



Brownfields Policy and Research Newsletter

Volume 2, Number 8, February 12, 2010

Newsletter produced for Northeast-Midwest Institute by [Evans Pauli](#) at
[Redevelopment Economics](#)
consultants for brownfields and sustainable urban redevelopment

CONGRESS AND FEDERAL BROWFIELDS POLICY

1. [Pallone-Sestak-Grijalva Will "Push to Renew the Brownfields Program"](#)
2. [President's Budget Boosts EPA Brownfields Program by 23 percent](#)
3. [President's Budget Proposes Eliminating HUD BEDI, and HUD 108 is "Zeroed"](#)
4. [HUD Budget – New "Catalytic Competitive Grants Program"](#)

BROWNFIELDS, GREEN JOBS, ENERGY AND SUSTAINABILITY

5. [EPA Announces New Support for Sustainable Communities](#)
6. [Green Jobs on Brownfields Case Studies and Models](#)
7. [EDA's Green Jobs and Sustainability Initiatives](#)

BROWNFIELDS INNER CIRCLE



PHOTOGRAPH COURTESY OF
[CAMPBELL ENVIRONMENTAL GROUP](#)
BUSINESSES AND ORGANIZATIONS
THAT SUPPORT THIS NEWSLETTER
AND THE INSTITUTE'S BROWNFIELDS
WORK -
[E-MAIL US FOR MORE INFORMATION](#)

INITIAL FUNDERS GROUP:



8. [Capital Markets Partnership Makes the “Business Case for Sustainable investment”](#)
9. [Solar Special Improvement Districts: Financing Considerations](#)
10. [Arizona Strategy to Create Renewable Energy on Brownfields](#)
11. [“Raging Grannies” take on Electric Car Plant’s Brownfields Site](#)

GETTING PRODUCTIVITY FROM LANDFILLS

12. [Somerville Plans Tech Park on 160-acre landfill](#)
13. [EPA Recognizes Eight Models for Methane Gas Capture](#)

LOCAL GOVERNMENT ACQUISITIONS AND LIABILITY

14. [Court Decision Favors Eminent Domain-related Liability Protections for Local Government Acquisitions](#)
15. [NEMW publishes paper on Local Government Acquisitions](#)

LOCAL INNOVATIONS

16. [Indianapolis Using Legal Mechanisms, including Insurance Archeology, as Funding Declines](#)
17. [Atlanta BeltLine - TOD, Brownfields, and TIF](#)
18. [Worcester, Mass Medicinal Plant Facility](#)

UP-COMING CONFERENCES AND WEBCASTS – see right column

Feature Article

[Some States Offer Third Party/Toxic Tort Protection, But What Does it Mean? Readers Comments Invited on Draft Article.](#)

CONGRESS AND FEDERAL BROWFIELDS POLICY

BROWNFIELD EQUITY COMPANY

BOUTIQUE BROWNFIELDS FINANCING
THROUGH TAX CREDIT MONETIZATION



GOLDSTEIN
BROWNFIELDS
FOUNDATION

Redevelopment Economics

CONSULTANTS FOR BROWNFIELDS AND
SUSTAINABLE URBAN REDEVELOPMENT



**Cardno
TBE**

Shaping the Future
SUSTAINABLE BROWNFIELDS
REDEVELOPMENT SERVICES

PUT YOUR BROWNFIELDS
ORGANIZATION IN A LEADERSHIP
ROLE

YOUR BUSINESS/
ORGANIZATION LOGO,
AND LINK [HERE](#)

THIS NEWSLETTER REACHES
6,000 BROWNFIELDS

1. **Pallone-Sestak-Grijalva Will "Push to Renew the Brownfields Program."** Rep. Frank Pallone (D-New Jersey), Rep. Joe Sestak (D-Pennsylvania); and Rep. Raúl M. Grijalva (D-Arizona) have introduced [H.R. 4188 - Brownfield Cleanup Enhancement Act](#), a bill to reauthorize the EPA Brownfields Program. The bill, as currently drafted, is a simple reauthorization, increasing funding levels from \$200 million (original 2003 authorization level) to \$600 (FY 2015) for the 104(K) site assessment and cleanup program, and increasing funding from \$50 million (original 2003 authorization level) to \$120 million (FY 2015) for the 128(a) brownfields assistance to the states program. Representatives Pallone and Sestak's offices have indicated that the bill is a placeholder for a more comprehensive bill.

