

**BROWNFIELDS AND THE  
CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL  
KEY PROGRAMS AND CHALLENGES**

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and  
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California, which has a vast and varied industrial past, has seen an unprecedented number of military base closures, has experienced a significant loss of local industries such as logging in the Northwest, all of which have been compounded by a rash of natural disasters (flood, fires, earthquakes, mudslides) and have resulted in scores of abandoned properties in their wake. These are just a few of the factors which have contributed to the brownfields phenomenon in the State. "Brownfields" are properties with active potential for redevelopment or reuse that lie fallow due to actual or perceived contamination. Businesses have relocated, residential communities have followed in their path, and, as a result, what were urban and rural commercial/industrial centers languish as shells of their former selves. California's brownfields differ from those in the Northeast/Midwest United States, largely due to the more recent onset of the industrial revolution in the State. Former manufactured gas plants, and remnants of the computer industry are some key examples of California's "newer" brownfields.

Additionally, many "rural" areas in California have significant brownfields problems, e.g., lumber mills. The California Trade and Commerce Agency estimates that over a recent ten year period, over 1,000 lumber mills have closed in these areas, devastating the

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local economy.<sup>3</sup> Literally thousands more have closed in previous years. California also faces the challenge of redeveloping major parcels of land which previously served as military bases. In fact, the State has the somewhat dubious “honor” of experiencing significantly more base closures than other States in the nation.<sup>4</sup> Additionally, there are a significant number of formerly used defense facilities (FUDs) in the State, some of which are currently being reused, yet have not been sufficiently evaluated for environmental hazards.

When industrial and commercial facilities are built on "Greenfields" (land with no previous commercial or industrial use), roads, sewers, schools, residences and other infrastructure must be developed, and new units of government created to levy the taxes to pay for them. Redundant infrastructure not only wastes scarce tax dollars, it adds to the burden on the environment. Redevelopment of brownfields properties represents an optimal alternative and is a critical factor in serving the needs of the increasing population in California.

Brownfields projects are now viewed more broadly than just environmental mitigation and can be considered a key component of State smart growth management approaches. As compared to initiatives which provide monetary disincentives for urban sprawl, reuse and redevelopment of brownfields can be viewed as an incentive (or positive means) to achieve smart growth objectives. Given the strong California economy, the Center of Continuing Study of the California Economy (CCSCE)<sup>5</sup> has conservatively estimated that in the next ten years, California will add 3 million more jobs, 6 million more residents, and 2 million more households. By 2020, their estimates increase to 5.1 million jobs, 12.4 million residents and 4.3 million more housing units needed.

In order to meet the challenges posed by significant increases in population, the recycling of brownfields is essential. Recycling brownfields can also promote infill development which will, in turn, optimize population densities and can serve to reduce negative aspects of sprawl. Infill development can revitalize existing communities as idle or underutilized properties in urban centers will be used for residential, commercial and public purposes (schools, parks, hospitals). However, there exists a delicate balance in California, where urban density has increased, there is increased competition for buildable sites, particularly for public facilities, i.e., schools.

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<sup>3</sup> “An Assessment of the Opportunities for Developing a Mill Reuse Project in California,” California Trade and Commerce Agency, November 1997.

<sup>4</sup> Based on DTSC staff discussions with Department of Defense staff and other States’ program staff who address military facilities.

<sup>5</sup> Land use and the California Economy, Center of Continuing Study of the California Economy (CCSCE), September 1998.

The Department of Toxic Substances Control (DTSC)<sup>6</sup> developed a number of early initiatives to address brownfields problems, and, where available, complemented them with other related State mechanisms. Both legislative and administrative reforms were the cornerstones of these early tools. Additionally, DTSC views all types of cleanup projects as a potential reuse opportunity and seeks to work cooperatively with parties to meet this objective while ensuring that cleanups are conducted in an environmentally sound manner. This article will examine the origins of DTSC's brownfields programs, highlight key new programs enacted or proposed under the Administration of California's Governor Gray Davis (Davis Administration) and examine emerging brownfields issues for the State. This article presents an analysis which is in large part based on the authors' direct observations, interactions and interpretations.

## **I. KEY HISTORIC BROWNFIELDS INITIATIVES**

### **A. Lender Liability**

Prior to 1997, the extent of a lender's potential liability under State and federal law was uncertain due to varying interpretations of the scope of lender liability under the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).<sup>7</sup> Under CERCLA and the California Hazardous Substances Account Act (HSAA),<sup>8</sup> "owners and operators" of property on which there has been a release of a hazardous substance are liable for the cost of responding to the release. The HSAA incorporates by reference the CERCLA definition of owner and operator.<sup>9</sup> Liability under these statutes is strict, without regard to intent, knowledge, or the degree of care which was exercised by the owner or operator. Under both CERCLA and State law, lenders were entitled to an exemption from liability for response action costs, to the extent that the lender, without participating in the management of the property, held indicia of ownership primarily to protect a security interest in the property.

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<sup>6</sup> DTSC is one of the six boards and departments within the California Environmental Protection Agency.

<sup>7</sup> 42 U.S.C. §§ 9601-9675 (1994 & Supp.II 1996).

<sup>8</sup> Division 20, Chapter 6.8, §§ 25300-25395.32 of the California Health and Safety Code.

<sup>9</sup> A responsible party or liable person are those persons described in section 107(a) of CERCLA (42 U.S.C. Sec. 9607(a)). In summary, such persons include the current owner or operator of the site; the owner or operator of the site at the time that hazardous substances were disposed; any person who arranged for the disposal or treatment, or transportation for the disposal or treatment of the hazardous substance; and any person who accepted hazardous substances for transport to a disposal or treatment site selected by such person. See *id.* at §25323.5.

This uncertainty as to liability led to anxiety among lenders and a reluctance to finance the purchase of, or development of projects at, property where contamination was suspected or confirmed. In response to the perceived need for clarity among lenders, in 1997, the California Legislature enacted a specific State law lender liability exemption.<sup>10</sup>

This law provides that a person, by reason of acting in the capacity of a lender, shall not be liable under any State or local statute, regulation, or ordinance, for specified costs and damages arising from the release or threatened release of hazardous materials at, from, or in connection with property in which the lender maintains indicia of ownership primarily to protect a security interest; property that was acquired through foreclosure or its equivalent; or property that is owned, leased, possessed, or used by a person who is obligated to the lender under a loan or obligation and in which the lender holds no security interest.<sup>11</sup> The lender liability exemption is limited to an exemption from State and local laws and ordinances, and does not include an exemption from common law liability that may be imposed upon lenders.<sup>12</sup> The exemption covers liability for certain damages and for taking or paying for response action at the property, as well as fines, penalties, impositions, assessments, and forfeitures arising from the release of threatened release of hazardous materials at, from, or in connection with the property.<sup>13</sup> The exemption is applicable to the extent that the lender does not participate in the management of the property during the term of the loan or obligation.<sup>14</sup> If a lender does acquire property through foreclosure or its equivalent, the lender must thereafter make a good faith effort to sell the property.<sup>15</sup>

There are several important exceptions to the State lender liability exemption.<sup>16</sup> Many of these exceptions are designed to ensure that once a lender acquires property through foreclosure or its equivalent, the lender complies with obligations that are inherent to the ownership of property and that are designed to protect public health and safety and the environment. For example, the exemption does not excuse a lender who operates a hazardous waste management facility from compliance with operational

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<sup>10</sup> Division 20, Chapter 6.96, §§25548-25548.7 of the California Health and Safety Code.

