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The Wiggin and Dana Manual on Legislative, Regulatory, and Financial Assistance Tools for Brownfields Development in Connecticut

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INTRODUCTION

A cradle of manufacturing and industry, Connecticut serves as home to a significant number of abandoned or partially used industrial properties.[1] Plagued or stigmatized by either real or perceived environmental contamination, these legacy properties constitute Connecticut's "brownfields." Factories and mills that once made clocks, pins, thread, hats, buggies, guns, military ordnance, and other products made in plants throughout the state now lay idle and unused, suffering from the specter of environmental contamination. The redevelopment of these brownfield properties presents a significant economic opportunity for private developers while serving important public functions, including expanding the State's economic base, revitalizing towns and cities, and leaving prized undeveloped "greenfields" undisturbed.

This Manual aims to bring together in a single concise volume various materials concerning the legislative, regulatory, and financial assistance tools available for brownfields development in Connecticut. We do not intend for this work to serve as a comprehensive legal reference, particularly with regard to legislation and regulation governing the cleanup of contaminated sites. Rather, we focus on the facilitation of planning for and implementation of transactions involving properties challenged by real or perceived environmental contamination.

In doing so, we first present, in Chapter 1, a brief overview of the subject of brownfields development. We proffer an overall definition of brownfield properties, describe the liability scheme created by federal and state statutes that substantially contributed to the boarding-up and under-utilization of these sites, and briefly discuss the recent legislative trend to provide relief from that liability scheme and encourage brownfield development.

Next, in Chapter 2, we present a thumbnail description of the Connecticut Transfer Act, Connecticut General Statutes §§ 22a-134 et seq., which regulates the transfer of establishments which at one time conducted hazardous waste operations, and other legislative and regulatory programs dealing with voluntary remediation of contaminated properties in Connecticut.

We have devoted the majority of our attention in this Manual to financial assistance tools, the subject of Chapter 3. We deal first with Connecticut programs, then with federal programs, and present a table that lists the programs by agency, showing (among other things) eligibility criteria and amounts available.

We hope you will find that this Manual serves as a useful and useable tool when you consider undertaking a brownfields project. Please do not hesitate to contact us at Wiggin and Dana if you have any questions about

the subjects discussed in this Manual or if we can provide any other assistance.

CHAPTER 1: OVERVIEW

I. What are Brownfields?

Federal law defines a "brownfield site" as "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."[2] In a more general and practical sense, a brownfield consists of any real property which, due to actual or suspected environmental contamination at or in the vicinity of the site, may lie idle, unoccupied, underutilized, unused, or have any one or combination of these characteristics. Brownfield sites include industrial, commercial, agricultural, and even residential properties - urban, suburban, ex-urban, and rural. In many, if not most instances, neither the U.S. Environmental Protection Agency (EPA) nor a state environmental agency will have undertaken an active investigation, remedial, or enforcement action of the brownfield sites, although they may have done so.

The contamination at a brownfield may stem from activities that took place or conditions that arose before current ownership and operation of the property, and as a result of lawful non-negligent conduct. Liability for brownfields cleanup arises under the federal Comprehensive Environmental Remediation, Compensation, and Liability Act ("CERCLA" or "Superfund", 42 U.S.C. §§ 9601 et seq.) and similar state statutes (*e.g.*, Conn. Gen. Stat. §§ 22a-133e et seq. and §§ 22a-451 et seq.), and extends to all past and current owners and operators of the property and to any party responsible for generating or transporting any hazardous substances requiring cleanup at the property. Liability under this scheme is "joint and several," *i.e.*, each potentially responsible party ("PRP") bears the entire responsibility for all remedial expenses to a person who cleans up a site, notwithstanding the amount or nature of contamination for which the PRP may be individually responsible. Allocation among PRPs usually takes place in lawsuits or in other adversary contexts in which the PRPs seek equitable contribution among themselves. This liability scheme has discouraged parties who own properties which they believe may have contamination from putting these properties on the market, and likewise has discouraged parties who could purchase and rehabilitate these properties from doing so.

II. The Liability Scheme

Four words concisely summarize CERCLA's liability scheme: joint, several, strict, and retroactive. Liability attaches to every party that has any connection with a site that experiences a release or threatened release of hazardous substances. For CERCLA purposes, "connection" means owning the property, operating the property, or having generated or brought a hazardous substance to the property, and there was a release or threat of release of that hazardous substance from the property which resulted in investigation and remediation.

An entity that undertakes the investigation and remediation at the site (*i.e.*, the government or a private party) may sue any PRP connected to the site in a "cost recovery" litigation. "Joint & Several" liability means that every PRP is liable for the entire cost incurred for investigation and cleanup. Thus, if one PRP who contributed 99% of the contamination at the site has dissolved or otherwise cannot pay its share, but two other financially viable PRPs remain, each of whom contributed only 0.5% of the contamination, those two viable parties will each be required to participate in paying not a combined 1%, but 100% of the cleanup cost (although they may argue with one another over how to split that cost). Congressional sources have estimated that the average cost of a cleanup initiated by the EPA under CERCLA in 2001 amounted to about $30,000,000[3] and a report from Resources for the Future projected total Superfund cleanup costs for fiscal year 2000-2001 of as much as $16.5 billion.[4] Not surprisingly the division of responsibility among PRPs for those huge amounts often led to expensive and protracted litigation.

"Strict" liability means that the manner in which the PRP conveyed the hazardous substance to the site or the way it operated or managed the site makes no difference to liability: one need not have been negligent nor have intended to cause a release of contamination in order to be subject to liability. Thus, the mere fact that a release occurred from a property which required cleanup makes all connected parties responsible for the cleanup cost. "Retroactive" liability arises in the context of conduct occurring or a site operating prior to CERCLA's 1980 passage, even if that conduct or management was entire-

ly lawful and consistent with then-current state of practice. Courts usually consider retroactive laws as unconstitutional, but the government argued, and the courts agreed, that CERCLA's retroactivity withstands constitutional scrutiny because it is a "remedial" statute.

The enactment of CERCLA and its liability scheme derive in large part from the hazardous waste disaster at the Love Canal in western New York state during the late 1970s. In that matter a chemical company had, over a period of more than 20 years from the 1920s through 1940s, filled an old abandoned clay-lined hydro-electric canal with hazardous plant waste, and sealed the site with a cap. In 1948, several years after it had closed the site, the company sold the property to the local school board, which had threatened the company with a condemnation action. Although the deed conveying the property contained a restriction that prohibited breaking the cap, the school board did so anyway, inexorably releasing a witches' brew of chemicals over a period of time into the basements of houses surrounding the canal. By 1978, the residents of those homes experienced high levels of cancer and other diseases arguably related to exposure to the chemicals' release from the Love Canal. At that time, no federal statute existed to redress this sort of problem - i.e., contamination emanating from the historical use of industrial facilities. Congress reacted to the Love Canal incident with the passage of CERCLA.

Regrettably, this well motivated statute had the major, although unintended, consequence of having property owners board up their contaminated properties. CERCLA's draconian liability scheme inhibited property owners from putting brownfield properties on the market for development out of a reasonable fear that they would face massive financial exposure, and similarly inhibited purchasers from acquiring and developing these properties for fear of inheriting the previous owners' liability.

The National Brownfield Association (http://www.brownfieldassociation.org), an organization made up of stakeholders in brownfield properties, recently conducted a survey that tracked the sale and development of industrial properties from pre-1980 (when CERCLA was enacted) until the late 1990s. In the 10 years before the enactment of CERCLA, the survey found a steady increase in the purchase and development of industrial properties. With the passage of CERCLA, however, came a precipitous decline. Then, in the mid 1990s, when the states became more aware of a brownfields problem created by the CERCLA liability scheme, and they started enacting voluntary cleanup initiatives, a renaissance emerged in the development and marketing of environmentally impaired properties. This trend continued with the enactment in January, 2002, of the Small Business Liability Relief and Brownfields Revitalization Act (the "Brownfields Revitalization Act").[5]

III. Programs to Remediate and Develop Brownfields

Recent developments in federal and state law, as well as creative transactional lawyering, have enabled the cleanup and redevelopment of brownfields in ways that protect the parties from onerous potential liabilities.

The Brownfields Revitalization Act, referred to above, amended CERCLA by providing significant liability protection for brownfield developers, including prospective purchasers, innocent landowners, and owners of contiguous properties. In the new law's most significant change to the system of joint, several, strict, and retroactive liability, it exempts bona fide **prospective purchasers** of contaminated properties, provided that such purchaser "does not impede the performance of a response action or natural resource restoration." It also provides similar protections to qualified **owners of properties contiguous to contaminated sites**. The Act removes a party who qualifies as a "bona fide prospective purchaser" or as a "contiguous property owner" from CERCLA's definition of a PRP. It also clarifies the existing "**innocent landowner**" defense in CERCLA to allow current owners to rely (pending publication by the U.S.E.P.A. of its own regulations) on site assessment standards published by the American Society of Testing of Materials ("ASTM") to demonstrate their having made "appropriate inquiry" about the property before its purchase. Further, the Act provides that parties, even current owners, who do not qualify as "innocent," but who clean up contaminated sites under state programs (as discussed below) generally need fear no further cleanup enforcement by the EPA. The Act also provides $200 million for states to develop and expand environmental cleanup programs. By mitigating the legal risks associated with brownfields development, this law intends to foster brownfields redevelopment projects.

Every state in the country has adopted, either by statute or administrative directive or regulation, one or more

programs for the voluntary remediation of brownfield properties. (See description of Connecticut programs in Chapter 2 below). Most of these programs facilitate the sale and redevelopment of brownfields by allowing cleanups based on site specific use and risk-based standards in lieu of an inflexible standard which may be technologically or financially infeasible. Many of these programs also provide binding government approvals which allow parties in real estate and commercial transactions to quantify risk. Further, individuals or entities who choose not to participate in state voluntary cleanup programs, can continue to develop brownfields and deal with the liability associated with contaminated sites within the context of traditional transactions, using appropriate liability shifting, indemnification, and insurance mechanisms.

CHAPTER 2: THE CONNECTICUT TRANSFER ACT AND OTHER PROGRAMS GOVERNING THE CLEANUP OF CONTAMINATED PROPERTIES

I. The Connecticut Transfer Act, Conn. Gen. Stat. §§ 22a-134 et seq. (the "Transfer Act")

A. Transfer Act Forms I, II, III, and IV

The Transfer Act sets forth the conditions under which an owner may transfer property or a business operation at which hazardous waste was generated on or after November 19, 1980. The Transfer Act assures the identification of contamination and allocation of responsibility for remediation of the contamination upon transfer of the property or business operation. It requires the owner of the "establishment" (as defined in the Transfer Act) to submit one of several property transfer Forms that discloses environmental conditions at the property or business operation to the transferee and to the Connecticut Department of Environmental Protection ("DEP"). The choice of Form depends upon the environmental status of the establishment. If the establishment has experienced a release of a hazardous waste or a hazardous substance, the party who signs the Form must also certify that he or she agrees to investigate the property and remediate pollution caused by any release of a hazardous waste or hazardous substance from the establishment. Four fundamental questions arise when considering the Transfer Act: 1. Does the property or business operation constitute an establishment? 2. Does the transaction constitute a transfer? 3. Which Form does the transaction require? 4. Who must submit or sign the Form?

