ABA Section of Environment, Energy, and Resources
AMERICAN BAR ASSOCIATION

Environmental Transactions and Brownfields Committee Newsletter

Vol. 17, No. 1 **October 2014**

WELCOME FROM THE CHAIR

Pamela K. Elkow
Robinson + Cole
Stamford, CT

"Hey, no one told me about this 'Message from the Chair' stuff when I signed up for this." That was my first reaction when my intrepid newsletter vice chairs, Tom, Rob, and Lindsay, e-mailed me with the articles for this latest issue and mentioned the whole message thing. My second reaction was—what on earth can I add of value to this endeavor? Tom, Rob, and Lindsay do a lot of the hard work—they find the authors, vet the articles, and chase down author publication agreements. Our authors—in this issue, Chip D'Angelo, Erica J. Dominitz, Chad Salsbery, Misty A. Sims, Bennett Resnik, and Matthew D. Manahan, Esq.—did the rest of the hard work by writing these articles that I think you'll find interesting and useful. What can I add to that? Well, here goes. . . . (one paragraph down)

As I read the articles for this ETAB Newsletter, I was struck by a few things. Our authors are quite varied. While most are lawyers, or aspiring lawyers, not all are. We have seasoned practitioners and a law student. We have authors from a very small firm, a very large firm, and a medium-sized firm. Similarly, the topics reflect the breadth of our committee's charge. The topics literally span the country from Maine to Arizona, and cover issues as diverse as planning for catastrophes to dealing with historic Indian land claims. So, I found my topic for my message! (next paragraph down)

This breadth of topic and practitioner is one of the strengths of ETAB. We have lawyers from all across the country and from all different types of practice coming together to figure out a better way to get deals done, and brownfields remediated and redeveloped. Even the term "brownfields" itself can be and is widely defined. As a result of this wide variety of experiences, we can learn a lot from each other. My goal as chair is to facilitate that exchange of ideas. I recently sent an e-mail to the entire committee asking what topics were of interest to you. I got a lot of responses, and we'll be working on programs and articles that address those issues. I reiterate the call here—let us know what matters to you and what you want to talk about. This is your committee, and we want to be relevant to what you do. My e-mail is pelkow@rc.com. Thanks for being an ETAB member, for reading the newsletter, and for sharing your thoughts.

Visit the committee webpage:
www.ambar.org/EnvironCommittees

Environmental Transactions and Brownfields Committee Newsletter
Vol. 17, No. 1, October 2014
Tom Doyle, Rob Gelblum, Lindsay Howard, Editors

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AMERICAN BAR ASSOCIATION
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CLE Webinar

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March 4, 2015
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For full details, please visit www.ambar.org/EnvironCalendar

WHEN ENVIRONMENTAL DISASTERS STRIKE: HOW TO PLAN FOR AND REACT TO CATASTROPHIC EVENTS IN ORDER TO MINIMIZE LIABILITIES AND FACILITATE INSURANCE RECOVERY

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Introduction

Even a company that is in compliance with applicable environmental laws and permits, and implements measures to avoid disaster, might receive a late night call reporting that a fire, explosion, flood or other catastrophic event has occurred at the company's premises, and police officers and television crews are on the scene. Such events could cause environmental contamination and other forms of property damage and third-party liabilities, which could result in increased expenses and extended revenue losses. These events also tend to result in investigations by regulatory agencies (such as the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA)), and lawsuits by those harmed, such as employees, neighboring individuals or businesses, and customers or suppliers whose businesses also are impacted by the loss.

The actions a company takes before and immediately after a catastrophe often affect the extent to which the property is protected, the amount that the cleanup will cost, whether lawsuits will be filed against it, and to what extent insurance coverage will be available. Careful pre-disaster planning that considers potential environmental impacts can streamline and help facilitate post-disaster actions and communications, allowing for an integrated response by the company's environmental, legal, financial, and risk management professionals.