<sup>11</sup> *See id.* §25548.2(a).

<sup>12</sup> *See id.*

<sup>13</sup> *See id.*

<sup>14</sup> *See supra* note 5, §25548.5(i).

<sup>15</sup> *See id.* §25548.5(a).

<sup>16</sup> *See supra* note 5, §§25548.4 and 25548.5.

requirements such as hazardous waste management laws.<sup>17</sup> The exemption only applies if a lender complies with disclosure and reporting requirements, and takes required steps to secure the property and prevent additional releases from occurring.<sup>18</sup> Notwithstanding the exemption, a lender must take temporary measures required by an administrative order to respond to an emergency caused by a release or threatened release of hazardous materials, up to a cost of \$25,000.<sup>19</sup> The exemption does not excuse a lender from operation and maintenance requirements that were established on the property as a result of a cleanup action conducted on the property.<sup>20</sup> The exemption does not apply if the lender, by an act or failure to act, caused or contributed to the release or threatened release of the hazardous material.<sup>21</sup>

Notwithstanding its stated exceptions, the exemption was an important step in alleviating lender liability concerns and thereby promoting the financing and development of brownfield properties in the State. The exemption clarifies that participation in management, which voids the exemption, means actual, and not potential, participation in the management or operational affairs of the property by the lender while the borrower is in possession of the property.<sup>22</sup> It provides that in order to be participating in the management of the property, the lender must engage in activities that indicate a level of decisionmaking control over environmental compliance or operational aspects of the property, as opposed to financial or administrative matters. The exemption clarifies that the following activities engaged in by the lender are not participation in the management of the property: loan policing and work out activities, conducting or requiring the borrower to conduct a response action, and securing or exercising authority to monitor or inspect the property both prior to and after making the loan.

#### **B. Ownership of Property Over Contaminated Groundwater**

In 1988, the California Legislature enacted a statute that gave relief from liability for a release of a hazardous substance to the owner of property who occupies a single family residence constructed on the property.<sup>23</sup> Property is defined as real property of five

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<sup>17</sup> California Health and Safety Code §25548.4(d).

<sup>18</sup> California Health and Safety Code §25548.4(i) and (j).

<sup>19</sup> California Health and Safety Code §25548.4(k).

<sup>20</sup> California Health and Safety Code §25548.4(l).

<sup>21</sup> California Health and Safety Code §25548.5(j).

<sup>22</sup> See *supra* note 5, §25548.1(k).

<sup>23</sup> See *supra* note 3, §25360.2.

acres or less which is zoned for single family use.<sup>24</sup> The statute was later amended to expand the relief to the owner of common areas within a residential common interest development.<sup>25</sup> Owners of residential property were concerned about their ability to sell property overlying known groundwater contamination caused by offsite sources. Consequently, later amendments provided that the owner of such property would not be liable for a release of a hazardous substance to groundwater underlying the property if the release occurred at a site other than the property.<sup>26</sup> The liability relief is stated as a presumption of no liability that can be rebutted by DTSC certifying that in its opinion one of the following conditions exist: (1) the release that occurred on the property occurred after the owner acquired the property; (2) the release that occurred on the property occurred before the owner acquired the property and at the time of acquisition the owner knew or had reason to know of the release; or (3) the owner of the property where there has been a release to groundwater underlying the property caused or contributed to a release to the groundwater, failed to provide DTSC with access to the property, or interfered with cleanup activities.<sup>27</sup> The presumption of no liability must be rebutted by a preponderance of the evidence.<sup>28</sup>

In 1990, DTSC adopted an administrative policy that provides that DTSC will not pursue cost recovery or other enforcement against the owner of any property whose land is located above contaminated groundwater if certain conditions are satisfied.<sup>29</sup> This policy applies only if the property owner is a liable responsible party solely on the basis of ownership of the land located above the contaminated groundwater. The policy will not apply if the property owner caused or contributed to the release of contaminants to groundwater, or if the property owner's activities significantly exacerbated or spread the contamination. The policy gives the following examples of activities that may be relevant to a determination of whether it applies: (1) extraction, injection, and other operations that affect groundwater hydraulics; (2) improper construction or operation of wells connecting contaminated and uncontaminated aquifers; and (3) pumping from a well that increases the rate of flow of contaminated groundwater.

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<sup>24</sup> See *id.* §25360.2(a)(2).

<sup>25</sup> See *id.* §25360.2(a)(1).

<sup>26</sup> See *id.* §25360.2(b)(1)(B).

<sup>27</sup> See *id.* §25360.2(c).

<sup>28</sup> See *id.* §25360.2(d).

<sup>29</sup> Department of Toxic Substances Control Management Memo #90-11, "RP - Ownership of Property Over Contaminated Groundwater," December 7, 1990.

### **C. Community Redevelopment Law “Polanco Redevelopment Act”**

The Community Redevelopment Law was first amended in 1990 to include the “Polanco Redevelopment Act.”<sup>30</sup> The Act provides a local redevelopment agency with authority to take any actions that the agency determines are necessary and are consistent with State and local law, to remedy or remove a release of hazardous substances on, under, or from property within a redevelopment project area.<sup>31</sup> The redevelopment agency must conduct its cleanup action in accordance with cleanup guidelines provided by DTSC or the regional water quality control board, or under certain circumstances, a local agency.<sup>32</sup> Cleanup and remedial action plans prepared by the redevelopment agency must be approved by DTSC, the regional water quality control board, or a local agency.<sup>33</sup>

A redevelopment agency that, in accordance with the provisions of the Polanco Redevelopment Act, undertakes and completes an action or causes another person to undertake and complete an action, to remedy or remove a hazardous substance release on, under, or from property within a redevelopment project area, is not liable with respect to that release under any State or local law.<sup>34</sup> Upon proper completion of a removal or remedial action, this immunity from liability extends to all of the following: 1) any employee or agent of the redevelopment agency; 2) any person who enters into an agreement with the redevelopment agency for the redevelopment of property, if the agreement requires the person to acquire property affected by the hazardous substance release or to remove or remedy such a release; 3) any person who acquires the property after a person has entered into an agreement with a redevelopment agency for the redevelopment of the property described in 2); or 4) any person who provided financing to a person described in 2) or 3).<sup>35</sup> The immunity from liability is expressly not extended to specified groups, including persons who were responsible parties for the release.<sup>36</sup>

### **D. Unified Agency Review of Hazardous Material Release Sites**

For many years, interest groups have complained that there are too many agencies at the local, State and federal levels of government that have the authority to take or

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<sup>30</sup> Division 24, Part 1, Chapter 4, Article 12.5, §§33459-33459.8 of the California Health and Safety Code.

