



Veeder Place - Hartford, CT

Third report of the State of Connecticut TASK FORCE ON BROWNFIELDS STRATEGIES



Pfizer Global Development Facility - New London, CT

**THIRD
REPORT OF THE
STATE OF CONNECTICUT**

**TASK FORCE
ON
BROWNFIELDS STRATEGIES**

Submitted to the

**Commerce Committee
&
Environment Committee**

of the

Connecticut General Assembly

FEBRUARY 2009

PURPOSE OF THE REPORT

The purpose of this report is to respond to Public Act 08-174, “An Act Concerning the Face of Connecticut Steering Committee, the Preservation of Farmland, a Municipal Grant Program for Development Projects, Loans for Brownfield Purchasers and Tax Exemptions for Open Space Land Held by or for Certain Corporations”. By way of background, the Brownfields Task Force was created through Public Act 06-184, “An Act Concerning Brownfields” and was continued through Public Act 07-233, “An Act Implementing the Recommendations of the Brownfields Task Force.” The Task Force was created to develop long-term solutions for cleaning up Brownfields and to propose new incentives to stimulate investment and rehabilitation of Brownfields. The Task Force issued its first Report to the Environment and Commerce Committees in February 2007 and its second Report to the Environment and Commerce Committees in February 2008. This is its Third Report.

In the 2006 Act, a Brownfield has been defined as “any abandoned or underutilized site where redevelopment and reuse has not occurred due to the presence of pollution in the soil or groundwater that requires remediation prior to or in conjunction with the restoration, redevelopment and reuse of the property.” The Task Force has continued in its mission to “study strategies for providing long-term solutions for the state’s Brownfields”.

Each year, the Task Force issued a number of recommendations, many of which were enacted by the Legislature and signed by Governor M. Jodi Rell in 2007 and 2008. However, many were not. In this Report, the Task Force urges the Legislature and the Governor to consider the recommendations that were previously offered and to enact new, vibrant and innovative programs to stimulate the redevelopment of our State’s Brownfield properties. A strong Brownfield program can provide economic stimulus to a municipality and to the state in a time when such stimulus is sorely needed.

The Task Force has continued to look at the existing state programs, the modifications made in 2006, 2007 and 2008, and whether the issues and impediments to successful Brownfields redevelopment that were raised by the Task Force have been addressed. The Task Force in 2007 and 2008 proposed incremental changes, when sweeping ones were really necessary. Each year the Task Force has evaluated the changes that were made in accordance with its recommendations. We chose to prioritize changes to address: organizational reform, funding and financing initiatives, regulatory programs, liability relief. As to organizational reform, the Task Force saw many changes. And, each year the legislature responded to creating new funding programs albeit without the necessary funding. This year, in this Report, we are revisiting some of our prior recommendations and using them as a scorecard to judge the changes that have been made. And, we are also moving forward on some of our prior recommendations and urging reform in the

state's liability relief and cost recovery programs. In our opinion, these programs are absolutely necessary and fundamental in order to spur new development and redevelopment on these sites.

As we stated in 2007 and 2008, the recommendations in this Report will undoubtedly require accepting significant and, in some cases, controversial changes to existing programs, structures and philosophies. These changes and the recommendations the Task Force has made are significant economically to our state as new jobs are created and new revenue streams are developed, which is needed in these uncertain times. On the environmental side, Brownfield redevelopment is "green" as it saves land, reduces the effect of contamination on our soil and water resources, and provides redevelopment where existing infrastructure exists. Since our last report, the Northeast Midwest Institute has issued a report entitled: "*The Environmental and Economic Impacts of Brownfields Redevelopment*" (July 2008) which substantiates the initiatives the Task Force has proposed.

The Task Force members are grateful to the staff of the Departments of Economic and Community Development and Environmental Protection, and the Connecticut Development Authority, which spent the time with us and assisted us in our meetings, researching issues, inviting various representatives to testify, responding to our various questions and in engaging in lively debate and discussion. We believe we have been successful collaborating and working together on a number of issues. Through the process, we do believe that we have made progress but more has yet to be accomplished.

The Task Force members also thank the General Assembly and the appointing authorities for the opportunity to serve on this Task Force and make recommendations for what we believe is the continuation of a very important initiative for determining the future of Connecticut Brownfield properties.