Rep. Pallone, in Plainfield, New Jersey for an event highlighting the recent \$1,000,000 brownfields grant to Plainfield, said he would "Push to renew the Brownfields Program." He added "At current funding levels, EPA can only fund about one third of the applicants for Federal brownfields grants; they have turned away approximately 800 applicants over the past two year. That is why I am working in Congress to increase funding for EPA's brownfields program. I will be introducing a Brownfields Reauthorization bill in the coming weeks that will significantly increase the funding level for this program over the next few years."

2. **President's Budget Boosts EPA Brownfields Program by 23 percent.** The President's FY 11 budget proposed boosting the EPA Brownfields Program by \$40 million, which is 23 percent over FY 10. The majority of the expanded funding goes to the popular site assessment and cleanup program for localities. The press release states, "EPA will focus its efforts on area-wide planning and cleanups, especially in under-served and economically disadvantaged communities." The EPA budget is available at: <http://www.epa.gov/budget/>. NEMW's chart for the historic funding of the EPA and HUD brownfields programs is [posed here](#).
3. **President's Budget Proposes Eliminating HUD BEDI, and HUD 108 is "Zeroed."** The HUD Brownfields Economic Development Initiative (BEDI) is again proposed for elimination in the HUD budget. The justification is that, "The program is relatively small and local governments have access to other public and private funds, including the larger Community Development Block Grant (CDBG), which can serve similar purposes."
4. **HUD Budget – New "Catalytic Competitive Grants Program."** The President's budget proposes \$150 million for a new Catalytic Competition Grants program which "uses the authorities of CDBG, but will provide capital to bring innovative economic development projects to scale to make a measurable impact." The competitive grants will fund strategic projects designed to change market conditions in distressed communities. Non-profit consortia, as well as local governments would be eligible.

BROWNFIELDS, GREEN JOBS, ENERGY, AND SUSTAINABILITY

PRACTITIONERS

UP-COMING CONFERENCES AND WEBCASTS

- NEMW 2nd Annual Revitalizing Older Cities Capitol Hill Summit, March 3rd, 2010. See [Registration and Summit Information](#)
- Council of Development Finance Agencies Annual Development Finance Summit - May 10-13, Portland. See [Registration Information](#)
- National Brownfields Association, [Big Deal Conference](#), March 23 – 24, 2010, Atlanta
- Sustainable Property Transactions – RTM conference, April 14-16, Philadelphia, see [conference brochure](#).

NEMW Brownfields Reports:

[Impacts And Benefits of Brownfields Redevelopment](#)

- [Environmental and Economic Impacts of Brownfields Redevelopment](#) - July 2008 (being updated – e-mail forheschall@nemw.org to add

5. **EPA Announces New Support for Sustainable Communities.** The U.S. Environmental Protection Agency announced three steps to support communities' efforts to provide their citizens' with economic opportunity while reducing impacts on the environment:
 - The creation of a new Office of Sustainable Communities to encourage communities to take an integrated approach in making environmental, housing and transportation decisions.
 - A new pilot grant program designed to help three states – New York, Maryland and California – use their clean water funding programs to support efforts to make communities more sustainable.
 - A pilot program to clean up and redevelop contaminated sites, known as brownfield sites, in coordination with communities' efforts to develop public transportation and affordable housing.

More information on the Partnership for Sustainable Communities:
<http://www.epa.gov/smartgrowth/partnership>
6. **Green Jobs on Brownfields Case Studies and Models.** Delta Institute's "[Growing the Green Economy](#)" website features three case studies of green job reuse of brownfield sites:
 - [Sustainable Reuse of a Vacant Warehouse for a Building Material Reuse Center](#)
 - [Sustainable Reuse of a Brownfield Site for a Small-Scale Movable Wind Farm](#)
 - [Sustainable Reuse of a Former Steel Site for Large-Scale Composting](#)

