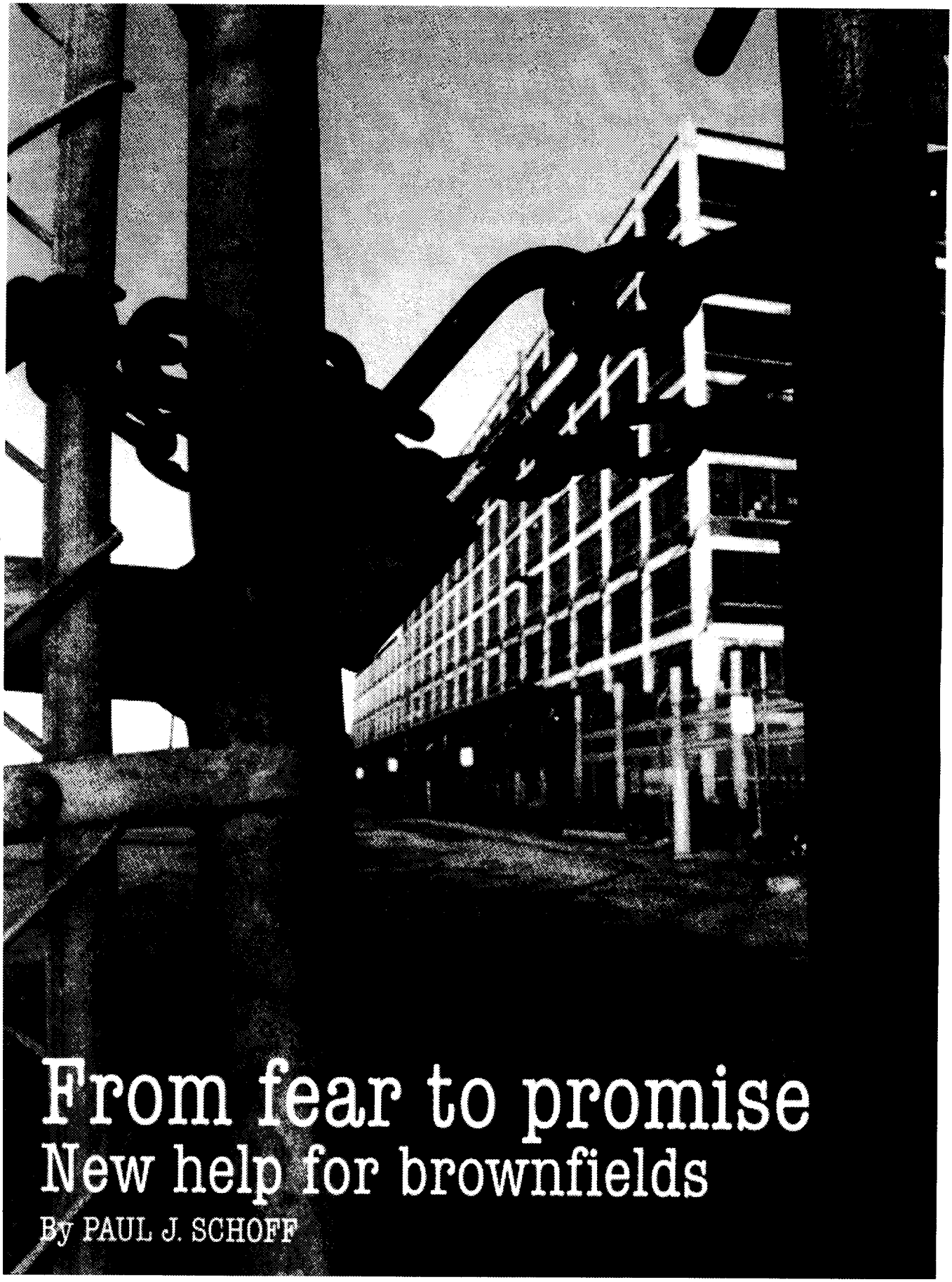

From fear to promise

New help for brownfields

By PAUL J. SCHOFF

Your best corporate client wants to buy a vacant industrial site for his new wholesale textile operation.