1. Does the property or business operation constitute an "establishment?"

An establishment consists of real property at which (i) 100 kilograms of hazardous waste[6] was generated in any one month on or after November 19, 1980; (ii) hazardous waste generated at a different location was recycled, reclaimed, reused, stored, handled, treated, transported, or disposed of; (iii) dry cleaning or furniture stripping was conducted on or after May 1, 1967; or (iv) a vehicle body repair facility was located on or after May 1, 1967.[7] If a property or business operation qualifies as an establishment, then the party making the inquiry must move to the next inquiry.

2. Does the transaction constitute a "transfer?"

The Transfer Act defines "transfer" to mean "any transaction or proceeding through which an establishment undergoes a change in ownership" and then the Act provides a list of transactions excluded from the definition. The definition does not include, among other things:

- a corporate reorganization not substantially affecting the ownership of the establishment;
- the issuance of stock or other securities of an entity which owns or operates an establishment;
- the transfer of stock, securities, or other ownership interests representing less than forty per cent of the ownership of the entity that owns or operates the establishment; or
- termination of a lease and conveyance, assignment or execution of a lease for a period less than ninety-nine years including conveyance, assignment or execution of a lease with options or similar terms that will extend the period of the leasehold to ninety-nine years.

Parties contemplating any form of conveyance of a real property or business in Connecticut should read the terms of the statute closely to determine whether the transaction constitutes a "transfer." For a full list of Transfer Act exclusions, see endnote 8. If an "establishment" undergoes a "transfer," then the transferor must answer the next question:

3. Which Form does the transaction require?

One cannot lawfully complete the transfer of an establishment without the submission to the transferee and filing with DEP of one of four distinctive Forms that sets forth the environmental condition of the site. The Forms, which the transferor must submit to the DEP within 10 days after the transfer of the property, cover environmental conditions ranging from those where no pollution has occurred to those where the pollution has already been remediated. In all transfers, the Transfer Act requires an investigation of the parcel in accordance with prevailing standards and guidelines in order to determine the condition of the property.

Form I applies in two instances: In the first, no release of hazardous waste or a hazardous substance has occurred at the establishment. In the second, no release of a hazardous waste will have occurred at the establishment, but a release of a hazardous substance will have occurred and will have been remediated[9] in accordance with standards established by Connecticut's Remediation Standard Regulations ("RSRs").[10] Form I must be accompanied by a completed Environmental Condition Assessment Form ("ECAF")[11] and supporting reports.

Form II applies when a discharge, spillage, uncontrolled loss, seepage, or filtration of hazardous waste or a hazardous substance has occurred at the establishment, but a cleanup has been completed and approved in writing by the DEP or has been verified by a Licensed Environmental Professional ("LEP")[12] and supporting reports to have been performed in accordance with RSRs. Form II must be accompanied by a completed ECAF.[13]

Form III applies when a discharge, spillage, uncontrolled loss, seepage or filtration of hazardous waste or a hazardous substance has occurred at the establishment that has not been fully remediated or the environmental conditions at the establishment are unknown. The person signing the Form III certification agrees to investigate the parcel and remediate pollution caused by any release of a hazardous waste or a hazardous substance from the establishment in accordance with the remediation standards.[14] The statute does not require completion of remediation before transfer of the establishment. Form III must also be accompanied by a completed ECAF.

Form IV applies when a discharge, spillage, uncontrolled loss, seepage or filtration of hazardous waste or a hazardous substance has occurred at the establishment, and all actions to remediate any pollution caused by any release at the establishment have been taken in accordance with the remediation standards except post-remediation monitoring, natural attenuation monitoring, or the recording of an environmental land use restriction. The person or persons signing the Form IV must agree, in accordance with the representations made in the Form, to conduct post-remediation monitoring or natural attenuation monitoring in accordance with the RSRs, and must further certify that if further investigation or remediation are necessary, to perform further actions to investigate the establishment in accordance with prevailing standards and guidelines and to remediate the establishment in accordance with the remediation standards[15] and supporting reports. Form IV must also be accompanied by a completed ECAF.

4. Who must submit or sign the Form?

Forms I and II each constitute a "Negative Declaration"[16] with regard to contamination at an establishment. For establishments that meet the eligibility requirements for filing a Form I or Form II, the **transferor** of that establishment must submit the Form I or Form II to the transferee before the transfer, and to the DEP within 10 days after the transfer. If the establishment does not meet the criteria for a Negative Declaration, however, the Transfer Act requires the transferor to submit to the transferee and file with the DEP "a complete Form III or Form IV prepared and **signed by a party associated with the transfer to the transferee**."[17] This signatory party may include one or more of the following entities:

a. the present or past owner of the establishment;

b. the owner of the real property on which the establishment is located;

c. the transferor, transferee, lender, guarantor, or indemnitor;

d. the business entity which operates or operated the establishment; or

e. the state.[18]

B. DEP Response and Practical Application of the Transfer Act

DEP may decline to accept a negative declaration at face value and thus require the follow-up submission of a Form III. The Form III must be filed with the DEP within 10 days after the closing of a transaction that the Act deems a Transfer [19](and be accompanied by the appropriate $3,000 fee[20]). As noted above, one of the parties to the transfer must certify to the DEP in the Form III that it will assume responsibility for the investigation and remediation of the property. In doing so, one of the parties assumes the role of "Certifying Party" and the DEP will look to that party to carry out the investigation and remediation of the property. The determination as to which of the parties becomes the Certifying Party is a determination made by the parties to the transfer. It could be the transferor, but it could just as easily be the transferee.

The certifying party must, upon request by the DEP, supply copies of all technical reports and studies relating to the investigation of the property.[21] Upon receiving the Transfer Act Form, the DEP has 45 to notify the party who filed the Form whether the DEP will oversee and approve the remediation of the property or whether an LEP can have that responsibility.[22] The DEP typically allows an LEP to have oversight of properties that are not significantly contaminated or when the remediation of the property will not be overly complicated.[23]

If the DEP allows the LEP to verify the remediation, the certifying party has 30 days from the receipt of that notice to submit a schedule for investigating and remediating the establishment to the DEP. The schedule must provide that investigation of the establishment will be completed within two years after the date of receipt of the notice and that remediation will be initiated within three years after the date of the receipt of the notice.[24] The certifying party must also provide the DEP with a schedule for providing public notice of the remediation prior to the start of the remediation.[25]

If the DEP determines that the DEP will oversee the investigation and remediation of the property, the certifying party has 30 days from the receipt of the notice to provide the DEP with a schedule for investigating the establishment, submitting reports to the DEP and providing public notice of the remediation prior to the start of the remediation.[26]

C. Failure to Comply

The DEP commissioner may issue an order to any person who fails to comply with the provisions of the Transfer Act, including any person who fails to file a form or who files an incomplete or incorrect form.[27] Additionally, if no form is filed for a transfer, the commissioner may issue an order to the transferor, the transferee, or both, requiring a filing.[28] The commissioner may also ask the Attorney General to bring an action in Superior Court against any person who fails to comply with the Transfer Act, including any person who fails to file a form.[29] Failure of the transferor to comply with any of the provisions applicable to it entitles the transferee to recover damages from the transferor, and renders the transferor strictly liable for all remediation costs and all direct and indirect damages.[30] Finally, any person who violates any provision of the Transfer Act may be assessed a civil penalty or be fined not more than $25,000 for each offense ($50,000 per day for each violation for knowingly violating the provisions of the Transfer Act).[31]

II. Connecticut Voluntary Remediation Programs

In 1995, the Connecticut General Assembly established two Voluntary Remediation Programs administered by the DEP's Bureau of Waste Management, Remediation Section of the Planning and Standards Division to encourage the cleanup of contaminated sites in the state. Unlike the Covenants Not to Sue, discussed below, parties responsible for contamination at a site or who are affiliated with such responsible parties, may participate in and take advantage of these programs.

The Voluntary Remediation Program, codified under Connecticut General Statutes § 22a-133x, provides eligibility to owners of sites that are (1) municipally-owned; (2) defined as "establishments" under the Transfer Act; (3) on the inventory of hazardous waste disposal sites maintained pursuant to Connecticut General Statutes § 22a-133c; or (4) located in areas where groundwater is classified as GA or GAA (groundwater designations that denote supplies of water known or presumed to be suitable for drinking without treatment).

To participate in the § 22a-133x Program, owners of eligible contaminated sites must submit an ECAF and

review fee of $3,000 to the DEP Commissioner. Within thirty days after receipt of an ECAF, the Commissioner will then notify the owner in writing whether (1) the owner may proceed to use an LEP to verify that the participating site has been investigated in a manner consistent with prevailing standards and remediated in accordance with the RSRs or (2) the Commissioner will maintain oversight of the investigation and remediation of the site. For sites requiring DEP oversight, an owner must submit all schedules, plans, and reports for DEP review and approval before investigation and remediation may proceed. For sites not requiring DEP oversight, owners must submit a copy of an LEP's verification letter confirming a site's effective investigation and remediation to the DEP.

A second Voluntary Remediation Program, codified in Connecticut General Statutes § 22a-133y, applies to sites where a spill of hazardous waste has taken place. To qualify for the § 22a-133y Program, a site (1) must be located in an area where groundwater is classified as GB or GC (designations that denote groundwater (a) known or presumed unsuitable for drinking without treatment and (b) underlying waste disposal and surrounding areas) and (2) may not be subject to any order, consent order, or stipulated judgment issued by the DEP regarding a spill. To participate in the program, a site owner must submit to the DEP a remedial action plan prepared by an LEP and must comply with the notice requirements of § 22a-133y(b) prior to undertaking any remedial action. Once remediation is complete, the LEP responsible for the remediation must submit a final remedial action report to the DEP for review, possible audit, and approval.

Voluntary cleanups completed under these programs will qualify the owner of an establishment to make a negative declaration with a Form II filing under the Transfer Act.[32]

III. Covenants Not to Sue

For bona fide innocent purchasers and innocent owners of sites who had no connection with contamination of the property, §§ 22a-133aa and 22a-133bb provide Covenants Not to Sue, i.e., legally binding assurances that the DEP will not require present or future owners to undertake additional cleanup at a site once it has been remediated to current standards. First incorporated into DEP's remediation programs in 1995 and expanded with the passage of "An Act Concerning Brownfields Redevelopment and Recycling" in 1998, Covenants Not to Sue facilitate the redevelopment of properties by eliminating the risk of future liability from past contamination.