Finally, the Task Force specifically recognizes the Co-Chairs of the Commerce Committee, Representative Jeffrey Berger from Waterbury and Senator Gary LeBeau from East Hartford, who recognized early on the importance of Brownfields revitalization to municipal economic and community development and public health and safety. We thank them for their leadership, support and tenacity as they have embraced Brownfield redevelopment as the key for turning around our communities, restoring a property quality of life, and restoring a municipality's tax base.

A strong Brownfields program will provide a needed economic stimulus to our state.

ADOPTION OF REPORT

On Tuesday, February 24, 2009, the Task Force members adopted and voted in favor of this report and its recommendations. In keeping with the separation of power between the Executive Branch and Legislative Branch of Government, the public officials who are members of the Agencies that serve on the Task Force and who were present at the Task Force meeting on February 24, 2009, appropriately abstained from the final vote on the Task Force's Report.

MEMBERS OF THE BROWNFIELDS TASK FORCE

<u>Member</u>	<u>Position/Occupation</u>	<u>Appointing Authority</u>
Ann M. Catino, Co-Chair	Partner, Halloran & Sage, LLP	President Pro Tempore of the Senate
Gary B. O'Connor, Co-Chair	Partner, Pepe & Hazard, LLP	Speaker of the House of Representatives
Robert Genaurio	Secretary, Office of Policy & Management	Statutory Member
Gina McCarthy	Commissioner, Department of Environmental Protection	Statutory Member
Joan McDonald	Commissioner, Department of Economic & Community Development	Statutory Member
Ronald F. Angelo, Jr.	Deputy Commissioner, Department of Economic & Community Development	Governor
Laura T. Grondin	Member, Board of Directors, Connecticut Development Authority & President and CEO, Virginia Industries, Inc.	Governor
Lee D. Hoffman	Partner, Pullman & Comley, LLC	Majority Leader of the Senate
Charles T. Kellogg	Chairman and Chief Financial Officer, Hubbard-Hall, Inc.	Minority Leader of the House of Representatives
Frank Moore	The WorkPlace, Inc.	Majority Leader of the House of Representatives
Stephen R. Sasala	President & CEO, Waterbury Regional Chamber	Minority Leader of the Senate

THIRD BROWNFIELDS TASK FORCE REPORT

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I. EXECUTIVE SUMMARY

In 2007 and 2008, the Task Force approached Brownfields reform from two different angles: (1) Evolutionary and (2) Revolutionary. Many of our prior recommendations were a combination of both. However, despite passage of Public Acts No. 07-233 and 08-174, we believe that our growth remains firmly entrenched in geologic time. Significant progress has not yet been made. And, today, many projects are now stalled do to the economic realities of our time. Financial and credit support from traditional lending sources for even the best of projects has been lacking and/or stalled. Brownfield projects, which are usually more risky for development and require greater scrutiny due to the environmental considerations, are few (if any) in existence today. Consequently, many of our downtown and main streets continue to deteriorate. Jobs are lost. Municipalities see a shrinking tax base. The State is seeing record deficits. Brownfield projects can provide a needed economic stimulus. And, they provide an added environmental justice benefit especially to our urban areas which carry the heavy weight of a disproportionate number of Brownfield properties.

With the laudable goals of creating green corridors, transit-oriented development and responsible growth, Brownfield redevelopment is the missing link that ties all of these programs together. As we stated last year: “[t]o promote development where infrastructure exists, transportation corridors accessible, mass transit readily available and utilities pre-existing, the municipal core centers and urban areas that once fueled Connecticut’s economy are ripe for restoration in accordance with smart and responsible growth principles.” Brownfield redevelopment serves these needs and can provide the beneficial economic injection that Connecticut needs. But Brownfield initiatives are falling woefully behind. With some exception, Brownfield redevelopment does not readily occur – it takes state support. The State must take the lead and create the funding and financing programs, administrative support, and regulatory programs to encourage and incentivize such Brownfield redevelopment.

