



Managing Environmental Risk through Brownfield Programs When Buying or Leasing Real Property in the United States

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American environmental laws can be daunting for a foreign investor. For example, both federal and state laws can impose strict liability, which is liability regardless of fault or intent, on the owner or tenant of a contaminated property, which is sometimes called a “brownfield property.” Such liability could lead to the imposition of penalties, the obligation to perform cleanup work, the duty to reimburse another party for its damages, or the restriction of use of the property itself, even if the contamination occurred prior to the acquisition or lease of the property or if the contamination was not caused by the owner or tenant. However, there are various methods that an entity can use to limit or avoid such liability, as well as unexpected costs, time and expenses. A purchaser or incoming tenant of property that could be contaminated can protect itself by performing due diligence and availing itself of one or more of these methods.

One method frequently used to manage environmental liability is participation in a “Brownfield Program.” Brownfield programs provide liability protection and other benefits to a purchaser or new tenant of real property and have been adopted by several states. Generally, brownfield programs require that a party apply for acceptance either prior to or within a short time after acquiring a property interest. Both the property and the applicant must qualify under the particular criteria for that program. In the state of Georgia, for example: (1) the property must have a preexisting release of a hazardous substance but it cannot already be subject to cleanup requirements under other environmental laws; and (2) the applicant must not be a person who contributed to the contamination or have a close relationship with a person who contributed to the contamination, and the applicant must not be in violation of any environmental order or law. The applicant must agree to adequately assess the environmental conditions of the property, if not already done, and to address any releases that exceed regulatory clean up levels; the proposed assessment and remediation work are submitted in the application as part of a proposed corrective action plan. Finally, the applicant must certify to the agency that it has achieved its corrective action plan tasks after all the work is completed.

In return, an applicant will receive a “Limitation of Liability” under the brownfield law for all of the contaminants that it assessed and/or addressed. The limitation of liability is usually granted as soon as an application is approved, conditioned on the full performance of the corrective action plan. The limitation of liability becomes final upon approval of the applicant’s certification of compliance. The scope of a limitation of liability varies by state, but usually will include protection against any claim by the government for additional cleanup as well as by a third party, such as a neighboring property owner.

Participation in a brownfield program provides several other advantages as well. Remediation requirements can be reduced according to the specific intended use of the property and likely risks of exposure to human health or the environment. A residential use will require a more strict clean up than an industrial use; consequently, the cost to clean up property for an industrial plant will be much less than the costs to clean up property to be a housing development. A prospective purchaser or tenant will have a good estimate of how much it will have to spend and how much time it will take to address environmental problems before it acquires the property, enabling better budgeting and cost evaluation. A very important benefit is that the brownfield limitation of liability runs with the land, which means that the protections pass from the initial applicant to all subsequent owners and tenants of the property. Existing brownfield protection is a significant advantage when

marketing the property if and when the owner wants to sell or re-lease it.

As with the extent of liability protection, other brownfield benefits can also vary state by state. Using the Georgia program as an example, a purchaser or new tenant in the brownfield program is excused from having to address any groundwater contamination (which is often the most costly type of remediation work), and the corrective action plan can be performed autonomously, only requiring governmental involvement when the entity submits its final certification of compliance with the corrective action plan. Not being required to obtain governmental approval at various milestones will save the owner or tenant significant time in completing the project.

Many states also offer tax benefits. The Georgia brownfield program incorporates property tax abatements up to the amount of eligible brownfield costs incurred. Eligible brownfield costs include almost all expenses related to assessing the property, working with consultants, cleaning up the property, preparing and submitting all required documentation and finalizing the limitation of liability; legal fees and true construction costs are not eligible. In essence, a new property owner or tenant can get reimbursed for all of its environmental costs through tax savings and still recoup the brownfield liability protection, limitation and certainty of expenses and time, and marketing benefits for resale.

In sum, a potential purchaser or tenant might want to give a contaminated property a second look. Such an investment may yield greater returns than locating on a clean property.

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