

Brownfields Legislation Listening Session
Private Sector Stakeholders
April 4, 2002

Participants:

William Hoffman, ICSC	Linda Garczynski, U.S. EPA OSPS
Joe Maheady, National Association of Realtors (NAR)	Sven-Erik Kaiser, U.S. EPA OSPS
Roger Platt, The Real Estate Roundtable	Valerie Green, U.S. EPA OSPS
Jay Spector, National Association of Industrial and Office Properties (NAIOP)	Karl Alvarez, U.S. EPA OSPS
Bob Elam, American Chemistry Council	Alison Evans, U.S. EPA OSPS
Mark Malander, Exxon Mobil	Anthony Raia, U.S. EPA OSPS
Kevin Matthews, AIG Environmental	Patricia Overmeyer, U.S. EPA OSPS
Michael Mittelholzer, National Association of Home Builders (NAHB)	Rey Rivera, U.S. EPA OSPS
Steve Hirsch, U.S. Chamber of Commerce	Beth Zelenski, U.S. EPA OSPS
Bernie Reilly, DuPont Company	Jim Maas, U.S. EPA OSPS
Sue Briggum, Waste Management	Ann McDonough, U.S. EPA OSPS
Don Clay, Koch Industries, Inc.	Tom Rinehart, U.S. EPA OSPS
Al Collins, Occidental International	Cate Tierney, U.S. EPA OSRE
Sara Beth Watson, Steptoe and Johnson for American Bar Association SEER	KC Schefski, U.S. EPA OSRE
Charlotte Bertrand, U.S. EPA Administrator's Office	Susan Boushell, U.S. EPA OSRE
Jim Woolford, U.S. EPA FFRRO	Tod Burnett, U.S. EPA
Bob Myers, U.S. EPA OERR	Sara Rasmussen, U.S. EPA OSW
Brigid Lowery, U.S. EPA OSWER	Michael Shapiro, U.S. EPA OSWER
Tim Jones, U.S. EPA	Dottie Pipkin, U.S. EPA OSWER
	Carolyn Hoskinson, U.S. EPA OSWER
	Christopher Prins, U.S. EPA OSWER
	Myron Knudson, U.S. EPA Region 6
	Bill Muno, U.S. EPA Region 5
	Colleen Morgan, Marasco Newton Group
	Wendy Spillane, Marasco Newton Group

Introduction:

Mike Shapiro, deputy assistant administrator for the Office of Solid Waste and Emergency Response (OSWER), welcomed all the participants and emphasized the importance the U.S. Environmental Protection Agency (EPA) attaches to maximizing stakeholder involvement early in the implementation process of the brownfields law. Mr. Shapiro explained that there is a short-time frame that EPA is working under to implement the legislation. He encouraged the group to view this meeting as an early opportunity to identify issues and provide input. Mr. Shapiro noted that this is the second of four listening sessions and that EPA has recently set up its teams and structure to develop the appropriate policies, guidance, and regulations.

Mr. Shapiro noted that the schedule to develop the policies and guidance to implement the law is being driven by the need to get the grants guidelines in place when the 2003 fiscal year funding is available beginning on October 1. At that time, the new funding will trigger the need

for the new rules. He also noted that, with a few exceptions, there was no need for lots of formal rulemaking. As EPA has begun the implementation process it has noted a few issues, and looks forward hearing about any issues, concerns, or comments from this group.

Linda Garczynski, director of EPA's Outreach and Special Projects Staff (OSPS), spoke of the challenge that EPA faces with the new legislation, including several unique issues of interest to the private sector:

- **Definitional changes:** Expanding the types of sites that can be addressed (e.g., petroleum, mine-scarred lands, controlled substance labs), including the issues related to what a viable responsible party means in the context of petroleum sites
- **Grants issues:** For example, EPA is considering the use of a two-step grant application process to help with efficiently and fairly processing the expected deluge of applications resulting from the expanded sites and eligible entities. Congress also added three new criteria for the grant evaluation process and EPA needs to determine what these mean.
- **Prospective purchaser protection:** Consideration of whether the law is self-implementing and if prospective purchaser agreements (PPAs) will be needed in the future.
- **State voluntary response programs (VRPs):** Examination of issues such as what constitutes a public record.
- **Phase 1 assessment standard:** Clarifying use of 1997 versus 2000 ASTM Phase 1 standard, undertaking the regulatory development process for the final rule, and considering a regulatory negotiation ("regneg") process.

