

How to Make Blight Bright: A Roadmap for Turning Brownfields Green

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The development of solar power projects on closed landfills and other sites with a history of industrial operations has the potential to provide numerous benefits. In addition to jobs, such projects provide an opportunity to produce clean power close to load and can facilitate the productive reuse of idle properties. Recognizing this, numerous state and federal initiatives have attempted to eliminate barriers to such developments, the most obvious being potential liability for historic contamination. The transformation of a growing number of “brownfields” into “brightfields” has generated not only an increasing amount of green energy, but also a more substantial library of case studies that shed light on the advantages of, and obstacles to, developing solar on disturbed lands. This alert presents the lessons learned from these experiences and identifies additional tools that might smooth the path for brightfields projects.

Advantages of Developing Solar on Brownfields

“Brownfields” are generally defined to include “abandoned or underutilized industrial and commercial facilities where expansion or reuse is complicated by suspected or known environmental contamination.”¹ They encompass former municipal and hazardous waste landfills and sites where industrial and commercial practices were previously conducted at a time when regulators and businesses had an immature understanding of the consequences of routine operations and disposal practices. Located within and adjacent to cities and other significant human developments, brownfields are well positioned to supply power directly to entities with large individual loads (i.e., hospitals) and to interconnect to existing urban distribution grids.²

Brownfield sites are additionally located, more often than not, in areas that are zoned for industrial activities, which can reduce the timeline for permitting and obtaining entitlements. Development rights on or title to brownfields properties can also be acquired for less as owners, often local governments, look for sources of revenue to fund ongoing cleanup costs and opportunities to offload management responsibilities for closed sites.

On some scores, however, the unique risks attendant to brownfield developments can be substantially greater compared to greenfields developments. Developers accordingly need to undertake careful due diligence to mitigate these risks at every stage of the project development process.

Challenges Associated with Development on Disturbed, and Potentially Contaminated, Property and Tools for Addressing or Compensating for Liability

Site Selection

Notwithstanding significant redevelopment incentives offered by state and local governments, and general discounts on contaminated property, the practical reality is that brownfield sites can

generally be used for a limited set of purposes unless the owner or a developer has the resources to undertake a comprehensive cleanup and remediation program. As a consequence, the current stock of brownfield properties contains significant variety that should allow developers, at least in the immediate future, to focus on the sites that are least likely to have significant contamination issues. In particular, lined landfills, capped and closed for a minimum of 10 years, are likely to offer a platform for development that is strong, stable, and, due to past noxious uses, less likely to offend neighbors – if any. Engineering constraints (limitations on the loads that can be placed on a particular cap) will present more of an issue at closed landfills compared to contaminated former industrial sites due to the consequences of decaying, subterranean waste. These concerns can, however, be addressed by using innovative technology designed to accommodate standard landfill cap constraints (see, e.g., the solar racking system designed by GameChange, which additionally tackles the increased installation costs of ballasted systems by simplifying the installation components and steps). Insurance and indemnities, as discussed in more detail below, can further address uncertainty.

Cleanup Liability

Cleanup liability at both former landfills and contaminated industrial sites is an issue of concern, but not an insurmountable obstacle. The risks of cleanup obligations associated with brownfield redevelopment are not novel, and have been successfully managed by developers for decades. In particular, developers have grappled with liability for environmental harm under several federal statutes, including the Clean Water Act, the Resource Conservation and Recovery Act (“RCRA”), the Clean Air Act, and the most comprehensive liability statute of them all: the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). CERCLA establishes a framework for responding to present and historic spills or releases of hazardous substances, pollutants, or contaminants into the environment. Liability under this statute is strict, potentially joint and several, and expansive.³ Practically anyone connected with the handling of released substances, at any point in time, may find themselves liable as a potentially responsible party (“PRP”).