Under both sections, the DEP Commissioner may enter into covenants not to sue with (1) prospective purchasers of contaminated property; (2) current owners of contaminated property; and (3) lending institutions to which owners or prospective owners have conveyed a security interest in such property. Under § 22a-133aa, the DEP (rather than an LEP) must have approved the applicant's plan of remediation. This Covenant is transferable to a successor owner. The Covenant Not to Sue under § 22a-133bb applies where the remediation plan has received the approval of an LEP and is not transferable to a successor owner.

To obtain a Covenant Not to Sue under either section, prospective or current owners of a site must demonstrate that the site has been remediated and that they did not cause contamination at the site and have no affiliation with any party that did. In addition, prospective or current owners must attest that they will continue the productive use of the property or redevelop the property for productive use. Such an owner who obtains a transferable Covenant Not to Sue under § 22a-133aa must also pay a fee equivalent to 3% of the value of the property, based on an appraisal of the property as if it were uncontaminated. (Successors in interest to Covenant holders are not subject to the fee requirement.)

Although Covenants Not to Sue bar the DEP from ordering further remediation at a site related to contamination that pre-dates the Covenant, they do not protect against potential liability from third-party damage claims. Covenants also do not relieve owners from responsibility for contamination that occurs after the effective date of the Covenant, nor do they eliminate the requirement of additional remedial action if the DEP discovers previously unknown contamination resulting from a release prior to the date of the Covenant. Given the alternatives provided in §§ 122a-133aa and 122a-133bb, owners and prospective purchasers may choose between the less expensive and easier to obtain non-transferable Covenant and the more expensive but more valuable transferable Covenant.

IV. Third-Party Liability for Contaminated Property

As discussed above, Covenants Not to Sue provide protection from suits filed by the DEP but do not provide protection from suits filed by third parties. On June 7, 2005, however, Public Act 05-90 (formerly Senate Bill 795) (the "Act"), went into effect. This new statute bars third-party actions against innocent landowners for costs or damages from pollution existing prior to the landowners taking title. This bill protects only those innocent landowners who assume title on or after October 1, 2005.

The Act provides relief against third-party actions to developers who purchase properties with known contamination that they had no responsibility for creating and who are not "affiliated" with any person responsible for the pollution. Affiliation with the polluter includes direct or indirect familial relationship, contractual relationship, corporate relationship or financial relationship. A developer who meets these conditions must also:

1. Notify the owners of adjoining properties, by certified mail, of the intent to initiate a site investigation.
2. Engage a licensed environmental professional (LEP) to conduct an adequate site investigation in accordance with prevailing standards and guidelines. The investigation report must be submitted to and approved, in writing, by DEP.
3. Send to the owners of adjoining properties, by certified mail, a copy of the site investigation reports and remedial action plans, if remediation is necessary.
4. Initiate and complete, under the direction of the LEP, any required remediation. The LEP must then complete a final remedial action report that demonstrates remediation was completed in compliance with the Connecticut's Remediation Standards Regulations (RSRs). This report must also be submitted to and approved by DEP.

The Act presumes that, as part of remediation, an environmental land use restriction (ELUR) will be placed on the property. Failure to place the ELUR and comply with its provisions, or failure to obtain a variance from the ELUR, would invalidate the third-party relief.

By following these steps, the owner of the remediated property will avoid liability for any costs or damages to any person other than the State of Connecticut, any other state, or the federal government "with respect to any pollution or source of pollution on or emanating from such owner's real property that occurred or existed prior to such owner taking title to such property." Plus, the potential costs to the state may be limited by "innocent landowner" provisions of § 22a-432.

Section 3(c) of the Act provides for a civil penalty of $100,000 or the cost of remediating the pollution or source of the pollution, whichever is greater, against parties who improperly claim not to be affiliated with a responsible party. Worded awkwardly, this provision refers to "an owner of real property . . . found to be liable under this section," although the "section" does not create any liability.

Section 3 should not be read to provide any new cause of action by the state or a third party against a party who happens to be affiliated with a responsible party. Rather, it should be read as a "penalty" provision to apply in connection with fraudulent attempts to claim the protection of this statute.

CHAPTER 3: BROWNFIELDS FINANCIAL ASSISTANCE PROGRAMS

I. Introduction

Brownfield sites raise issues with regard to contamination, government regulation, and community relations, among other areas of concern, that one would not encounter at a "greenfield" site. It thus comes as no surprise that programs designed specifically for use at brownfield properties address financial requirements unique to these properties. Properties not stigmatized by real or perceived contamination do not require the expense of undertaking invasive site assessments, preparing remedial plans, and implementing cleanup. In addition, the cost of financing brownfields sites commonly exceeds that for other sites because investors and lenders believe they assume a higher risk which justifies a higher return. Hence, lenders commonly require at least a 25% equity investment in a brownfields project.[33]

Recognizing the need to "level the playing field" for brownfield properties, both the State of Connecticut and the United States government offer grant and loan programs for brownfield site assessment, remediation, and development. These include programs administered by the Connecticut Brownfields Redevelopment

Authority (CBRA), the Connecticut Department of Economic and Community Development (DECD), the United States Environmental Protection Agency (EPA), the United States Department of Housing and Urban Development (HUD) and the Economic Development Administration (EDA) of the United States Department of Commerce. The CBRA's innovative programs target for-profit owners and developers. Most federal funding sources, however, limit eligibility to municipalities, quasi-governmental organizations, and, on occasion, to non-profit entities. For-profit entities can sometimes apply for federal funding as subgrantees, when local and state governments or governmental organizations manage and distribute federal funds as subgrantors.

II. State Funding of Brownfield Redevelopment in Connecticut

In recent years Connecticut has made considerable strides in reaching out to property owners, for-profit developers, and municipalities interested in redeveloping the State's brownfield sites, most significantly with the creation of the CBRA in 1999. CBRA is a wholly-owned subsidiary of the Connecticut Development Authority (CDA), a quasi-public organization dedicated to expanding Connecticut's business base by providing financing to stimulate business growth. CBRA focuses exclusively on brownfields and strives to offer a largely "one-stop-shopping" approach to facilitate brownfield redevelopments in the State. Specifically, CBRA administers grant and loan programs for brownfield site assessment, remediation, and redevelopment, which specifically target for-profit developers and property owners.

Connecticut's DECD, a state agency that implements policies and programs for the enhancement and development of communities, businesses, and housing within Connecticut, also administers several programs that may be appropriate for some brownfield developments. In particular, DECD administers both the Small Cities Community Development Block (CDB) Grant Program, targeted at particularly distressed areas within the State, and the Urban Site Investment Tax Credit Program, which provides corporate tax credits for brownfield investments. In cooperation with the DEP, DECD also operates (1) the Special Contaminated Property Remediation and Insurance Fund, which furnishes loan assistance for investigations and remediations; (2) the Dry Cleaning Establishment Remediation Fund, which provides cleanup grants to eligible dry cleaning operators; and (3) the Urban Sites Remedial Action Program, which commits public funds for remediation at sites in particularly distressed communities within the State.

A. Connecticut Brownfields Redevelopment Authority

In identifying brownfields, CBRA uses the definition provided in CERCLA, 42 U.S.C. § 9601(39)(B): "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence of a hazardous substance, pollutant, or contaminant." To assist developers in locating appropriate sites, CBRA has compiled on its website (http://www.ctbrownfields.com) an inventory of Connecticut brownfields awaiting redevelopment. Although the expanding list provides a useful sampling of suggested sites, CBRA does not restrict its programs to these listed properties. Any brownfield property in Connecticut is potentially eligible to receive CBRA funding.

After its creation in 1999, CBRA received an initial allocation of funds from the State Legislature, from which it pays operating expenses and provides assessment grants.[34] CBRA's redevelopment grants employ a tax increment finance (TIF) model whereby its parent, CDA, issues bonds to finance a redevelopment project, and the municipality in which a project is located dedicates a portion of anticipated incremental (future) tax revenues from the redevelopment to CBRA. Once financing is in place, CBRA uses incremental tax revenues assigned to it by the municipality to pay bondholders and, where possible, to finance new redevelopment projects. By implementing this method, redevelopment grants may largely sustain themselves. If a redevelopment project fails or the developer abandons the project before completion, CDA (and not the developer or the municipality in which the project is located) remains legally responsible to service the CBRA project-related bonds.[35] In the event of a shortfall in tax proceeds relative to debt service requirements, CBRA may file a tax lien annually on any underlying redevelopment property equivalent to the amount of the shortfall. CBRA may also extend the duration of payments where incremental tax revenue projections have exceeded actual returns.

Parties who contributed to environmental contamination at the subject site may not participate in this program. Before a developer who does qualify for the program, however, initiates the CBRA grant application

process, he or she must identify the site as a brownfield eligible for potential redevelopment. Determining site potential will include considering both unofficial community reaction and the anticipated official response of the municipality to the potential development. Before submitting any application, the developer should contact CBRA to verify his or her eligibility and to facilitate the application process. Economic prudence may dictate deferring work on a site development plan until the developer has confirmed both the potential for site development and his or her own eligibility to participate in the CBRA program. With these tasks accomplished and having created a site development plan, the developer may then present the plan to the municipality where the site is located to obtain its support. If the municipality agrees with the plan, either it or the developer may then apply for a CBRA site assessment grant to gauge the level of contamination at the site.[36]

1. CBRA Brownfield Assessment Grants (BAG)

Before developers and municipalities can reasonably form an opinion as to the economic viability of a brownfield project, they must determine the extent and cost of the remediation needed at the site. The BAG program provides financial assistance to developers and municipalities at this early stage of the brownfields redevelopment. BAG grants are used to reimburse costs associated with Phase I and Phase II Environmental Assessments. Phase I Assessments include site reconnaissance, review of land records, interviews with owners and officials, and report preparation by an environmental professional.[37] Phase I BAG grants may not exceed $3,000. If the Phase I Assessment identifies a "Recognized Environmental Condition" (as defined in ASTM E1527-00 Section 3.3.30)[38] at the property, and the municipality or developer (as the case may be) decide to undertake further invasive investigatory work to determine the nature and extent of contamination at the site, the municipality or developer may apply for a BAG grant of up to $10,000 to finance a Phase II Assessment. A Phase II Assessment involves some combination of surface sampling, soil or ground water sampling, and suspected hazardous material sampling.[39] BAG recipients may not use BAG funds for remediation and all records and reports generated by BAG-financed assessments remain the property of CBRA. If a developer declines to pursue a project after a BAG-financed assessment, CBRA retains these assessment records and makes them available to any future developers of the site.[40]

To apply for a BAG grant, a developer or municipality must submit information about itself, the site, the site's history, potential contamination at the site, a proposed assessment budget, and the identity of the environmental professional who will conduct the assessment. If an applicant does not have legal access to the site at the time of application, it must obtain access within 90 days from the date when it receives notification from CBRA that funds have been approved. Examples of BAG grants include a North Haven project involving the conversion of a former industrial site into a multi-use development supporting both office space and light manufacturing, and also funds to the town of Danbury for assessment of the 5-acre Mallory Hat Company site, where manufacturers of hats with fur pelts had operated for more than a century and which had been abandoned in 1987.

