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Brownfields Voluntary Cleanup Programs

*New Opportunities for
Redeveloping Contaminated
Industrial Property*

Certain current environmental legislation and regulations are taking a new direction in addressing environmental contamination, resulting in new opportunities for those in the adhesives and sealants industry. In particular, these environmental laws are providing opportunities in the redevelopment of potentially or actually contaminated urban, industrial facilities known as "brownfields."

This article briefly outlines some problems that have developed as a result of strict environmental laws, the new brownfields programs that have emerged in response to these problems, and the potential benefits and pitfalls for those in the adhesives and sealants industry seeking to take advantage of these brownfields programs.

Because of strict environmental laws and regulations, most notably the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), brownfields have been abandoned by industry in a desperate attempt to

avoid being held liable for the often immense costs of cleaning up these contaminated sites. As a result, industry has located its operations in rural, undeveloped sites known as "greenfields" where it will not face this potential liability.

Industry's shift in locating its operations to greenfields and abandoning or avoiding brownfields, however, has resulted in several adverse consequences. It has contributed to both urban and contamination sprawl since once-pristine areas are now subject to environmental contamination. Moreover, the communities surrounding and once relying on the abandoned brownfield sites have become economically depressed as the industry providing an economic base has left the community. Finally, because there is no market for these sites, thousands of acres of real estate remain valueless and idle, and they pose even greater environmental and health hazards as the contamination at these sites remains in the ground or water.

These adverse environmental and economic consequences prompted the development of a new approach in addressing contaminated property. Today, 30 states have adopted voluntary cleanup programs encouraging the redevelopment of brownfield sites by reformulating cleanup standards and limiting the liability for those who redevelop these sites. In addition, the American Bar Association recently published *Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property* (hereafter *The Brownfields Guide*) written by Todd S. Davis and Kevin D. Margolis to assist industry and industry lawyers in taking advantage of state programs.

Illinois' Voluntary Cleanup Program

The state of Illinois provides a case study in what these 30 states have

done to reformulate cleanup standards applicable to brownfields. Illinois' voluntary cleanup program provides developers of brownfields with less-stringent cleanup standards than those applying to other sites. Rather than requiring the same level of cleanup regardless of what the site's future use will be, Illinois' voluntary cleanup program considers the future use of a site. As such, the Illinois voluntary cleanup program recognizes that a brownfield site that will be used for industrial or commercial purposes does not require the same level of cleanup as a site that will be used for residential purposes. Because the future use of the site, as well as the

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background levels of contamination surrounding the site, are considered in establishing the cleanup standards for each site, cleanup standards for brownfield sites being redeveloped for commercial or industrial purposes will often be less stringent and less costly to comply with than they would be under the traditional standards.

Once a brownfield site is cleaned under the voluntary cleanup program and a "No Further Remediation Letter" is issued by the Illinois Environmental Protection Agency, the developer, as well as lenders who acquire the property through foreclosures, will be released from

liability for further investigation and cleanup under the Illinois Environmental Protection Act.

Moreover, Congress recently limited lender liability under the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996. Now a lender will only be held liable under CERCLA if it has control "of the decision-making of the borrower's compliance with environmental laws" or has "responsibility for the handling or disposal of hazardous substances."

To further encourage ownership and redevelopment of brownfield sites, Illinois amended its Environmental Protection Act to eliminate strict, and joint and several, liability for parties subject to cost-recovery actions brought by the state. Now, a party can only be held liable for cleanup costs in a cost-recovery action brought by the state if he caused the release of hazardous substances. Additionally, such a party can only be held liable for his proportionate share. Previously, a party could potentially be held liable for the entire cleanup costs even if he did not cause the release of hazardous substances.

Primary Considerations

If one is interested in relocating her industrial or commercial operation and is considering redeveloping a brownfield site, she should first ensure that the site is eligible to participate in her state's program. Not all sites are eligible for participation in voluntary cleanup programs, and states have differing eligibility requirements. For example, in Illinois, the following sites are ineligible for participation in the voluntary cleanup program:

- Sites listed on the federal National Priorities List under CERCLA;
- Permitted treatment, storage and disposal facilities, or facilities subject to closure requirements under federal or Illinois hazardous-waste laws;

- Sites subject to federal or Illinois laws for underground storage tanks; and
- Sites undergoing investigation or remedial activities pursuant to a federal court or U.S. EPA order.

