"BROWNFIELDS" – VARYING DEFINITIONS, COMMON CONCERNS

Most property owners, buyers, sellers and developers are familiar with the term "brownfields," but the term can have different meanings and bring with it a host of concerns depending on their perspective (newfound opportunity or potential liability). Fortunately, insurance can play an important role in insulating the opportunity or limiting the concerns.

The U.S. EPA defines brownfields as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of hazardous substances, pollutant, or contaminant." Others more simply define it as *real estate with environmental personality*.

Generally speaking, real property is viewed as a valuable asset; however, most brownfields remain unused or underused because of real or perceived contamination and its associated liabilities. The two major concerns are potential legal liability/toxic tort scenarios and potential remediation expenses/cleanup costs.

KEY ENVIRONMENTAL EXPOSURES

Brownfield sites can pose a range of exposures for owners, buyers, seller, developers and even lenders and investors, including:

- **Third-party claims** – Pollution-related property and/or bodily injury damages
- **New issues** – Discovery of new or additional contamination/pollution conditions
- **Government "reopeners"** – Regulatory determination of more stringent cleanup requirements (virtually no environmental cleanup is ever unequivocally "closed" as states/regulatory authorities rarely ever issue an unconditional release of liability); several "reopener" contract qualifiers allow the government to reassess a site previously deemed closed/clean
- **Cost overruns** – Exceedance on cleanup projects
- **Contractor-caused pollution** – Creation of new pollution from activities of contractors
- **Financial defaults** – Bank/financial institution exposed if borrower defaults due to environmental liabilities
- **Consequential losses** – Business interruption or loss of tenant revenue resulting from pollution incidents

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REAL SOLUTIONS & RISK MANAGEMENT STRATEGIES

An increasingly attractive alternative to the more traditional approaches (such as price discounting, indemnifications, escrows and hold-back provisions) is to transfer these risks into the environmental insurance market. For a single fixed premium, environmental insurance can be used to protect against the risk of unexpected future losses – providing more certainty and comfort to all parties. Effective risk management of environmental exposures during brownfield redevelopment may also entail an integration of contracting strategies coupled with insurance solutions. A growing market of firms, primarily from the environmental engineering services sector, is pursuing opportunities to help contaminated property owners resolve liability issues through such transfers.

The fundamental environmental exposures identified in the preceding section can be addressed with appropriately structured insurance programs. These insurance solutions can be introduced to virtually any transaction structure. A few of the key insurance products are detailed below.

POLLUTION LIABILITY INSURANCE

The unknown and future environmental exposures associated with brownfields can be effectively managed with a Pollution Legal Liability policy. These policies can be structured to address unknown/unanticipated pre-existing (historical) and/or new (operational) pollution conditions. "Known" conditions that have been properly delineated and previously remediated can often be incorporated.

INTERESTING BROWNFIELD FIGURES/FACTS

- No one knows exactly how many brownfields there are but estimates range from 400,000 to more than 1,000,000 in the U.S. alone.
- As much as $2 trillion of real estate may be undervalued due to the presence of contamination.
- Environmental hazards are estimated to be present at 20-50% of all industrial real estate properties.
- Brownfield Funding Sources available at the federal, state and local level – Grants, matches, loans, tax incentives.

Source: 2010 National Brownfields Association

REMEDIATION COST CAP INSURANCE

While there has been a significant restriction in market appetite and limited scenarios in which a carrier will consider writing, a cost cap or stop loss policy is designed to pay for unanticipated, additional remediation project costs once they have exceeded original estimates. Such a cost overrun might result from a variety of sources including the discovery of additional contamination, underestimation of base costs or changes in regulatory requirements.

BLENDED INSURANCE PROGRAMS

It is possible to transfer both known cost items (i.e., identified remediation obligations) and the associated unknown risks (for example, potential overrun) using a combination of pre-funding and conventional cost cap insurance. These so-called blended programs are typically combined with a Pollution Liability policy to cover third-party liability claims. In essence, insurers will charge a premium to fund the predicted remediation expenditure with an additional charge to transfer the cost overrun and timing risks. Since they are future costs, the estimated remediation costs are discounted to an appropriate net present value.

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