

# Brownfields to Green: A Proposal for Redevelopment of Brownfields Property for Natural Resource Value

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There are many sites in the United States that are blighted or undeveloped because of actual or perceived environmental contamination. Often, these sites are “orphans,” without existing owners having the wherewithal to undertake responsibility for environmental remediation. Federal and state laws developed since the 1980s placed strict responsibility for remediation costs on many types of parties associated with such sites, including subsequent owners with no involvement in the acts that caused the contamination.<sup>1</sup> Consequently, even where such sites would otherwise be attractive for redevelopment, the fear of becoming responsible for expensive and time-consuming remediation limited the willingness of buyers, investors, lenders, and end-users of such property to become involved.

As explained more fully below, recent legislation has provided some mechanisms for incentives to undertake control of certain types of sites and to accomplish cleanup and redevelopment. One such approach consists of “brownfield” programs designed to facilitate remediation of environmental issues and to encourage redevelopment of the properties. Federal and state brownfield programs provide incentives through a variety of grants, tax incentives, liability protections, partial payment or reimbursement of site-rehabilitation costs, and other methods. The U.S. Environmental Protection Agency (EPA) estimates that there are over 450,000 such sites in the country.<sup>2</sup> This is probably an underestimate.

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*Authors' Note: The topic of this Comment will be explored more fully as part of the Fourth Annual ELI-Stetson Wetlands Workshop and webinar, to be held on November 3, 2016, at the Stetson University College of Law in Gulfport, Florida.*

1. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405 (among other things, CERCLA imposed cleanup liability on a broad range of parties with very limited defenses).
2. U.S. EPA, *Brownfield Overview and Definition*, <http://www.epa.gov/brownfields/brownfield-overview-and-definition> (last updated Aug. 3, 2016).

Many brownfield properties include areas of altered aquatic ecosystems, such as wetlands and streams, or may be located in the midst of important wetland or upland habitat areas for protected plant and animal species. Of course, during site-rehabilitation efforts, the protection and restoration of such areas must be taken into account and properly permitted, including federal, state, and local approvals. For example, the removal of contaminated sediments in stream beds or adjacent wetlands is often a part of site rehabilitation.<sup>3</sup>

Often, brownfields incentives are provided in connection with redevelopment of the brownfield site into a variety of land uses, including commercial, retail, office, residential, and other end uses. We think, however, that when the remediation of contaminated property is undertaken in areas where natural resource components could exist, significant economic and ecological potential may be available through the development of wetland mitigation or conservation banks.<sup>4</sup> Such banks would provide not only additional environmental benefits, but also an alternative profitable use for the remediated sites that could potentially bring a new type of developer to the brownfield program.

The policy goals of brownfield redevelopment are consistent with those of mitigation banking in that under both programs, the environmentally impacted property is reused in an effective manner that is beneficial to the environment, the economy, and society. This Comment provides some practical thoughts and discussion as to how the two programs can be used together to maximize state and

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3. Federal approval for remedial excavations in jurisdictional areas in some cases may be simplified by the application of Nationwide Permits (NWPs), including NWP 38, which applies to certain limited remediation projects, as described in 33 C.F.R. §330 (2008). Many states have similar simplified approvals for site rehabilitation of a certain scope; *see, e.g.*, FLA. ADMIN. CODE r. 62-330.635 (2013) (larger projects will require the full range of dredge and fill permitting procedures and approvals).
  4. The idea could apply to the development of mitigation banks for offset of impacts involving a variety of habitats. For purposes of this discussion, we will focus on aquatic resource mitigation banks.

federal benefits to encourage and facilitate some presently underutilized effective reuses of contaminated or potentially contaminated properties. We would like to explore a few practical thoughts on how both of these ideas can be addressed.