2. CBRA Grants for Brownfields Redevelopment

With the environmental assessment completed and having obtained the approval of the appropriate municipality, the developer may then apply to CBRA for a redevelopment grant. The developer may use the proceeds from a redevelopment grant for any expenses directly related to the remediation, redevelopment, and improvement of a brownfield site, including the cost of environmental insurance. Applicants may propose a wide variety of project types, including manufacturing, high technology, research, laboratory, office, retail, housing, mixed-use or any combination thereof. While applicants are not required to contribute matching funds for a redevelopment grant, CBRA does insist that applicants show they have sufficient financing to complete a proposed development exclusive of cleanup costs. There is no minimum redevelopment grant amount and CBRA may award redevelopment grants of up to $10 million.

Consistent with the TIF model described above, a developer may not apply for the redevelopment grant until the assessor's office in the municipality where the site is located has calculated the amount of increased property taxes it anticipates that the proposed redevelopment will generate. The municipality must then determine the

percentage of this future increase in annual taxes it is willing to assign to CBRA in exchange for an up-front grant from CBRA to the developer. Once future tax and assessment figures have been determined, the developer and the municipality must each submit a grant application to CBRA relative to the proposed redevelopment.

CBRA has used the following example to illustrate how the redevelopment grant program operates. If a developer proposes a project that a municipal assessor's office determines should generate $200,000 in new tax revenues annually, that municipality could decide to dedicate 50% of future projected taxes to CBRA for the next ten years. Under this scenario, CBRA would then provide an up-front redevelopment grant to the developer of $1 million dollars (based on an anticipated annual payment stream of $100,000 over ten years). Because CDA issues agency bonds to finance redevelopment grants, municipalities where redevelopment sites are located are not encumbered with additional redevelopment-related debt. If estimates for a project prove too optimistic and future tax revenues fall short, CDA-and not the municipality or the private developer - bears the risk. To compensate, however, CBRA may place a tax lien on the subject property on an annual basis in the amount of the shortfall.

Major projects to receive CBRA redevelopment grants include the University of Hartford's performing arts center and the new train station complex in Fairfield. Using a CBRA redevelopment grant in conjunction with other public and private funding, the University of Hartford's Hartt School is constructing a new Performing Arts Center to house its dance, vocal, and community Divisions. The new center is located on the 7.2-acre site of the former Thomas Cadillac distributorship, built in 1929 by architect Louis Kahn. The new Fairfield train station project, which will add a new stop to the Metro North commuter rail line, will transform an abandoned industrial site into a 1.3 million sq. ft. office, hotel, and restaurant complex, alongside a new station and a 1,200-space parking facility.

3. Direct Loans through Connecticut Development Authority

Since the close of 2003, CBRA began facilitating applications of brownfield developers for loans under CDA's Direct Loan program.[41] Under this program, CDA provides subsidized, low interest loans or equity-equivalent investments of up to $5 million to businesses that expand or commence operations in Connecticut. Companies relocating to the State or undergoing significant in-state expansion may apply for inducement loans of up to $10 million. Loan amounts for both are computed on the basis of no more than $20,000 per job created or retained. Direct Loan borrowers may couple CDA loans or investments with financing from other, including private, sources. Borrowers may use Direct Loan funds for a variety of purposes, including (1) acquiring land, buildings, machinery or equipment; (2) refinancing loans; (3) providing working, start-up, or mezzanine capital; and (4) site remediation. CDA Direct Loan applicants must demonstrate the strong economic development potential of their projects, or be unable to obtain adequate financing without CDA participation, or both. Business owner applicants must personally guarantee CDA Direct Loans and all applicants must show evidence of debt service capability. The CDA accepts applications at the beginning of each month and provides responses within seven business days. CBRA's involvement with this program is in its infancy, and, as of this writing, CDA has not yet distributed any Direct Loans to brownfield developers under the auspices of CBRA.

B. Department of Economic and Community Development

DECD implements policies and programs for the enhancement and development of communities, businesses, and housing within Connecticut.[42] Serving a broader constituency than the quasi-governmental CDA, which focuses on expanding Connecticut's business base, particularly through financing programs, state agency DECD's mission encompasses programs and strategies not only to attract and retain businesses and jobs, but also to revitalize neighborhoods and communities, ensure quality housing, and foster development in Connecticut cities and towns. Of the many programs administered by the DECD, the five discussed below may be appropriate for some brownfield development projects.

1. Small Cities Community Development Block Grant Program (CDBG)

Connecticut's Small Cities CDBG grant program aims to revitalize particularly distressed areas within the State through enhancing neighborhoods, expanding affordable housing, creating economic opportunities, and improving local facilities and services. In terms of brownfield redevelopment, Small Cities grant recipients may use program funds to acquire property, to reconstruct and rehabilitate housing or other property, to build public facilities, and to eliminate or prevent slums or blight. Only local governments or multi-jurisdictional governmental entities may apply for a Small Cities grant. Applicants must first develop and obtain approval of a Community Revitalization Strategy (CRS) and must demonstrate a minimum local contribution of 10% of the award requested. Only residential areas that contain at least 51% low and moderate income residents may receive Small Cities Grants.[43]

HUD funds the Small Cities program and DECD administers Small Cities grants in Connecticut. Although the size of the program is subject to change based on HUD allocations, Connecticut has received approximately $15 million in annual Small Cities program funds in recent years. In 2002, for example, DECD awarded the Town of Vernon a $50,000 Small Cities grant to be used for a study to determine the economic potential of the historic Hockanum Mills industrial site, which then housed several manufacturing companies. The study encompasses evaluating existing environmental data for the site, reviewing site architecture, and estimating the cost of rehabilitation.[44]

Municipal and governmental recipients of Small Cities grants may provide grants or loans from their Small Cities funds to subgrantees who qualify as Community Based Development Organizations (CBDO), i.e., nonprofit organizations that serve the development needs of areas within nonentitlement communities.[45] CBDOs may carry out neighborhood revitalization, community economic development, or energy conservation activities with Small Cities grants. With prior approval, a CBDO may perform usually ineligible activities including new housing construction.

2. Urban Site Investment and Industrial Site Reinvestment Tax Credit Program

Designed to encourage private investment in the redevelopment of Connecticut brownfields, the Urban Site Investment Tax Credit Program (USITCP or Urban Reinvestment Act Program) provides dollar-for-dollar corporate tax credits for private brownfield investments. To be eligible for the program, an Industrial Site Investment Project must consist of real property or property improvements that have suffered environmental contamination. Investment in the property must return it to a viable business condition where it can sustain new economic activity, increase employment, and generate additional tax revenue to the State and the municipality where the property is located. The state projects the additional tax revenue by relying on an econometric model to estimate economic and fiscal impacts of the investor's project. The projected tax revenues must exceed a target threshold, and the total credits allowed may not exceed the cumulative increase in tax revenue. Within this limitation, an investor in an Urban Site Development Project may receive a dollar-for-dollar corporate tax credit on a yearly basis over a ten year period of up to 100% of its investment, up to a maximum of $100 million.[46] The overall program has a $500 million ceiling, and should a project fail to meet its projected tax revenue targets, the credit will be reduced to assure the state remains in a revenue positive position. To participate in the USITCP, a community must (1) have an Enterprise Zone;[47] (2) have been designated a Distressed Municipality under Connecticut General Statutes § 32-9; or (3) have a population in excess of one hundred thousand.

A taxpayer may invest funds in a USITCP project either directly or indirectly through an investment fund. Direct investments must equal or exceed $20 million. Eligible investment funds must (1) have a minimum asset value of $60 million; (2) be established for the specific purpose of making investments under this program; and (3) be managed by a Certified Fund Manager. There is no minimum investment threshold for indirect investments made through an eligible investment fund. The aspect of this program that distinguishes it from others, both in Connecticut and elsewhere, consists of its allowing project investors to assign the credits authorizing their sale to other taxpayers in the state. The first project to use of the Urban Reinvestment Act Program involved the state's agreement to give $40 million in tax credits to the United Kingdom-based liquor giant

Diageo. Diageo agreed to move its U.S. headquarters from Stamford to Norwalk, thus preempting its threatened move to Westchester County, N.Y. Diageo qualified for a five-year tax abatement in which it will be required to pay only 20% of its taxes. State authorities anticipate that Diageo will invest more than $100 million in capital associated with the project in Connecticut while the City of Norwalk looks to additional tax revenues of more than $21 million and the creation of 1,000 new jobs. State officials have projected combined state and local tax revenues for the project to amount to $83 million over the next 10 years. According to DECD, the Diageo deal requires more than a dollar of new tax revenue for each dollar in breaks given, as well as the creation of new jobs. Controversy around the Diageo deal has led to the introduction of legislation which would require the program to provide eligibility for smaller companies, assure greater legislative oversight over large deals, and require a third-party review of deals that offer companies more than $20 million in tax breaks.

3. The Special Contaminated Property Remediation and Insurance Fund

DECD, in cooperation with DEP, administers the Special Contaminated Property Remediation and Insurance Fund (SCPRIF) to provide assistance for site investigations and redevelopments in the form of short-term, low interest loans. Established under § 22a-133u of the Connecticut General Statutes, SCPRIF provides loans for Phase II Assessments, Phase III Investigations,[48] building demolitions, and related lead and asbestos surveys and removal. The goal of the program is to facilitate public and private partnerships in the investigation, remediation, and redevelopment of commercial and industrial properties that remain underutilized due to concerns about site contamination.

Any person, corporation, municipality, or business may apply for a SCPRIF loan and there is no specified limit as to the amount that may be requested. An applicant, however, must demonstrate the financial and technical expertise and the resources necessary to undertake the investigation, remediation, and redevelopment of a site. Current site owners, prospective owner/developers with site access, and municipalities are standard applicant categories. However, owner-applicants must demonstrate that they did not willfully or knowingly create a source of pollution. In evaluating applications, DECD gives priority to projects that have the potential to generate (1) high commercial value, (2) additional municipal tax revenue, (3) community or economic benefit (including eliminating blight, conforming to a town development plan, and stimulating tourism), and (4) indirect spin-off economic benefits, including state tax revenue. The State Bond Commission has already approved $2 million for the SCPRIF program and up to $5 million has been allocated.