The site was used in the '60s and '70s to assemble tractor trailers. An old paint booth stands alone in the cavernous 70,000-square foot facility. A collection of 55-gallon drums has been piled up next to the rear loading dock for the past eight years and two underground storage tanks haven't been tested since they were installed in the late '60s. The owner is clearly insolvent and the delinquent real estate taxes on the site now hover in the hundreds of thousands of dollars.

How quickly can you tell your client to run, don't walk, away from the site?

Not so fast. The above hypothetical has been played out in thousands of variations in the last 15 years and everyone has heard the horror stories of innocent purchasers being tagged with liability for environmental remediation that far exceeds the cost of the property. The quicksand of CERCLA and RCRA have gobbled up their fair share of enterprising business clients.

The pendulum has finally swung back and the "brownfields" concept is gathering more and more momentum. The reuse of commercial and industrial sites without remediation to "background" standards is an idea whose time has arrived. Of the states, 38 now have some sort of brownfield legislation in place—36 became law in the last five years. President Clinton announced $2 billion in tax incentives for brownfield projects in March of last year and in the 104th Congress, no less than 22 separate brownfields bills have been introduced. So far, five bills have been introduced in the current congressional session.

But first, what are "brownfields"? *The Hoffman Report*, an online Internet brownfields resource, defines them as "vacant, abandoned or under-utilized commercial and industrial properties where the fear of unknown environmental liability is a serious obstacle to their successful redevelopment or improvement."

Downside? No current federal law.

Just as business lawyers and real estate lawyers made the uncomfortable stretch into environmental law during the last five to 10 years, these same lawyers need to be cognizant of the white knight named "brownfield," which has appeared on the horizon. While each state that has passed brownfield legislation has a different version, there are common elements.

Pennsylvania's Land Recycling Act is typical. Passed into law in July of 1995, the Pennsylvania act provides for a statutory covenant not to sue those persons who can show that the property has met one of three standards for remediation: background, statewide health or site specific. The act provides protection from state environmental enforcement action as well as third party contribution suits. Current and future owners of the site, tenants, prospective purchasers, developers and public utilities are all eligible. Moreover, the liability protection is fully transferable to successors in title.

The act contains certain "re-opener" provisions where previously undetected contamination is later discovered, new contamination is present or the site conditions cause an "unacceptable" increase in the level of risk—such as converting the use of the property from commercial or industrial to residential— and, of course, fraud. All in all, the protection afforded is extensive and transferable—two key ingredients in getting clients excited about the concept.

The downside is that despite the plethora of bills pending before Congress, there is *no* current federal brownfields law. Thus, in situations where the Environmental Protection Agency has taken an active role, a "prospective purchaser agreement" (see the accompanying glossary) is still the preferred method of obtaining safe harbor protection from the agency The process can be long and difficult but is certainly preferable to dealing with the EPA after the fact. The only other method of achieving EPA comfort is if a memorandum of understanding has been signed between your jurisdiction and the agency. The good news is that 27,000 sites were recently delisted from CERCLIS. CERCLIS is the EPA maintained database of properties where some environmental information is known, but where the conditions on the property do not rise to the level of concern generated by those sites on the National Priority

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Glossary of brownfield terms

ACBM — Asbestos-containing building materials

AST — Above-ground storage tank

Baseline report — A report performed to determine the nature, quality and extent of contamination present at a site. To be used as a reference for contamination that may occur in the future.

Brownfield or voluntary cleanup program — A program designed to provide a comfort level to owners or purchasers of actual or potentially contaminated real estate that requires a testing of the site and an abatement, remediation or confinement of the contamination so that the property does not present a threat to persons, property or the environment. The program takes into consideration the former, current and future uses of the site.