<sup>31</sup> *See id.* §33459.1(a)(1).

<sup>32</sup> *See id.*

<sup>33</sup> *See id.*

<sup>34</sup> *See supra* note 20, §33459.3(a).

<sup>35</sup> *See id.* §33459.3(e).

<sup>36</sup> *See id.* §33459.3(f).

require action in response to the release of hazardous materials. It is argued that this adds unnecessary confusion and cost to the cleanup process and results in the imposition of inconsistent cleanup standards and processes. In addition, interest groups argue that even though a cleanup is deemed complete by one agency, there is no guarantee that another federal, State, or local agency will not later require additional response action.

The Unified Agency Review Statute was enacted in 1993 to address these problems by creating the process for designating an administering agency and by providing a means for legal recognition that a cleanup is complete and that liability to all governmental entities has been satisfied.<sup>37</sup> This law established a process whereby a responsible party that agrees to conduct a site investigation and remedial action at a hazardous materials release site,<sup>38</sup> may request that the Site Designation Committee within the California Environmental Protection Agency (Cal/EPA), designate an administering agency to oversee the response actions.<sup>39</sup> Depending upon the nature of the site conditions and the expertise of the agency that is under consideration, the administering agency may be DTSC, a California regional water quality control board, the Department of Fish and Game, other Cal/EPA boards or departments or a local agency.<sup>40</sup> The administering agency selected is required to supervise all aspects of a site investigation and remedial action conducted by the responsible party.<sup>41</sup> The administering agency has sole jurisdiction over all activities that may be required to carry out a site investigation and remedial action.<sup>42</sup> The administering agency is required to administer all State and local laws, ordinances, regulations, and standards that are applicable to, and govern the activities involved with the site investigation and remedial action at the site, determine the adequacy of site investigation and remedial action activities at the site, and issue permits or other forms of authorization that are necessary to undertake activities that are related to the site investigation and remedial action.<sup>43</sup> An advisory

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<sup>37</sup> Division 20, Chapter 6.65, §§25260-25268 of the California Health and Safety Code.

<sup>38</sup> A “responsible party” is either a party that is liable for the site investigation or remedial action or a party that agrees to perform such actions because they are required by State or local law. See *id.* §25260(h).

<sup>39</sup> See *supra* note 27, §25262(a).

<sup>40</sup> See *id.* §25262(c).

<sup>41</sup> See *supra* note 27, §25264(a).

<sup>42</sup> See *id.*

<sup>43</sup> See *id.* §25264(a)(1)-(3).



team may be convened if necessary so that other agencies may provide guidance to the administering agency in its oversight role.<sup>44</sup> Upon determining that the site investigation and remedial action is complete and that a permanent remedy to the release has been accomplished, the administering agency must issue the responsible party a certification of completion.<sup>45</sup> The issuance of the certification of completion constitutes a determination that the responsible party has complied with the requirements of all and local laws, ordinances, regulations and standards applicable to the site investigation and remedial action.<sup>46</sup> No or local agency that has jurisdiction over hazardous materials releases may take action against the responsible party with respect to the release unless certain reopener conditions exist.<sup>47</sup> Neither the certification of completion nor the prohibition against agency action are applicable to a person other than the responsible party that carried out the site investigation and remedial action.<sup>48</sup>

The certainty afforded by the certification of completion provided by the Unified Agency Review statutes may be viewed as an incentive to owners of brownfield properties to investigate and cleanup their sites. Indeed, these authors know of only two other current State statutes that provide for immunity or a specific release from liability.<sup>49</sup> A liability release is available to a party that has submitted to a binding arbitration of liability pursuant to the HSAA and discharged its obligations under the arbitration decision, either by paying its apportioned share of the costs of all response actions to DTSC or a regional water quality control board, or by performing the specified response action pursuant to a cleanup agreement.<sup>50</sup> The scope of this release is that such a party has no additional civil liability to any governmental entity under State or local law for any prior acts or omissions associated with the conditions addressed in the remedial action plan which is the subject of the arbitration decision. A liability release is also

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<sup>44</sup> See *supra* note 27, §25263.

<sup>45</sup> See *supra* note 27, §25264(b).

<sup>46</sup> See *id.* §25264(c).

<sup>47</sup> See *id.* Reopener conditions include: remedial action standards and objectives were not achieved or are not being maintained; remedial action conditions, restrictions or limitations are violated; site monitoring or operation and maintenance activities are not being carried out; a new hazardous materials release is discovered; a change in known facts or new facts causes an agency to find that additional remedial action is needed; or the certificate of completion was obtained by fraud, negligent or intentional nondisclosure or information or misrepresentation.

<sup>48</sup> See *id.*

<sup>49</sup> California Health and Safety Code §§22356.6 and 33459.3.

<sup>50</sup> See *supra* note 3, §25356.6.

available to local redevelopment agencies as discussed above pursuant to the Community Redevelopment Law.

### **E. Cleanup Agreements with Local Agencies**

A responsible party at a site where there has been a release of waste may request a local health officer to supervise the remedial action for the site.<sup>51</sup> The local health officer may enter into a remedial action agreement with the responsible party if the local health officer determines that adequate staff resources and the requisite technical expertise and capabilities are available to adequately supervise the remedial action.<sup>52</sup> The agreement must specify the testing, monitoring, and analysis the responsible party will carry out to determine the type and extent of the contamination, the remedial actions that will be taken and the cleanup goals that the local health officer determines are necessary to protect human health or safety or the environment and that constitute a permanent remedy for the release of waste.<sup>53</sup> The law does not require that the local health officer follow a particular cleanup process that meets specific standards. After determining that the actions required by the agreement are complete, the local health officer may provide the responsible party with a letter stating that the cleanup goals embodied in the remedial action agreement were accomplished.<sup>54</sup>

This process is not available for all sites. Sites listed by DTSC pursuant to HSC section 25356 (the State Superfund list), sites subject to an order or agreement pursuant to the HSAA, hazardous waste facilities that are subject to corrective action or a corrective action order, and sites that are subject to a regional water quality control board cleanup and abatement order may not be addressed by remedial action agreements with local health officers.<sup>55</sup> In addition, either DTSC, the State Water Resources Control Board, or a regional water quality control board may take an enforcement action to address the release, despite the existence of a remedial action agreement with a local health officer.<sup>56</sup> Within 10 working days prior to entering into a remedial action agreement, the local health officer must provide written notification to DTSC or the appropriate regional water quality control board to allow the State agencies determine whether or not the cleanup should proceed under State level oversight.<sup>57</sup> In order to preempt the local

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<sup>51</sup> §101480(b) of the California Health and Safety Code.