[Redevelopment Economics](#) has produced a summary these and other "[Models for Green Jobs and Renewable Energy Reuse of Brownfields.](#)"
7. **EDA's Green Jobs and Sustainability Initiatives.** EDA has delivered \$27 million in ARRA economic recovery funds to promote green businesses and jobs, which have been estimated to include 4,700 jobs created/saved jobs. See: [Cleaner, Greener: DOC Leads Efforts for Environmental Sustainability and Economic Growth.](#)
8. **Capital Markets Partnership Makes the "Business Case for Sustainable investment."** The Capital Markets Partnerships [Capital Markets Partnership](#) has issued a report that makes "[The Business Case for Commercializing Sustainable Investment](#)" The report cites data that indicates that "7 of 10 commercial occupants will pay a rental premium to occupy space in a green property and... 41% of (home) buyers – motivated by health and wellness– would pay a premium even if no payback was received."
9. **Solar Special Improvement Districts - Financing Considerations.** Emmett M. Kelly from Bricker & Eckler LLP gave a presentation on [Solar Special Improvement Districts](#) at the [Council of Development Finance Agencies](#) (CDFA) Ohio Financing Roundtable Recovery and Reinvestment Bond Finance Seminar. This presentation discusses the creation of a solar

new data)

[Brownfields Legal and Regulatory Issues](#)

- [Mothballed Sites and Local Government Acquisition](#) (October, 2008)
- [State and Local Non-Cash Tools and Strategies for Enhancing a Brownfield Project's Bottom Line](#) (October 2006)

[Brownfields Disadvantaged Communities Network](#)

- [Brownfields Redevelopment Toolbox for Disadvantaged Communities](#) (December, 2009)

[Brownfields, Sustainable Development, and Energy](#)

- [Energy Benefits of Urban Infill, Brownfields, and Sustainable Urban Redevelopment](#) (October, 2008)
- [Sustainable Urban Redevelopment and Climate Change - Briefing White Paper](#) (July, 2008)
- [Sustainable Urban Redevelopment as a Climate Change Solution](#) -- Brownfields News Newsletter (March, 2008)
- [Energy and Sustainable Urban Redevelopment – by the Numbers](#)
- [Removing Market Barriers to Green Development](#): with US EPA

energy special improvement district and the different incentive programs available to communities to create these districts.

10. **Arizona Strategy to Create Renewable Energy on Brownfields.** The Arizona Bureau of Land Management's (BLM) [Restoration Design Energy Project](#) was cited in a [Wilderness Society white paper](#) as a model for accommodating renewable energy on brownfields. BLM plans to analyze 42 sites totaling 26,000 acres, including landfills, abandoned mine lands, gravel pits, hazardous material sites, former airfields, trash dumps, and other isolated BLM lands in urban areas.
11. **"Raging Grannies" take on Electric Car Plant's Brownfields Site.** According to [this article](#), "A group of concerned activists is raising questions about one potential location for Tesla's future Model S electric car assembly plant. The Raging Grannies (are) asking why the electric vehicle company might build their future plant on a brownfield site in the SoCal town of Downey. The site was previously used for military and NASA research... (and the group contends that) numerous people who have worked at the location say that they're now suffering from chronic, debilitating illnesses possibly caused by toxic waste left behind by the government's research."

GETTING PRODUCTIVITY FROM LANDFILLS

12. **Somerville Plans Tech Park on 160-acre landfill.** Somerville, New Jersey signed a memorandum of agreement with the Somerset County Business Partnership to explore the possibility of turning a portion of the landfill into a center for life sciences and emerging technologies. See article in [NJ.com](#).
13. **EPA Recognizes Eight Models for Methane Gas Capture.** EPA's Landfill Methane Outreach Program (LMOP) Awards were given in three categories: Projects of the Year were given to the University of New Hampshire EcoLineTM Project, Rochester, N.H.; Jefferson City, Missouri Renewable Energy Project, Jefferson City, Mo.; The Altamont Landfill Resource and Recovery Facility, Livermore, Calif.; Ox Mountain LFG Energy Project, Half Moon Bay, Calif.; Sioux Falls Landfill & Poet LFG Pipeline, Sioux Falls, S.D. and the Winder Renewable Methane Project, Winder, Ga. The State Partner of the Year was given to the Kansas Department of Health and Environment, and the Community Partner of the Year was awarded to the Kent County Department of Public Works, Byron Center, Mich. More information on the awards, see: <http://www.epa.gov/lmop/partners/award/index.html>. For more information on the LMOP program: <http://www.epa.gov/lmop>

