searches, institutional controls, interview neighbors
- Identifies Recognized Environmental Conditions (RECs)
- REC - Presence or likely presence of hazardous substance from existing release, past release or material threat of release to soil or water

RISK MANAGEMENT: DEFENSES TO CERCLA LIABILITY (BASIC BROWNFIELD HYGIENE)

Common Elements:

- Conducted All Appropriate Inquiries assessment prior to purchase
- Exercise due care/reasonable steps
 - Report releases timely (regulators and third parties)
 - Stop continuing release/prevent threatened/limit exposure
- No relationship to liable owner/operator
- Cooperate in providing access to regulatory
- Comply with land use restriction/institutional controls

ENVIRONMENTAL INSURANCE: POLLUTION LEGAL LIABILITY POLICY (PLL) (BASIC BROWNFIELDS HYGIENE)

Insurance against:



- Discovery of previously unidentified contamination
- Discovery of contamination of adjoining property
- Third parties claims alleging personal injury or property damage (e.g., toxic tort liability)
- Government reopeners
- New Impacts caused by business operations

RISK MANAGEMENT: NEGOTIATING THE DEAL (PURCHASE SALE AGREEMENT)

- **Structuring the Transaction**
- **Negotiating the Deal**
 - Representations and warranties
 - Covenants
 - Indemnities

NEGOTIATING THE DEAL: MANAGING THE RISK

Example: Buyer-side Deal Structure

- Require seller to clean-up property prior to closing
- Insist that a contaminated parcel be excluded from a deal and retained by the seller
- Adjust the purchase price to reflect acquired liabilities
- Require an escrow account, holdback, letter of credit or surety bond to cover future environmental costs
- Create a special purpose entity to buy seller's property

NEGOTIATING THE DEAL: LIMITING THE RISKS (PURCHASE SALE AGREEMENT)

Representations and Warranties and Disclosures

Guarantees made by each party establishing, for example:

- Suitability of property for particular use
- Absence of violations, regulatory actions or know conditions
- Passed Uses of the property
- Location of equipment having environmental permits
- Listing of all environmental reports, correspondence with regulators
- Seller has conducted own due diligence

Note: Reps and Warranties should survive closing.

NEGOTIATING THE DEAL: LIMITING THE RISKS (PURCHASE SALE AGREEMENT)

Indemnities allow parties to allocate environmental liabilities that might arise after the deal is closed

- Indemnification, however, does not shift CERCLA's strict liability from one party to another; rather, it is a means of contractually allocating the cost arising from CERCLA liability
- If an indemnitor disappears, indemnity is useless there is a guarantor, or the indemnity is secured by a financial tool, e.g., such as a holdback or escrow account

BROWNFIELDS REGULATORY PROGRAMS: AB 2061- UNIFIED AGENCY REVIEW PROGRAM (SITE DESIGNATION)

- **Responsible party request designation of state or local agency to serve as “Lead Agency”**
- **Lead Agency:**
 - Consults with other state agencies and will follow substantive requirements
 - Oversees investigation and remediation
 - Issues Certificate of Completion (“Super Cert”), binding on all other agencies

BROWNFIELDS REGULATORY PROGRAMS: POLANCO REDEVELOPMENT ACT (AND SB 628 AND SB 440 *(PRETTY MUCH)*)

- **Authorizes Municipalities and Financing entities to:**
 - Obtain existing Phase I/II reports
 - Direct owners to investigation/remediate sites
 - Remediate sites directly if RPs won't implement on a timely basis
 - Recover cleanup costs and attorneys fees, as well as injunctions ordering RPs to do cleanup
 - Places State regulator on schedule and streamlined clean-up process
- **Immunities conferred to redevelopers, lenders, downstream owners and tenants following remediation**

BROWNFIELDS REGULATORY PROGRAMS: AB 389 CALIFORNIA LAND REUSE & REVITALIZATION ACT

- Available to Bona Fide Purchasers (BFP), BFPPs, Innocent Land Owners, and Contiguous Property Owners
- Limited to urban infill sites
- Streamlined Clean-up process
 - Lead agency can be RWQCB or DTSC
- Qualified immunity from most California environmental statutes; immunity attaches upon execution

OTHER BROWNFIELDS PROGRAMS:

- **Voluntary Clean-up Program:** Allows environmental regulators to oversee clean-ups performed on a voluntary basis by parties, typically resulting in “site certification” or a “no further action” letter
- **Prospective Purchaser Agreement:** Essentially a covenant not to sue, provided certain clean-up action take place
- **SB 32 (California Environmental Restoration and Reuse Act):** Establishes a local agency hazardous materials clean-up program.

SEQUENCING

Entitlement/Land Use	DTSC Processing	CEQA	Date
Prepare Site Plan; Initial Design Charrette	DTSC Approves Risk Assessment Prepare Draft Feasibility Study and Draft Remedial Action Plan; submit to DTSC		Winter 2014
Conduct Public Outreach Finalize and submit applications for Vesting Tentative Map (VTM)	DTSC Staff Endorse Clean-up Plan	City to File NOP (30 Day Scoping); Prepare Technical Reports; Prepare Draft EIR	Spring-Summer 2015
City Council Working Session on Project Planning Commission Hearing on Draft EIR	DTSC Reviews Hazards Section & Geotechnical Section of ADEIR; DTSC Submits RAP for 30-day Public Comment at Planning Commission Hearing	Complete ADEIR and City Submits Draft EIR for 45-day Public Comment	Fall 2015

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QUESTIONS

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