Owners of sites that undergo SCPRIF-financed assessments (whether or not they are also applicants) must consent to the placement of a lien on the property in the amount of the loan. Once environmental remediation at the subject property is complete, or once the property is sold or leased, the SCPRIF borrower must repay the loan. (If an assessment determines that remediation or redevelopment is not economically feasible, DECD may "forgive" the loan.) DECD selects SCPRIF recipients based on its evaluation of the environmental impact, community enhancement, and economic feasibility of a proposed project. Recently, DECD awarded the town of Manchester a $62,700 SCPRIF loan to conduct a Phase II Assessment and Phase III Site Investigation at the former Morland Valve property on Tolland Turnpike, a site that had been abandoned and blighted for several years. Once the assessment was complete, the town was able to sell the tax lien on the property, the property was subsequently foreclosed, and it is currently slated for redevelopment.

4. Dry Cleaning Establishment Remediation Fund

Under the Dry Cleaning Establishment Remediation Fund, DECD, working in conjunction with DEP, provides grants to eligible dry cleaning operators for use in the cleanup, containment, or mitigation of pollution from releases of tetrachloroethylene, stoddard solvent or other dry cleaning solvents.[49] The program is financed through a surcharge on gross receipts from dry cleaning services within the State and in recent years has had approximately $600,000 available annually for grants.

To be eligible for program funds, operators may not have litigation pending against them and must prove that they cannot secure conventional financing. To receive a grant, an operator must identify (1) the party responsible for site investigation and remediation and (2) the sources of funding designated to complete the

project, over and above state sources of funding. DECD chooses recipients based on an evaluation of the risks the site poses to the public and the magnitude of environmental contamination at the site, among other factors. Grants may not exceed $50,000 annually for a maximum of $150,000 over three years. The DECD also requires operators to bear a portion of project costs in the amount of either $10,000 or $20,000, depending on when a release at the site was initially reported to the DEP.

5. Urban Sites Remedial Action Program

The Urban Sites Remedial Action Program[50] commits public funds for the planning and implementation of site remediation at potentially polluted commercial and industrial properties in Connecticut and for the acquisition of those properties by DECD. The program provides for expedited remediation of polluted properties, aims to enable the private sector to invest in property development without concern for past environmental contamination, and is funded through state bonding of more than $30 million.[51] DECD directs Urban Sites Remedial Action funds to sites that would otherwise remain vacant or economically unproductive. Program funds are restricted to sites located either in Distressed Municipalities,[52] as defined in Connecticut General Statutes § 32-9p, or in Targeted Investment Communities.[53]

As described below, two types of projects qualify for the Urban Sites Remedial Action Program. In both cases, DECD must first identify a site as a potentially contaminated property that is significant to the State's economy. There is no formal application process for Urban Sites funds. DECD generally selects projects internally through its review of applicants to other relevant programs or by referral. DECD will consider the resources available to the site owner or potential developer in considering them for priority within the program. Further, although the statute that authorizes the program does not exclude "PRPs," DECD is not likely to accept such a party into the program.

The first project type within the Urban Sites Remedial Action Program, the Economic Development Initiative (Type 1), encompasses contaminated properties with property owners and developers who are willing and able to conduct site investigation and remediation under the oversight of DEP. With Economic Development Initiative projects, DECD first identifies and selects a Connecticut property with a willing owner/developer based on its determination that the property is significant to the State's economy. After DECD has selected a Type 1 property, DEP expedites the review, inspection, and approval of the remedial investigation, planning, and implementation for that property. Dozens of sites funded by responsible parties with DEP oversight have taken advantage of this program.[54] These include: remediation projects at Pitney Bowes in Norwalk and U.S. Repeating Arms Company in New Haven.

With the second type of Urban Sites Remedial Action project, the Unwilling or Unable Party (Type 2), DECD also selects properties that it deems significant to the State's economy. In the case of Type 2 projects, however, property owners cannot be identified or are unwilling or unable to perform a remediation. Consequently, these become state funded projects. As with Type 1 sites, Unwilling or Unable Party sites must be located either in Distressed Municipalities,[55] as defined in Connecticut General Statutes § 32-9p, or in Targeted Investment Communities.[56] For Unwilling or Unable Party project types, the DEP itself will investigate and, if necessary, will also perform remediation at the selected property. In such cases, the State reserves the right to seek to recover expended public funds. Type 2 projects have included the Colt Manufacturing, Inc. site in Hartford, the Windham Mills site in Willimantic, and the Triangle Wire & Cable project in Griswold.

II. Federal Programs

The federal government has more than 20 programs over a variety of agencies that may provide financial assistance for various aspects of brownfield development. The Northwest-Midwest Institute, a Washington, D.C. based research organization whose mission surrounds the economic vitality of states in the Northeast and Midwest, has identified the following federal programs:

Federal Financial Assistance for Brownfield Redevelopment Activities [57]

Loans
HUD funds for locally determined CDBG loans and "floats"

- HUD Section 108 loan guarantees
- EPA capitalized brownfield revolving loan funds
- EPA capitalized clean water revolving loan funds
- SBA microloans
- SBA Section 504 development company debentures
- SBA Section 7(a) and Low-Doc programs
- EDA Title IX (capital for local revolving loan funds)

Grants
- HUD Brownfield Economic Development Initiative (BEDI)
- HUD Community Development Block Grants (for projects locally determined)
- EPA assessment pilot grants
- EDA Title I (public works) and Title IX (economic adjustment)
- DOT transportation and community system preservation (TCSP) pilot grants
- DOT (various system construction and rehabilitation programs)
- Army Corps of Engineers (cost-shared services)

Equity capital
- SBA Small Business Investment Companies

Tax incentives and tax-exempt financing
- Historic rehabilitation tax credits
- Low-income housing tax credits
- Industrial development bonds

Tax-advantaged zones
- HUD/USDA Empowerment Zones (various incentives)
- HUD/USDA Enterprise Communities (various incentives)

Only a handful of these programs, including those discussed below deal directly with brownfield; the others have purposes and contain elements, such as general economic and environmental improvement, that lend themselves to brownfields development.[58] The programs of most general applicability to brownfields are those of the EPA, HUD and the EDA.[59]

A. United States Environmental Protection Agency Brownfield Funding

1. Eligibility Generally

The EPA offers several national grant and loan programs for the redevelopment of brownfield sites. As with CBRA, the EPA draws its definition of a brownfield site from CERCLA, 42 U.S.C. § 9601(39)(B): "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence of a hazardous substance, pollutant, or contaminant."[60] The 2002 Small Business Liability Relief and Brownfields Revitalization Act (P.L. 107-118) (Brownfields Revitalization Act) prohibits the EPA from providing funds to certain categories of sites. Ineligible properties include (1) facilities listed (or proposed for listing) on the National Priorities List (NPL):[61] (2) facilities subject to unilateral administrative orders, court orders, administrative orders on consent or judicial consent decrees issued to or entered into by parties under CERCLA; and (3) facilities that are subject to the jurisdiction, custody or control of the United States government.[62]

With regard to petroleum-contaminated sites, the Brownfields Revitalization Act permits the EPA to award funds to petroleum-contaminated sites that (1) either the EPA or the appropriate state determines pose relatively low risk compared to the state's other petroleum-contaminated sites;[63] (2) have no viable responsible party and will be assessed, investigated, or cleaned up by a person that is not potentially liable for cleanup; and (3) are not subject to a 9003(h) order under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq., (RCRA). The Brownfields Revitalization Act requires the EPA to make 25% of total grant funds available to petroleum-contaminated sites.

EPA funding applications are due in December each year and successful applicants usually receive written notice of their award in April of the following year. The EPA website at http://www.epa.gov/swerosps/bf/applicat.htm (visited June 28, 2004) provides a "quick link" to EPA brownfield grant application information.

2. Brownfield Assessment Grants (BAGs)

The EPA awards assessment grants to inventory, characterize, assess and conduct planning and community involvement related to brownfield sites. Eligible public

entities may apply for up to $200,000 to assess a site (a) contaminated by hazardous substances, pollutants, or contaminants (including hazardous substances co-mingled with petroleum) or (b) to assess a site contaminated by petroleum.[64] EPA BAGs also may fund efforts to inventory, characterize, assess and conduct planning for sites contaminated by petroleum alone.[65] The EPA does not require BAG recipients to contribute to the cost of assessments.

Only state, local, and tribal governments (including general purpose units of local governments or quasi-governmental entities operating under local government control) qualify for EPA BAGs. Neither non-profit corporations nor for-profit entities may apply. Once awarded the grant, the recipient must perform the assessment within two years.

3. Brownfields Cleanup Revolving Loan Fund (RLF) Grants

Under its Brownfields Cleanup RLF grant program, the EPA distributes grants to recipients who use the funds to establish and administer revolving loan funds in their localities. From those funds recipients typically award no-interest or low interest loans to applicants to carry out cleanup activities at local brownfield sites. Recipients may also award subgrants to other eligible entities, including non-profit organizations, for cleanups on sites owned by the subgrantee. (Subgrants do not require repayment).

The EPA awards initial RLF grants in amounts of up to $1 million, but a coalition of eligible entities may apply under one application for grants of up to $1 million per entity.[66] The EPA requires the ultimate recipients of RLF awards to contribute an additional 20% of the amount of the award towards cleanup.[67] A cost share may take the form of a contribution of money, labor, material or services from a non-federal source. Contributions to administrative expenses, however, do not qualify.

Only state, local and tribal governments (including general purpose units of local governments and quasi-governmental entities operating under local government control) qualify for RLF grants. Neither non-profit corporations nor for-profit entities may apply. However, coalitions of any combination of the above entities (non-profits in collaboration with municipalities and Planning Commissions, for example) may apply for RLF grants. Once awarded, the grantee must perform RLF grant activities within five years.

4. Brownfield Cleanup Grants

The EPA awards cleanup grants to provide funding for recipients to carry out cleanup activities at brownfield sites that they own. It awards grants in amounts up to $200,000 per site (for a maximum of five sites per applicant). An applicant for a cleanup grant must either own the site by fee simple title at the time of application or by September 30 of the following year.[68] The EPA requires cleanup grant recipients to contribute 20% of the overall cost of a cleanup.

Along with eligible governments and governmental entities (as described above), non-profit organizations and non-profit educational institutions may apply for EPA-funded cleanup grants. For-profit entities may not. Once awarded, the cleanup grant activity must be performed within two years.[69]

5. Clean Water State Revolving Loan Funds (CWSRLF)

States may use these EPA CWSRLF funds to make loans for up to 20 years on brownfields projects where protection or remediation of water plays a role. Very few states have taken advantage of the program (New Mexico, New York, and Ohio), but all are eligible for the money. States may set their own CSWRLF project priorities within EPA guidelines and the funds loaned can cover a wide gamut of activities that include underground storage tank remediation, well capping and abandonment, and site assessments. The state may lend the money to municipalities, individuals, and non-profit organizations.