BTEX — Benzene, toluene, ethylbenzene and xylene. A reference to the presence of petroleum-related contaminants. This is frequently used in Phase II Audit Reports (see Phase II, below) to refer to the degree of petroleum and petroleum byproduct contamination.

CERCLA — The Comprehensive Environmental Response, Compensation and Liability Act. 42 U.S.C. § 9601 *et seq*. Also known as the "Superfund" law. It is one of the most potent of the myriad of federal laws imposing joint and several strict liability on "owners," "operators," "generators" and "transporters" of hazardous substances. Civil and criminal penalties are available to the EPA when enforcing the terms. It also provides for private causes of action and contribution rights between and among those found liable.

CERCLIS — Comprehensive Environmental Response, Compensation and Liability Information System. This is a tracking system maintained by the EPA that serves as the repository of information concerning sites of known or suspected contamination that could be eligible for placement on the National Priority List.

Hazardous substance — A broadly defined term under CERCLA that incorporates substances listed in other federal statutes and includes toxic pollutants, hazardous waste and "any imminently hazardous chemical substance or mixture." It does *not* include petroleum or petroleum byproducts (although petroleum is covered under RCRA, see below).

LUST — Leaking underground storage tank

MOU — Memorandum of understanding. An agreement between the EPA and another agency, state or other entity that governs the relationship of the EPA region and the entity executing the agreement. It typically will provide for an agreement by the EPA not to interfere with state or other agency enforcement actions unless certain criteria exist.

NFA — No further action. A letter from the EPA or a state environmental enforcement authority stating that based on the information received by the agency, no further enforcement action is anticipated at a particular site. Also known as NFRAP—"no further remedial action planned."

NPL — National Priority List. A listing of the most heavily contaminated sites in the country—also known as the Superfund list. Creation and maintenance of the NPL follows procedures set forth in the National Contingency Plan (42 U.S.C. § 9605; 40 C.F.R. Part 300).

PCBs — Polychlorinated biphenyls. A hazardous substance frequently found in electrical equipment, such as transformers, due to their remarkable electrical conductivity properties.

Phase I — The definitions of Phase I and Phase II environmental site audits have become increasingly blurred. However, a Phase I audit generally refers to a noninvasive review of a site by a qualified environmental consultant. State and federal environmental records are checked, a site visit occurs where potential environmental issues can be raised, and a history of the prior and current use of the facility is

examined. Existing underground and above-ground storage tanks will be noted and areas of concern will be highlighted.

Phase II — A Phase II audit is designed to either confirm or deny the existence of an environmental condition and will typically involve sampling of environmental conditions at the site. This may include soil sampling, groundwater tests, checking for the presence of asbestos, lead paint or PCBs. The consultant will perform investigations into all of those conditions identified in the Phase I report in order to quantify the extent of contamination and the degree of remediation or containment required.

Plume — A graphic depiction of location and quantity of contamination in soil or some other nonmigratory medium at a given location.

Pollution exclusion — An exclusion inserted into most comprehensive and general liability policies by insurance companies that excludes coverage for acts of pollution. The earliest form started to appear in policies around 1970 and dealt mainly with intentional acts of pollution. A more comprehensive version became popular in 1985 and has been refined since that time into an "absolute pollution exclusion."

PPA — Prospective purchaser agreement. An agreement negotiated with the EPA that limits the liability of a prospective purchaser when acquiring title to a site. Only available for sites on the NPL or CERCLIS.

PRP — A potentially responsible party. This is CERCLA parlance for those persons identified as being within one of the four classifications of persons capable of being held liable under CERCLA.

RCRA — The Resource Conservation and Recovery Act. 42 U.S.C. § 6901 *et seq.* This is federal legislation that was a precursor to CERCLA and noted for its requirement of "cradle-to-grave" tracking of hazardous waste. Subtitle D of RCRA also covers nonhazardous waste. RCRA does cover petroleum products but does not provide for a private right of recovery although citizen suits to enforce RCRA are authorized after prior notice is given to the EPA.