This Report largely reflects our recommendations in 2007 and 2008. We strongly urge the legislature to consider our prior recommendations and act upon them. In our last report we stated that “[t]he time is now for us to turn the corner or we are going to be left behind.” The reality is that we have been left behind – by other states, by the federal government, by developers and now by economic realities. Connecticut could and should be a leader in this area and show how real economic stimulus packages can turn an economy, provide jobs, raise revenue, and restore an urban area. As we have stated unequivocally in our prior reports – financial support, programmatic changes, liability relief, and meaningful opportunities for property owners and developers are needed in order to spur development. We recommend that all our recommendations from our prior two reports be adopted in 2009. We also request that particular attention be paid to providing meaningful funding and financing, providing liability relief to municipalities and new property purchasers/developers, creating easier redevelopment in flood plains, providing for meaningful cost recovery actions by parties who clean up sites against the responsible parties or parties who fail to comply with the Transfer Act, creating a tax credit for Brownfield redevelopment and permitting CDA to continue its tax increment

financing program, loan guarantees and loan programs. More specifically, we ask the legislature to consider:

- Making floodplain development easier;
- Allowing municipalities to transfer properties without the Transfer Act if it took title through eminent domain, foreclosure or a tax warrant sale, provided that the property has been remediated or is undergoing remediation under a DEP program;
- Clarifying municipal immunity for any town that receives funding through OBRD rather than just the pilot municipalities;
- Shielding “white knight” developers from pursuing investigation and remediation of contamination outside of the Brownfield property boundary in streams and sediments;
- Allowing meaningful cost recovery actions by parties who clean up sites against responsible parties;
- Allowing meaningful claims under the Connecticut Transfer Act for damages incurred by transferees against sellers who fail to comply with the Transfer Act;
- Clarifying municipal immunity when municipalities perform an environmental investigation/assessment;
- Creating a tax credit for Brownfield development;
- Asking for \$200 million in funding for the OBRD programs;
- Taking away CDA TIF's sunset date.

It is incumbent upon the legislature, the Administration and all of us to make Connecticut a better place. Consistent with the laudable responsible growth initiatives currently being mapped, Brownfields redevelopment is an integral part. Indeed, responsible growth cannot happen without a meaningful Brownfields program. To promote development where infrastructure exists, transportation corridors accessible, mass transit readily available and utilities pre-existing, the municipal core centers and urban areas that once fueled Connecticut's economy are ripe for restoration in accordance with smart and responsible growth principles. Similarly, existing, but long neglected ghosts of the state's manufacturing past that exist along waterways and channels or that served as a central hub for a community can be resurrected and restored for a variety of uses rather than standing as good soldiers keeping the secrets of what lies in the building, the soil and groundwater resulting from an era long gone. As a state, this marriage has to be recognized and Brownfields programs supported, in terms of policy, staffing, funding and programmatic changes. In Public Act 07-07, the Responsible Growth Incentive Fund, was funded in an amount not exceeding \$ 10,000,000, with up to \$5,000,000 to be used for grants-in-aid and of up to \$ 1,000,000 to each of the participating municipalities or regional planning organizations for implementation of transit-oriented plans and strategies in designated pilot program areas. Brownfields, which are the lynchpin to the success of this initiative, are falling woefully behind. Responsible Growth policies will not be successful unless attention and support is given to Brownfields.

The Task Force respectfully submits that in these tough economic times, rather than abandon a Brownfields initiative, the State should embrace it. A comprehensive

Brownfields program is the nucleus for many of the State's policy priorities: responsible and smart growth, economic development, urban revitalization, job creation and open space preservation.

The Federal Government has recognized the vital role of Brownfields remediation and development as an economic stimulus. The \$787 billion American Recovery and Reinvestment Act signed into law on February 17th includes funding to create green jobs using a variety of mechanisms including \$100 million for competitive grants to evaluate and clean up Brownfields. This program will be administered by EPA. Our federal government recognizes the fact that Brownfields cleanups create jobs not only through the workers needed to do the cleanups themselves, but subsequently with the new businesses that occupy the property and that the money invested in Brownfields cleanups is returned not just through job creation but also through increased tax revenue. Jobs created by Brownfields cleanups--both before and after--are taken by locally available workers, further stimulating local economies. Connecticut has the opportunity to capitalize on the federal program by demonstrating it is prepared to facilitate the development of Brownfields sites. Given the emphasis being placed on efficiency, transparency and speed it is critical that we adequately fund our state programs and enact the improvements necessary to expedite development. If we do not, we may see our neighbors winning grant monies that should be coming here for Brownfields projects.