6. Threshold Criteria

Applicants for any of the EPA's grant or loan programs must first meet four threshold criteria for EPA to consider them for an award: (1) applicant eligibility; (2) community notification; (3) obtaining a letter from a State or Tribal Environmental Authority; and (4) site and property ownership eligibility. Failure to meet any

one of these threshold criteria will result in denial of the application.

An applicant can meet the community notification threshold by supplying evidence that the applicant notified the community or communities where the site is located and provided sufficient opportunity for public comment. To assure meeting the community notification threshold, an applicant should (1) provide notification of the preparation and submission of a grant proposal to local newspapers and other local media; (2) hold a public meeting; and (3) make available a draft version of the proposal for public review or comment at an easily accessible location.

An applicant must also obtain a letter from the State or Tribal Environmental Authority where the site is located, acknowledging that the applicant plans to conduct or oversee assessment and/or cleanup activities and to apply for grant funds. If applying for multiple types of grant activities, an applicant may submit copies of one letter acknowledging those activities with each application.

To meet site and property ownership requirements, an applicant may not be an entity (or affiliated with an entity) that is considered potentially liable under CERCLA § 107. The process by which an applicant has acquired a site also determines its eligibility for EPA funds. Acquiring a site by means of formal foreclosure after the disposal of hazardous substances has already occurred, for example, assures a site's eligibility.[70] Properties acquired by purchase or donation prior to November 11, 2002 may not participate unless an applicant is exempt from liability under CERCLA. For properties acquired after November 11, 2002, an applicant qualifies only if he or she (1) fits the criteria for a bona fide purchaser under CERCLA (i.e., not a liable party-or affiliated with a liable party) who performed all appropriate inquiry (ASTM Phase 1 or equivalent)[71] prior to taking ownership); (2) meets continuing obligations, including complying with land use restrictions and taking reasonable steps with regard to hazardous substances;[72] (3) provides full cooperation with and access to authorities; (4) complies with CERCLA information requests; and (5) provides legally required notices.

Properties acquired by eminent domain qualify, if an applicant can meet a defense to CERCLA liability.[73] An applicant can meet a third-party defense where (1) a municipality acquired the site after the disposal took place; (2) the release and resulting damages were caused by a third party; (3) the applicant exercised due care with respect to the contamination, including taking steps to prevent continuing exposure; and (4) the applicant took precautions against the foreseeable acts of the party that caused the contamination.

In the case of RLF and cleanup grants, applicants must also meet the threshold requirement of having satisfactory cleanup authority and oversight structure, including providing information regarding the applicant's plans to enroll in a voluntary response program, acquire necessary technical expertise and secure site access. Applicants for RLF grants must also submit a legal opinion from the applicant's legal counsel, demonstrating the applicant's legal authority - based on statute, regulation, or other authority - to manage a revolving loan fund. At a minimum, the EPA requires that an RLF applicant have the legal authority to hold funds, make loans, enter into loan agreements and collect repayments.

7. Ranking Criteria

The EPA evaluates and ranks submitted applications using a point system based on certain criteria. Although similar, the ranking criteria for the EPA's three loan types do vary to some extent. Ranking criteria for site assessment grants, for example, include: (1) the proposed budget; (2) the site selection process; (3) sustainable development potential; (4) the creation and/or preservation of greenspace, open space or other nonprofit purpose; (5) the reuse of existing infrastructure; (6) community involvement; (7) the reduction of threats to human health and the environment; (8) the leveraging of additional resources (i.e. other sources of funding or funds committed by the applicant); and (9) the ability to manage grants.

Ranking criteria for RLF grants consist of: (1) the proposed budget; (2) community need; (3) the description of a target market for loans and subgrants; (4) sustainable development potential; (5) the creation and/or preservation of greenspace, open space or other nonprofit purpose; (6) the reuse of existing infrastructure; (7)

community involvement; (8) the reduction of threats to human health and the environment; (9) leveraging additional resources; and (10) the ability to manage grants and the proposed management structure of the loan fund. The EPA expects RLF applicants who do not identify specific borrowers to provide a description of target markets, including the types of borrowers, subgrantees and sites to which it will direct funds.[74] EPA also requires the RLF applicants to submit a Business Plan, describing the applicant's marketing strategy, its readiness to set up operations, and specific information regarding potential rates, terms and types of projects.

Ranking criteria for cleanup grants include: (1) the proposed budget; (2) community need; (3) sustainable development potential; (4) the creation and/or preservation of greenspace or other nonprofit purpose; (5) the reuse of existing infrastructure; (6) community involvement; (7) the reduction of threats to human health and the environment; (8) the leveraging of additional resources; and (9) the ability to manage grants.

B. United States Housing and Urban Development Programs

1. Brownfields Economic Development Initiative (BEDI)

HUD administers the BEDI grant program to stimulate and promote economic and community development activities under Section 108(q) of the Housing and Community Development Act of 1974, 42 U.S.C. § 5308, as amended (Housing and Community Development Act). HUD grants BEDI awards of up to $2 million once a year on a competitive basis. BEDI funds may be used to improve the economic viability of a brownfields project, but are available only for projects financed with Section 108 loan guarantees.

Section 108 is the loan guarantee provision of the Community Development Block Grant (CDBG) program.[75] Section 108 provides eligible public entities with a source of financing for economic development, housing rehabilitation, public facilities and large-scale physical development projects. Recipients may use Section 108 funds for such activities as site clearance, property acquisition, infrastructure development, and related activities, including removal of contamination.

To be eligible for the Section 108 program, a proposed project must principally benefit low- and moderate-income persons, aid in the elimination or prevention of slums and blight, or meet a community's urgent needs. The Section 108 program allows recipients to transform a small portion of their CDBG funds into federally guaranteed loans. To secure such loans, the public entity applicant (the state in the case of nonentitlement public entities)[76] must pledge current and future CDBG funds as security. HUD often also requires additional loan security on a case-by-case basis, including the assets financed by the guaranteed loan. Section 108 funds are available throughout the year on a noncompetitive basis. The maximum term for a Section 108 loan is twenty years and the minimum BEDI grant to Section 108 loan ratio is 1:1 (i.e. no grant smaller than the amount of the Section 108 loan). HUD endeavors to structure loans in accordance with the needs of the project and borrower.

Only public entities that already receive CDBG funding are eligible to apply for BEDI grants, but recipients may re-lend Section 108 proceeds and provide BEDI funds to private entities to carry out approved brownfield projects. (BEDI grants may not, however, provide funding to public or private entities to remediate conditions caused by their own actions.) BEDI funds may not be used at sites listed on the EPA's National Priority List.

BEDI grants, coupled with Section 108 loan guarantees, may be used for a variety of purposes, including writing down land, site remediation, funding reserves, over-collateralizing a Section 108 loan, enhancing the security of a Section 108 loan, or providing financing to for-profit entities at below market rates. HUD considers applications for BEDI awards based on certain rating factors, including (1) applicant (and sub-applicant) capacity and relevant organizational experience; (2) the extent of the existing problem; (3) the soundness of the applicant's approach; (4) leveraging of resources/ financial need; (5) the comprehensiveness of the project, including coordination with other local groups and organizations.

2. Economic Development Initiative (EDI) Grants

EDI grants are also authorized under Section 108(q) of the Housing and Community Development Act. Like BEDI grants, EDI grants are awarded annually on a

competitive basis to public entities in conjunction with Section 108 loan guarantees. Eligible activities include: (1) property acquisition; (2) the rehabilitation of publicly-owned property; (3) housing rehabilitation; (4) economic development; (5) the acquisition, construction; reconstruction or installation of public facilities; and (6) public works and other site improvements. Within this context, EDI funds may be used in the redevelopment of brownfield sites. Applicants may utilize EDI funds to pay project costs, to reduce interest rates on revolving loan fund loans, to establish a loan loss reserve, and to provide additional security for a Section 108 loan.

Regrettably, HUD has not received Congressional funding for competitive EDI grants in 2004. HUD does have a funded program in its non-competitive EDI program. Funds for noncompetitive EDI grants are allocated by Congressional action based on the recommendation of a Congressional delegation.

3. Community Development Block Grant (CDBG) Program

Successful applicants may use Community Development Block Grants, administered by HUD's Office of Community Planning, for brownfield redevelopment activities that meet one of the program's national objectives of benefiting low and moderate income persons, preventing or eliminating slums and blight, or addressing conditions that present a serious and immediate threat to community health and safety. HUD awards CDBG grants directly to Entitlement Communities or to state entities for distribution to nonentitlement communities. To receive CDBG funds, a brownfield redevelopment activity must be incorporated into a local government's stated priorities through its CDBG Consolidated Plan and annual action plan.

In Connecticut, entitlement communities include Bridgeport, Bristol, Danbury, Hartford, Meriden, Middletown, New Britain, New Haven, New London, Norwalk, Norwich, Stamford, Waterbury, West Haven, East Hartford, Fairfield, Greenwich, Hamden, Manchester, Milford, Stratford and West Hartford. Those interested in applying for CDBG funds for sites in entitlement communities should contact those municipalities directly. For sites outside entitlement communities, prospective grantees must contact the Office of Municipal Development at the Connecticut Department of Economic and Community Development.

C. Economic Development Administration (EDA) of the U.S. Department of Commerce

EDA has as its purpose the creation and retention of jobs and the stimulus of industrial and commercial growth in economically distressed areas. The agency provides grants for infrastructure development, local capacity building, and business development to help communities alleviate conditions of substantial and persistent unemployment as well as underemployment in economically distressed areas and regions. Thus, EDA grant eligibility criteria include consideration of the unemployment rate in the applicant's area. EDA grants, which are highly competitive, are available to state and local governments, Indian tribes, and to public and private non-profit organizations. EDA investments include locally developed public works infrastructure projects that support private sector businesses. Grant recipients may use grant funds for major construction projects, such as water and sewer lines and public facilities that encourage private investment. Recipients may also use grant funds for site assessment and remediation, provided such costs do not account to more than 10% of the total project budget (with the exception of housing).

The vast majority of EDA funds go to small towns and rural areas who have used the funds for a wide variety of purposes pertinent to brownfields development. These have included addressing issues related to leaking underground storage tanks, asbestos, PCBs, and lead based paint, as well as reuse/rehabilitation of old factory buildings. Grants average about $900,000.

[Please see Table of Connecticut and Federal Financial Assistance Programs for Brownfield Assessment, Remediation, and Development, following the Postscript below.]

Postscript: What you should expect of your lawyer in dealing with a brownfields matter?

The issues discussed in this Manual directly effect current owners, potential purchasers and lessors, developers, lending institutions, local governmental units or industrial authorities, and other entities interested in improving property or otherwise enhancing its value or reducing exposures arising from its environmental condition. These entities should expect their lawyers to provide

them with representation and advice with regard to actual and potential liability, remediation, reuse, financing, sale, lease, donation, and strategic stockpiling of brownfield properties.

