

New Developments in the Brownfields Arena

By
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Will Rogers once said, “Buy land. They ain’t making any more of the stuff.”

And since that’s true, the land that there is, especially in older urban areas, is more desirable to developers and investors with each passing year. In the past decade, developing environmentally-blighted properties (known as Brownfields) has become a lively arena for investors in inner city areas, because the amount of available, clean, undeveloped land in those areas has been shrinking. Commercial and residential real estate investors have targeted more central locations within cities to revitalize neighborhoods and commercial hubs.

Brownfield is a term applied to property known or thought to be contaminated or have a history of pollution problems.

purposes at a time when environmental regulations were less rigorous than they are today. The good news is that barriers

to developing Brownfields have decreased in recent years. At the Federal level, programs created under the Small Business Liability Relief and Brownfields Revitalization Act have helped developers and investors move projects forward and put otherwise blighted or stigmatized property to beneficial uses. Various states have followed the Federal programs with additional legislation that has made Brownfield redevelopment even simpler and more efficient. For example, in California the Land Reuse and Revitalization Act of 2005 (AB 389) has gained traction as a way for developers to deal with Brownfields they might otherwise ignore, because it grants developers and purchasers very broad immunities from legal action.

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While environmental standards and regulations have been strengthened in the past few decades, as cities have become increasingly interested in revitalizing urban centers, they have tried to make the process of developing Brownfield property easier and more efficient.



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Prior to laws like California's AB 389, government agencies could require additional remediation measures after a construction project was completed. While the US EPA and other agencies provided tax breaks and technical assistance for Brownfields investments, developers were still left with liability exposures for newly discovered pollution conditions or new pollution incidents. Under AB 389 and other similar provisions, however, once agencies have approved a clean-up plan, they can no longer seek funds for remediation from the developer, unless it is found that there is an "urgent and immediate" threat to public health. AB 389 also provides innocent landowners and contiguous property owners with immunity for hazards that are discovered or occur after the approval of remediation plans. These immunities extend to the Fish and Game Code, the Water Code and other Health and Safety Codes in the California regulatory framework.



Two other components of AB 389 have helped streamline Brownfield development in California. First, the program funded the development of a comprehensive database that maintains and displays the geographic locations of Brownfield sites. The data includes such information as acreage, topography and potential for reuse. Second, AB 389 formally codifies the Prospective Purchaser Agreement (PPA) that the California EPA honors. The PPA is used to document the covenant not to sue that CA EPA offers in exchange for a developer's offer to remediate a site. Prior to AB 389, PPA document use was unstructured. Now, the method for its use is embedded in the regulatory framework.

AB 389 does have some limitations. It does not extend to sites on the Superfund National Priorities List or to properties impacted solely by petroleum releases from underground storage tanks that would be eligible for state funding. Also, problematic with AB 389 is the long application process. At a recent

conference, representatives from the CA EPA noted that although the law is well crafted, the large volume of issues facing the agency prevents it from responding to applicants in a timely fashion. Due to the overload, the application process can take many months, or at this point, years. The implication is that the law is workable, but the agency needs more resources and personnel to meet demand.

Many states have programs somewhat similar to AB 389 and offer some degree of immunity from legal action upon approval of a remediation plan. But most states' programs are not as broad as California's and continue to limit immunity if new pollution conditions are discovered or a new pollution event occurs. This variable in immunities granted leaves many developers in other states focused on the tax incentives they receive for developing Brownfields. The tax incentives are usually substantial, and the tax savings can help offset developers' expenditures if they are found liable for new pollution conditions at their projects.

Willis has been involved in many environmental insurance program placements involving state Brownfield programs and tax incentives. While Brownfield redevelopment programs don't solve all of a developer's problems, they are catalysts that move projects off the drawing board. Even with the good protections provided by these programs, some risk remains. Willis' Environmental Practice has been a key player in helping developer and investor clients find environmental insurance solutions for the risks and residual contingencies that generally continue beyond the benefits of Brownfield redevelopment programs.