This article discusses environmental risk management best practices, both before and after an emergency, from the environmental, insurance, and accounting perspectives. Below are steps companies can take to integrate environmental compliance and emergency response with insurance claims management and cost segregation, which should minimize liabilities and facilitate the recovery of insurance proceeds.

Pre-Loss Planning

Businesses can (and should) take certain steps pre-loss that will facilitate the environmental response and the insurance claim adjustment process post-loss.

Establish a Multi-Disciplinary Crisis Management Team

A pre-established crisis management team can assist a company in quickly and efficiently addressing the various issues that follow an environmental disaster, including damage to company property, damage to third-party property, bodily injury, and interruption of normal business operations. The team should include internal and external professionals with knowledge of the company operations and environmental compliance and of environmental emergency response protocols, such as individuals in the risk management, legal, human resources, purchasing, finance, operations, and environmental health and safety departments, as well as accounting claims consultants. This team should be led by an Environmental Response Manager ("ER Manager"). This individual can be a third party who has immediate access to additional technical resources and expertise commonly not found within.

Pre-loss Environmental "Management" Rather than "Mitigation" Promises

While many property owners and managers are familiar with restoration and mitigation companies, and may have "Preferred Client" agreements with such companies for post-disaster response, these agreements and the services they promise often provide little benefit in the wake of a large-scale environmental disaster. The potential environmental

hazards associated with a property damage claim, even in a commercial, residential or institutional building, are many and often not initially apparent. Asbestos and lead paint can be readily dislodged with a water event.[1] Contamination, including dioxins and furans from polychlorinated biphenyls (PCBs) and mercury in ballasts and switches, can be dispersed widely in a small fire.[2] Legionella and excessive mold can spawn from a neglected or damaged heating, ventilation, and air conditioning (HVAC) system. In response to superstorm Sandy in New York, flooding caused interior building fuel tanks to float from their saddles and burst, releasing copious amounts of oil into the contained floodwaters, coating interior surfaces. These hazards are exaggerated in a hospital or medical facility and much larger in a manufacturing facility with chemical use.

While many of the standard property damage restoration and drying companies tout environmental expertise, few have proven experience in-house. Further, while many of the hazardous response firms understand liquid and chemical spills, few have drying and restoration capabilities. Specialty hazards such as blood-borne pathogens or radionuclides require very special expertise.

Contractors need to be managed. Therefore, there is a need to have multiple resources in place, under contract, and an ER Manager to properly and effectively deploy and supervise these resources. It is important that this be done from the onset to minimize the likelihood that an insurance carrier will "disallow" or deny coverage for charges it deems to be excessive after they already have been incurred.

The response to flooding resulting from superstorm Sandy is a perfect example. Property owners responded to flooded basements by calling in pumping resources. This instinctive reaction often proved to be incorrect as these general contractors were pumping oil-laden water, at high concentrations, into city streets and even adjacent vacant properties! The risks and hazards became further exacerbated by the use of gas-powered generators that caused potentially deadly carbon monoxide buildup in subterranean and confined spaces.

Experiences like this demonstrate the need to have the proper resources and management in place *before* the loss.

The property restoration contracting industry typically offers simple "Preferred Client" agreements that guarantee the services of the restoration contractor before the contractor deploys services to others who have not signed such an agreement. The contractor commits to a response time, commonly within eight hours. There is a general description of work to be performed, but no specifics concerning the actual site-specific scope of services. These contracts include time and materials cost and billing schedules, with multiple labor categories and dozens of listed unit prices for every possible piece of equipment or material that may be used, down to a single trash can, paper towel, or rag. The moment the contractor sets foot on the site, the response obligation is satisfied and the meter starts ticking against the unit price schedule. The rental rates for equipment start accumulating regardless of whether the equipment is appropriate, adequate, or properly deployed. Required equipment may not even be on site. When the unaware owner, in turn, submits these costs to its insurance carrier, it often will result in invoices being rejected or reduced. This then leads to, or compounds other, payment delays and disputes.