Another primary consideration is an assessment of the value of the site to be cleaned and developed. As *The Brownfields Guide* notes, no amount of environmental cleanup will redeem a site that has no intrinsic real estate value. Therefore, before investing in a site, determine if the site would have value if it were clean.

In assessing the value of a brownfield site, *The Brownfields Guide* identifies three factors to consider:

- Estimating the value of the property as if there were no loss of value due to environmental contamination;
- Valuing the property, taking into consideration the environmental contamination; and
- Calculating the difference between the two value estimates, yielding the loss in value due to the impairment.

In determining the first factor, estimating the value of the property as if there were no environmental contamination, it is important to consider the property in light of its surroundings. The estimation should be calculated as if the site were a similarly situated site without the contamination.

Similarly, in determining the second factor, valuing the property taking the environmental contamination into consideration, it is important to hire an environmental consultant who is an expert in contaminants and understands the nature and extent of the contamination to assist the appraiser in accurately estimating the value of the contaminated property.

Financing the Cleanup

After reviewing the above factors and considerations, one must then consider how to finance the cleanup. The costs of cleanup range from paying initial costs of site assessment to the actual cleanup of the facility. Several options

are available for financing cleanups.

First, lending institutions are beginning to feel more comfortable with financing the redevelopment of contaminated property because of the recent changes addressing lender liability. In addition, some state agencies will help finance the costs of the preliminary site identification and site assessment costs in the form of grants. Communities surrounding the site offer another potential revenue source because they have an interest in the redevelopment of the site.

Federal funding for the redevelopment of brownfields is also available. While the U.S. EPA has

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provided several \$200,000 grants to cities and communities to develop a planning process for brownfield remediation, the U.S. Department of Housing and Urban Development may provide a more direct and immediate source of funding for such projects. HUD's Community Development Block Grants may be used to finance the site assessments as well as the actual cleanup. *The Brownfields Guide* identifies several other sources of revenue and financing strategies to redevelop brownfields, as well.

Site owners potentially have the opportunity to have cleanup costs paid for by their comprehensive general liability (CGL) policies, as well. As soon as owners receive confirmation from a testing laboratory of contamination, they should immediately file claims with their insurance carriers. Such carriers would include those insurers that were covering the policy periods from the date the contamination was deposited to the present.

Another option for those site owners would be to contact an attorney skilled

in that subject area for the purpose of filing and handling those insurance claims. The two highest priorities in these claims are timeliness and proving the terms and conditions of the insurance policy. The latter is most easily accomplished through locating the policies themselves.

Tax Incentives

While states and the federal government are encouraging the redevelopment of brownfield sites by amending environmental laws to limit liability and reducing cleanup standards for industrial and commercial sites, there are also tax incentives to further encourage the redevelopment of brownfield sites. The costs for cleaning up a brownfield site may be deductible.

Under President Clinton's 1997 balanced-budget proposal that was recently enacted into public law, a taxpayer may elect to deduct cleanup costs he has incurred in abating or controlling hazardous substances at a "qualified contaminated site" in the year the taxpayer incurs those costs. A "qualified contaminated site" must fall within certain "targeted areas," and there must be a release or threat of release of hazardous substances. Moreover, the site must be used in the taxpayer's trade or business.

Previously, it was unclear whether a taxpayer could deduct cleanup costs in the year the costs were incurred or whether the taxpayer was required to capitalize those costs over the life of the property. This possible tax deduction provides yet another incentive to explore the option of redeveloping a brownfield site for one's operations.

Pitfalls of Redeveloping Brownfields

While there is a trend in environmental laws and regulation to encourage the voluntary cleanup and redevelopment of brownfields and many incentives are being offered, there remain some pitfalls of which one should be aware if considering redeveloping a brownfield site. Most importantly, a developer should understand that, while the

states are leading the way in amending state environmental laws and providing voluntary cleanup programs, the federal government has not amended the federal environmental laws and has not yet signed off on these state programs. This means

that even if one complies with her state's cleanup program and cleanup standards, she may still be sued by the federal government.

While U.S. EPA Region V has entered into a Memorandum of Agreement (MOA) not to sue redevelopers that

enter the voluntary cleanup programs and comply with the cleanup standards of the states within its region, this MOA does not encompass a private party's right to sue for cleanup costs. Therefore, a redeveloper can be subject to a law suit under federal law by an adjacent landowner or by a private party who purchases the property and subsequently uses the property for residential purposes, which requires higher levels of cleanup.