LOCAL GOVERNMENT ACQUISITIONS AND LIABILITY

14. **Court Decision Favors Eminent Domain-related Liability Protections for Local**

Region 5 and Delta Institute
(January 2009)

Incentives and Financing

- [Federal Program Summary Chart- Programs to assist Brownfields Redevelopment in Disadvantaged Communities](#) (December, 2008)
- [The Cleanup War Chest: State Bond Financing for Environmental Initiatives and Brownfields Redevelopment](#) (March, 2009)
- [Case Study of State Incentives for the State of Iowa](#) (January, 2008)
- [State Brownfields Tax Credits](#) – Summary chart (October, 2008)

Best Practices and Resource Guides

- [Petroleum/UST Brownfields Cleanups](#) (September, 2007)
- [Getting Started with Brownfields -- Key Issues and Opportunities: What Communities Need to Know](#) (April, 2006)

Government Acquisitions. In the case [Evansville Greenway and Remediation Trust v. Southern Indiana Gas and Electric Co.](#), the court ruled that the City of Evansville was not a liable party for contamination at a property the City acquired through a negotiated purchase under the threat of eminent domain. Evansville was claiming a CERCLA “involuntary acquisitions” exemption under 107(b) and 101(35)(A)(ii), but Southern Indiana Gas and Electric contended that the 101(35)(A) protections did not apply because the eminent domain process was not completed. The court sided with the City and held that the purchase did not have to be an acquisition completed through a judicial proceeding related to eminent domain.

15. **NEMW Publishes Paper on Local Government Acquisitions.** An article addressing the issue of how local governments can “[Overcoming Impediments to Public Agency Acquisition of Brownfield Sites](#)” has been published in *Environmental Practice*, volume 11, issue 04, pp. 311-319, [Cambridge University Press on-line](#). Evans Paull, Senior Policy Analyst at the Institute, authored the article. The article reviews liability, eminent domain, and site access issues, highlighting state reform measures and calling attention to the need for federal reforms to ease local government liability concerns.

LOCAL INNOVATIONS

16. **Indianapolis Using Legal Mechanisms, including Insurance Archeology, as Funding Declines.** An extensive review of Indianapolis brownfields issues by the [Indy Star](#) found dramatic declines in state funding for brownfields. Indianapolis, however, is still making progress, in part, because the City is using aggressive legal tools such as insurance archeology to recover cleanup costs. Their progress in recovery of \$5 million from Ertel Manufacturing was cited in [this article](#). The City of Evansville also uses insurance recovery in its brownfields strategy, as cited in [this article](#). Indiana law and legal precedents are particularly favorable to insurance recovery.
17. **Atlanta BeltLine - TOD, Brownfields, and TIF.** The [Atlanta Beltline](#) is a \$2.8 billion transit and transit-oriented development (TOD) redevelopment project that will shape the way Atlanta grows over the next 25 years and beyond. The project provides a network of public parks, multi-use trails and transit along a historic 22-mile railroad corridor circling downtown and connecting 45 neighborhoods directly to each other. According to the [Beltline’s brownfields web page](#) the project involves approximately 1,100 acres of brownfields that are slated to be remediated and redeveloped over 25 years, creating new opportunities for public spaces and economic development. The largest remediation effort currently underway is the construction of Historic Fourth Ward Park in the Old Fourth Ward neighborhood. This project is transforming 15 acres of former industrial sites and unregulated landfills into a new park that has already spurred new residential and commercial development adjacent to it.

Tax Allocation District (TAD) Financing: The BeltLine Tax Allocation District (TAD, Georgia’s

version of tax increment financing) will serve as the primary source of funding and will cover the majority of infrastructure costs. Bonds issued against increased tax revenue streams generated by new development within the 6500-acre TAD will fund approximately \$1.7 billion of the project. See the [project financing web page](#).