## I. Background of Brownfield Programs

The brownfield program was initially started by EPA in 1993. At that time, it consisted of community grants to stimulate redevelopment. In 2002, the U.S. Congress acted, in part, to relieve some of the environmental impediments to redevelopment of many urban sites with environmental issues. EPA was provided specific statutory authority to address Brownfields with the enactment of the Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Act).<sup>5</sup> Among other things, the statute authorized a grant program, similar to the one EPA had established administratively under its general Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authority in the mid-1990s. The stated purpose of the Brownfields Act was “to promote the cleanup and reuse of brownfields, to provide financial assistance for brownfields revitalization, to enhance State response programs, and for other purposes.”<sup>6</sup>

### A. Federal Incentives

The Brownfields Act resulted in a variety of grants that are available today on an annual basis through the brownfield program: assessment; revolving loan fund (RLF); cleanup; areawide planning (AWP); environmental workforce development and job training; and research, training, and technical assistance.<sup>7</sup> Funding opportunities are primarily for communities, states, tribes, and other stakeholders; however, cleanup grants may be obtained by private parties. The grants are highly competitive and the process from application to use of funds may take over one year to complete. The grant program and its various processes are summarized in the tables below.

### B. State Incentives

In response to the federal program, many states have developed their own brownfields incentives. These incentives vary by state and may provide a far greater financial benefit than the federal grant programs. The incentives are typically provided after redevelopment and cleanup dollars are spent on a certain property. The incentives may include liability protections for the buyer and lender, no-interest or low-interest loans, tax incentives that may be used to offset

cleanup costs, job creation bonuses or tax credits, and other incentives.<sup>8</sup>

In many states, including Alabama, Colorado, Florida, Georgia, North Carolina, and South Carolina, tax incentives for developers of brownfield sites provide significant funding alternatives for site cleanup. Some states provide third-party liability protection for qualifying developers of brownfield properties. The state incentives, and requirements to obtain the incentives, are highly variable by state, but in many cases provide greater opportunities for site cleanup and reuse than the federal grant program. Further, the timing for acquiring state incentives is more consistent with typical redevelopment schedules than the timing at which EPA funds may become available.

## II. Background of Aquatic Resource Compensatory Mitigation Banking

The concept of “mitigation” for impacts to wetlands originated in the Clean Water Act (CWA) in 1972 and its associated rules, regulations, and judicial interpretations since that time.<sup>9</sup> CWA §404 establishes regulation of the discharge of dredge or fill material into waters of the United States.<sup>10</sup> While EPA is responsible for protecting water resources, the permitting program of §404 is carried out by the U.S. Army Corps of Engineers (the Corps), which operates through 38 districts across the United States.<sup>11</sup> In 2008, mitigation processes and procedures were given a regulatory framework by federal rule.<sup>12</sup> The rules set out requirements for the establishment of compensatory mitigation based on replacing lost ecosystem functions within the same watershed and ecosystems, generally, where impacts occur.

### A. Establishing a Mitigation Bank

Compensatory mitigation is accomplished through three primary methods: (1) the permittee establishing mitigation either at the impact site or elsewhere in the local watershed; (2) payment to an in-lieu fee program that has been established to collect fees and then implement mitigation; and (3) the purchase of mitigation credits from a mitigation bank. Based on research of mitigation projects and the fact that mitigation banks provide resource compen-

5. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118 (2002).

6. *Id.*

7. U.S. EPA, *Types of Brownfields Grant Funding*, <https://www.epa.gov/brownfields/types-brownfields-grant-funding> (last updated Aug. 3, 2016).

8. For example, in Florida, those who accomplish site rehabilitation pursuant to an agreement with the supervising agency at a site that has been designated as a brownfield by the local government under the state program can obtain significant tax credits for certain eligible costs. Florida Dep't of Env'tl. Protection, *Voluntary Cleanup Tax Credit*, <http://www.dep.state.fl.us/waste/categories/vctc/default.htm> (last updated July 13, 2016); *see also* Florida Dep't of Env'tl. Protection, *Economic Incentives*, [http://www.dep.state.fl.us/waste/categories/brownfields/pages/economic\\_incentives.htm](http://www.dep.state.fl.us/waste/categories/brownfields/pages/economic_incentives.htm) (last updated Oct. 21, 2015).

9. Federal Water Pollution Control Act, 33 U.S.C. §§1251-1387.

10. *Id.*

11. U.S. Army Corps of Engineers, *Regulations and Guidance*, <http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/> (last visited Aug. 22, 2016).