The first step in avoiding CERCLA liability is to select a site that is unlikely to have significant contamination issues. While there are no guarantees, sites where remediation is complete, with the possible exception of ongoing groundwater treatment and monitoring, are obviously less likely to hold costly surprises. On the spectrum of risk, as suggested above, lined landfills that have been capped and closed should generally involve less complicated issues, but contaminated properties where industrial operations were short lived, that ceased operating long ago, and that have since complied with EPA-imposed remediation may be palatable from a business and political standpoint.⁴

Tools for Avoiding Cleanup Liability

To further avoid being ensnared by the broad net cast by CERCLA, developers can structure their deals to ensure that they are not, at the time of any enforcement action, the “owner and operator” of the contaminated site (alternatively, “facility”).⁵ To avoid owner liability, developers frequently secure site control through easements, licenses, or ground leases. Before settling on a particular mechanism for transferring property rights, however, the developer should become familiar with the views on ownership rights held by the courts in the area surrounding the project. In some jurisdictions, even limited property rights can carry sufficient indicia of ownership that could provide a basis for establishing the required ownership interest.⁶ Other jurisdictions, including the Ninth Circuit, where some of the nation’s best solar resources are located, focus instead on property principles embodied in state common law to determine whether a party with some property or possessory interest may be liable as an owner.⁷ No court has, to our knowledge, considered whether the typical 30-year solar lease or easement should be interpreted to have more in common with ownership interests due to its length and other features.

In jurisdictions where it is not clear whether interests lasting for several decades qualify as “ownership interests,” or where the deal requires that the developer assume ownership, developers can additionally, or instead, rely on state and federal protections for Bona Fide Prospective Purchasers (“BFPPs”) to provide limited liability protections. Congress enacted the BFPP exemption in 2002 as part of a package of CERCLA amendments intended “to promote the cleanup and reuse of brownfields.”⁸ BFPP status exempts a current owner or operator of a facility acquired after January 11, 2002 from CERCLA liability, provided that the person or entity takes reasonable steps⁹ with respect to the contamination, does not impede response actions, and cooperates with authorities.¹⁰ Recently, the United States Environmental Protection Agency (“EPA”) issued a guidance document to clarify that this exemption also applies to tenants that are not affiliated with other PRPs and who otherwise comply with the guidance.¹¹

The BFPP protections are somewhat more constrained regarding protections for the operators of CERCLA facilities, in light of the fact that they only apply when such persons take “reasonable steps to (i) stop any continuing release; (ii) prevent any threatened future release; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.”¹² CERCLA generally does not impose liability for “the gradual passive migration of contamination through the soil.”¹³ But courts have recognized operator liability for “subsequent ‘movement, dispersal, or release[] [of hazardous substances] during landfill excavations and fillings.’”¹⁴ Avoiding operator liability, compared to owner liability, is therefore much more complicated for a utility-scale solar developer, who will likely need to perform some kind of grading and site preparation work. If the developer can ensure that it does not operate in areas where it might disturb and further disperse contaminated material, avoid penetrating any existing cap, and ensure that the additional weight of the solar facilities does not cause leaching, then the BFPP protections might extend to developers as non-owner operators.¹⁵

In light of the potential limitations of the BFPP defense, prudent developers should consider layering on other assurances. Specifically, indemnities, comfort letters, and, where available, Prospective Purchaser Agreements (“PPAs”) and Prospective Lessee Agreements (“PLAs”) can provide additional layers of comfort for developers and investors. Obtaining these protections can admittedly be challenging. For example, regarding indemnities, notwithstanding specific state laws or local ordinances, there is no generally applicable legal principle that prevents state and local governments from providing an indemnity to private purchasers of and tenants on brownfields. Yet several municipalities have drafted very one-sided lease agreements for solar projects on landfills that provide very little, if anything at all, in terms of indemnities for the developer.¹⁶ Developers may have more success with efforts to secure favorable terms at brownfield sites controlled by private owners.¹⁷

Comfort/status letters can offer additional assurance by “clarify[ing] the likelihood of EPA involvement at a property” and “suggest[ing] reasonable steps that should be taken at a site.”¹⁸ To obtain some actual liability relief, however, developers must obtain a PPA or PLA. PPAs and PLAs are agreements between a liable party and EPA whereby EPA provides the party with liability relief (a covenant not to sue and contribution protection against all third parties) in exchange for payment and/or cleanup work.¹⁹ Specifically, a PPA or PLA will provide a covenant not to sue and contribution (liability) protection against all third parties as well as EPA.