<sup>52</sup> *See id.*

<sup>53</sup> *See id.* §101480(c).

<sup>54</sup> *See id.* §101480(e).

<sup>55</sup> *See supra* note 40, §101483.

<sup>56</sup> *See supra* note 40, §101485.

<sup>57</sup> *See supra* note 40, §101487.

health officer, DTSC would have to place the site on the State Superfund list or either State agency would need to issue an order or enter into a cleanup agreement for the site.

#### **F. Voluntary Cleanup Program**

The Voluntary Cleanup Program (VCP) has been the primary brownfields vehicle for DTSC. The VCP was formally established administratively, using existing statutory authority under the HSAA in late 1993. The official policy and procedure was issued in fall 1995.<sup>58</sup> Under the VCP, proponents (they may or may not be responsible parties), initiate projects to undertake site investigation or other response actions under DTSC oversight. Most sites are eligible, except sites on the State Superfund list, sites on the National Priority List (federal "Superfund" sites), Department of Energy or Department of Defense sites. Project proponents enter into a Voluntary Cleanup Agreement, which includes: a provision for payment of DTSC oversight costs and advance funds by the proponent; a detailed scope of work; a project schedule; and a description of services to be provided by DTSC.<sup>51</sup>

Under the VCP, projects are subject to the same cleanup process and standards and DTSC approvals as sites on the State Superfund list. Through the VCP, motivated project proponents fund their own site cleanup with DTSC's oversight, and proceed at their own pace on site assessment, investigation and remediation. A major benefit of the VCP is that project proponents may choose to conduct projects in a phased manner pursuant to an agreed upon schedule, and, most often, the length of time for project completion is compressed. Project proponents do not admit legal liability for a site cleanup upon entering into a VCP agreement and either side may terminate the agreement, for any reason, with a 30-day written notice.<sup>51</sup> DTSC is not precluded from taking enforcement action under other statutory provisions.<sup>51</sup>

Under the VCP, DTSC is committed to a cooperative team approach to achieve successful project completion. The common goal is to achieve efficient and effective response actions which are protective of public health and the environment. The work conducted must be consistent with the National Oil and Hazardous Substances Contingency Plan (the "National Contingency Plan," NCP)<sup>59</sup> and the HSAA. The cleanup standards and process are guided by the NCP. Public participation is a key component of the response action activities. Public participation activities may involve, among other things, preparation of public participation plans, mailing lists of interested parties and community members, development of fact sheets, holding community meetings, and preparation of remedy selection documents with formal opportunities for public comment.

When the site assessment/remediation is complete, DTSC issues either a "No Further

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<sup>58</sup> Department of Toxic Substances Control #EO-95-006-PP, "Managing Voluntary Site Projects (The Voluntary Cleanup Program)," September 25, 1995.

<sup>59</sup> 40 C.F.R. §§300.1 - 300.920.

Action" (NFA) determination 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.

In large part, the VCP projects have been initiated to foster redevelopment, provide opportunities for disadvantaged groups or otherwise provide substantial benefits to local economies and to California as a whole.

### **G. Prospective Purchaser Agreements**

A prospective purchaser agreement (PPA) is an agreement between DTSC and a prospective purchaser (a person who will be an responsible party upon the purchase of a site) that requires that the prospective purchaser perform specified response actions in exchange for a settlement of liability with DTSC. DTSC first developed an informal policy on PPAs in 1994. In 1995, DTSC convened a workgroup to develop a formal policy which was adopted in July 1996.<sup>60</sup> Key external stakeholders were consulted during the policy development. The policy includes, among other things, eligibility criteria, a model agreement, and an application form. DTSC uses settlement authority under the HSAA to enter into PPAs, which, in exchange for due consideration (e.g., cleanup of the site, access, entering into Land Use Covenants, and provision of significant public benefits), DTSC provides a covenant not to sue for existing contamination and provides for contribution protection. Public benefits may include: significant increase in tax base, creating new jobs, and/or reuse which improves quality of life, e.g., parks, open space, schools. PPAs are a valuable tool for bringing brownfield sites back into productive reuse.

To date, DTSC has entered into nine PPAs; two more are currently under negotiation. The following are descriptions of where PPAs have been instrumental in the revitalization of brownfields.

Two PPAs were executed for redevelopment projects in Los Angeles that will result in major economic, employment and environmental benefits. DTSC entered into a PPA with the Alameda Corridor Transportation Authority (ACTA) for a site in downtown Los Angeles. After the cleanup, the property will be redeveloped for transportation purposes that will stimulate new commercial/industrial use of adjacent areas, and trigger a 10-year project to more than double the harbor capacity of Los Angeles. In the course of the project, more than 10,000 temporary construction jobs will be created. The impacts of the project and harbor-capacity increases projected by the year 2010 are: value of trade - \$136 billion; State and local revenues - \$6.3 billion; federal taxes - \$16.7 billion; and customs revenue \$3 billion.<sup>61</sup>

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<sup>60</sup> Department of Toxic Substances Control #EO-96-005-PP, "Prospective Purchaser Policy," July 1, 1996.

<sup>61</sup> Based on DTSC staff discussions with various prospective purchaser

DTSC also entered into a PPA with the Los Angeles Media Tech Center (L.A. Media) for a 50-acre parcel located in the Cypress Park area of Los Angeles. Union Pacific Railroad owns the property and has completed the cleanup. L.A. Media will redevelop the 50-acre parcel to include up to 12 buildings, totaling 735,000 square feet for light industrial use (media/technical-related). It will provide approximately 2,200 new jobs to the community and a significant new tax base.<sup>62</sup>

In the Bay Area, two PPAs were executed for redevelopment projects in Mountain View and San Jose. A PPA was entered into with Ryland Homes for a site in Mountain View. Following installation of a groundwater extraction system, 62 new housing units will be constructed on the currently vacant 5 acre site, generating approximately \$300,000 per year of property taxes. The development will also require payment of \$200,000 in local school funding and over \$2,000,000 in City fees. The other PPA was entered into with Opus West Corporation for an approximately 25 acre undeveloped site in San Jose. Opus West Corporation characterized the site, removing contaminated soil and two large existing soil stockpiles. The property will be developed into a commercial/industrial park, adding approximately \$110,000 per year in new property taxes as well as 200 long-term jobs.<sup>63</sup>

A PPA will soon be completed with the Busboy Company for the 167 acre Hercules Properties site, a former State Superfund site, in Hercules, Contra Costa County. The project includes a proposal for a mixed use development that will generate approximately \$2 million per year of additional property taxes. The project is expected to add 207 single-family housing units and 840 multi-family home and live/work units which will reduce the City's housing demand. The development will also include office and commercial/retail buildings.<sup>64</sup>

## **II. NEW BROWNFIELDS INITIATIVES**

The Davis Administration has played a key role in developing new essential programs that provide incentives to recycle brownfields.