In addition to providing their clients with counsel on assessment of liability, the lawyers for the interested parties should offer representation in the following areas:

- negotiating cleanup obligations commensurate with land use and property value,
- negotiating liability limitations between and among buyer/seller, lessor/lessee, lender/borrower, and owner-developer/builder-engineer,
- negotiating title acquisition,
- preparing appropriate construction documentation mindful of the environmental issues,
- acquiring liability limitation insurance,
- meeting various land use requirements, such as zoning, wetlands, and "entitlement" issues
- preparing appropriate land use controls (such as deed restrictions and mandatory maintenance and operation requirements to assure the continuing viability of remedial schemes),
- attending to the special requirements of lending institutions and local authorities; and
- providing advice on funding of brownfields cleanup and development through creative financing including loans, grants, bonds, and tax increment financing.

At any one or more times during the assessment, remediation, transfer, and development of a Brownfield property, as well as with regard to any transaction involving such a property, an interested party may require legal services in the following areas:

- environmental law,
- real estate,
- land use,
- project finance,
- construction law,
- insurance,
- government contract law,
- governmental relations,
- commercial or corporate law; and
- international or trans-national law.

When searching for an attorney to provide counsel in any such role, the interested party should inquire about the lawyer's specific brownfields experience. Practical real-life examples in any particular context may give some lawyers an edge over others, e.g., having obtained a release for or covenant not to sue a client from a regulatory agency, having successfully negotiated an indemnity provision in the purchase or lease of a brownfield property, or having developed a workable financing mechanism for development of such a property.

In conclusion, lawyers can serve a pivotal role in helping to develop the economic potential in brownfield properties. Parties interested in the remediation, use, and development of these properties should keep in mind how their attorneys can best serve them in this complex and challenging field.

ENDNOTES

1. As of the end of 2003, the Connecticut Brownfields Redevelopment Authority (CBRA) listed more than 200 brownfield sites as eligible for redevelopment funding under its programs. See CBRA, (visited September 28, 2005) <http://www.ctbrownfields.com/w3c/brownfields_search/index.html>. Further, as of September 28, 2004, the Connecticut Department of Environmental Protection (DEP) had identified over 280 brownfield sites in Connecticut. See also DEP (visited September 28, 3005) <http://www.dep.state.ct.us/wst/remediation/brownfields/brownfields.htm>.
2. 42 U.S.C. § 9601 (39).
3. Anne Claire Broughton, Recycling Today, "Superfund Reformers Remain Hopeful," August 16, 2001, (visited September 28, 2005) <http://www.recyclingtoday.com/articles/article.asp?ID=3734&AdKeyword=Superfund+reformers+remain+hopeful>.
4. Resource For the Future, "Asarco, Superfund tied in Liability Cliffhanger," March 12, 2002, (visited September 28, 2005) <http://www.rff.org/rff/News/Coverage/2002/March/Asarco-Superfund-tied-in-liability-cliffhanger.cfm>.
5. Pub. L. 107-118, Jan. 11, 2002, 115 Stat. 2356.
6. "Hazardous waste" means "any waste which is (A) hazardous waste identified in accordance with Section 3001 of the federal Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 et seq., (B) hazardous waste identified by regulations adopted by the

commissioner of environmental protection, or (C) polychlorinated biphenyls in concentrations greater than fifty parts per million except that sewage, sewage sludge and lead paint abatement wastes shall not be considered to be hazardous waste for the purposes of this section and sections 22a-134a to 22a-134d, inclusive." Conn. Gen. Stat. § 22a-134(4). Although the Transfer Act conditions its applicability with regard to the generation of "hazardous waste," its requirements for declarations and certifications with regard to remediation also apply to "hazardous substances" at an establishment, as that term is defined under CERCLA, 42 U.S.C. § 9601, and extending as well to petroleum and petroleum by-products otherwise excluded from the CERCLA definition.
7. Conn. Gen. Stat. § 22a-134(3).
8. Conn. Gen. Stat. § 22a-134(1) excludes the following from the definition of "transfer":
• Conveyance or extinguishment of an easement;
• Conveyance of an establishment through a foreclosure;
• Conveyance of a deed in lieu of foreclosure to a lender;
• Conveyance of a security interest;
• Termination of a lease and conveyance, assignment or execution of a lease for a period less than ninety-nine years, including conveyance, assignment or execution of a lease with options or similar terms that will extend the period of the leasehold to ninety-nine years;
• Any change in ownership approved by the Probate Court;
• Devolution of title to a surviving joint tenant, or to a trustee, executor, or administrator under the terms of a testamentary trust or will, or by intestate succession;
• Corporate reorganization not substantially affecting the ownership of the establishment;
• The issuance of stock or other securities of an entity which owns or operates an establishment;
• The transfer of stock, securities or other ownership interests representing less than forty per cent of the ownership of the entity that owns or operates the establishment;
• Any conveyance of an interest in an establishment to a trustee of an inter vivos trust created by the transferor solely for the benefit of one or more of the sibling, spouse, child, parent, grandchild, child of a sibling or sibling of a parent of the transferor;
• Any conveyance of a portion of a parcel upon which portion no establishment is or has been located and upon which there has not occurred a discharge, spillage, uncontrolled loss, seepage or filtration of hazardous waste, provided either the area of such portion is not greater than fifty per cent of the area of such parcel, or written notice of such proposed conveyance and an environmental condition assessment form for such parcel is provided to the commissioner sixty days prior to such conveyance;
• Conveyance of a service station;
• Any conveyance of an establishment which, prior to July 1, 1997, had been developed solely for residential use and such use has not changed;
• Any conveyance of an establishment to any entity created or operating under chapter 130 or 132 (Conn. Gen. Stat. §§ 8-124 et seq., 8-186 et. seq.), or to an urban rehabilitation agency, as defined in Conn. Gen. Stat. § 8-292, or to a municipality under Conn. Gen. Stat. §§ 32-224, or to the Connecticut Development Authority or any subsidiary of the authority;
• Any conveyance of a parcel in connection with the acquisition of properties to effectuate the development of the overall project;
• The conversion of a general or limited partnership to a limited liability company under Conn. Gen. Stat. § 34-199;
• The transfer of general partnership property held in the names of all of its general partners to a general partnership which includes as general partners immediately after the transfer all of the same persons as were general partners immediately prior to the transfer;
• The transfer of general partnership property held in the names of all of its general partners to a limited liability company which includes as members immediately after the transfer all of the same persons as were general partners immediately prior to the transfer; and
• Acquisition of an establishment by any governmental or quasi-governmental condemning authority.
9. Conn. Gen. Stat. § 22a-134(10).
10. Conn. Agencies Regs. §§ 22a-133k-1 through 22a-133k-3. In addition to providing cleanup standards under the Transfer Act, the RSRs provide detailed guidance for all remedial actions required by Chapters 445 and 446k of the Gen. Stat. and for voluntary remediation of polluted soil, surface water, or a ground water plume at or emanating from a release under sections 122a-133x and 122a-133y of the Connecticut General Statutes.
11. The ECAF must be prepared under the supervision of a licensed environmental professional ("LEP").
12. Conn. Gen. Stat. § 22a-133v establishes standards for LEPs who may perform certain activities with regard to the assessment and remediation of hazardous waste and hazardous substances in lieu of DEP. See, e.g.

Conn. Gen. Stat. § 22a-134a(e): DEP may allow an LEP to verify that an investigation has been performed in accordance with prevailing standards.
13. Conn. Gen. Stat. § 22a-134(11).
14. Conn. Gen. Stat. § 22a-134(12).
15. Conn. Gen. Stat. § 22a-134(13).
16. The term "Negative Declaration" used to comprise the section heading title for Conn. Gen. Stat. § 22a-134a until its amendment effective in 1997. "Negative Declaration" continues to describe accurately a Form I or Form II filing.
17. Conn. Gen. Stat. § 22a-134a (c) (Emphasis added).
18. Conn. Gen. Stat. § 22a-134 (7).
19. Conn. Gen. Stat. § 22a-134(a)(c).
20. Conn. Gen. Stat. § 22a-134(e)(m).
21. Conn. Gen. Stat. § 22a-134a(d).
22. Conn. Gen. Stat. § 22a-134a(e). It is not uncommon for the DEP to take more than the prescribed 30 days to notify the certifying party whether the form is complete or incomplete.
23. Conn. Gen. Stat. § 22a-134a(f).
24. Conn. Gen. Stat. § 22a-134a(g).
25. Id.
26. Conn. Gen. Stat. § 22a-134a(h).
27. Conn. Gen. Stat. §§ 22a-134c.
28. Conn. Gen. Stat. §§ 22a-134a(j).
29. Id.
30. Conn. Gen. Stat. §§ 22a-134b.
31. Conn. Gen. Stat. §§ 22a-134d, 22a-438(a) and (c).
32. Conn. Gen. Stat. §§ 22a-133x(d) and 22a-133y (d).
33. Charles Bartsh & Barbara Wells, Financing Strategies for Brownfield Cleanup and Redevelopment, NORTHEAST-MIDWEST INSTITUTE, June 2003, at 1 <http://www.nemw.org/BFfinancingredev.pdf>.
34. CBRA may also use this original allocation amount to supply short-term temporary funding between transactions.
35. CBRA redevelopment grant funds generally pay for only about 10% of the overall cost of a redevelopment project.
36. CBRA policy discourages the diversion of funds for speculative purposes. The agency, therefore, requires, as a demonstration of good faith from the applicant, that it apply as well for a redevelopment grant if assessment shows the property to be viable.
37. The procedures of the American Society for Testing and Materials (ASTM) set forth in ASTM Standard E1527-00, entitled "Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process," ("ASTM E157-00") currently satisfy the requirement set forth in CERCLA for innocent land owners, bona fide prospective purchasers, or contiguous property owners to establish that they performed "All Appropriate Inquiry" ("AAI") to qualify for a defense against cost-recovery actions under 42 U.S.C. §§ 9601(35)(B), 9601(40) and 9607(q)-(r). 40 C.F.R. § 312.2 Pursuant to 42 U.S.C. § 9601(35)(B)(ii), the EPA must issue new standards for such AAIs. When issued, these standards will appear as regulations in the Code of Federal Regulations, 40 C.F.R. §§ 312.1 to 312.31. ASTM will amend its standard E1527-00 to reflect the new EPA regulation set forth in the Code of Federal Regulations. If the Phase I report discloses a Recognized Environmental Condition (see note 38), the party for whom the assessment has been prepared will risk sacrificing its statutory defense if it does not follow up the Phase I inquiry with a Phase II assessment as part of its duty to take reasonable steps or provide appropriate care with respect to hazardous substances at the site. (See note 39).
38. Section 3.3.30 of ASTM E1527-00 defines a Recognized Environmental Condition as "the presence or likely presence of any hazardous substance or petroleum products into structures on the property or into the ground, ground water, or surface of the property . . . ."
39. For purposes of defenses under CERCLA, Phase II inquiries constitute part of the "reasonable steps" or "appropriate care" the party must undertake with regard to hazardous substances found at a facility. 42 U.S.C. §§ 9601(35)(B)(i)(II), 9601(40)(D) and 9607(q)(1)(A)(iii).
40. ASTM E1527-00 provides that Phase I assessments completed within the immediately previous 180 days are "presumed to be valid," and sets forth action criteria to be applied to older assessments for their ability to have continuing viability. As of this writing, EPA's proposed regulation in 40 C.F.R. § 312.20 will require that AAI be conducted within one year before purchase of a property and would require certain information collected as part of AAI to be updated if it was collected more than 180 days before the purchase of a property.

