

## CHAPTER FIVE

### EVALUATING ENVIRONMENTAL CONDITIONS AT BROWNFIELDS

Once individual brownfield properties have been identified as sites of interest for redevelopment, information about the nature and extent of contamination at those sites is needed in order to better understand the actual cleanup and redevelopment potential. Even in cases where the municipality will not be the party carrying out the site cleanup, municipal agencies often play a crucial role by facilitating or conducting the site assessment for eventual private cleanup and development. Information about site contamination is important in considering different reuse options for the property. The information will also help gauge potential cleanup liability under federal and state law, as well as the costs of cleanup, demolition, and site preparation. In some cases, an assessment will reveal that no cleanup is required. EPA has reported that about one third of the sites receiving federal funding for assessment have not required any cleanup.<sup>20</sup>

#### *Strategic Considerations for Evaluating Environmental Conditions*

► **Reviewing public records from municipal, state, or federal agencies.** Formal evaluation of a site can require considerable time and resources. An initial review of government records to find out what is already known about brownfield sites can help prioritize certain sites for potential redevelopment and eliminate other sites from consideration. The information obtained from agencies can also help focus more detailed evaluations conducted for those sites. Government records can shed light on the types of businesses that have operated at the site, as well as the kinds of chemicals used or wastes created at those businesses. Government records can also provide specific information about current site conditions.

Local agencies can provide a variety of relevant information, such as ownership and tax status, current and past zoning, and public utility service. In addition, there are several state and federal public databases that provide land use, contaminated site, demographic, wetland and other site-specific information. Members of the public can also request regulatory information about specific sites by submitting a written request at the state or federal levels. For more information on submitting a request under New Jersey's Open Public Records Act, see <http://www.nj.gov/dep/opra/>. For information about requests under the federal Freedom of Information Act, see [http://www.justice.gov/oip/04\\_3.html](http://www.justice.gov/oip/04_3.html).

---

<sup>20</sup> Natl. Assn. of Local Government Environmental Professionals and Northeast-Midwest Institute, *Unlocking Brownfields: Keys to Community Revitalization*, available at: <http://www.resourcesaver.com/file/toolmanager/CustomO93C337F65023.pdf>

### State and Federal Databases with Site-Specific Information

***I-MapNJ*** is an interactive GIS mapping tool that allows anyone to view GIS maps showing environmental, land use, and other information about specific properties or areas in New Jersey. Each property listed on the New Jersey SiteMart database includes a link to the location of property via I-MapNJ. (See <http://www.nj.gov/dep/gis/depsplash.htm>.) Another similar website, ***NJ-Geo Web***, allows users to view various mapped environmental layers for a specific location, including key items found in the I-MapNJ. (See <http://www.nj.gov/dep/gis/geoweb splash.htm>.)

***Known Contaminated Sites in New Jersey (KCS-NJ)***. Because the state's definition of a brownfield includes sites where there is only *suspected* contamination, a site listed on the SiteMart may or may not have actual contamination. In contrast, the KCS-NJ report is a listing of sites, by county and city, where contamination of soil and/or ground water has been detected at levels greater than the applicable cleanup criteria or standards. The list is organized into active, pending, and closed sites. (See <http://www.nj.gov/dep/srp/kcsnj/>.)

***Data Miner***. The NJDEP maintains a database that allows users to search for one or more sites that are currently regulated by NJDEP, and then to retrieve additional environmental information about regulatory activities connected with that site. (See [http://datamine2.state.nj.us/dep/DEP\\_OPRA/](http://datamine2.state.nj.us/dep/DEP_OPRA/).)

***Envirofacts***: The US EPA manages the Envirofacts website, which provides access to several EPA databases containing information submitted or compiled pursuant to federal air, water, and waste laws. Users can retrieve information by zip code or facility name. (See <http://www.epa.gov/enviro/>.)

***ATSDR Brownfield/Land Reuse Site Tool***: The federal Agency for Toxic Substances and Disease Registry (ATSDR, within the Centers for Disease Control and Prevention) has created this searchable database of brownfield properties, which provides information on former uses, institutional controls, and other site characteristics. See <http://www.epa.gov/r5brownfields/pdf/bf-sitetool-flyer-072109.pdf>. The tool is available as a CD packet that can be obtained from ATSDR by contacting the agency via email at [atsdr.landreuse@cdc.gov](mailto:atsdr.landreuse@cdc.gov).