Summary

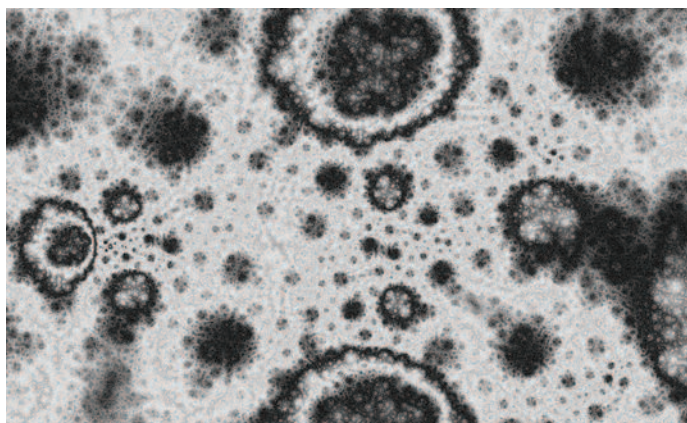
Brownfields will continue to serve as prime properties for developers and investors. Programs like AB 389 are expected to be the new trend across the country, further enhancing developers' ability to remediate sites, turning them to profitable commercial and residential uses. New York, for example, now has a relatively comprehensive program focusing on tax incentives, but also containing provisions for some degree of immunity to innocent purchasers. New Jersey, Maryland, Delaware and Florida have programs emphasizing the revitalization of specific types of properties in certain locations targeted by the states. City, county and state governments are realizing more and more that such legal frameworks in addition to tax incentive programs are a win-win situation for all.

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Environmental Policies and Mold: A Rapid Evolution of Coverage

By
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Willis Environmental Practice

Property owners and contractors have faced an increasing onslaught over the past decade of mold-related losses and litigation and have often turned to environmental insurance as a solution. This is an appropriate response, given the similarities between mold claims and other more typical pollution claims addressed by environmental insurance (i.e., first- and third-party claims for clean-up costs, property damage, bodily injury, and/or business interruption, etc).



Unfortunately, the number of claims and demand for coverage evolved so quickly that early mold coverage grants given by environmental underwriters often overlooked critical differences between mold issues and other, more classic pollution conditions. Rather than craft mold coverage that specifically addressed these differences, such coverage was often granted through simple microbial matter endorsements that left the base policies unchanged. This approach ignored the differences between how mold is regulated as compared to other pollutants and how such differences in regulation relate to common policy triggers for coverage.

For example, most pollution policies will only cover clean-up costs “to the extent required by environmental laws.” However, there are no Federal or state laws or regulations that specifically mandate the remediation of mold. Although some Federal and state guidance documents exist, they focus on techniques for preventing and removing mold and do not specify clean-up levels. Consequently, some environmental insurance policies did not respond in cases where mold clean-up costs had been incurred, but where a law or standard did not exist.

Recognizing this problem – and at the request of Willis and our clients – many insurers subsequently amended their endorsement language to provide clean-up coverage as recommended by a Certified Industrial Hygienist or Mold Matter Professional when clean-up standards do not exist. Today, such language is common and part of standard mold coverage grants.

Insureds can become even more frustrated when seeking the assistance of their environmental insurers in response to claims for bodily injury resulting from exposure to airborne mold spores (such allegations were made famous by lawsuits such as the case on which the movie *Erin Brockovich* was based and Ed McMahon’s civil action and eventual out-of-court settlement over alleged toxic mold exposure).

Here, the problem is the lack of medical case studies or agreed-upon health standards applicable to mold. The recommended guidelines from various government entities deal only with treatment and removal of mold, not with human exposure levels. In this light, some environmental insurers have attempted to deny claims for bodily injury based upon the lack of any established causal link between mold and adverse health effects.

As confirmed in the OSHA Bulletin dated 10-10-2003:

“Currently, there are no federal standards or recommendations, (e.g., OSHA, NIOSH, EPA) for airborne concentrations of mold or mold spores. Scientific research on the relationship between mold exposures and health effects is ongoing.”

Scientists continue to improve our understanding of the long-term health effects of exposure to mold and fungal spores. Willis has been closely monitoring the evolving technical debate and associated regulatory developments. Moreover, our specialist environmental claims team has been tracking mold claim activity and is at the forefront of representing insureds with mold-related claims.



Also challenging are situations where well-meaning insureds have incurred costs in an attempt to minimize or eliminate the potential for alleged negative health effects from the presence of mold spores in their buildings. This scenario is often found in the hospitality sector where the presence of mold can generate damaging publicity. Owners of such establishments want to remediate even negligible amounts of mold in air ducts, restrooms, kitchens and common areas without any governmental mandate requiring them to do so. Environmental insurers will generally reject claims for reimbursement of costs associated with pre-emptive remediation, again citing the lack of any clean-up requirement “to the extent required by environmental laws” (a standard qualification in many environmental insurance policies). However, with careful negotiation, insurers may, in some instances, be prepared to consider covering costs associated with a pre-emptive clean-up response, if such action will potentially avoid a future claim situation.