Where a solar developer seeking to construct a project on a brownfield or closed landfill might be a liable party, it should obviously try to obtain a PPA or PLA. This, however, is easier said than done. EPA does not see such agreements as typically necessary for properties, whether purchased or leased, in the aftermath of its creation of a BFPP defense. For a variety of reasons, the agency has refused to exercise this authority on a wide scale. Under pressure from solar developers promoting low-risk redevelopment plans, however, EPA might be persuaded to change its approach. A clear

policy change on this issue would further improve the climate for landfill and brownfield redevelopment.²⁰

As a final stop-gap measure, insurance offers reliable and universally applicable protection against liabilities potentially associated with redeveloping contaminated properties. Pollution Legal Liability (“PPL”) policies provide coverage for third party bodily injury and property damage claims, including pre-existing unknown conditions and new conditions resulting from natural resource damage and/or changes in clean-up standards. Business interruption and transportation claims are typically covered as well and sometimes limited coverage can be secured for known conditions. Developers can additionally obtain coverage for unknown contamination and future cleanup obligations arising from changed conditions at the site as well as regulatory changes by procuring a “cost cap” policy. Combined with careful due diligence and geotechnical explorations, insurance could address any perceived shortcomings in the liability exemptions offered by the government and contractual terms reached with the property owner.

Government Incentives for Development of Solar Projects on Brownfields

Government authorities at all levels generally support the re-use of landfills, in particular for utility-scale solar projects that can coexist with moderate amounts of contamination. EPA in particular is actively pursuing the transition of brownfields to brightfields through its RE-Powering America’s Land²¹ program. More generally, certain federal and state tax incentives and grants for brownfield redevelopment are specifically designed for renewable energy development.²² Local and state programs that impose obligations to procure homegrown renewable energy sources are additionally driving the market for solar on closed landfills and brownfields.²³

Community Support for Development of Brightfields

The presumption that brownfield redevelopment projects will face less community opposition compared to developments on undisturbed land (e.g., public lands in the desert made available by the Bureau of Land Management in accordance with several federal policies) and fallow farmlands may not be entirely accurate, at least with respect to the redevelopment of Superfund sites and other significantly contaminated properties. The redevelopment of the former Koopers Wood-Treating Plant in Carbondale, Illinois, where Brightfields Development LLC has proposed to build a solar energy farm on 73 acres of a 222 acre property, has faced significant opposition from a community that has suffered losses due to the irresponsible, or uninformed, business practices that led to the contamination in the first place. Although the safety of properly maintained generation and transmission facilities located near residential uses has been studied at length, these residents, some of whom would live within 250 feet of the proposed development, are understandably skeptical of more industrial uses coming to town. This project demonstrates that careful consideration should be given to site proposal that would place facilities in or near communities that have been physically and emotionally scarred by prior uses of Superfund sites.

In addition to safety concerns, visual impact concerns might be just as acute at an inner-city brownfields redevelopment site as in the desert. If the argument in favor of a solar project is that it would improve circumstances within and surrounding contaminated property, a chain link fence topped with barbed wire surrounding an industrial facility will not do much to deliver on that promise. Developers may need to put additional effort into visual mitigation for sites that are central to existing communities.