### **A. State Superfund Reenactment**

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<sup>62</sup> *See id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

The HSAA was enacted in 1981. Like the federal Superfund Program, the State Superfund Program was envisioned to be temporary and to be phased out as site cleanups were completed. Therefore, specified "sunset" dates were built into the HSAA which provided that if a subsequent law was not enacted to extend the statutory deadline, the entire body of law would be repealed on that date. Under the Administration of previous Governor Pete Wilson (Wilson Administration), the HSAA, the statutory authority for the State Superfund Program, was repealed by operation of law on January 1, 1999. Although DTSC determined it had sufficient remaining authorities to require responsible parties to continue site cleanup efforts, it did not retain authority to fund State Orphan site (listed sites without viable responsible parties) cleanups. Many key administrative tools that served as incentives to redevelop brownfields were in jeopardy due to the repeal of the statutory authorities that were the foundations of these tools. The change in the Administration due to the November 1998 gubernatorial election signaled that the HSAA and the State Superfund Program would swiftly be reenacted. Legislation was introduced in January 1999 to reenact, retroactively, the expired program and extend the statute indefinitely. The legislation was quickly approved by the Legislature and signed into law by Governor Davis in May 1999.<sup>65</sup>

## **B. Schools Program**

In July 1995, DTSC staff discovered that a new school (Jefferson Middle School) was being built across the street from a State Superfund site. Subsequent investigations conducted by the Los Angeles Unified School District (LAUSD), under the oversight of DTSC, determined that the proposed school site had never been properly characterized for toxic contamination prior to construction, and that significant questions remained about the remedial activities that were performed at the site prior to construction.<sup>66</sup>

DTSC's discovery set off a series of events that resulted in hearings and a significant report by the Joint Legislative Audit Committee<sup>67</sup> (chaired by former Assemblymember Scott Wildman) in 1998/1999 on school site acquisition by the LAUSD. Several other legislators held numerous hearings on the subject of school site acquisition. The Audit Committee's reports revealed a significant flaw in the system in place for the acquisition of new school sites. A school district had both the responsibility and authority for identifying the extent of contamination and carrying out its remediation, and for certifying to the Department of Education that such remediation had been properly completed

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<sup>65</sup> Statutes of 1999, c.43 (Senate Bill 47), section 2, effective May 26, 1999.

<sup>66</sup> Based on DTSC staff observations, conclusions and discussions regarding the Jefferson Middle School Site.

<sup>67</sup> "Toxic School Sites in Los Angeles: Weaknesses in the Site Acquisition Process," Joint Legislative Audit Committee, Assemblymember Scott Wildman, Chair, August 1998.

prior to the actual school site acquisition. This system was significantly problematic as districts do not generally have the expertise to conduct such environmental activities and there were troubling questions as to potential conflicts of interest in this decisionmaking. The Audit Committee report revealed that there were a number of potential school sites under consideration by LAUSD that posed serious toxic risks and LAUSD's environmental due diligence on these properties was inadequate.<sup>54</sup>

In 1999, Governor Davis signed into law two bills which became effective January 1, 2000.<sup>68</sup> These new laws clearly complement the Governor's efforts to vastly improve the quality of public education in California. He also signed "cleanup" schools legislation into law in September 2000. These bills, taken together, amend the California Education Code and require that DTSC be involved in the environmental review of properties on which a school district proposes to construct a school.<sup>69</sup> School districts that wish to receive State funds for the acquisition and/or construction of a school site are subject to the law.<sup>70</sup> These new laws reflect concerns raised by parents, teachers, local communities, and the Legislature over school properties that are or may be contaminated by hazardous materials and whether these properties pose a threat to children's health. DTSC's role in the assessment, investigation, and cleanup of proposed school sites is to ensure that selected properties are free of contamination, or if the property was previously contaminated, that they have been cleaned up to a level that will be protective of the students and faculty who will occupy the new school.

This program is the first of its kind in the nation to ensure environmentally safe reuse of brownfields for schools. The statute provides a comprehensive environmental review process for new schools. Additionally, under the legislation, DTSC is the sole agency to oversee this program and was provided broader authority to do such (i.e., authority to respond to releases of all hazardous materials or naturally occurring hazardous materials, as opposed to hazardous substances). Under the statute, all proposed school sites which will receive State funding for acquisition and/or construction are required to go through a rigorous environmental review and/or cleanup process under DTSC's oversight. Environmental assessments are conducted to provide basic information for determining if there has been a release of a hazardous material or if there may be a naturally occurring hazardous material present at the site that presents a risk to human health or the environment.

A Phase I environmental assessment (Phase I) must be completed for all proposed school sites that have been identified by a local school district as the preferred site.<sup>71</sup> A

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<sup>68</sup> §§ 17210-17213.3 of the California Education Code.

<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See id.* §17213.1(a).

Phase I is a preliminary review conducted to determine whether there has been or may have been a release of hazardous material or if there may be a naturally occurring hazardous material present at the site. The Phase I typically includes the review of public and private records of current and historic land uses, databases, federal, State and local regulatory agencies' files, surveys of the property, and interviews with current and previous owners or operators of the property. Phase Is must be developed using the American Society of Testing and Materials (ASTM) guidance.<sup>72</sup> Phase I reports must be prepared by a qualified environmental professional<sup>73</sup> under contract with the local school district. A Phase I report would either conclude that no recognized environmental threats are identified, or that a Preliminary Endangerment Assessment is needed.

Phase I reports must be sent to the California Department of Education (CDE).<sup>74</sup> CDE routes the Phase I reports to DTSC within 10 days of receipt. DTSC generally has 30 days to review the Phase I report and determine either that there is no reason to believe that the proposed property is contaminated and is therefore suitable for acquisition (DTSC issues a "no action" letter), or that Preliminary Endangerment Assessment (PEA) must be conducted.<sup>75</sup> For deficient Phase Is, DTSC is required to tell the school district what is missing or incorrect in the Phase I and allow it to be corrected prior to making the determination (thus extending the 30 day timeline).

If DTSC determines that a PEA is necessary or the Phase I concluded that a PEA is needed, the local school district has two options.<sup>76</sup> It can either proceed to contract with a qualified environmental assessor to conduct a PEA on the property under DTSC oversight, or it can eliminate the site from further consideration.<sup>77</sup> The primary objective of a PEA is to determine whether there has been a release of a hazardous material at a site or whether a naturally occurring hazardous material is present which could pose a potential threat to public health or the environment. As part of the PEA, site sampling is conducted to identify specific hazardous materials present and preliminarily identify the extent of contamination. A risk evaluation is conducted to estimate the potential threat to public health or the environment posed by the hazardous material. PEAs are

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<sup>72</sup> ASTM Designation: E 1527-00, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," July 2000.