Willis has helped numerous clients maximize the benefits of mold coverage and ensure that protection is accessible when claims arise by following “Best Practices” (summarized below) when adding mold coverage to pollution liability policies.

Endeavor to Make Improvements on Renewal

For renewals, a critical re-evaluation of expiring language should be conducted. Expiring programs may not be optimal, and opportunities for improvements should be aggressively explored. For example, previous versions of mold coverage endorsements excluded coverage if there was a construction defect or failure to maintain a mechanical system in accordance with standard procedures. Such exclusions have been dropped from current policies. However, care should be taken while introducing language to clarify or expand coverage so that any claims on the expiring policy are not compromised.

Best Practices When Adding Mold Coverage

- Endeavor to make improvements on renewal
- Ensure there is a thorough exposition of environmental law
- Incorporate CIH guidance into policy language
- Clarify coverage for investigation and replacement costs
- Be certain that the insured understands their obligations

Ensure There Is a Thorough Exposition of Environmental Law

Since mold remediation practices are dictated in part by guidance documents, actions taken in accordance with such guidance should be covered.

Incorporate CIH Guidance into Policy Language

In the absence of regulatory requirements or enforcement, mold clean-ups are often performed according to specifications of a mold expert such as a Certified Industrial Hygienist (CIH). Endorsement language should cover expenses for mold remediation performed at the direction of an expert of specified qualification.

Clarify Coverage for Investigation and Replacement Costs

Many insureds view restoration costs as the key component of mold coverage. Their position is based upon the fact that restoration and investigation costs are often larger than pure remediation expenses. Insurers are frequently looking to eliminate or sublimit these areas of risk. Coverage and limits for such expenses must be clearly defined, and negotiation is often needed to raise sublimits to the level of providing meaningful coverage.

Be Certain That the Insured Understands Their Obligations

In some cases, coverage may be contingent upon the development, implementation, and possibly underwriting review of mold prevention protocols by the insured. Environmental insurers need to review and approve the insured’s mold management/water intrusion response plan, as well as evidence of appropriate training for key employees. However, because the need to develop these programs is also relatively new and not necessarily mandated by regulation, insurers will often provide the help of mold experts in the development of such plans as a value-added service. Some insurers are even willing to incept mold coverage in the absence of such plans as long as they will be completed within 60 to 90 days after binding. A sublimit may apply when the plans are being drafted. After mold is encountered, the insured must be careful to take appropriate actions to enable optimal insurance recovery.

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News/Events

Mike Balmer participated in a very well received expert panel session at the recent Association of Defense Communities national conference in Miami. The focus of the session was the valuable role that environmental insurance can play in the transfer and redevelopment of former military facilities.

Richard Sheldon will be speaking at the 15th Annual ABA Conference on Energy, Environment and Resources in Pittsburgh on September 27-28. His topic will be Environmental Liability Transfers. General items on the agenda include regulatory issues, insurance, Sarbanes-Oxley and liability management.

Willis will serve as a primary sponsor at the Environmental Financial Consulting Group's (EFCG) 18th Annual Conference for CEOs and senior executives of Environmental engineering and contracting firms. In its 18th year, this invitation-only event, which runs from October 17-19, draws top executives from more than 200 companies across North America. The event is held at the Millenium Broadway Hotel, The New York Yacht Club, and the Harvard Club. Willis will make a presentation focused on insurance trends in the environmental industry.

New Faces



Lindsey Basham

Lindsey Basham joined the Southeast Environmental Team in Atlanta in March 2007 as an Assistant Client Manager. She recently graduated from Mississippi State University with a Bachelor of Science in Biological Sciences and served in leadership roles for several campus organizations. Prior to receiving her degree, she also worked in the Willis Atlanta office during an internship.



Brian Smith

Brian Smith also joined the Southeast Environmental Team in Atlanta in March of this year. His current position is Marketing Specialist. Brian previously worked in the environmental consulting field with Earth Tech and KPA, specializing in project management of Superfund projects and environmental regulatory and health and safety compliance. Brian graduated from Mercer University in 1997 with a Bachelor of Science in Environmental Science and the University of Georgia in 2003 with a Master of Business Administration in Finance.

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