► **Conducting an Environmental Assessment.** An environmental site assessment (ESA) is the formal tool used to determine the presence, type, and extent of contamination. These assessments are routinely conducted as part of due diligence prior to the sale of commercial properties and are often required by lenders. They vary in scope and cost, depending on the site conditions. The Association for Standards, Testing and Materials (ASTM) has developed a standard industry practice for conducting an ESA on commercial real estate. The standard practice is divided into phases. A *Phase I* ESA is the first step in identifying the presence or likely presence of contaminants, and generally involves a review of readily available information. A *Phase II* ESA, which involves sampling and testing, evaluates the recognized environmental conditions identified in the

Phase I ESA in order to provide sufficient information about the nature and extent of contamination to assist in making an informed business decision.<sup>21</sup>

New Jersey law establishes independent requirements for conducting an environmental site assessment. Sites falling under the jurisdiction of state cleanup laws must conduct a *preliminary assessment* (PA) and, if necessary, a *site investigation* (SI). A Preliminary Assessment is defined as “the first phase in the process of identifying areas of concern and determining whether contaminants are or were present at a site or have migrated or are migrating from a site. . . .”<sup>22</sup> A site investigation is “the collection and evaluation of data adequate to determine whether or not discharged contaminants exist at a site or have migrated or are migrating from the site at levels in excess of the applicable remediation standards. . . . developed based upon the information collected pursuant to the preliminary assessment.”<sup>23</sup> The PA/SI are similar to the ASTM Phase I and II, but require information and reporting formats as set out in state law and regulations.<sup>24</sup> Specifically, the NJDEP’s Technical Regulations stipulate that the PA must examine past operations at the site to determine the likelihood of environmental contamination.<sup>25</sup> Historical data must be reviewed, including aerial photographs, title documents, and fire insurance maps among others.<sup>26</sup> Based on this information, the PA report must present an opinion as to whether additional investigation or remediation is warranted. If an SI is required, the owner must determine through a rigorous sampling and analysis process if any contaminants are present at the site and remediate as required.<sup>27</sup>

New Jersey law requires due diligence in the form of a PA (and if necessary, an SI) in order to qualify for certain defenses to liability for those who purchase brownfields (see Chapter Eight). Additionally, New Jersey brownfields programs provide funding specifically for conducting PA and SI activities.

At the federal level, EPA brownfields grantees must meet the “All Appropriate Inquiries” (AAI) standard for conducting due diligence or a Phase I ESA of a property. EPA has adopted a regulation setting forth standards and practices for AAI and recognizes the ASTM Phase I standard as meeting the federal requirements.<sup>28</sup> Following accepted standards for conducting assessments can also help protect municipalities and other parties from potential liability under federal cleanup laws. At the federal level, the AAI requirements are applicable to any party who may potentially claim protection from CERCLA liability. In practice, the most important aspect of ASTM is the fact that it addresses CERCLA liability under AAI requirements.

---

<sup>21</sup> See ASTM E1527-05 and ASTM E1903-97, summaries available at: <http://www.astm.org/Standard/index.shtml>; see generally N.J. Institute of Technology, Brownfield Contaminated Site Investigation, at: <http://www.njit.edu/tab/managing/pre-development/contamination-investigation.php>.

<sup>22</sup> N.J.S.A. 58:10B-1; 13:1K-8.

<sup>23</sup> N.J.S.A. 58:10B-1; 13:1K-8.

<sup>24</sup> See N.J.A.C. 7:26E-3.1, 3.3.

<sup>25</sup> N.J.A.C. 7:26E-3.1.

<sup>26</sup> N.J.A.C. 7:26E-3.1(b).

<sup>27</sup> N.J.S.A. 58:10B-1; N.J.S.A. 58:10-23.11g (d), (e).

<sup>28</sup> See 40 Code Fed. Regs. Part 312. See also <http://www.epa.gov/swerosps/bf/regneg.htm>.

► **Hiring a Consultant.** A qualified consultant can assist in pursuing an environmental site assessment to identify the nature and extent of contamination, liability issues, and potential cleanup costs. As noted above, recipients of federal brownfields grants and those seeking federal liability protections must comply with the federal AAI procedures, which include using a qualified consultant. The EPA AAI rule requires that the person who oversees the AAI and who signs the written report must meet the definition of an environmental professional provided in the rule.<sup>29</sup>

In New Jersey, state law requires that Licensed Site Remediation Professionals (LSRPs) oversee site cleanup, but the state does not require use of an LSRP for carrying out “due diligence” (environmental site assessments) required to obtain liability protection as set out in the law.<sup>30</sup> While some firms specialize in site assessments, many now are full-service firms that are capable of conducting remediation activities as well.<sup>31</sup> Because LSRPs must report all discharges of hazardous substances, many developers do not elect to use an LSRP for initial environmental assessments.

### Sample RFPs for Selecting an Environmental Consultant

The following websites contain examples of Requests for Proposals and/or provide detailed guidance for developing an RFP for an environmental consultant on a brownfields redevelopment project.