Conclusion

Although solar developments on brownfields are generally lauded, developers cannot assume that every proposal will be welcomed with open arms. In addition, many of the policies and laws currently in place to support redevelopment of contaminated properties do not entirely foreclose the possibility of liability for contamination that the developer did not create. Developers

accordingly need to conduct careful due diligence, from public relations, legal, and engineering perspectives, to identify sites where risks can be minimized through appropriate site selection, private agreements, and insurance coverage. Developers also should aggressively pursue underutilized tools, such as Prospective Lease and Purchase Agreements, for the same purpose. As evidenced by the over 80 renewable energy projects constructed on potentially contaminated lands and former landfills and mine sites pursuant to the RE-Powering America's Land Initiative,²⁴ there is an emerging market where savvy, careful brightfields developers can do well by doing good, but success depends on careful planning.



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¹ Interstate Technology & Regulatory Council Brownfields Team, Property Revitalization—Lessons Learned from BRAC and Brownfields iii (2006), available at http://www.itrcweb.org/Documents/Brnflid_2web.pdf.

² Solar farms can also be used to provide electricity to cleanup operations at brownfield sites, as is the case at the Aeroject-General Superfund Site, in Rancho Cordova, California, where the solar facility powers the groundwater treatment facility. Furthermore, at landfill sites where methane generated by decomposing waste has already been harnessed for its power generation capabilities, even more sophisticated interconnection infrastructure may already be in place. Solar is particularly well suited for such sites that have been closed for some time (increasing the likelihood that compaction and settlement will not be an issue), where delivery systems designed to transmit energy generated from landfill gas may be underutilized due to dwindling supplies expected to decrease over time.

³ *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 608-09 (2009); 42 U.S.C. § 9607.

⁴ The 8 megawatt ("MW") Maywood Solar Farm, located on 43 of the 120 acres that makes up the former Reilly Tar & Chemical Corp. site in Indiana, came online in March 2014. Operations at the site, from the 1950s until 1972, included tar-coal refining and wood treatment using creosote. Remediation activities took place in the 1980s under agency oversight and a groundwater treatment system operated from 1994-2005. The site provides a text book example of the conditions that might make a Superfund site a viable candidate for redevelopment with solar. See <http://www.epa.gov/Region5/cleanup/reillytar>.

⁵ 42 U.S.C. § 9607(a)(1).

⁶ *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 326, 330-31 (2d Cir. 2000).

⁷ *Long Beach Unified School District v. Dorothy B. Godwin Living Trust*, 32 F.3d 1364, 1386 (9th Cir. 1994); *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 452 (9th Cir. 2011) (applying California common law to a revocable permit and holding that permit did not render the permit holder an "owner" at the time of disposal).

⁸ Small Business Liability Relief and Brownfields Revitalization Act, Pub.L. No. 107-118, 115 Stat. 2356 (2002).

⁹ As noted in EPA's Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Common Elements) (Mar. 6, 2003), <http://www2.epa.gov/sites/production/files/documents/common-element-guide.pdf>, "The reasonable steps determination will be a site-specific, fact-based inquiry." Guided by the information and professional recommendations, if any, obtained during an all appropriate inquiries investigation of the premises prior to assuming site control, the BFPP must attempt, as needed, to "stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases."

¹⁰ 42 U.S.C. §§ 9601(40)(A)-(H), 9607(r)(1).

¹¹ EPA, Revised Enforcement Guidance Regarding the Treatment of Tenants under the CERCLA Bona Fide Prospective Purchaser Provision (Dec. 5, 2012), http://www2.epa.gov/sites/production/files/documents/tenants-bfpp-2012_0.pdf. EPA expressly adopted this guidance to support the “important role” played by leasehold interests “in facilitating the cleanup and reuse of contaminated properties.” Developers should nevertheless recognize that the guidance does not guarantee immunity. It pertains only to EPA’s enforcement discretion and probably would not provide protection against third-party suits.

¹² 42 U.S.C. § 9601(40)(D).

¹³ *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001).

¹⁴ *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341-42 (9th Cir. 1992) (quoting *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988)).

