

"REDEVELOPMENT AND REVITALIZATION OF BROWNFIELDS,  
DEPARTMENT OF TOXIC SUBSTANCES CONTROL INITIATIVES"

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CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
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The Brownfields phenomenon, projecting its striking images of the rusting relics in industrial core areas of the Northeast and Midwest, is just as pervasive in the State of California. In fact, California may have a more significant and heterogeneous Brownfields problem than do states such as New Jersey and Michigan. California's vast and varied history of industrialization, the economic devastation of closing military bases and loss of local industry (e.g., Northwest logging), the recent rash of natural disasters (floods, fires, earthquakes, mudslides) and social calamities such as the recent riots in South Central Los Angeles are just a few of the factors which have contributed to the "browning" of the Golden State.

As is the case with states more commonly envisioned during Brownfields discussions, scores of California properties which are or are perceived to be contaminated remain as a legacy to this recent and past history. Businesses have relocated, residential communities have followed in their path, and, as a result, what were bustling city centers languish as shells of their former selves. Some areas resemble ghost towns of post-Gold Rush lore, others look as if they were targets from some forgotten war. Given California's great geographic expanse and ceaselessly increasing population, Greenfields encroachment continues unabated, increasing the need for infrastructure (with resulting tax increases), and carries with it traffic congestion, decreased air quality, increased crime and overall environmental degradation.

Various local and State agencies, along with private industry, have adopted various approaches to revitalizing and recycling these Brownfields properties. The Department of Toxic Substances Control (DTSC) has developed a number of initiatives to address Brownfields problems, and, where available, has complemented them with other State mechanisms. Both legislative and administrative reforms are the cornerstones of DTSC's Brownfields program.

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## ***DTSC's VOLUNTARY CLEANUP PROGRAM***

The primary vehicle driving DTSC's Brownfields effort is the Voluntary Cleanup Program, or VCP. DTSC established the VCP administratively, using existing statutory authority (Division 20, Chapter 6.8 of the Health & Safety Code, the Hazardous Substances Account Act) in late 1993. Under the Program, volunteers (they may or may not be Responsible Parties, RPs) initiate projects to undertake site investigation or other response action under DTSC oversight. Most sites are eligible; however, those already on DTSC's annual workplan (also known as "State Superfund" sites), on the National Priority List, federal facilities or those not within DTSC's jurisdiction (e.g., some petroleum sites) are ineligible. Project proponents enter into Voluntary Cleanup Agreements, which include:

- provisions for payment of DTSC oversight costs and advance funds by the Proponent, and
- a detailed scope of work, project schedule and services to be provided by DTSC.

Project proponents do not admit legal liability for site remediation upon entering into a VCP agreement and either side may terminate the project, for any reason, with 30-day written notice.

Under the VCP, DTSC is committed to a team approach to achieve successful project completion. Projects are subject to the same cleanup standards and DTSC approvals as sites in the base program. However, Proponents may choose to conduct projects in a phased manner and establish a schedule and, most often, the length of time for project completion is compressed. Many Proponents choose to complete the Preliminary Endangerment Assessment (the initial assessment with a risk analysis component) to determine if the property warrants further work. Both regulatory approval and project streamlining are critical factors in arranging financing and meeting development schedules.

The VCP emphasizes the use of presumptive remedies and innovative technologies to expedite remediation. Additionally, site-specific risk analysis and land use restrictions can be used as a basis for establishing remediation standards that are geared to the planned use of the property. Using land use controls to limit future exposure to contaminants is authorized in DTSC's base Chapter 6.8 Hazardous Substances Account Act program and is outlined in DTSC's June 1990 Official Policy and Procedure on Development and Implementation of Land Use Covenants. These land use restrictions run with the land and bind future successors, assigns, etc. (H&SC section 25355.5).