- *New Jersey Institute of Technology*  
Sample Request for Proposals: Environmental Engineering Services to Perform Brownfield Assessments  
[http://www.njit.edu/tab/docs/sample\\_request\\_for\\_proposal.pdf](http://www.njit.edu/tab/docs/sample_request_for_proposal.pdf)
- *Smarte.Org*  
Writing a Request for Proposals for Environmental Site Assessment or Cleanup  
<http://www.smarte.org/smarte/resource/sn-rfp.xml;jsessionid=ekem6aolfr6a4>
- *U.S. EPA Region 10*  
Grantee Toolbox (“Procurement”)  
<http://yosemite.epa.gov/R10/CLEANUP.NSF/4c5259381f6b967d88256b5800611592/d94a4bcba5919e2088256f3400826e3b!OpenDocument>

<sup>29</sup> For more information on the required qualifications for an environmental professional under the EPA rule, see [http://www.epa.gov/brownfields/aai/HiringEP\\_Addendum\\_factsheet.pdf](http://www.epa.gov/brownfields/aai/HiringEP_Addendum_factsheet.pdf).

<sup>30</sup> N.J.A.C. 7:26C-1.4. The experience and other requirements for licensing under New Jersey law would qualify an LSRP as an “environmental professional” under the federal AAI rule. See N.J.S.A.58:10C-7; 40 C.F.R. 312.10.

<sup>31</sup> For practical tips on selecting an environmental consultant for a brownfields project, see Env. Law Inst., *A Guidebook for Brownfield Property Owners* 20, available at: [http://www.elistore.org/reports\\_detail.asp?ID=459](http://www.elistore.org/reports_detail.asp?ID=459).

► **Gaining Access to Privately-Owned Sites.** For properties that are privately owned, a municipality would need permission from the owner in order to investigate the site. This typically involves obtaining an access agreement from the owner.

There are also circumstances in which a municipality may wish to acquire title to brownfield properties that are privately owned, in order to advance cleanup and redevelopment efforts. In addition to negotiating purchase of a property, a city might have other options for properties that:

- Are vacant or underutilized and contributing to blight conditions. In this type of situation, a municipality may consider exercising eminent domain over brownfield properties in order to facilitate redevelopment. New Jersey law sets out the requirements for exercising eminent domain within designated redevelopment areas (see Text Box below).
- Present an imminent threat to public health or the environment. In situations where a property is posing an imminent threat to the public, municipalities may seek to exercise eminent domain under the state’s Eminent Domain Act.<sup>32</sup>
- Are delinquent in taxes. Such sites may be subject to foreclosure by the municipality, which could retain the property or assign it to an interested developer. New Jersey law governs the tax foreclosure process.<sup>33</sup>

In the 1990s, the city of Trenton began a major redevelopment effort in the distressed neighborhood surrounding the city’s Battle Monument site. At the outset, the city acquired all 120 properties that comprised the 11-acre site. The city purchased some of the sites, but most were acquired through tax foreclosure, while a few were condemned. The city assembled the properties into six sites that corresponded to the different phases of the redevelopment initiative – in addition to three housing developments, the initiative included a head start program, a health center, and a small park.<sup>34</sup>

Certain state financing programs can facilitate acquisition of brownfield sites. These include New Jersey Redevelopment Authority programs that are available to projects in NJRA eligible urban communities, such as the *Urban Site Acquisition Program* and the *Environmental Equity Program* (E<sup>2</sup>P) program. (See Appendix B.)

Under New Jersey law, there are certain liability protections for municipalities involved in brownfields redevelopment. A local government entity can qualify for a defense against liability to the State or another person when the local government “involuntarily” acquires contaminated land (*e.g.* via tax bankruptcy, tax delinquency, abandonment, condemnation or eminent domain) and also when it voluntarily acquires a site “for

---

<sup>32</sup> N.J.A.C. 20:3-1, *et seq.*

<sup>33</sup> N.J.S.A. 2A:50-1, *et. seq.*; N.J.S.A. 54:5-1--137.

<sup>34</sup> U.S. Conference of Mayors, *Reclaiming the Land, Revitalizing Communities: Brownfields Redevelopment Best Practices*, Vol. 2 (2007), available at: [usmayors.org/brownfields/library/brownfieldsbestpracticesvol207.pdf](http://usmayors.org/brownfields/library/brownfieldsbestpracticesvol207.pdf).

redevelopment purposes.” The liability protection does not apply if the local government caused or contributed to the discharge of the hazardous substance.<sup>35</sup>