<sup>73</sup> §17210(b) of the California Education Code.

<sup>74</sup> §17210.1(a)(2) of the California Education Code.

<sup>75</sup> *See id.*

<sup>76</sup> The school district may also elect to "skip" the Phase I and prepare the PEA.

<sup>77</sup> *See supra* note 52, §17213.1(a)(3).



developed using DTSC's PEA guidance manual.<sup>78</sup>

If the school district chooses to proceed with a PEA, it will be required to enter into an agreement with DTSC to perform the oversight function.<sup>79</sup> DTSC is available to assist the school district with the scoping and planning of the PEA. DTSC must review and approve all PEAs. When the PEA has been completed, the district forwards it to DTSC for review and approval. All proposed school sites must be suitable for residential land use, which is DTSC's most protective standard.

DTSC is required to review and respond to PEA reports within 60 days of receipt. If the property does not require cleanup based on DTSC's review of the PEA, it will approve it as a "Final Draft."<sup>80</sup> When the Final Draft is approved, the district releases to the public and holds hearings to take comments at the same time and manner as for environmental documents required pursuant to the California Environmental Quality Act<sup>81</sup> (CEQA).<sup>82</sup> After the CEQA document is approved by the district, DTSC has thirty days to consider all comments and approve the Final PEA.<sup>83</sup>

If an approved PEA concludes that the property proposed school site is contaminated and cleanup is required, the school district can either cleanup the property under DTSC oversight or it can elect not to proceed with the acquisition or construction project.<sup>84</sup> If the school district elects to proceed with a cleanup, it must: prepare an estimate of the cost of investigation and cleanup of the proposed site; assess the benefits of selecting the proposed site as compared to alternative sites; obtain the approval of CDE to acquire the site and; evaluate the suitability of the proposed site versus an alternative site if CDE recommends an alternative.<sup>85</sup>

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<sup>78</sup> Department of Toxic Substances Control, "Preliminary Endangerment Assessment Guidance Manual," January 1994 (second printing June 1999).

<sup>79</sup> "Model Environmental Oversight Agreement for Conducting a Preliminary Endangerment Assessment," Department of Toxic Substances Control, April 2000.

<sup>80</sup> §17213.1(a)(6) of the California Education Code.

<sup>81</sup> California Resources Code §21000 et seq.

<sup>82</sup> §17213.1(a)(6) of the California Education Code.

<sup>83</sup> *See id.*

<sup>84</sup> *See supra* note 52, §17213.1(a)(8).

<sup>85</sup> *See id.*

If the school district elects to cleanup and acquire the site or proceed with construction, it must enter into an agreement with DTSC to oversee the cleanup.<sup>86</sup> The agreement must be entered into, and all investigations and cleanup actions must be conducted pursuant to the HSA.<sup>87</sup> This includes requirements for public participation. When the cleanup is complete and DTSC is satisfied that the cleanup goals have been achieved, a letter will be issued to the school district certifying that the cleanup meets State standards.

If hazardous materials are encountered during school construction, the school district is required to stop construction, promptly notify DTSC, and take actions necessary to address the hazardous materials under DTSC oversight.<sup>88</sup>

Under the new law, school districts are not required to address contaminated groundwater that may have migrated from an offsite source and that underlies a proposed site so long as the school district did not cause or contribute to the contamination, provides necessary access to the site to DTSC, and does not interfere with any necessary investigation and/or cleanup actions.<sup>89</sup>

DTSC faced significant challenges in implementing the new legislation. Developing relationships with school districts, school administrators, members of the public, CDE and various schools oversight coalitions was extremely difficult and at times contentious. The need to build hundreds of new schools, the diminished availability of suitable properties and competition for limited State school funds, generated concern among some stakeholders that the environmental review process would cause delays which would prevent schools from being built. Rural districts which are experiencing rapid population increases felt that DTSC's involvement would undermine their ability to compete with urban districts, i.e., that DTSC would delay their ability to "get in line" for State funds, in effect, that funds would be depleted and therefore unavailable. DTSC is working closely with all stakeholders to ensure that these concerns are not realized.

DTSC staff have prepared several guidances and model documents to carry out its mandate. DTSC, working in concert with a coalition that represents several hundred school districts, developed a Model Environmental Oversight Agreement for conducting PEAs. This model enforceable agreement between DTSC and a school district significantly expedited the negotiations process.<sup>90</sup> Fact sheets have been generated to

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<sup>86</sup> §17213.2(a) of the California Education Code.

<sup>87</sup> *See id.*

<sup>88</sup> *See id.* §17213.2(e).

<sup>89</sup> *See id.* §17213.2(b).

<sup>90</sup> "Model Environmental Oversight Agreement for Conducting a Preliminary

outline the basic principles of the new program. DTSC's PEA guidance manual had been used for several years in the Voluntary Cleanup and State Superfund programs. ASTM's guidance is generally available and most school districts have already used it to conduct Phase Is. DTSC also developed a guidance on Pesticide Sampling for Agricultural Lands<sup>91</sup> as this was a key need for rural and Central Valley school districts. Given DTSC's new authority to oversee the investigation and cleanup of naturally occurring hazardous materials, fact sheets on radon, oil and gas and naturally occurring asbestos are underway. As many school districts are acquiring residential and commercial properties, guidance has been developed to evaluate asbestos-containing building materials and lead-based paint.<sup>92</sup> DTSC also entered into a contract with CDE to outline each respective agency's roles and responsibilities. Other educational materials and guidance documents are under development or will be developed as needs arise.

To implement the new legislation, DTSC requested and received approval for a significant number of additional new staff to address schools in the Governor's budget, which was subsequently approved by the Legislative. In order to ensure that DTSC would have dedicated resources to carry out its obligations under the new statutes, in May 2000, DTSC's Site Mitigation Program established a separate division, the Schools Property Evaluation and Cleanup Division.

### **C. Brownfields Loan Programs**

The previous Wilson Administration did not provide financial incentives for brownfields reuse, a sharp contrast to what occurred in many other States throughout the nation. However, Governor Davis quickly showed his personal commitment to restoring brownfields by committing \$85 million in his Fiscal Year 1999/2000 budget to create two low-cost loan programs.

On September 29, 2000, Governor Davis signed enabling legislation into law.<sup>93</sup> The new law provides \$85 million in General Funds for loans to investigate and cleanup urban brownfields.<sup>94</sup> In accordance with the statute, DTSC is responsible for developing and

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Endangerment Assessment," Department of Toxic Substances Control, April 2000.

<sup>91</sup> Department of Toxic Substances Control, "Interim Final Agricultural Lands Guidance," June 2000.