When the site assessment/remediation is complete, DTSC issues either a "No Further Action" (NFA) letter or certification of completion, depending on the project circumstances. Either signifies that DTSC has determined that the site does not pose a significant risk to public health or the environment. While neither constitutes a release or covenant not to sue, both significantly minimize future liability concerns. Additionally, because response actions conducted under the VCP are consistent with the National Contingency Plan, project proponents may seek cost recovery from other RPs under CERCLA.

DTSC published a fact sheet (July 1995) on the VCP and recently finalized its Official Policy and Procedure and Model Agreement (September 1995). To date, more than 180 projects have entered the Program; approximately 90 have been completed. In large part, the projects have been initiated to:

- foster redevelopment, which increases jobs and local tax bases, provide opportunities for disadvantaged groups,
- or otherwise provide substantial benefits to local economies and to California as a whole.

The examples below illustrate how the VCP has been used to accomplish the objectives cited on the previous page:

*DTSC's VOLUNTARY CLEANUP PROGRAM  
REDEVELOPMENT AND REVITALIZATION SUCCESSES*

*Bay Area – Cypress Freeway Reconstruction and Emeryville Redevelopment*

In the Bay Area, DTSC and the California Department of Transportation (Caltrans) entered into an agreement to allow reconstruction of the Cypress Freeway through West Oakland and Emeryville. The elevated roadway structure was destroyed during the 1989 Loma Prieta Earthquake. Along the revised replacement route, 34 contaminated sites are being investigated and/or remediated. Caltrans has or will relocate several businesses and will build two parks; one will serve as a memorial to the victims of the freeway collapse. Another agreement between DTSC and the nearby City of Emeryville will culminate in remediation of an area of contiguous abandoned industrial sites, and the redevelopment of the area for a regional shopping mall and hotel complex.

*Southern California - Culver City Kite and Cropper's Plating*

In Southern California, the Culver City Kite site will be redeveloped as an industrial park and is estimated to provide in excess of 100 jobs. Under the VCP, the former Cropper's Plating site was remediated in less than a year and is currently being developed as a public ice skating facility, which will provide as many as 60 jobs.

*Sacramento - US EPA Brownfields Grant Projects*

In Sacramento, the key concepts of two VCP redevelopment projects, one the home of a new federal courthouse, the other a 250 acre parcel, were expanded upon in the City of Sacramento's successful Brownfields Grant proposal awarded by U.S. EPA in July.

*Statewide - Cal-Mortgage Guaranteed Loan Insurance Program*

Under a Memorandum of Understanding with a sister agency, Cal-Mortgage, DTSC reviews or performs Phase I assessments for their guaranteed loan insurance program for the construction, improvement and expansion of various health care facilities. The loan applicants are either public entities or non-profit groups.

## ***LEGISLATIVE CONTRIBUTIONS TO BROWNFIELDS***

On September 6, 1994, Governor Wilson signed SB 923 (Calderon), the California Expedited Remedial Action Reform Act of 1994 (Chapter 6.85, H&SC sections 25396-25399.2). This bill enacted a separate track, pilot voluntary cleanup program limited to 30 sites which meet specified criteria. The Program is designed to encourage and expedite cleanups by offering a number of incentives to an RP or a Prospective Purchaser, including:

1. Requiring DTSC to review and evaluate submissions within set timeframes;
2. Requiring extensive PRP search and notice by DTSC;
3. Allowing more flexibility in remedy selection - using site-specific cleanup goals based on the proposed property use, and, with the exception of "hot spots", there is no preference for treatment;
4. Providing extensive rights to dispute DTSC technical decisions;
5. Providing for liability allocation, including state funding for "orphan shares" (limited to 10 sites and to the extent monies are available);
6. Providing qualified future liability protection by the AB 2061 (see below) certificate of completion;
7. Providing a cleanup process independent of the National Contingency Plan; and
8. Requiring that DTSC and the RP enter into mutual covenants not to sue under CERCLA.