18. **Worcester, Mass Medicinal Plant Facility.** Worcester development officials have approved a plan to build a medical plant-growing facility on a brownfield site in the city. [This article in Boston.com](#) indicates PharmaSphere intends to build a 50,000-square-foot bioprocessing facility. Earlier this year, the \$16.9 million project received a key financing component when the City Council granted a \$2.5 million, eight-year loan to PharmaSphere. The project is expected to create about 60 full-time jobs.

Feature Article

Some States Offer Third Party/Toxic Tort Protection, But What Does it Mean? Readers Comments Invited on Draft Article

Summary

Many brownfields professionals bifurcate environmental liability into two aspects that involve two entirely different solutions. First, there is liability relative to governmental enforcement actions which is generally addressed through entering properties in state voluntary cleanup programs and by following the procedures prescribed to obtain federal “Bona Fide Prospective Purchaser” status. Second, there is third party and toxic tort (personal injury) liability which is generally assumed to be addressed only through private environmental insurance or “liability transfer.”¹

This article points out that some states offer third party liability protection through their voluntary cleanup programs (VCP) – these are generally divided into the following categories:

- States that offer general third party liability protection for innocent purchasers who are cleaning up under a state sanctioned plan – Connecticut, Georgia, and South Carolina;
- States that offer limited third party liability protection for a specific period of time or for particular activities – California, Missouri, and Massachusetts;
- States that offer some form of third party liability protection for public agencies and/or lenders – Wisconsin, Pennsylvania, New York, and New Jersey

Given that third party liability is generally regarded as one of the primary obstacles to brownfields investments, it is surprising that there has been no research on the efficacy of the programs in the

¹ One aspect of third party liability - contribution actions by responsible persons – is sometimes addressed in voluntary cleanup release language.

states that are pioneers in third party liability. Little is known, for example, about how the private sector has responded to these changes or whether the policies have been tested and upheld in court.

This article is termed “a draft conversation starter” because it is designed as a two-part proposition. The first part is this article, laying out what the author has found in state statutes relative to third party and toxic tort protections. The second part depends on reader response. If readers respond with valuable information – for example, related to the impact of these reforms or legal interpretation of the statutes cited, it will lead to an article that will be a more comprehensive examination of the issue.

With most states facing severe budget difficulties, there may be widespread interest in reform measures, such as third party liability protections, that could have a significant benefit without impacting state budgets.

Third Party Liability as a Priority

Third party liability protection is not a trifling matter. One analysis rated third party liability as the highest ranking impediment to brownfield investments. By employing a survey of 300 developers, analysts were able to rank the relative importance of various factors that impact progress success, and

² Kris Wernstedt, Lauren Heberle, Anna Alberini, and Peter Meyer, “The Brownfields Phenomenon: Much Ado about Something or the Timing of the Shrewd?” November 2004 • Discussion Paper 04–46, Resources for the Future.
<http://www.rff.org/rff/Documents/RFF-DP-04-46.pdf>

⁴ See: <http://www.cga.ct.gov/2005/ACT/PA/2005PA-00090-R00SB-00795-PA.htm>

⁵ See: http://www.scstatehouse.gov/sess116_2005-2006/bills/3650.htm

⁶ See: <http://www.mass.gov/dep/cleanup/bfhdout2.htm>

⁷ See: <http://www.ded.mo.gov/bcs/upload/BrownfieldApplication032309.pdf>

⁸ See: <http://www.nga.org/cda/files/0412BROWNFIELDSLAW.pdf>

⁹ Pennsylvania Act 3, 1995 – See: <http://www.palrb.us/pamphletlaws/19001999/1995/0/act/0003.pdf>

¹⁰ NJ PL 1997, chapter 278 (S39) page 39

¹¹ New York ECL 56-0509.

¹² Wisconsin Statute 292.26. See: http://www.dnr.state.wi.us/org/aw/rr/liability/muni_1.html#8; and Godfrey & Kahn, S.C, “Environmental Liability Mitigation Strategies for Local Public Agencies,” 2005, http://www.glc.org/wiconference/PDF/mw_913100_1.pdf.

¹³ See: <http://www.legis.state.wi.us/statutes/Stat0292.pdf>; 292.26 Civil immunity. Legislative intent confirmed in an E-mail from Darci Foss, Chief, Brownfields and Outreach, Wisconsin Department of Natural Resources, Bureau for Remediation and Redevelopment, to Evans Paull.