12. Compensatory Mitigation for Losses of Aquatic Resources, 33 C.F.R. §§325, 332 (2008); 40 C.F.R. §230 (2008).

### Summary of Brownfields Program Accomplishments as of March 1, 2016

Performance Measure	FY2016 Targets	FY2016 Accomplishments	Cumulative Program Accomplishments
Properties Assessed	1,400	582	23,932
Jobs Leveraged	7,000	2,781	108,924
Dollars Leveraged	\$1.1 billion	\$411 million	\$20.96 billion
Acres Made Ready for Anticipated Reuse	5,500	4,530	59,149

Source: U.S. EPA, *Brownfields Program Accomplishments and Benefits*, <https://www.epa.gov/brownfields/brownfields-program-accomplishments-and-benefits> (last updated Aug. 3, 2016).

### Types of Grant Funding

Grant	Amount	Application
<b>Assessment Grant</b> (Three-year grant cycle) Applicant must own land	Up to \$200,000 with a waiver for \$350,000 Up to \$600,000 for coalitions (three applicants or more)	Inventory, characterize, assess, and conduct planning and community involvement related to Brownfield sites.
<b>Cleanup Grant</b> (Three-year grant cycle) Applicant must own land	Up to \$200,000 per site	Cleanup of hazardous substances or petroleum products—requires 20% cost share
<b>Revolving Loan Fund</b> (Five-year grant cycle) Single recipient or coalition	Up to \$1,000,000	Provide funds to capitalize a revolving loan fund that provides loans and sub-grants to carry out cleanup activities—requires 20% cost share
<b>Job Training Grant</b> (Three-year grant cycle)	Up to \$200,000	Allows nonprofit and other organizations to recruit, train, and place predominantly low-income and minority, unemployed, or underemployed people living in areas affected by solid and hazardous waste
<b>Areawide Planning Grant</b> (Offered every other year)	As funding is available—typically \$200,000	Funding for research, planning, and development of implementation strategies

Source: U.S. EPA, *Types of Brownfields Grant Funding*, <https://www.epa.gov/brownfields/types-brownfields-grant-funding> (last updated Aug. 3, 2016).

sation prior to the sale of credits, the 2008 federal rule established a preference for mitigation banks. A strong, market-based mitigation banking industry has developed. Florida was ground zero for mitigation banking in its earliest development.<sup>13</sup>

#### B. Connection of Brownfield Redevelopment and Mitigation Banking

From the viewpoint of the user of mitigation credits, mitigation requirements are the last step in a complex regulatory structure where a party seeking permits to impact the regulated resource must compensate for the loss of that resource by purchasing credits. However, from the standpoint of the operator of the mitigation bank (the Banker), the development of a mitigation bank represents a form of property development where the profits derived are from the sale of mitigation credits. We believe that there are properties where the brownfields site redevelopment options could well include a mitigation bank for wetlands or other habitats.

### III. Brownfield Sites to Wetland Mitigation Banks

There are many contaminated sites eligible for brownfields program benefits where the habitats involved could be restored to native systems worthy of use in mitigation banking. Possible sites include property impacted by mining, federal defense operations, or industrial activity. Mitigation banking projects would move such sites beyond the mandated cleanup activities to the reestablishment of functioning ecosystems in keeping with the long-term goals of the mitigation bank.

Development of a mitigation bank on an uncontaminated site often includes increasing wetlands value by restoring surface contours, such as in the restoration of agricultural lands impacted by drainage systems, crops, or livestock. As with uncontaminated sites, land development activities on contaminated sites may alter natural landscapes and impact wetlands. Brownfields remediation includes the excavation of contaminated soils or removal of solid wastes. In many cases, the areas where solid wastes were disposed in the past were “low-lying.” These areas are frequently jurisdictional wetlands that have been impacted by waste disposal or other environmental releases. In such

13. See ROYAL C. GARDNER, *LAWYERS, SWAMPS, AND MONEY* 111-163 (2011); see also Florida Dep't of Env't. Protection, *Mitigation and Mitigation Banking*, [http://www.dep.state.fl.us/water/wetlands/mitigation/mitigation\\_banking.htm](http://www.dep.state.fl.us/water/wetlands/mitigation/mitigation_banking.htm) (last updated Apr. 12, 2016).