An ER Manager should apply standard construction management procedures to control the scope, budget, quality, schedule and safety of environmental emergency response actions. An emergency response action should be considered a fast-track project, and pre-disaster planning and proper contracting can prevent or minimize inefficiencies, overbilling, and payment disputes after a major loss. An ER Manager can control and save costs for the owner/insured by directly contracting and coordinating with the event-specific subcontractors (e.g., for waste disposal) in order to save on mark-ups and avoid start-up delays. A portion of these tasks should be able to be procured in a lump-sum fashion, setting the costs in advance. The ER Manager should be independent of the response contractors and aligned with the owner. As such, the ER Manager will evaluate the geographic coverage, technical disciplines, and limitations of potential response contractors.

As part of a company's disaster response planning team, the ER Manager should review, assemble and protect all information pre-loss that may be needed in order to respond to environmental impacts after a loss, such as floor plans, fire response plans, locations of utilities, AST/UST locations, operations and management plans, environmental compliance permits, hazardous materials storage (MSDS), and use data. Pre-loss, the ER Manager also should establish regulatory reporting and notification procedures as well as a written emergency assessment and response protocol.

Pre-Loss Insurance and Accounting Planning Make Good Business Sense

There are several pre-loss steps that companies can take to help facilitate the insurance claim adjustment process. For instance, every year companies should carefully review their insurance policies to make sure that they provide sufficient coverage for the various environmental (and other) risks that they face. While companies should review their entire policies, special attention should be paid to the scope of coverage provided (i.e., coverage grants and exclusions); the amount of coverage available for different types of losses (i.e., limits and sublimits, as well as retentions/deductibles); and dispute resolution provisions (e.g., alternative dispute resolution (ADR) clauses, choice-of-law clauses, choice-of-forum clauses, and contractual limitations periods).

Companies also should develop and implement an accounting structure that provides for the segregation of costs associated with the disaster from costs associated with normal operations. The guidelines should include cost-charging instructions for procurement activities and labor charging for, among other things, (1) normal payroll; (2) damage assessment; (3) cleanup labor; (4) and downtime due to physical damage. These guidelines should be communicated throughout the company (and appropriate training should be provided to employees at all levels). In addition, companies should organize and maintain accounting files, and keep other important documents, such as copies of their insurance policies, in an accessible location, which will facilitate the preparation of insurance claims, including (1) accounting guidelines for a disaster; (2) historical financial performance documents; (3) current financial forecasts with documented support; and (4) documentation reflecting the company's procurement process (e.g., a list of certified vendors). Equally important is understanding what types of losses are covered by the company's—and possibly other entities'—various policies (including property insurance policies, commercial general liability policies, and environmental policies) such that cost control and recording can be categorized and allocated properly.

It is important for companies to maintain, in a secure location, an up-to-date inventory of their property and assets as well as photographs or video footage of their assets. This should help avoid or minimize potential post-loss disputes regarding the existence, number, or pre-loss location and condition of assets that were damaged or destroyed.

Finally, companies should be sure to take reasonable steps to avoid, or to minimize, impending losses. Property policies typically cover costs incurred to protect property from an impending loss, such as costs incurred to secure a facility before a forecasted severe weather event. The ER Manager, or another member of the Crisis Management Team, can coordinate such activities.

Post-Disaster Response

After a loss occurs, a company should consider taking the following steps in order to efficiently and effectively address environmental concerns, while mitigating liabilities and maximizing the likelihood of recovery from the company's insurance carriers.

Identify, Contain, and Close Environmental Hazards

After a disaster, while the pre-approved response contractors are mobilizing, the ER Manager should first conduct a life safety inspection of the affected areas for hazards. Environmental, electrical, and structural hazards may need assessment by a licensed professional in some instances. The ER Manager will also photograph and videotape the entire affected area with an eye for "causation" of damage. Often

photographs are focused on the results of the major damage as they can be startling. *All areas* affected should be photographed, as there may be subtle clues to causation that will help in proving and negotiating insurance claim(s).