41. See <http://www.ctcda.com>.
42. See <http://www.etgov/ecd.>.
43. Recipients may also apply for HUD-guaranteed Section 108 Loans (see discussion below of HUD federal funding at text accompanying footnotes 75 and 76) by pledging future Small Cities funds as a source of

security. DECD has established award minimums and maximums for Section 108 loans of $500,000 and $4 million respectively. Section 108 loans may not constitute more than 90% of total project costs.
44. See DECD, "Governor Rowland Announces a $50,000 Small Cities Planning Grant to Vernon For Hockanum Mills,"
(visited September 29, 2005)
<http://www.ct.gov/ecd/cwp/view.asp?a=1104&q=251270>.
45. Entitlement communities are metropolitan cities and urban counties that meet certain demographic criteria and receive CDB grants directly from HUD. All other areas are nonentitlement communities that receive CDB grants through state entities.
46. A taxpayer may not claim this tax credit in addition to the 25% corporate tax credit allowed under the provisions of the Enterprise Zone Program, as described in Conn. Gen. Stat. § 12-217e. A taxpayer may, however, carry over any credit not used in the income year for which it was allowed for the five immediately succeeding income years until the full credit has been allowed. A taxpayer may also assign a credit to another taxpayer provided that the assignee taxpayer claims the credit in the taxable year for which the assignor taxpayer would have been eligible to claim the benefit. The underlying property of an Industrial Site Investment project may also be eligible to receive a 50% property tax abatement on that portion of the property tax attributable to the increased value of the property resulting from the approved remediation and redevelopment. This property tax abatement will not be granted if the property qualifies for an abatement of or exemption from property taxes under any other provision of the Connecticut General Statutes.
47. Conn. Gen. Stat. § 32-70 designates the establishment of the State's Enterprise Zones. An Enterprise Zone consists of a census tract or several contiguous tracts within a community. In order for a community to be eligible to establish an Enterprise Zone, it must meet certain criteria related to social and economic conditions.
Primary census tracts must meet at least one of the following:
• a poverty rate of 25%
• an unemployment rate of two times the state average at least 25% of the tract's population receives public assistance
Secondary census tracts must meet lower thresholds:
• a poverty rate of 15%
• an unemployment rate of at least 1.5 times the state average
• at least 15% of the tract's population receiving public assistance.

East Hartford, Groton, and Southington were designated Enterprise Zone municipalities by way of special legislation due to the impact of severe defense industry cutbacks, each resulting in a minimum of 2,000 lost jobs. The above poverty criteria did not apply.
48. Phase III Investigations generally result from recommendations made in Phase II assessments and may involve "super-intensive" testing, sampling, and monitoring, "fate and transport" studies and other modeling, and the design of feasibility studies for remediation and remedial plans.
49. Commonly used as a dry cleaning solvent, stoddard solvent is a petroleum distillate comprising 44% napthanes, 39.8% parafins, and 16.2% aromatics.
50. Conn. Gen. Stat. § 22a-133m.
51. DEP, Connecticut's Urban Sites Remedial Action Program, (visited September 29, 2005) at <http://dep.state.ct.us/pao/PERDfact/urban.htm>.
52. Distressed Municipalities include Hartford, New Britain, Bridgeport, Waterbury, New Haven, Windham, East Hartford, New London, Meriden, Ansonia, West Haven, Winchester, Derby, Torrington, Naugatuck, Bristol, Norwich, Plainville, Killingly, Plymouth, Sprague, Putnam, Enfield, East Windsor and Stafford.
53. Targeted Investment Communities include Bridgeport, Bristol, East Hartford, Groton, Hamden, Hartford, Meriden, Middletown, New Britain, New Haven, New London, Norwich, Plainfield, Plainville, Putnam, Sprague, Stratford, Thompson, Torrington, Waterbury, Winchester, Windham and Windsor Locks. A municipality with a designated Enterprise Zone (see note 46) is defined in Conn. Gen. Stat. § 32-222(v) as a Targeted Investment Community.
54. TODD S. DAINS, BROWNFIELDS: A COMPREHENSIVE GUIDE TO DEVELOPING CONTAMINATED PROPERTY, at 484 (2d ed., American Bar Association 2002).
55. See endnote 52.
56. See endnote 53.
57. Bartsh, supra, note 33, at 11.
58. The U.S. Army Corps of Engineers, for example, offers several programs that may support brownfields development, including the Continuing Authorities Program, the Support for Others Program, and the Planning Assistance to Status Program, all of which offer

"matching" support for state or local environmental programs.
59. See Bartsh, supra, note 33, at 11-26; see also Charles Bartsch and Barbara Wells, "Promoting Brownfield Development in the 108th Congress: Summary of Federal Legislative Activity," NORTHEAST-MIDWEST INSTITUTE, January 2005 (visited September 29, 2005) <http://www.nemw.org/BFFLu2005.pdf>.
60. Hazardous substances, pollutants and contaminants may include hazardous substances (such as heavy metals and solvents), petroleum and other environmental hazards (including such contaminants as mold and guano). Asbestos and lead paint are eligible contaminants if they are part of a larger hazardous substance contamination and represent only a small percentage of cleanup costs.
61. The NPL is the Environmental Protection Agency's annually updated list of the most serious uncontrolled or abandoned hazardous waste sites in the U.S. identified for possible long-term cleanup under CERCLA.
62. Land held in trust by the United States for an Indian tribe is eligible for brownfields funding. In rare instances, the EPA may consider some types of ineligible properties on a case-by-case basis. If the EPA determines that funding for assessment and cleanup activities at a given site will meet the goals and criteria of the brownfields program, it may declare a site eligible to apply for brownfield funding (although it has rarely done so). Properties eligible for property-specific determinations include (1) properties subject to planned or ongoing actions under CERCLA; (2) properties with facilities that have been issued or entered into a unilateral administrative order, a court order, an administrative order on consent, or a judicial consent decree or to which a permit has been issued by the U.S. or an authorized state under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq., (RCRA), the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq., as amended (FWPCA), the Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq. (TSCA) or the Safe Drinking Water Act, 42 U.S.C. §§ 300f et seq. (SWDA); and (3) properties where there has been a release of PCBs (polychlorinated biphenyls) and all or part of the property is subject to TSCA remediation.
63. The EPA prefers that states make these determinations. However, if an applicant is unable to secure a state determination in time, an applicant may request a determination from the EPA up to two weeks before the application deadline.
64. Applicants may seek a waiver of the $200,000 limit, and request up to $350,000 per site. However, no entity may apply for more than $700,000 in assessment funding.
65. As long as the primary purpose of an assessment grant is to assess a site potentially contaminated with petroleum, a petroleum brownfields grant may be used for the incidental assessment or cleanup of hazardous substances. Sites that are potentially contaminated with PCBs may qualify for assessment grants, except where the EPA has already initiated an involuntary action to address PCB contamination at the site or a portion of it. However, even if a site (or part of it) has been subject to an EPA-initiated involuntary action to address PCP contamination, the site may still qualify for funding if the EPA makes a site-specific determination to that effect. (As previously noted, however, the EPA rarely finds sites eligible by means of site-specific determinations).
66. Sites potentially contaminated with PCBs may qualify for RLF grants, except where the EPA has already initiated an involuntary action to address PCB contamination at the site or a portion of it. However, even if a site (or part of it) has been subject to an EPA-initiated involuntary action to address PCP contamination, the site may still be eligible for funding in the rare instance that the EPA makes a site-specific determination to that effect.
67. EPA calculates cost shares for community-wide grant programs on the basis of the entire program, i.e. a cost share contribution may be met with the first award. Limited waivers are available, but are usually reserved for applicants in bankruptcy.
68. This policy is subject to change and should be verified each application cycle. The EPA does consider special circumstances with regard to site ownership on a case-by-case basis, including situations where applicants secure an irrevocable agreement to sell or donate property in the event of an award.
69. As with RLF grants, sites that are potentially contaminated with PCBs may be eligible for Brownfields cleanup grants, except where the EPA has already initiated an involuntary action to address PCB contamination at the site or a portion of it. *See* endnote 65.
70. The process must be one of formal foreclosure, however, and not a donation in settlement of a tax claim.
71. See endnotes 37 and 38.
72. Reasonable steps include (1) stopping continuing

releases; (2) preventing future releases; and (3) preventing or limiting exposure (e.g. fencing in the site). See endnote 37.
73. The EPA advises applicants that acquired sites by eminent domain to contact the Agency directly to determine their eligibility to apply for funds.
74. Although the EPA has already distributed a considerable number of RLF grants, these grants have resulted in a relatively small number of actual loans to date. The EPA is trying to identify and award grants to grantees that are ready to begin distributing loans as soon as possible after the receipt of an RLF grant.
75. Section 108 loan guarantees are available for projects the costs for which exceed a City's single year CDBG funding and the loan guarantee request must accompany each BEDI application. BEDI and Section 108 funds must be used in conjunction with the same economic development project. Both CDBG entitlement and nonentitlement communities may apply for BEDI grants. (Entitlement communities include metropolitan areas and urban counties that meet certain criteria - e.g. large cities with population of at least 50,000 and urban communities with at least 200,000 residents. They receive CDBG grants directly from HUD; all other (nonentitlement) communities receive CDBG grants through state entities). If a nonentitlement community receives a BEDI grant and applies for Section 108 loan guarantee assistance, the applicable state entity will be required to pledge CDBG funds as partial security for the loan guarantee. This restriction has proven to be a major stumbling block to smaller cities that must rely on their states for use of CDBG and BEDI programs. Consequently, the BEDI program has only limited application to smaller cities. See also discussion above regarding Connecticut's CDBG program at text accompanying notes 43 and 43 .
76. As previously stated, entitlement communities are metropolitan cities and urban counties that meet certain demographic criteria and receive CDBG funds directly All other areas are nonentitlement communities that receive CDBG funds through state entities.