

PRIVATIZED CLEANUPS: REDEVELOP WITHOUT DELAY

Developers in some states can benefit from new privatization programs that expedite state-mandated cleanups.

Russell Fitzpatrick and James B. O'Brien

Over the past decade, much has been made of the brownfield concept — that of redeveloping former industrial properties, either with or without the incentive of tax benefits or municipal grants. In the Northeast, this concept continues to grow in interest due to the increasing cost of real estate, the prime location of former industrial properties, and their availability. These factors, combined with the better definition of environmental regulations and risk assessment parameters, have enabled many transactions to occur. As an added incentive to redevelop brownfields in the Northeast, several states have privatized, to varying degrees, the actual cleanup process.

Historically, environmental remediation has followed an undefined process that was filled with uncertainty. This process involved negotiating with individuals within state agencies at every step of the process and waiting long periods of time for understaffed agencies, hoping for the ever-elusive No Further Action (NFA) letter. The NFA letter is an agency's determination that remediation is complete; it is essential prior to purchase or redevelopment.

From preparing a work plan, to resolving the state's comments on the work plans, writing and rewriting reports, and agonizing over the best remedial technology — the process has not been the smoothest way to redevelopment. Additionally, the process has severely limited the economics of redeveloping former industrial sites. Imagine being in the middle of an extensive excavation for a new residential complex and encountering unknown soil contamination. Construction would immediately halt, and the project could be delayed while waiting for the state to review the work plan and the cleanup plan.

Though initially conceived as a way to more effectively allocate slim governmental resources, the privatization of the investigation and cleanup process has been a major contributor to the success of many redevelopment projects in the Northeast. In fact, the key to a successful brownfield redevelopment process is often the successful integration of environmental remediation and construction — not just coordination, but true integration. In practice, this involves working with design engineers, developers, architects, contractors, construction managers, environmental professionals, lawyers and often the lenders. Privatization of the cleanup process provides the key to success.

In the Northeast, privatization programs are underway in New Jersey, Connecticut, and Massachusetts. In all instances, the programs establish a form of certification for a private consultant — the Cleanup Star in New Jersey, the Licensed Environmental Professional (LEP) in Connecticut, and the Licensed Site Professional (LSP) in Massachusetts. While the authority given to the certified professional varies state by state, one thing is common: the state's vigorous procedures for ensuring that private consultants perform activities in a manner consistent with the state's philosophies. Credentials required to obtain certification are intense, as is the exam. Ethics regulations and a robust audit program further ensure reliability of the program.

In New Jersey, the Cleanup Star is limited to investigating and performing remedial measures on sites with no groundwater contamination. Keeping the regulators themselves out of a simple soil removal and disposal project will vastly minimize potential construc-



tion delays. In Connecticut, LEPs can oversee remediation in various areas, often depending on the groundwater classification of the area.

In Massachusetts, the LSP program allows state-licensed private consultants to effectively investigate, remediate, and bring sites to closure with few exceptions. The Massachusetts version of the NFA is the Response Action Outcome (RAO), and LSPs can now provide RAOs. LSPs can determine the suitability of a site for redevelopment in the initial development stages based on the knowledge of what form of remediation, including institutional controls and/or deed restrictions, will be appropriate, acceptable and legal. In Massachusetts, LSPs are allowed to close sites with soil and groundwater impacts.

Many Massachusetts sites have been redeveloped with LSPs, where a true team is created between the developer and the environmental consultant. Not that cooperative teams cannot be developed with regulators, but this privatization approach removes the step-by-step requirement for a state agency to review and comment upon a project, often causing delays. At the initial due diligence stages of a redevelopment project, an LSP can discuss with a developer what type of remedial measures may be necessary and exactly what can be done to achieve closure. In most cases, there is no outside third-party approval required. More importantly, the LSP is enabled to react quickly during a redevelopment project, when existing conditions frequently change. Typically there is no need for a delay to obtain state approval of a change in the remedial plan.

Brownfield redevelopment projects have been talked about for years. While the concept of cleaning up and again utilizing a contaminated property is exciting stuff, the often extensive regulatory requirements and the bureaucratic methods of the Remedial Investigation/Feasibility Study (RI/FS) process do nothing to overcome the stigma of a property or to maximize the economics of such a project. In forward-thinking states like Massachusetts, Connecticut and New Jersey, the privatization of remediation may be the best thing yet for brownfields.