The ER Manager typically should immediately convene a meeting with the disaster team and a *senior* person from each response contractor on-site to establish (a) a chain of command, (b) communication channels, (c) a written scope of work, at least for the first 48–72 hours, (d) a written "resource loading" plan that matches the scope, and (e) a schedule, by shift and budget, in a simple Gantt chart format or a computerized critical path method, cost-loaded project schedule.

With the correct project management expertise, these items often can be completed within eight (8) hours of arriving at the loss site. As the initial response unfolds with the objective of controlling environmental hazards, preventing electrical or structural damage causing fire or injury and removing free water, the ER Manager typically will continue to perfect the scope, schedule, and estimate for investigation and remedial measures needed to fully address the environmental hazards. The ER Manager will also typically deploy his or her own staff to direct and oversee all contractors and vendors on every shift. In addition, the ER Manager can coordinate with insurance carriers or their adjusters to help them set reserve(s) for the claim(s).

The ER Manager should also be responsible for ensuring, to the extent possible or practicable, that all project documentation and reporting meet the requirements of not only regulatory agencies, but also of the insurance carrier(s) and claim adjustor(s). Each subcontractor must be instructed to keep records to substantiate the labor, consumables, and the time and amount of equipment run.

Assess, Quantify, and Pursue Coverage for Your Losses

The following post-loss steps should get the insurance claim adjustment off to the right start.

First, companies typically must provide written notice to insurance carriers. Carefully review your insurance policies, and, as soon as possible, provide proper written notice to all carriers that issued potentially applicable policies, such as first-party property insurance policies, commercial general liability policies, and environmental liability policies. Failure to give timely notice could jeopardize your coverage or result in a protracted (translation: costly) dispute about whether the carrier is off the hook.

Second, calendar all policy deadlines. Insurance policies generally, and property policies in particular, tend to contain requirements and deadlines for providing notice, submitting a proof of loss, completing repairs (in order to recover the replacement cost value of the damaged or destroyed property), and for filing a lawsuit against the carrier (if necessary). Some of these deadlines can be as short as 30–60 days from the date of loss. It is best to identify, calendar, and meet these deadlines, and to timely request extensions, in writing, when necessary.

Be sure to protect and to provide the carriers with evidence relating to the loss. Gather and preserve all documents that substantiate or relate to losses, such as photographs, video footage, invoices, receipts, and labor records. These documents will enable the company to prove damages and (hopefully) get the insurance claim paid. Additionally, most insurance policies contain some form of cooperation clause, which typically requires the policyholder to comply with insurance carriers' reasonable requests for information that will enable them to investigate and adjust the insurance claim(s). The company also may be required to preserve such information in connection with actual or anticipated litigation.

As soon as possible, develop a business recovery plan to return the company to full operations, which, from an environmental standpoint, typically can begin when the environmental response is substantially complete. Assess the impacts that property damage is likely to have on business operations and financial performance. In order to develop and implement a plan to return to full operations, consider the following possible scenarios and options: (1) a full shutdown during the rebuild period; (2) a partial shutdown during the rebuild period; (3) alternate facilities to use during the

rebuild period; and/or (4) use of outside vendors to help mitigate loss. The plan selected will impact the time it likely will take for the company to operationally and financially recover from the environmental disaster. The options and plan selected, and the estimated recovery time, should be communicated to and discussed with the insurance carriers.

When losses are large or complex, the insurance claim adjustment process tends to be lengthy. Policyholders should not be forced to fund their entire recovery in the meantime. Companies should request advances and/or interim partial payments for undisputed portions of the loss.