Identification of Specific Issues/Questions:

Prospective Purchaser Agreement Clarification

- Comment that EPA should take a good, quick look at PPAs. The representative would like to know if prospective purchasers are protected against liability without a PPA. He said it is a key issue for underwriters of the developers. Though they will underwrite the transactions either way, insurers need clarity about whether PPAs will be required. If they do not have to fear the liability without a PPA, they will not have to write for that risk (e.g., will not need to include PPA language in the policies or cover the risk financially).
- Comment that realtors encouraged by EPA's approach and understanding of the site-specific nature of these transactions—what is needed at a Superfund caliber site may not be an issue at a lower risk site. The need for EPA to take the time to get these liability issues right, rather than focusing on getting things done quickly, was emphasized.
- EPA should make the law self-implementing to enable real estate agents/attorneys to handle these transactions without having to rely on Superfund experts.
- It will take time for the standard practices to be developed to conduct transactions under the new law.

Clean/Contaminated Parcels Issue

- Request for clarification on parceling of sites and whether clean parcels will be treated differently than contaminated parcels for properties that contain both.

Due Care Versus Appropriate Care

- Need for clarification about the difference between “due care” and “appropriate care” standards referenced in Subtitle B.

Major Themes Guiding EPA

- Question about EPA’s overarching themes or principles in implementing the law. Such principles have been useful to the stakeholders in working with other EPA reforms.

EPA’s Communication Strategy

- Inquiry about EPA’s communications strategy regarding the new law.
- Suggested that private-sector stakeholders can help with these outreach efforts.

TSCA Site Transactions

- Inquiry about the impacts on TSCA/PCB transfer and how it will be considered in the context of the brownfields law.

Institutional Controls (ICs)

- Question about what will be considered an acceptable remedy and how the extent of the responsibility of a buyer/developer will be defined.
- Need for EPA to help with certainty on the remedy by clarifying the rules relating to ICs. Using a model state law for ICs might help this process.

Petroleum Contamination

- Comment about the expansion to cover petroleum sites and concern that EPA is now sending mixed messages by providing grant funding to address petroleum contaminated sites but not providing liability relief.
- There is an incongruity between the protection provided by states and the new legislation—states do not distinguish between CERCLA contaminants and petroleum, but the federal government does.
- Question whether the USTfields initiative would be merged into the brownfields initiative.
- Question about who has jurisdiction over cleanup at UST/RCRA sites, and how to handle states that have non-degradation rules for groundwater (e.g. Wisconsin).

Sector Targeted Approaches

- Suggestion that EPA consider focus on sector-specific issues, example of landfills and the reuse opportunities they provide because of the availability of large buffer areas.

Property Investigation Standards/Safe Harbor

- Question about whether EPA would provide guidance with regards to property investigation or whether the statute would be self implementing.
- Most stakeholders seem to be happy with the ASTM standard but from a site assessment perspective, the ASTM standard was not as useful and that many states do not rely on ASTM for their site-assessment standards
- Difficulty is that professional standards will always be subject to change.
- A representative said that there should be a standard that serves as a safe harbor from liability for day-to-day transactions. He encouraged EPA not to try to change current commercial practice.

Grants Criteria and Application Process

- Question about whether there would be any guidance on the grants and any indication about what kinds of projects EPA would prefer to fund (e.g., highest/best use versus greenspace or nonprofit projects).
- EPA is considering a two-step application process with a short statement of interest to make the initial cut; those making the cut would then submit a longer, more detailed application. Most indicated that they thought this seemed like a good approach.

Federal/State VRP Interplay

- Interest in hearing more about the federal/state relationship, especially regarding those sites that were not abandoned.
- Hope to see resources devoted to working on issues related to the federal/state role at both EPA Headquarters and EPA regional levels. Noted that these efforts would be key to getting mothballed properties back into productive use.
- Comments that the reopeners are still problematic and cause discomfort to property owners.
- Questions about the Federal experience with State programs.

Small Business Exemptions

- Request for more information about small business liability exemptions.