One of the means by which this legislation can be used to foster Brownfields redevelopment is the requirement that cleanup standards are developed based on the planned use of the property. The pilot program explicitly authorizes land use controls to limit future exposure. As with the Chapter 6.8 programs, land use controls run with the land and bind future successors, etc. (H&SC section 25396(1)). In view of the Brownfields problem, the basic premises of the legislation, limiting future liability and remediation costs, may allow expedited remediation and redevelopment of these properties.

DTSC adopted emergency regulations for the SB 923 program in mid-1995; Official Policies and Procedures are nearing completion. The regulations also included provisions to allow Prospective Purchasers into the Program. Two Southern California sites have recently been selected for the SB 923 Program.

The California legislature has long been sensitive to the deleterious effects which contaminated properties have on their local communities. One of the earlier legislative initiatives was the adoption, in 1990, of H&SC sections 33459-33459.8 (AB 3193, the "Polanco" legislation) which enacted a hazardous substance release cleanup program in the California Community Redevelopment Law. Under the law, redevelopment agencies may proceed with cleanup actions, and are subsequently granted a qualified immunity from liability under state or local law, provided that the cleanup is conducted in accordance with a remedial action plan approved by DTSC or a Regional Water Quality Control Board. This liability immunity extends to, among others, certain persons entering into development agreements for a Brownfields site, their successors in title, and persons providing them financing (H&SC section 33459.3).

In a similar vein, AB 2610 was enacted June 26, 1990. It amended the Mello-Roos Community Facilities Act to create the first long-term financing for the purpose of hazardous substances cleanup on both public and private property. Under this law, Community Facilities Districts are authorized to operate revolving funds to conduct cleanups. The Community Facilities District is an entity through which a local government is empowered to levy special taxes and issue bonds, if authorized by two thirds of the vote of qualified voters in the Community Facilities District. Parties liable for the cleanup are liable to the Community Facilities District for cleanup costs.

In 1993, the Legislature enacted the AB 2061 (Umberg) program for Unified Agency Review of Hazardous Materials Release Sites (H&SC sections 25260-25268). Its intent is to expedite site cleanups by allowing an RP who agrees to conduct investigation and remediation to request that a committee (the Site Designation Committee, SDC) designate a state or local "administering agency" (AA) to oversee the response actions. AB 2061 requires coordination of all state and local agencies with jurisdiction and requires that the AA issue a certificate of completion upon satisfactory completion of remedial actions. This certificate represents a conclusive determination that the RP has complied with

all state and local laws, ordinances, regulations and standards, and is in effect a statutory release of the RP subject to certain reopeners. The release is not applicable to liability under CERCLA or other federal laws. The AB 2061 process can and has been used with DTSC's VCP and State Superfund sites; in these cases the AB 2061 certificate of completion would be issued. Because the SDC selects sites for entry into the SB 923 program, all SB 923 sites are subject to the AB 2061 certification.

## ***OTHER DTSC ADMINISTRATIVE MEASURES***

In addition to the VCP, DTSC has aggressively undertaken other administrative measures to address Brownfields problems. In late 1993, DTSC initiated the CalSites Validation Program (CVP), similar in some respects to U.S. EPA's removal of "No Further Remedial Action Planned" (NFRAP) sites from the CERCLA Information System, or CERCUS. The CalSites database is an automated database, analogous to CERCUS, which is used to evaluate and track activities at properties that may have been affected by the release of hazardous substances. DTSC created CalSites in 1991 from several existing databases. At that time, CalSites listed approximately 26,500 entries, even though DTSC had evidence of releases at only a small fraction.

Because the lending and real estate communities often relied on CalSites to determine financing, leasing or salability of a property, the listing of a property on CalSites caused potential problems for the site owner even if the site was "clean". As lenders and real estate brokers subsequently "redlined" many properties, the over-inclusive "list" created significant impediments to Brownfields development. Under the CalSites Validation Program, DTSC reevaluated the listings and updated the criteria for inclusion in the database. As of August 1995, over 21,200 listings have been deleted. Many existing entries are being actively addressed by DTSC, referred to other agencies, or have been completed by DTSC (i.e., NF A letters or certifications issued). Therefore, the list of properties remaining to be addressed by DTSC is actually quite small.