### **Eminent Domain and Redevelopment Areas: Evolving New Jersey Law**

The 1947 New Jersey Constitution included a clause declaring that: “The clearance, replanning, development or redevelopment of *blighted areas* shall be a public purpose and public use, for which private property may be taken or acquired.” Article VIII, Section 3 (emphasis added). The 1992 Local Redevelopment and Housing Law is the most recent in a series of statutes that implements this constitutional provision authorizing municipal redevelopment of blighted areas. N.J.S.A. 40A:12A-5. The Redevelopment Law sets forth the requirements for municipalities to designate a “redevelopment area,” within which municipalities are authorized to take a number of actions to advance redevelopment, including the exercise of *eminent domain* over properties in certain circumstances. N.J.S.A. 40A:12A-8. In order to designate a redevelopment area, the municipality must demonstrate (and establish by formal resolution) that the property satisfies one of several criteria listed in the law. The criteria incorporate conditions such as substandard, unsanitary and dilapidated buildings; abandonment of buildings; and lack of proper utilization of the area due to condition of the title or diverse ownership of real property. N.J.S.A. 40A:12A-5. A number of recent court cases, beginning with *Gallenthin Realty Development Inc. v. Borough of Paulsboro*, have analyzed how these Redevelopment Law criteria are to be applied. See 191 N.J. 344 (2007). In the wake of the *Gallenthin* and other decisions, commentators have underscored the importance for municipalities of documenting carefully the bases for their decisions to designate a Redevelopment Area. See, e.g., Goldsmith & Beckelman, “What will Happen to Redevelopment in New Jersey when the Economy Recovers?” 36 RUTGERS LAW RECORD 314 (2009). Attorneys specializing in redevelopment law can assist municipalities in ensuring that Redevelopment Area designations meet the statutory criteria, consistent with recent state court decisions.

The decision whether to acquire an abandoned or inactive site raises a host of legal and financial issues for municipalities to consider and requires careful consideration of the risks and advantages to the municipality. New Jersey law in the areas of environment, redevelopment, and housing provides the context for making these decisions and is a complex and evolving arena. Thus redevelopment projects usually require the services of a lawyer who specializes in these fields.

### ***Resources for Evaluating Environmental Conditions***

Appendix B contains a listing of the key state and federal financial assistance programs that are available to fund various stages of brownfields redevelopment initiatives. These include the following resources that are available for assessing environmental conditions at brownfield sites:

---

<sup>35</sup> N.J.S.A. 58:10-23.11g(d)(4). If there is a “timely cleanup” taking place at the time that an eminent domain action is instituted, the municipal innocent owner defense is lost.

- *Hazardous Discharge Site Remediation Fund (HDSRF)*. This NJDEP and NJEDA program provides grants to public entities (municipalities, counties, redevelopment agencies) for PA, SI, and RI activities. The public entity must hold the tax sale certificate, have acquired the property through foreclosure or other similar means, or have acquired the property by voluntary conveyance for the purposes of redevelopment. These grants provide for 100% of the eligible costs and are capped at \$3 million per municipality per calendar year.
- *New Jersey Pre-Development Fund*. This fund supports pre-development activities in NJRA-eligible urban communities. The fund covers feasibility studies, architectural costs, environmental and engineering studies, legal and other related soft costs needed for development to proceed.
- *Brownfields Assessment Grants*. Through this program, the U.S. EPA awards grants to governmental entities for inventory, characterization, assessment, planning, and community involvement activities related to brownfield sites. Municipalities may apply for a site-specific grant or a community-wide assessment grant. The total request is limited to \$400,000, unless a waiver is requested due to the extent of contamination at a specific site.
- *Targeted Brownfields Assessments*. Under this direct assistance program, EPA (through its regional offices) directs a contractor to conduct environmental assessment activities that can include Phase I and Phase II assessments, and evaluation of cleanup options and/or cost estimates based on future uses and redevelopment plans.
- *Community Development Block Grant (CDBG) Program*. This U.S. HUD program provides an annual grant to municipalities on a formula basis and may be used for brownfields-related activities such as site assessment, cleanup, demolition, rehabilitation, and construction. Related programs, the *Section 108 Loan Guarantee Program* and the *Brownfields Economic Development Initiative (BEDI)* are available to finance redevelopment projects that increase economic opportunity for persons of low-and moderate-income or stimulate and retain businesses and jobs that lead to economic revitalization. Funds may be used for a range of activities, but applications are discouraged whose scope is limited only to site acquisition, assessment and/or remediation, where there is no immediately planned redevelopment.

### **State Technical Assistance Grants - A New Resource for Communities**

Under New Jersey's Site Remediation Reform Act, the NJDEP is directed to use funds from the Remediation Guarantee Fund to provide Technical Assistance Grants (TAGs) to nonprofit community groups. TAGs are provided for the purpose of hiring independent Licensed Site Remediation Professionals to assist the group in understanding environmental conditions at, and the remediation of, a contaminated site. The NJDEP has issued a guidance document to assist community groups and LSRPs in determining who is eligible for a TAG and how to apply, as well as understanding the eligible TAG activities and reporting requirements associated with a TAG. (See <http://www.state.nj.us/dep/srp/guidance/srra/>.) At the federal level, EPA manages a TAG program that provides similar assistance to communities living near Superfund sites. (See <http://www.epa.gov/superfund/community/tag/>.)