cases, the “lift” generated by removing wastes or contaminated soil and restoring surface elevations, hydrology, and vegetation could provide wetlands credits if the proper bank permits are obtained in concert with the site rehabilitation.<sup>14</sup>

Under this approach, the benefits of applicable brownfield programs would be available to the Banker as the redeveloper of the brownfield site.<sup>15</sup> Brownfield benefits vary with jurisdiction and are triggered only by meeting various specified criteria. If the criteria are met, benefits can include tax credits or other financial benefits offsetting site-rehabilitation costs, liability protections, and other benefits.

There are challenges to be overcome in coordinating brownfields site rehabilitation with establishment of a mitigation bank. First, as with any bank, all of the necessary business and financial criteria for the proposed bank must be met, just as any other development must be based upon projections for a profitable project. There must be a market for the credits in the watershed based on many complex factors, including the expected development in the watershed, the types and amounts of wetlands expected to be impacted, the types of habitat and credits that can be generated by the proposed project, and the timing of the availability of credits with the timing of anticipated development.

Second, there may be complex issues raised by the need to satisfy the requirements of site-rehabilitation regulations and the associated agencies. There may be the possibility of conflict between these programs’ requirements and very different design requirements for approval of a mitigation bank. Not the least of the issues may be in timing of the approvals by agencies with different needs and goals.

Third, where some contamination may remain under applicable remediation regulations, there could be unanticipated, legitimate questions regarding ecological effects of remaining contamination: For example, where groundwater contamination remains but is acceptable for closure of the brownfield site based on “risk-based” closure criteria.<sup>16</sup> The effect of such a circumstance upon mitigation bank permitting and the determination of the credits awarded

calls for additional investigation. In addition, cleanup target goals for sediment may be more restrictive than cleanup target goals for soil, which in many cases may be addressed through application of engineering and institutional controls. The more restrictive goals may define the level of site cleanup and increase cleanup costs. This may constrain the types of sites that may be suitable for mitigation banking based on the contaminants.

Finally, there will be a need to coordinate long-term controls on the use of the property. There may well be circumstances where institutional controls are placed on the property to manage environmental risk and there will be a conservation easement in connection with long-term care and agency oversight of the bank.<sup>17</sup> In many circumstances, these controls need not be incompatible, but must be coordinated. For example, the conservation easement will need to accommodate site access for any monitoring tasks required by the site closure. Certainly, where the institutional control forbids groundwater use or residential development, the goals of the programs and associated land use controls are completely aligned.

These factors strongly suggest that a successful project will require close coordination and interdisciplinary management by the Banker-developer to work between the two programs, with consultants of different experience and agency personnel of quite different expertise. Individuals who do not often communicate between their different missions must work together to achieve what could be an increased overall environmental benefit.

#### IV. Conclusion

Brownfield sites could benefit greatly from the approach outlined in this Comment. There may well be sites that, due to their location or local economic condition, are not attractive or suitable for traditional redevelopment but could be profitable when redeveloped for mitigation banking. Consequently, orphan sites, which would not otherwise be remediated, could become feasible economically for redevelopment. In addition, more development interests could be brought to brownfields redevelopment and more mitigation credits could be made available to offset wetlands impacts.

14. Of course, all of the regulatory requirements for the establishment of a mitigation bank under federal and state law would have to be met, including operational and maintenance planning, financial assurance, mechanisms for approvals and release of credits, and other requirements. *See supra* note 11.

15. This approach assumes that the Banker is a suitable beneficiary for both programs under the applicable law; for example, the Banker entity could not be a party that is responsible for a release under the applicable law in such a fashion as to be disqualified.

16. At the federal level, institutional controls may be imposed to limit the risk of exposure. U.S. EPA, *Superfund: Institutional Controls*, <https://www.epa.gov/superfund/superfund-institutional-controls> (last updated July 25, 2016). In Florida, closure under Risk Management Options Levels II and III can include institutional and engineering controls. FLA. ADMIN. CODE r. 62-780.680 (2014).

17. 33 C.F.R. §332.7(a) (2008).