<sup>92</sup> Department of Toxic Substances Control, "Draft Interim Guidance for Evaluating Lead-Based Paint and Asbestos-Containing Building Materials at Proposed School Sites," February 2001.

<sup>93</sup> Division 20, Chapter 6.8, Article 8.5, §§25395.20-25395.32 of the California Health and Safety Code.

<sup>94</sup> *See id.*

administering the program.

The law provides for two loan programs, the Investigating Site Contamination Program (ISCP)<sup>95</sup> and the Cleanup Loans and Environmental Assistance to Neighborhoods (CLEAN) Program.<sup>96</sup> Under the ISCP, low-interest loans of up to \$100,000 can be used to conduct PEAs.<sup>97</sup> If redevelopment of the property is determined not to be economically feasible, the repayment of 75 percent of the ISCP loan can be waived.<sup>98</sup> The CLEAN Program provides low-interest loans of up to \$2.5 million for the investigation and cleanup of hazardous materials.<sup>99</sup> DTSC is currently the sole agency which can oversee these environmental activities.<sup>100</sup> The loan recipients must enter into oversight agreements with DTSC as a condition of receiving loan funds.<sup>101</sup> Loan funds can only be used for conducting environmental activities. Loan funds cannot be used for property development costs or payment of DTSC oversight costs.<sup>102</sup>

To implement these loan programs, DTSC developed emergency regulations, program guidelines and application forms.<sup>103</sup> DTSC has also developed model environmental oversight agreements for each of the loan programs.

It is projected that the first loans will be issued early in 2001. While DTSC is responsible for approving loan applications, it must consult with the Secretary of Cal/EPA, the Secretary of the Trade and Commerce Agency, the Secretary of the Business, Transportation and Housing Agency and the Director of the Office of Planning Research prior to doing so. These agencies will be represented on a Loan Committee<sup>104</sup> which will serve to advise DTSC on its administration of the loan programs.

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<sup>95</sup> See *id.* §25395.21(a).

<sup>96</sup> See *supra* note 66, §25395.22(a).

<sup>97</sup> See *supra* note 66, §25395.21(d).

<sup>98</sup> See *id.* §25395.21(f).

<sup>99</sup> See *supra* note 66, §25395.24(a).

<sup>100</sup> See *supra* note 66, §25395.27(a).

<sup>101</sup> See *supra* note 66, §25395.25(a).

<sup>102</sup> See *supra* note 66, §25395.22(a).

<sup>103</sup> California Code of Regulations, Title 22, §§68200-68213 and appendix I (effective January 18, 2001).

<sup>104</sup> California Health and Safety Code §25395.23.

While urban brownfields are eligible for loans under the programs, certain other properties are excluded: property listed or proposed for listing on the National Priorities List; property that is, or was, owned or operated by a department, agency, or instrumentality of the United States; or property that will be the site of a contiguous expansion or improvement of an operating industrial or commercial facility.<sup>105</sup>

Persons that are ineligible for loans include: a person who has been convicted of a felony or misdemeanor involving the regulation of hazardous materials, a person who has been convicted of a felony or misdemeanor involving moral turpitude, including, but not limited to, the crimes of fraud, bribery, falsification of records, perjury, forgery, conspiracy, profiteering, or money laundering; a person who is in violation of an administrative order or agreement issued by, or entered into with, any federal, State, or local agency that requires response action at a site or a judicial order or consent decree that requires response action at a site; or a person who knowingly made a false statement regarding a material fact or knowingly failed to disclose a material fact in connection with a loan application.<sup>106</sup>

The Governor's Office has convened a brownfields working group comprised of several State agencies involved in various aspects of brownfields, to discuss the loan program development activities, coordinate brownfields efforts, share successes (and build upon them) and tackle emerging brownfields issues throughout California. Clearly, Governor Davis and his Administration are devoting significant resources and efforts to ensure that the State continues to develop innovative approaches for the recycling of brownfields. The Administration's dedication and leadership are essential to address California's evolving brownfields opportunities.

### **III. CONTINUING BROWNFIELDS CHALLENGES**

#### **A. Consistency in the Cleanup of Brownfields**

One of the primary challenges facing legislators and regulators is to develop a comprehensive statewide system for addressing contaminated properties. Any system developed should be designed to ensure that cleanups are performed using consistent cleanup procedures and standards. Appropriate levels of regulatory oversight should be required for all cleanups. These basic features are necessary to ensure that cleanups are conducted consistently throughout the State and in a way that provides appropriate protection to public health and safety and the environment.

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<sup>105</sup> California Health and Safety Code §§25395.20(a)(2), (5) and (11).

<sup>106</sup> See *supra* note 66, §25395.30.

Under current law, different federal, State, and local agencies take or require site cleanups and there is no requirement that such cleanups be conducted pursuant to consistent procedures or standards or meet the same cleanup objectives. The U.S. EPA oversees the cleanup of sites on the National Priority list. Sites on the federal list must be cleaned up in accordance with the NCP process and standards. DTSC is required to generate a list of sites which are subject to the authorities in the HSAA and to a cleanup process and standards which must also be consistent with the NCP.<sup>107</sup> DTSC, or, if appropriate, the regional water quality control board, is the State agency with sole responsibility for ensuring that required action in response to a release at a listed site is carried out in compliance with the procedures, standards, and other requirements of the HSAA. In practice, the regional water quality control boards do not oversee the cleanup of many listed sites. DTSC, and, under certain circumstances, local agencies that are certified unified program agencies,<sup>108</sup> are authorized to require cleanups at hazardous waste facilities. Existing statutes do not specify a particular cleanup process or standards that must be complied with in conducting cleanups at hazardous waste facilities. Site cleanups are also conducted or required by the regional water quality control boards as well as local government entities. Existing statutes do not specify a particular cleanup process or standards that must be complied with by these agencies in carrying out their specified mandates.

Different solutions have been proposed to bring more order and consistency to the cleanup process. Certainly, DTSC and the regional water quality control boards should make a renewed effort to ensure that their respective cleanup processes and standards are consistent. Current regulators should consider the notion that perhaps the two agencies should abide by a process that is the same, rather than a process that is simply not inconsistent. Some groups argue that more authority to address non-listed sites should be provided to local government to ensure that site contamination is appropriately addressed. It is argued that State governmental agencies do not possess the requisite resources to address sites that are really a local problem. There is no guarantee, however, that local governmental agencies will have the requisite resources or expertise needed to oversee cleanups at contaminated sites. Some interest groups argue that local jurisdictions may be more concerned about putting contaminated property back into reuse and generating additional local taxes than they are about ensuring that sites are cleaned to a level that is appropriately protective of public health and safety and the environment. In addition, local cleanup control will necessarily result

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<sup>107</sup> The NCP process generally includes conducting investigation and site characterization activities, development of a risk analysis and feasibility study, development of a remedy selection document which is made available for formal public comment, development of an engineering design, and implementation of the remedy (some sites also require operation and maintenance). Streamlining of the process can be conducted depending on the site circumstances. Public participation activities are integrated throughout the process.