Conclusion

As illustrated above, there are many complex and varied issues involved in preparing for and responding to a disaster, and all likely will involve some element of anticipating, mitigating, and responding to environmental risk. A company will be best served by establishing early on a multi-disciplinary team to coordinate pre- and post-disaster activities in order to maximize the likelihood that it will quickly and fully recover from such a loss. This team approach will help minimize environmental exposures while positioning the company to maximize the likelihood of recovering insurance proceeds for its losses. The team needs to be led by an independent ER Manager that is aligned with the company, as opposed to the mitigation or response subcontractors. This ER Manager generally accepts responsibility for managing and completing the response in the timeliest and most efficient manner and for documenting the claim for ease of processing by, and securing payment from, the insurance carriers.

Endnotes

[1] E.g., high-rise sprinkler head breaks overnight on 30th floor of a metropolitan high-rise building sprayed with asbestos fireproofing, resulting in extensive surface and street asbestos contamination, including municipal storm drains.

[2] E.g., small fire in the fifth-floor copy room (copier overheating) resulting in PCB ballasts burning and contaminated smoke confirmation on upper 15 floors.

OVERCOMING THE IMPACTS OF BROWNFIELDS IN ARIZONA

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Arizona's Brownfields Revitalization Project offers communities the ability to transform areas to productive uses, creating new business opportunities, and augmenting tax revenues. In order to assist in the process, the Arizona Department of Environmental Quality's (ADEQ) Brownfields Assistance Program (BAP) renders support to investors and government officials to determine the potential funding necessary to carry out a community's brownfields redevelopment project. Nonprofit organizations, cities, towns, and counties in Arizona may apply to participate in the ADEQ BAP. Benefits are offered through the program's various tools, which include the following: State Response Grant, Voluntary Remediation Program, Prospective Purchaser Agreement, Declaration of Environmental Use Restriction, and the State Lead Program. Each tool provided by the ADEQ BAP possesses diverse eligibility requirements as detailed in the next section.

Congruent with the brownfield movement, ADEQ acknowledges the effect that an abandoned or underutilized property with actual or perceived contamination may have on a community. Vandalism or illegal dumping, often occurring on abandoned properties, renders adverse economic and health effects on citizens and the environment. However, prior to identifying prospective uses for brownfields, the environmental issues must be resolved.

Assessing Eligibility to Acquire Assistance

The State Response Grant (SRG) is obtainable in rural regions of Arizona in areas possessing the following characteristics: (1) the site's redevelopment potential is made difficult by recognized or perceived contamination; however, the site has redevelopment potential; (2) the applicant is not found liable for any existing contamination at the site; (3) the site is an underutilized industrial or commercial site; and (4) the

site is mine-scarred land or is contaminated with a controlled substance, petroleum or petroleum products, or a hazardous substance as defined by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

For the fiscal year of 2015 beginning July 1, 2014, ADEQ is accepting grant applications. In order to begin the process, an interested party should call ADEQ to review grant eligibility for the prospective site. Then, the party must submit a written request for funding and a Brownfields SRG Application. Once ADEQ receives U.S. Environmental Protection Agency (EPA) project approval, ADEQ prepares the Brownfields Governmental Service Contract, which must be signed by the applicant's official representative and ADEQ. After funding has been awarded, ADEQ hires a contractor to commence the assessment.

The Voluntary Remediation Program (VRP) enables site owners or operators to tackle contamination with ADEQ concurrence. By offering a single point of contact between the participant and all ADEQ programs and enabling participants to customize a remediation schedule, the VRP confirms that voluntary cleanup attains a satisfactory level of human health and environmental protection. In comparison to the SRG, the VRP is easier to qualify for assistance. However, if the location of the site is within a Water Quality Assurance Revolving Fund (WQARF, or State Superfund) registry site boundary and the applicant intends to address the same contaminants of concern already addressed under WQARF, then the site is not eligible. In addition, if the site is a Resource Conservation and Recovery Act (RCRA) permitted or interim status facility, then the site is ineligible to participate in the VRP. Further, if the remedial action is mandated by a written agreement between ADEQ and the applicant, then the site does not qualify for the VRP.