Conclusion

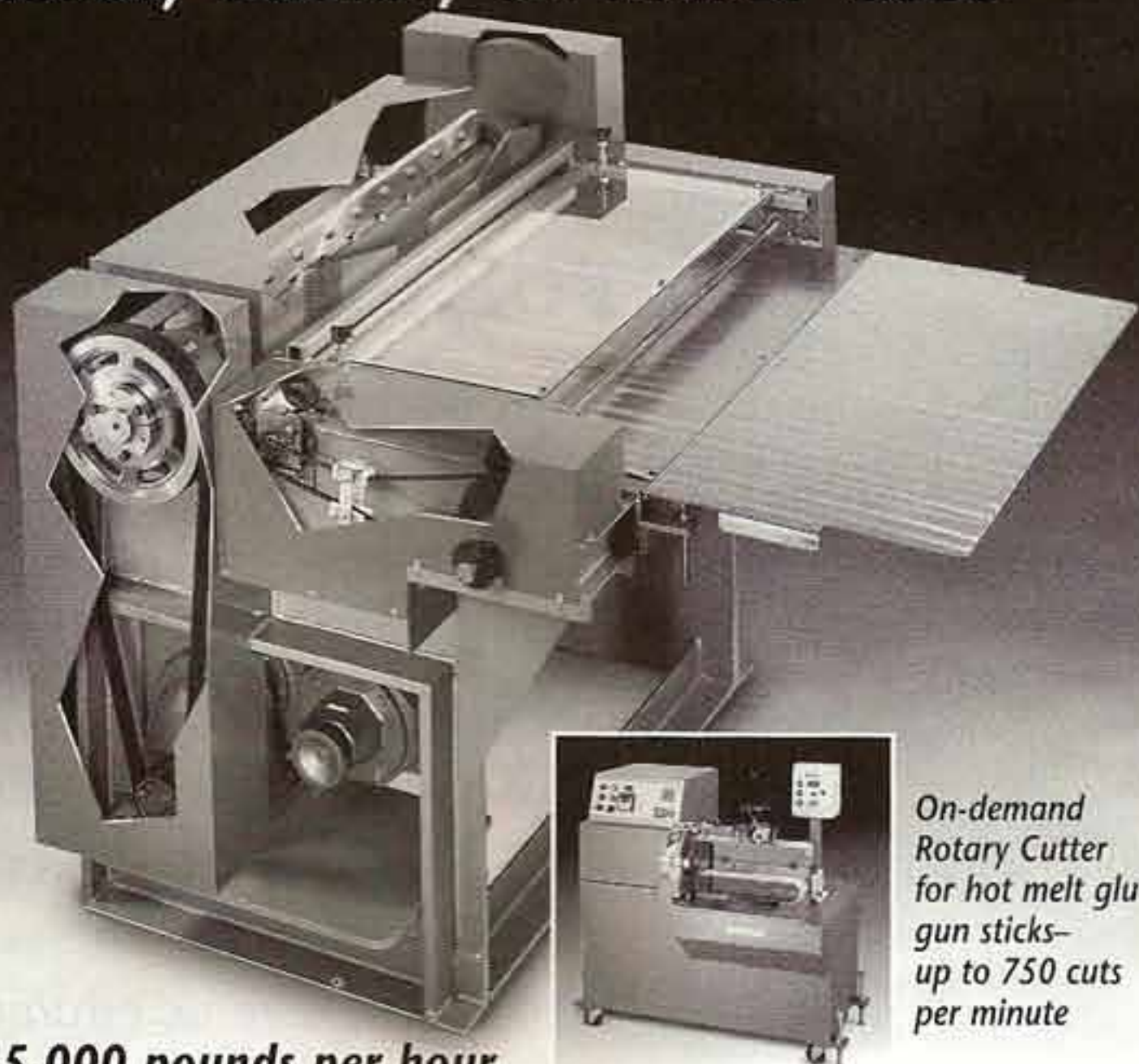
Recent changes in environmental laws are providing opportunities for those in the industrial and commercial industries to redevelop and make efficient formerly valueless brownfield sites. However, because these changes in the laws are recent and still evolving, there remain potential pitfalls that one should recognize. A person seeking to take advantage of these brownfield opportunities should contact an attorney skilled in this area.

If you are interested in reading more about brownfields, *Brownfields: A Comprehensive Guide To Redeveloping Contaminated Property* provides a detailed analysis of every aspect of obtaining and redeveloping a brownfield site. The guide can be purchased by contacting the American Bar Association Service Center, PO Box 10892, Chicago, IL 60611; 800-285-2221. The price is \$149.95. ●ASI

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