¹⁴ source

“Eliminating 3rd party liability risk” was the top ranked (although somewhat theoretical) factor.²

The private sector has responded to fill this gap, providing a variety of environmental insurance and risk transfer services. Needless to say, these private services come with a significant price tag. The governmental response that most brownfields professionals are aware of is state-subsidized and pooled environmental insurance programs. Massachusetts has been the leader in the former, and Ohio is one of a number of states trying the pooling approach.³ However, less recognized have been the efforts of a number of states to provide third party protection through their voluntary cleanup program liability releases. If states can lower liability barriers with the stroke of a pen rather than with major environmental insurance subsidies, then many states should be considering this area where only a few pioneers have gone, so far.

Definitions Needed. When one examines the language of these various efforts to redefine liability, one finds a confusing array of terms. To start with there could be confusion over what is meant by the terms “third party liability” and “toxic tort.” The author is not an attorney, but will advance a layman’s understanding. “Toxic tort” lawsuits are personal injury lawsuits related to exposure to contamination. “Third party liability” encompasses toxic tort but also includes contribution actions by responsible persons, property damage or property value diminution lawsuits, citizen suits challenging cleanup decisions, and any other legal actions brought by entities that are not party to the agreement between the state and the entity that is being granted the liability protection.

Another term sometimes cited in liability release language is “common law” or “common law equivalents.” References to liability protections will sometimes refer to “liability under state statutes and the common law equivalents.” Common law refers to law that is not based in statute, but rather is based on court case precedents going back to the English courts. Because third party/toxic tort actions are often brought under common law, these references are thought to confer toxic tort protection. However, attorneys have advised the author that legislative history would have to be reviewed in each state to determine legislative intent.

States with Broad Third Party Protection

Three states – Connecticut, Georgia, and South Carolina - appear to have broad third party liability protections, that is, if the party is innocent, unconnected to the responsible person (RP), and can demonstrate that the contamination occurred before their ownership, they are given broad third party liability protection.

Connecticut. The state adopted a 2005 amendment, the intent of which was made exceptionally clear by the title. The Connecticut third party protections begin after the completion and certification of the

cleanup; unlike the Missouri protections which are in place for the duration of site assessment and cleanup and then cease (see below).

CN Senate Bill No. 795, Public Act No. 05-90, "An Act Concerning Third-Party Liability for Contaminated Property."

Section 1. ... (a). No owner of real property shall be liable for any costs or damages to any person other than this state, 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, provided:

(1) The owner did not (cause or exacerbate the pollution)

(2) The owner is not affiliated with any person responsible for such pollution... and

(3) The Commissioner of Environmental Protection has approved in writing: (A) An investigation report ...; and (B) a final remedial action report... "⁴ (Emphasis added)

Georgia. The state's third party protections, adopted in a comprehensive 2002 reform bill, come into play upon the state's acceptance of the applicant's corrective action plan.

(a) Upon the director's approval of a prospective purchaser's corrective action plan, a prospective purchaser shall not be liable to the state or any third party for costs incurred in the remediation of, equitable relief relating to, or damages resultant from a preexisting release, nor shall the prospective purchaser be required to certify compliance with risk reduction standards for ground water, perform corrective action, or otherwise be liable for any preexisting releases to ground water associated with the qualifying brownfields property.

State officials have confirmed that legislative intent was to provide third party liability protection.

South Carolina. A 2005 amendment appears to offer broad third party liability protection, although it also introduces several new terms that may require legal interpretation. The protection is offered at the point of execution of a cleanup contract with a non-responsible party, and the protections also extend to "nonresponsible party's lenders, signatories, parents, subsidiaries, and successors." That are connected to the site, as follows:

Section 44-56-750 of the 1976 Code, SECTION 1:

"(H)(1) A nonresponsible party is not liable to any third-party for contribution, equitable relief, or claims for damages arising from a release of contaminants which is the subject of a response action included in the nonresponsible party voluntary cleanup contract provided for in this section."⁵ (Emphasis added)

States with Limited Third Party Protection

Another group of states offer limited third party protection for certain activities or for a specified period of time.