The Prospective Purchaser Agreement (PPA) is a mechanism that precludes liability through a written agreement with ADEQ. The statute delineates a covenant not to sue for any potential WQARF and state CERCLA liability for existing contamination, if statutory conditions are attained. A.R.S. § 49-285.01. If approved by federal court, then CERCLA contribution protection is offered. The following conditions must be present to be eligible for a PPA: (1) the property is located within a WQARF registry site or ADEQ has adequate evidence to assess the extent of the contamination; (2) the purchaser is neither associated with any individual that is responsible for the contamination, nor caused or contributed to the contamination; (3) the purchaser's plans for the property will not aggravate or impair the contamination or interrupt current remedial actions; and (4) the purchaser must not be solely continuing business activity on the property, but rather also providing a significant benefit to the community.

The Declaration of Environmental Use Restriction (DEUR), a restrictive covenant, can be utilized to attain site closure in an efficient and cost-effective manner. As a result, properties may be developed or sold more quickly. DEUR records engineering and institutional controls, which may be utilized to permit closure of a site even if contamination still exists. For the property owner to be eligible, the soil contamination on the site must be greater than the corresponding residential soil remediation levels; however, the soil must not exceed the non-residential soil remediation levels. In addition, contamination matters must be attended by way of the relevant ADEQ regulatory program, and the property owner must fulfill the requirements of Arizona Revised Statutes Title 49 Article 4.

The ADEQ State Lead Program (SLP) provides free or significantly subsidized characterization and remediation activities on a site in a timely manner to enable redevelopment. To qualify for the SLP, ADEQ must conclude that action is crucial to protect the environment and human health, and the owner is unknown, unwilling, or technically or financially unable to perform the necessary work.

Brownfields Grant Achievements in Arizona

Success may be reached through cleanup activities, meticulous land use planning, and risk evaluation in areas where contamination actually exists. In the city of Naco, the historical site of Camp Newell is the only Buffalo Soldier fort existing on the U.S.-Mexican

border. The property was contaminated with asbestos-containing transite. However, the ADEQ Brownfield Program provided the funds required to remove the asbestos from the community center building's roof. Restorative efforts to clean up the structures on the original camp property continue under the oversight of the VRP. Another example of a contaminated area is in the city of St. Johns on property that had previously been used as a gas station and car dealership. After a Phase I site assessment indicated possible petroleum contamination due to the historical uses of the site, a Phase II site assessment confirmed that petroleum-related, asbestos, and hazardous contaminants were present. The assessment enabled the city to proceed with the cleanup and construct a new city hall.

The main priority of the ADEQ Brownfields Assistance Program is to ensure that the property is compatible with its intended use and development, and to protect the public health. For more information required to apply for assistance through the ADEQ Brownfields Assistance Program, see the Brownfields Redevelopment Toolbox at http://www.azdeq.gov/environ/waste/cleanup/download/bftoolbox.pdf.

THE BUILD ACT: BUILDING A STRONGER FUTURE FOR BROWNFIELD REDEVELOPMENT

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Today, brownfields redevelopment remains a national priority. According to the Environmental Protection Agency (EPA), as of June 2013 the federal brownfields program has assessed 20,449 properties, completed 872 cleanups, and made 39,906 acres ready for reuse.[1] A bill currently wending its way through the U.S. Senate would improve the way in which the government supports brownfields redevelopment activities. Introduced to Congress on March 7, 2013, the Brownfields Utilization, Investment, and Local Development (BUILD) Act[2] would reauthorize EPA's brownfields program through fiscal year 2016 and aim to simplify the redevelopment process by increasing eligibility and the availability of federal brownfields cleanup grants.

Introduced by the late Senator Frank Lautenberg (D-NJ), the BUILD Act, with 10 cosponsors,[3] was reported favorably by the Senate Committee on Environment and Public Works on April 3, 2014. The Act would amend the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[4] which has been amended several times since its enactment by Congress in 1980,[5] to include nonprofit organizations, certain limited liability corporations, limited partnerships, and "qualified community development entities" as eligible entities qualified for site assessment grants.