Furthermore, CalSites deletions differ from the CERCLIS No Further Remedial Action Planned removals in that sites deleted from CalSites had no evidence of a release, while No Further Remedial Action Planned sites are not of National Priority List-caliber but may have had hazardous substance releases. DTSC issued a fact sheet about the CalSites Validation Program in March 1995.

Similar to U.S. EPA's recent Guidance for Owners of Properties Containing Contaminated Aquifers, DTSC established an enforcement policy designed to reassure owners of property onto which a plume of contaminated groundwater has migrated (Management Memo #90-11, December 1990). This policy ensures that these owners will not be the targets of enforcement or cost recovery action by DTSC solely on the basis of land ownership, provided that they do not cause or contribute to the contamination.

DTSC's policy on Prospective Purchaser Agreements (PPA) for the Chapter 6.8 Hazardous Substances Account Act programs, set forth in a letter to Pamela Nehring, dated December 15, 1994, was based in part on U.S. EPA's 1989 PP guidance. It outlines the criteria for eligibility as well as DTSC's statutory authority for entering into PPAs. The policy is also consistent with, yet less conservative than, EPA's recently revised policy. DTSC's policy differs from U.S. EPA's in some respects. For example, DTSC does not limit consideration to sites in which response actions have been conducted or planned, and so will entertain Prospective Purchaser Agreements at VCP sites. Further, DTSC considers benefits to the public, in terms of job creation, an increased tax base, opportunities for disadvantaged groups, and the like, as a key criterion to determine Prospective Purchaser eligibility.

In July, DTSC completed its first Prospective Purchaser Agreement in the form of a Buyer/Seller Agreement for the former Golden Eagle Refinery. Under this three-party agreement between the buyer, seller and DTSC, the seller (the Responsible Party) agreed to conduct all remaining site work. The

buyers (who are not RPs) received a covenant not to sue, agreed to provide access and not contribute to, or exacerbate, contamination. The agreement, which runs with the land, extends the covenant not to sue to future owners and occupants of the site, as long as they abide by the agreement provisions. DTSC certified the site in June 1995; operation and maintenance will continue for several years. Groundbreaking activities began in August; 40 acres of the site will be developed into a 500,000 square-foot open-air shopping mall. An additional 35 acres will be available for retail, high tech research and development, and industrial uses. The project will generate approximately 2,000 jobs and tax revenues in excess of \$12 million annually.

A second Prospective Purchaser Agreement is nearing completion for a former landfill site, which is proposed for use as the largest "outlet" shopping mall in the United States. Under the proposed Consent Decree, the Prospective Purchaser agrees to conduct a significant portion of the site remedy (with a monetary "cap") and in return receives a covenant not to sue, including provisions for contribution protection. It is estimated that approximately 5,000 jobs will be generated with between \$23 to \$30 million annual increase in tax revenues.

In order to refine its Prospective Purchaser policy and develop a model agreement, DTSC convened a Quality Improvement Project team. That team will use the existing Prospective Purchaser policy as a basis for development of an Official Policy and Procedure (including a model agreement) for the Chapter 6.8 program. The team will further evaluate U.S. EPA's and other state Prospective Purchaser programs to achieve and further enhance its objective. For example, the "Buyer/Seller" agreement used for the Golden Eagle site was developed from a concept developed based on agreements used by the State of Pennsylvania. Due to the significant issues and high transaction costs surrounding Prospective Purchaser Agreements, DTSC will limit negotiations on other sites until the Quality Improvement Project team's work is completed.

U.S. EPA's willingness to enter into Prospective Purchaser Agreements (or issue "comfort letters") may be a key factor for the potential redevelopment and reuse of Brownfields by Prospective Purchasers. Additionally, DTSC, given the significant expenditure of agency resources, can only entertain such agreements where the Prospective Purchaser Agreements criteria are met and resources are available, and when the agreements will not be used to facilitate pure real estate transactions. Given the other Administrative and legislative reforms available to DISC, however, Prospective Purchasers may utilize these and other private methods (e.g., RP indemnification, insurance, lease with option to purchase) to achieve a degree of assurance or comfort.