<sup>108</sup> Chapter 11, Division 20 of the California Health and Safety Code (commencing with §25404).

in increased inconsistencies throughout the State. Perhaps a middle ground would be to create a system whereby local agencies are authorized to require that sites suspected of being contaminated be subject to site investigation, under State agency oversight. A higher level of consistency will more likely be achieved if actual cleanup activities are subject to State oversight and approval. Some interest groups, however, prefer the current state of affairs because it allows them to forum shop for the most inexpensive cleanup.

In signing the legislation that addresses environmental contamination at potential schoolsites and that establishes the brownfields loan programs, Governor Davis has taken positive steps toward establishing a more consistent, statewide cleanup process and standards. All site investigation and cleanup activities under these two programs must be consistent with the NCP and conducted solely pursuant to DTSC oversight. Undoubtedly, legislation will be introduced this year to provide local agencies with a more recognized role to play in the investigation and cleanup of brownfields. Whether a uniform cleanup process and standards will be proposed that includes a State agency oversight function residing with DTSC or the regional boards, or both, remains to be seen.

#### **B. Default Health-Based Cleanup Levels**

For many years, some interest groups have advocated the adoption and use of default cleanup level tables to determine the need for, or level of cleanup activity required at a site. Such tables would list constituents of concern and quantitative levels of such constituents, that if present at a site, would require additional site investigation or cleanup. Theoretically, the use of these tables would expedite the cleanup process and be more cost-effective as they would be used in lieu of a site-specific risk assessment. If established, such default levels must be based on an agreed upon exposure scenario.

For example, the Maximum Contaminant Levels used as standards for drinking water are based on a simple and relatively non-controversial exposure scenario: people drink approximately two quarts of water per day. However, the exposure pathways for contaminants in soil are more complex and controversial. For example, the movement of vapors through the soil and into the air is affected by type of soil. Should it be assumed that vapors will move through clay or sand? Risk from non-volatile organic chemicals like PCBs and dioxins are more significantly posed by the ingestion of certain food sources. The ingestion of such food sources vary greatly throughout the State. What ingestion levels should default levels for these contaminants assume?

Use of default cleanup levels is troubling for a number of reasons. The primary reasons are that they do not take into account all exposure media (air, soil, water) and pathways; rarely is single chemical contamination encountered at sites; and they do not factor in synergistic (which can be cumulative, in the worst case scenario) effects.

Proponents of such “look-up” tables argue that their use will reduce the time and cost to complete cleanups. However, the main time investment is in site characterization, not risk assessment. The primary problem encountered by most regulatory agencies is the

lack of sufficient and adequate site characterization upon which to base a decision. Use of such tables may exacerbate this problem and provide a false conclusion that a site does not pose a health or environmental risk.

Any group charged with the task of establishing default levels would need to define the population of concern, the exposure pathways to be considered, and the appropriate level of protection to be afforded to humans and the environment. Such tables may ensure greater consistency and provide more certainty, yet sites and conditions generally differ significantly. As a result, a generic approach may yield less protective cleanups. Therefore, any attempt to establish a process for the use of default levels must carefully consider these factors; site-specific risk assessment should continue to play a critical role in the evaluation of brownfields.

### **C. Environmental Insurance**

Brownfields development may also be hampered by uncertainties associated with site cleanups. Once a cleanup commences, costs can escalate beyond projections. The existence of numerous federal, State and local entities with site cleanup authority can leave a potential developer in a state of uncertainty even after a site cleanup subject to regulatory agency oversight has been completed. Unless a responsible party receives a certification of completion from an administering agency under the Unified Agency Review statutes, has been through arbitration under the HSAA, or has obtained immunity pursuant to the Polanco Redevelopment Act, cleanups that are conducted under the oversight of one agency may not be considered satisfactory by another agency. Interest groups have complained that the Unified Agency Review process entails significant transaction costs and is not an effective alternative to address this issue. The establishment of a single State agency with authority to oversee and declare a cleanup complete as to all State and local agencies may be an essential element in the effort to encourage the cleanup and reuse of brownfield properties. However, proposals that include a liability release once a cleanup has been completed will generate controversy. After a cleanup is deemed complete, problems can arise due to a number of factors such as new information regarding risk or a failure of the remedy chosen to accomplish the cleanup objectives. In such cases, if liability releases have been provided, these problems could fall into the lap of government and the taxpayers in general.

Some interest groups suggest that the uncertainties associated with unanticipated cleanup costs and with the potential for open-ended liability can be addressed with environmental insurance mechanisms. There are two basic types of environmental insurance available on the market today. A "pollution legal liability" policy insures against the cost of cleanup for conditions that are unknown as well as liability to third parties for property damage and personal injury. A "cost-cap" policy insures against the risk of escalating development costs from unknown contaminants and uncertain cleanup costs. "Lender liability" insurance is also available to insure against loss incurred by lenders associated with contaminated properties.



The cost of environmental insurance may exceed what developers are willing to pay. In an effort to address these cost issues, a total of \$40 million has been included in Governor Davis' proposed budget this fiscal year<sup>109</sup> and in Senate Bill 232 (Sher) to establish the California Financial Assurance and Insurance for Redevelopment (FAIR) program. As proposed, the FAIR program has two components.<sup>110</sup> EnviroSure would make environmental insurance more affordable by lowering the transaction and unit costs of purchasing the insurance through the pre-negotiation of a group policy, bulk purchasing, and the creation of a guaranteed market. State funds would be used to negotiate a complete set of volume discounted environmental insurance policies that would include "pollution legal liability," "cost-cap" and "lender liability" policies. Cleanup loan recipients under the CLEAN program would be required to purchase environmental insurance. EnviroTrust would make environmental insurance more affordable by using State funds to partially subsidize the EnviroSure insurance premiums and other costs associated with the insurance, for cleanup loan recipients under the CLEAN program, and, in some circumstances, for other brownfield developers. The FAIR program may provide the certainty that many potential developers currently feel is missing in the California brownfields marketplace.

#### **IV. CONCLUSION**

California is clearly poised to become a national leader in the development of programs to address brownfields under the direction of the Davis Administration. While California has had considerable success in recycling brownfields, the new programs and directions discussed in this article will certainly produce significant results in the future, at the same time ensuring safe and productive reuse of brownfields. Governor Davis' commitment to innovation, and provision of significant financial resources, reflects a new era of brownfields revitalization for the State.

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<sup>109</sup> Assembly Bill 95 (Cardenas), section 2.00, item 3960-014-0001.

<sup>110</sup> Proposed Senate Bill 232 (Sher).