The BUILD Act has additional features which would increase grant opportunities for states and local communities. EPA would be authorized to award up to $2,000,000 to provide grants to states.[6] The Act would allow local governments to apply for site assessment grants for properties acquired before the brownfields program was enacted. The site assessment grants would be available to local governments even if they do not qualify for the "bona fide prospective purchaser exemption" under CERCLA.

In addition, the BUILD Act would permit EPA to provide grants up to $500,000 for brownfields appropriate for energy efficiency developments including but not limited to renewable electricity (wind, solar, or geothermal energy) generating facilities. Furthermore, the Act would incent brownfields redevelopment at certain sites through focused funding by requiring EPA to offer priority to "small communities, Indian tribes, rural areas, or low-income areas with a population of not more than 15,000."[7] EPA will also be required under the Act to give consideration to "waterfront brownfield sites" when awarding funds.

The Congressional Budget Office estimates that the Act would cost $500 million from 2015 to 2019.[8] From these funds, the BUILD Act will support the EPA Brownfields Program by making significant investments in America's property redevelopment. According to EPA, brownfield cleanup activities have led to a 2–3 percent increase in nearby residential property values and a $0.5 to $1.5 million increase in overall property value within a one-mile radius.[9] In addition, public investment in brownfields results in direct generation of local tax revenue, brings new jobs into the community, and increases the productivity of the property.

Brownfields redevelopment is typically the catalyst that generates a positive environment for new investments in the community. It is of great importance that Congress pass the Act, clean up brownfield properties, and bring them back to fully productive economic use, thereby creating sustainable communities across the United States. On June 5, 2014, the Committee on Environment and Public Works reported the bill with amendments; the bill was then placed on the Senate legislative calendar under General Orders (calendar no. 416). The Act has received bipartisan support and now goes to the full Senate for approval.

Endnotes

[1] Environmental Protection Agency, *The EPA Brownfields Programs Produces Widespread Environmental and Economic Benefits*, (June 2013), *available at* http://www.epa.gov/brownfields/overview/Brownfields-Benefits-postcard.pdf

[1] Brownfields Utilization, Investment, and Local Development Act, S. 491, 113th Cong., 1st Sess. (2013).

[1] Sen. Sherrod Brown (D-OH); Sen. Mike Crapo (R-ID); Sen. Kirsten E. Gillibrand (D-NY); Sen. Mazie K. Hirono (D-HI); Sen. James M. Inhofe (R-OK); Sen. Carl Levin (D-MI); Sen. Jeff Merkley (D-OR); Sen. Brian Schatz (D-HI); Sen. Tom Udall (D-NM); and Sen. Sheldon Whitehouse (D-RI).

[1] 42 U.S.C. § 9601 et seq.

[2] Superfund Amendments and Reauthorization Act (SARA) (1986); Asset Conservation, Lender Liability, and Deposit Insurance Act (1996); Superfund Recycling Equity Act (1999); and Small Business Liability Relief and Brownfields Revitalization Act (2002).

[3] States must have spent at least 50 percent of the previous year's funding on site assessment and remediation to qualify.

[1] BUILD Act, *supra* at 2

[2] Congressional Budget Office, Cost Estimate, *S. 491 Brownfields Utilization, Investment, and Local Development Act of 2013* (Apr. 10, 2014), *available at* http://www.cbo.gov/publication/45244; "S. 491 would authorize the appropriation of $250 million annually over the 2015-2016 period for EPA's brownfields restoration activities . . . Assuming appropriation of the authorized amounts, CBO estimates that implementing S. 491 would cost $500 million over the 2015–2019 period."

[3] Environmental Protection Agency, EPA Brownfields Program Benefits, *available at* http://www.epa.gov/brownfields/overview/Brownfields-Benefits-postcard.pdf.