Faced with expansive Brownfields problems, DISC has sought to address these complex issues through bold administrative and legislative reforms. Through the Voluntary Cleanup Program, in particular, DTSC has fostered successful partnerships with developers, redevelopment agencies, community groups, state and local agencies, and other stakeholders to demonstrate how revitalization of Brownfields sites can support and enhance sustainable growth and development. By leveraging technical, regulatory and financial resources, government agencies and their partners can begin to overcome the significant obstacles posed by "Brownfields."

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### "REDEVELOPMENT AND REVITALIZATION OF BROWNFIELDS, DEPARTMENT OF TOXIC SUBSTANCES CONTROL INITIATIVES"

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#### *LEGISLATIVE REFORMS*

AB 1876 (Richter) created a new program for credentialing private site managers (PSMs) to oversee investigation and cleanup activities at low-level hazardous substance sites with minimal DTSC oversight. The program, which took effect January 1, 1996, is nearing implementation. The new law calls for replacing the established Registered Environmental Assessor (REA) program with registered Class I and Class II assessors; only Class II assessors are eligible to act as PSMs. Regulations for registration criteria for Class I and II assessors and for PSM performance standards must be in place to enable program implementation. The program implementation is projected to begin in Spring 1997.

SB 1248 (O'Connell) formally recognizes local agency cleanup programs; it became effective on January 1, 1996. It establishes programs which allow a local health agency to enter into a written agreement to supervise the cleanup of a waste release, set cleanup goals, and issue a letter or other document that certifies that the cleanup goals were accomplished. Both the AB 1876 and SB 1248 programs are key links in Cal/EPA's and DTSC's efforts to outsource to qualified professionals to ensure that appropriate cleanup actions are taken at contaminated properties.

Cal/EP A and DTSC are working closely with the California Bankers Association to develop and finalize SB 1285 which would provide a limited liability exemption for lenders, fiduciaries and trustees. Passage of this bill is expected in 1996.

#### *ADMINISTRATIVE REFORMS*

DTSC has been negotiating State Memoranda of Agreement (SMOAs) with U.S. EPA for the Voluntary Cleanup Program (VCP) and the SB 923 VCP. In general, these SMOAs will ensure that: once a site has entered either VCP, U.S. EPA will adopt a "hands off approach", once a site is signed off by DTSC, in essence it will also represent a "sign off" by U.S. EPA. The SMOAs represent an endorsement of the overall programs rather than a site-by-site approval. Both agencies anticipate SMOA finalization in late 1996.

DTSC developed a "Clean Parcel Letter" policy in 1992. The policy allows DTSC to issue partial site sign-off letters for clean parcels which in turn allows redevelopment, sale, or continued business operations on these parcels. U.S. EP A recently adopted a similar policy. Originally developed for use with DTSC's Base Closure Program, this policy can and has been used for State Superfund and VCP Sites.

DTSC completed its formal policy for Prospective Purchaser Agreements (PP As) on July 1, 1996. The policy includes, among other things, eligibility criteria, an application and a model agreement. The document had key external stakeholder input during its development. The policy is available on the Internet on the Cal/EP A Home Page @ [HTTP://WWW.CALEPA.CA.GOV](http://www.calepa.ca.gov) and the DTSC Home Page @ [HTTP://WWW.DTSC.CA.GOV](http://www.dtsc.ca.gov). The State Water Resources Control Board issued a similar guidance memo on PPAs on July 9, 1996.

There is no one model for successful Brownfields redevelopment and reuse. DTSC, by developing and using administrative and legislative initiatives, provides a variety of tools which can be used in combination or alone to address simple and complex Brownfields issues.

FOR MORE INFORMATION		<i>(Revised 7/99)</i>	
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