Massachusetts. The Massachusetts 1998 brownfields reforms provided liability protections for innocent parties (those that did not own the property at the time of the contamination), and the liability protection extends to property damage claims (one piece of third party/toxic tort). Liability protection granted by the Commonwealth also confers protection “*from claims by third parties for contribution, response action costs and property damage under (statute)... and property damage under common law.*”⁶ These extra liability protections are available statewide for properties that achieve a permanent cleanup or remedy, and they are available for projects that do not qualify vis-à-vis the permanent cleanup standard, if the project is located in certain distressed areas and meets certain job, affordable housing, or preservation criteria.

Missouri. Missouri law offers extra protections for projects determined to be eligible for the Missouri Remediation Tax Credit. The law protects the owner (tax credit recipient) from toxic tort while carrying out the remedial action, but the protection ceases upon completion of the state certified cleanup. The question would be whether actions taken during the protected period have any continuing protection.⁷

California. California’s VCP protections includes a reference to liability protection under “common law.” The definition of common law refers to “contribution, nuisance, trespass, and equitable indemnity.” There is a considerable case history relative to how the California courts have interpreted “equitable indemnity,” which is a liability apportionment mechanism relating to contribution actions, but also sometimes including toxic tort. However, a more in-depth legal analysis, as well as legislative history, would need to be undertaken before any definitive conclusions could be reached.⁸

States that Single Out Public Agencies or Lenders for Third Party Liability Protections

The following states do not offer third party liability protections for private VCP applicants but do offer particular protection for public agencies and/or lenders.

Pennsylvania. Pennsylvania offers added protection for lenders and public agencies by stating that these entities shall not be liable under the environmental acts and the “common law equivalents.” However, the lack of definition of “common law equivalents” leaves uncertainty as to legislative intent.⁹

New Jersey also makes reference to “*common law*” protections for public agencies that acquire

property; however, the lack of definition of the term, similar to Pennsylvania, leaves uncertainty as to legislative intent.¹⁰

New York. Under the Environmental Restoration Program (which provides financial assistance to publicly owned brownfields), localities are granted broad third party protections and the protections apply to successors and lenders. Going one step further, the state indemnifies localities and mandates that the State Attorney General defend localities in any legal challenge.¹¹

Wisconsin. The State “Remedial action” statute provides local government with “*civil immunity*” relative to cleanup liabilities both before and after, but not during, the period of time that the entity owns the property¹² (emphasis added). Wisconsin officials confirm that the intent of this language is to confer toxic tort protection to local government.¹³

Issues and Follow-up

Above the author identified the states that have various elements of third party liability protections. However, the real question is: what is the impact? And should other states consider emulating the states that pioneered these reforms?

Legal. One analyst calls attention to the fact that these statutes may “limit access to state courts,” but he implies that the protections are far less than ironclad because federal law grants no such immunity.¹⁴ A further worry is the possibility of legal challenges overturning or limiting the protections conferred in the state reforms. Further research needs to be undertaken to determine if any of these laws have been challenged, and to better define the issue of state vs. federal jurisdiction.

Impact on Developers and Investment – feedback needed. Are developers in these states more likely to undertake projects with liability risk? Brownfields research and literature would certainly suggest that third party liability relief will lead to a higher level of brownfields investments. However, legal uncertainties and other factors may mitigate the gains. Analysis and data, even if just anecdotal, are needed.

The author is planning to expand this article to include feedback from public and private stakeholders, particularly those with significant experience in the states listed above. Readers are invited to provide input on these issues.

Evans Paull is Principal at Redevelopment Economics (www.redevelopmenteconomics.com, ev@redevelopmenteconomics.com) and Senior Policy Analyst at Northeast-Midwest Institute (epaull@nemw.org). .

Contact: *For any and all issues related to this newsletter (subscribing or unsubscribing; feedback; submission of future articles or links, etc.) contact: Evans Paull, epaull@nemw.org.*

Northeast-Midwest Institute
50 F Street, Suite 950
Washington, DC 20001
[NEMW Brownfields Website](#)

Newsletter produced for Northeast-Midwest Institute by [Evans Paull](#) at [Redevelopment Economics](#) – consultants for brownfields and sustainable urban redevelopment