REOPENING THE MAINE INDIAN CLAIMS SETTLEMENT ACT OF 1980

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If you lived in Maine in 1980, then you would remember that, after a huge controversy, the State of Maine entered into an historic settlement resolving Indian claims to ownership of over half the state. In return for extinguishing all aboriginal title and land claims, the Indians received, among other things, $81.5 million—over $235 million in 2014 dollars. The laws memorializing the settlement identified the Penobscot Reservation as specific islands in the Penobscot River, and set up a unique state-tribe relationship with the Maine Tribes — unlike that with Indians in other states—subject to state laws and jurisdiction.

Or so we thought.

According to the Penobscot Nation, the settlement acts, in both state and federal law, apparently didn't settle either the boundaries of its reservation or what or whom it can regulate. The Penobscots now claim their reservation includes at least the entire 60-mile main stem of the Penobscot River from Indian Island northward to Medway, and that they can regulate both Indian and non-Indian use of the river and many of its tributaries and branches. The Penobscot Nation is pursuing this position through a lawsuit currently pending against the State of Maine in federal court and in water quality standards the Penobscot Nation has proposed for those waterways.

According to the Penobscots, the settlement didn't settle things after all.

Here's the best part—as taxpayers we are paying for the Penobscot Nation to do this. Our federal tax dollars fund their pursuit of these claims to unravel the settlement acts previously paid for in 1980. The federal government has given the Nation the money to sue the state, to the tune of about $146,000 so far. To add to that, the Nation recently requested $170,000 more from the federal Bureau of Indian Affairs to cover legal expenses. The exact amount the Nation has received to date is unclear because the federal government is not forthcoming with this kind of information or in revealing any other communications it has with Maine Indian tribes.

The state has for years been unsuccessfully pursuing Freedom of Information Act claims. One tidbit that eventually was revealed is the fact that the federal government and the Penobscot and Passamaquoddy tribes in Maine have entered into secret pacts—secret from, among others, the state—to support these tribes' positions.

In that vein, aside from this direct funding of the Penobscots' lawsuit against the state to unravel the settlement acts, our federal tax dollars are also paying for the federal government to act as a party in supporting the Nation's position in the pending litigation, which includes paying for professors' testimony as to what was in the minds of the Penobscots when they entered into treaties in the 18th century, which the Penobscots say is somehow relevant, because apparently the 1980 settlement acts don't count.

What does it mean if the Penobscots prevail? They will regulate non-tribal hunting, trapping, and fishing on the river. They will regulate municipal and other discharges into the river and some of its branches and tributaries, even though such discharges are already carefully controlled by the state and federal governments. Anyone who might paddle, fish, or otherwise use the Penobscot River in any way will now confront a new regulator telling them what they can or can't do, and how much it will cost to do it. And, unlike state regulators, the Penobscots won't even be obligated to listen to concerns about the impact of their regulations; non-tribal members will have no control or influence over those regulations. The Penobscots have even announced they intend to close the river to trapping, and to require a permit to access the river for any reason, making it their exclusive domain.

In terms of impacts on property transactions, for towns, and for owners of properties that border the river who thought those town boundaries and property

ownership ran to the middle of the river in accordance with Maine law—surprise! Those lands would now be owned and controlled by the Penobscot Nation. Prospective purchasers should be aware that if they are buying property that borders the Penobscot River or its tributaries and branches, title to those properties is suspect, and a new entity could be regulating discharges and other activities on and in those waters.

We represent a coalition of municipalities and other entities that have state and federal permits to use the river. As towns and companies with thin profit margins, the coalition members don't have the endless federal resources that the Penobscot Nation has. But they see the critical issues at stake here—issues that we thought were resolved decades ago. The state attorney general alone is battling against all the resources of the federal government, and she needs all the support she can get.

There's no question that the history of the treatment of Indians in this country includes tragic episodes of overwhelming resources used to renege on commitments previously made. It's ironic that the same scenario is happening again, with roles reversed.