Release — A CERCLA euphemism that refers to any "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment (including the abandonment or discarding of barrels, containers and other closed receptacles containing any hazardous substance or pollutant or contaminant)... ."

Reopener — Those conditions or occurrences that would give rise to an environmental enforcement agency's ability to impose liability on the recipient of a covenant not to sue under a brownfields program. Examples would include fraud in the obtaining the covenant, new contamination and new conditions at a site that would pose an unacceptable risk to persons, property or the environment.

TPH — Total petroleum hydrocarbons. A measurement of the petroleum hydrocarbons present in the medium being analyzed. A frequently used measurement of the extent of petroleum contamination.

UST — Underground storage tank

VCP — Voluntary cleanup program, or brownfield law

—*Paul J. Schoff*

List (NPL), where Superfund action is clearly indicated.

This delisting of CERCLIS sites shows that the agency judges these sites to pose a low risk. In fact, all of the delisted sites have been designated as "no further remedial action planned."

Politically, the agency has talked about, and to a large extent, demonstrated, that they will take a hands-off approach to brownfield situations in non-NPL sites if the state agency is overseeing the clean-up. Almost as evidence of this new persona, the EPA issued two position papers relating to prospective purchaser agreements and land-use controls aimed at brownfields development. This approach, coupled with the EPAs brownfield pilot project —which has funded 50 geographical areas with $200,000 each over two years to study redevelopment methods and remove regulatory barriers— have changed many clients' thoughts about dealing with the agency.

True *federal* brownfield protection will not arrive until Congress passes one of the pending pieces of legislation. One of the simplest ways of coordinating federal and state brownfield efforts is contained in a bill sponsored by Reps. Jack Quinn, R-N.Y., and Paul McHale, D-Penn., introduced in January of last year and reintroduced in this session. H.R. 2919 provides for the EPA to certify state brownfield cleanup programs with recertification every two years.

You say your client isn't a manufacturer, but rather a lender whose collateral has recently become environmentally "questionable." You quickly envision a replay of the 11th Circuit's 1990 decision, *United States v. Fleet Factors* (901 F.2d 1550 (11th Cir. 1990)), that completely eviscerated the secured-party exemption under CERCLA and held that a lender can be held responsible for remediation costs "if its involvement with the management of the facility is sufficiently broad to support the *inference* that it could affect hazardous waste disposal decisions if it so chose." (emphasis added)

The shock wave generated by the *Fleet Factors* decision reverberated throughout the banking community and even the EPA felt the need to clarify the secured-lender exemption under CERCLA by issuing what has become known as the "Final Rule" (57 Fed. Reg. 63517 (April 29,1992)). While the Final Rule did clarify the exemption, the D.C. Circuit Court of Appeals in *Kelly v. EPA* (15 F.3d 1100 (D.C. Cir. 1994)), declared the Final Rule invalid, holding that the EPA lacked the authority to promulgate such a directive.

Fortunately, on Sept. 30, 1996, President Clinton signed the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996, that legislatively overruled the 1994 D.C. Circuit's decision in *Kelly*. The new law also expands the protection afforded by the EPA's Final Rule by providing additional clarification of the secured-party exemption and removing a 12-month presumptive time period for disposing of property acquired through foreclosure.

The fear that *Fleet Factors* had engendered has already been addressed at the state level by many of the 38 jurisdictions that have passed brownfield laws. Indeed, Pennsylvania's Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act provides protection to lenders unless they directly caused or directly exacerbated a release of regulated substances from the property, or knowingly and willfully compelled their borrower to cause an immediate release of such substances or violate an environmental act. Moreover, liability only extends to the cost of remediation that is directly attributable to the lender's actions and only if the lender's actions were the proximate and efficient cause of the release or violation. Ownership or control of the property after foreclosure, by itself, will not trigger liability.