¹⁵ As noted in the EPA’s fact sheet on *Siting Renewable Energy on Contaminated Properties: Addressing Liability Concerns* (March 2011), http://www.ct.gov/deep/lib/deep/site_clean_up/brownfields/renewableenergyfactsheet2011.pdf, “Generally, only contaminated properties with significant actual or potential public health and/or environmental impacts or those needing immediate attention are likely to warrant federal cleanup or enforcement under CERCLA or [the Resource Conservation and Recovery Act (‘RCRA’)]. The vast majority of contaminated properties requiring cleanup are [consequently] most likely to be addressed by state cleanup programs.” Accordingly, developers should investigate immunity afforded by state laws and programs, such as California’s Bona Fide Ground Tenant defense. See Cal. Health & Safety Code §§ 25395.102-.106 (exempting ground lessees from the obligation to clean up contamination beyond efforts necessary to make the site safe for its intended human use).

¹⁶ In contrast to municipal landfill projects, if a particular landfill were part of a former military base transferred pursuant to the various statutes authorizing the federal government’s Base Realignment and Closure program, a developer might have derivative access, by contract or otherwise, to the remediation covenants that must accompany the transfer of all federal facilities pursuant to CERCLA section 120(h) and the indemnity imposed by section 330 of the Fiscal Year 1993 Defense Reauthorization Act, Pub. L. No. 102-484, § 330 (1992), as amended by Pub. L. No. 103-160, § 1002 (1993). Section 120 of CERCLA requires that a deed transferring title to any real property owned by the United States on which any hazardous substance was stored for one year or more, or on which a hazardous substance was known to be released or disposed of, must contain covenants warranting that “all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer” and that “any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States.” 42 U.S.C. § 9620(h)(3)(A). The section 330 indemnity requires the secretary of defense to hold harmless and indemnify persons who acquire ownership or control of any facility at a military installation that is closing or closed pursuant to a base closure law from any claim for personal injury or property damage that results from the release or threatened release of any hazardous substance, pollutant or contaminant, or petroleum or petroleum derivatives as a result of Department of Defense activities.

¹⁷ Indeed, an indemnification agreement was part of the deal that resulted in the nation’s first solar plant on a former Superfund site. See http://www.clu-in.org/greenremediation/profiles/subtab_d31.pdf.

¹⁸ See <http://www2.epa.gov/enforcement/enforcement-tools-address-liability-concerns-brownfields-and-land-revitalization>.

¹⁹ See <http://www2.epa.gov/sites/production/files/2013-09/documents/expreq-ppa-mem.pdf>; see also Announcement and Publication of Guidance on Agreements with Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34,792 (July 3, 1995).

²⁰ Indeed, in the aftermath of *PCS Nitrogen Inc. vs. Ashley II of Charleston LLC*, 714 F.3d 161 (4th Cir.), *cert. denied*, 134 S. Ct. 514 (U.S. 2013), where the first appellate court to consider the BFPP defense determined that the purchaser failed to exercise reasonable caution during redevelopment activities and consequently forfeited the protections of the privilege, the BFPP defense might need to be reinforced by PPAs and PLAs to achieve EPA’s purpose.

²¹ See <http://www.epa.gov/oswercpa>.

²² See EPA, A Guide to Federal Tax Incentives for Brownfields Redevelopment (2011), www.epa.gov/brownfields/tax/tax_guide.pdf.

²³ In some instances, local governments have codified their renewable energy aspirations ordinances that self-impose procurement requirements. In other instances, the state legislature and/or regulatory body for utilities has imposed obligations on providers to execute Brightfield pilot programs. One example of such programs is New Jersey’s Solar 4 All initiative, which commits the Public Service Electric and Gas Company (“PSE&G”) to install 42 MW of solar generation on landfill and brownfield sites in PSE&G’s service territory. See <http://www.pseg.com/family/pseandg/solar4all/extension/landfills.jsp>.

²⁴ See *supra*, note 21.