Numerous tax and financing incentives frequently accompany brownfield legislation and provide even greater impetus to redevelopment. Low-interest loans, grant money and environmental due diligence funding is now being made available by state commerce agencies to lure back industries driven out by overzealous environmental enforcement frequently seen in the last decade.

Some states, such as Illinois, provide prospective purchasers who have neither the time, the money nor the inclination to obtain a state environmental sign-off, with the ability to still obtain liability protection by way of an "innocent purchaser defense." That permits a purchaser to create a record that he or she had no reason to know of environmental contamination. Obviously the wisdom of relying on this defense in a situation involving federal involvement is still highly questionable because of the strict liability provisions of the federal statutes.

One must still tread carefully since other jurisdictions have

notable exclusions to liability protection. Rhode Island's Industrial Property Remediation and Reuse Act specifically excludes most petroleum contamination as does the recently enacted Maryland brownfield law.

Moreover, when negotiating a specific prospective purchaser agreement or consent order with either the EPA or a state environmental agency, be sure to have the benefit of environmental counsel, since many of the agreements require careful wording and frequently terms and conditions that were previously nonnegotiable have become ripe for discussion.

Other incentives for participating in state brownfield programs include the availability of insurance coverage as stop-loss protection for contamination that was previously undiscovered. AIG's "cost cap" coverage is typical—coverage is provided for unanticipated remediation expenses above the deductible threshold. Reopener liability coverage is also available under the AIG Select program that allows a client to choose menu-style which reopener coverages are needed. Be aware however, that these coverages are *not* inexpensive. On substantial projects, however, the cost can be well worth the premium.

An added bonus that is also frequently available when purchasing brownfield sites is negotiation with local taxing authorities on past-due real estate taxes and reassessment of the property giving due credit to the diminution in value as a result of the contamination. In some cases, such as Ohio's Voluntary Action Program, a 10-year tax abatement for an increase in a site's value can be obtained.

Business clients can achieve even greater benefits if the site is located in a federal empowerment zone, thus freeing up those elusive investment-tax credits. Dave B. Levy, Baltimore's brownfields project coordinator, believes that when all of the incentives are in alignment, developers and municipalities can join together to gain a "win-win" result. This was the case in Baltimore's Fairfield Ecological Industrial Park—which lies within a federal empowerment zone, a state enterprise zone and also has the benefit of a state brownfield law as well as a memorandum of understanding. "These opportunities for brownfield projects help to spark the rebirth of the very communities that often created the brownfield landscape," Levy notes.

The brownfields concept has attracted a following in the legal, business, banking and real estate communities. A national "Brownfields Conference," co-sponsored by the EPA, the ABA and the International City/County Management Association, was held in Pittsburgh last year. Those involved in brownfields redevelopment were able to trade ideas, services and new information. This year's program will be held in Kansas City, Mo., in the first week of September.

Not surprisingly, the CEOs of many of America's Fortune 500 companies are behind the push for federal brownfields legislation. Properties that have been listed on the books of these companies as contingent liabilities or deserving of a footnote in the annual report may now turn out to be hidden assets. The politically popular support for brownfields initiatives is sure to provide the boost needed to move federal legislation to the next level. In the meantime, sites not on the National Priority List continue to be developed by those willing to invest the time and energy in complying with current state brownfield laws.

Your client may be among them.

Brownfield Web Sites

- EPA brownfields homepage:
  http://www.epa.gov/swerosps/bf
- Brownfields newsletter:
  http://www.ktc.com/brownfields
- Pennsylvania brownfields program:
  http://www.dep.state.pa.us/dep/deputate/airwaste/wm/landrecy/default.
- Listing of federal brownfields legislation pending:
  http://www.nemw.org/brownleg.htm
- Northeast-Midwest Institute brownfields information — contains links to many state brownfield programs:
  http://www.nemw.org/envqual.htm

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