II. TASK FORCE BACKGROUND

A. Creation & Membership

Public Act 06-184 created the Brownfields Task Force to study strategies for providing long term solutions for the state's Brownfields. The goal of the Brownfields Task Force was and remains to make recommendations to refine the current statutory framework and programs so that Connecticut may be one of the country's leaders in restoring our Brownfields to productive economic and community reuse. Under 06-184, the Task Force concluded its work upon submission of its Report to the Environment and Commerce Committees, which occurred on February 15, 2007. Two bills were raised during the 2007 session of the Connecticut General Assembly implementing the recommendations of the Task Force and Substitute House Bill No. 7369 emerged. Substitute House Bill No. 7369 passed both the House and Senate chambers of the General Assembly unanimously, on June 4 and June 6, 2007, respectively. On July 6, 2007, this bill was signed by Governor M. Jodi Rell and became Public Act No. 07-233.

Pursuant to section 15 of Public Act No. 07-233, the Task Force on Brownfields Strategies was reestablished and it reconvened in September 2007. All members appointed previously pursuant to section 11 of Public Act 06-184 remained on the Task Force and, in accordance with section 15 of Public Act 07-233, two additional members were added: the Commissioner of Economic and Community Development and the Secretary of the Office of Policy and Management. The Task Force issued its Second Report to the Environment and Commerce Committees on February 25, 2008.

During the 2008 session of the Connecticut General Assembly, several bills were introduced regarding Brownfields funding and HB 5589 was raised by the Commerce Committee implementing the recommendations of the Task Force. The Task Force bill ultimately was joined with other redevelopment bills and it emerged as Public Act 08-174, which also reauthorized the Task Force for another year with no changes to the Task Force membership. At times, for the Commissioners and the Secretary, their designees as authorized under the Act, participated in their stead. Those designees were Elizabeth Appel for the Commissioner of Economic and Community Development, and Graham Stevens for the Commissioner of Environmental Protection.

The Connecticut Development Authority also participated in the meetings through Cynthia Petruzzello, who provided valuable assistance as to CDA's programs, role, and successes in its efforts to stimulate Brownfield redevelopment.

In addition, DECD and DEP graciously provided staff to conduct research for us and update the Task Force on the development of the Office of Brownfields Remediation and Development (OBRD). The Task Force extends its special thanks to representatives Jan Czczotka and Tracy Iott of DEP who came and spoke to us regarding the draft Remediation Standard Regulations; Diane Duva, also from DEP, who spoke to us on the proposed changes to the solid waste regulations; and Jeff Caiola from DEP who spoke to us on the floodplains statute.

B. Meetings & Public Participation

Upon reauthorization, the Task Force convened on October 28, 2008, November 10 and 25, 2008, December 9 and 23, 2008, January 6 and 27, 2009, and February 24, 2009. As in prior years, the Task Force heard from the agencies and stakeholders; however, most of the time the members considered the changes that still need to be addressed from the first two Task Force Reports.

On Tuesday, February 24, 2009, the Task Force members adopted and voted in favor of this report and its recommendations. In keeping with the separation of power between the Executive Branch and Legislative Branch of Government, the agency representatives in attendance appropriately abstained from the final vote on the Task Force's Report. The agencies' participation in the Task Force and development of this report does not imply the agencies' endorsement of any recommendations contained herein.

C. Objectives

In large part, the Task Force reevaluated the progress that had been made over the last several years to address the state's Brownfields. Most of the recommendations in this Report are based upon prior year recommendations that have yet to be achieved. Therefore, the Task Force focused on three primary areas: First, whether the changes encompassed in Public Acts 07-233 and 08-174 sufficiently provided the tools deemed necessary to (i) stimulate Brownfields redevelopment, (ii) change the existing programs in a meaningful way to enhance investment in these properties, (iii) restore developer confidence in Connecticut, (iv) attract new investors to our state, (v) encourage existing property owners to remain and (vi) encourage municipalities, regional and municipal economic and community non-profit corporations to take action to take title and/or redevelop the properties themselves.

Second, during 2008, we heard from DEP representatives regarding changes to the Remediation Standard Regulations (RSRs), which set the clean up standards and the Solid Waste Regulations, which also impact Brownfield redevelopment. Through these meetings, we exchanged concerns and ideas for new Brownfield sites should be treated. Certainly, the dialogue has increased on Brownfields such that the agencies have become quite responsive. The proposed regulations have not yet been released yet for notice and comment; however, we have set forth some preliminary recommendations and concerns. It is the intent of the Task Force members to continue to participate in the process and offer recommendations to the agencies and as needed based upon our service on the Task Force.

Our observations and recommendations for 2009 are set forth in the next Section.

III. RECOMMENDATIONS

A. FUNDING AND FINANCIAL TOOLS ARE NEEDED, WHICH WILL STIMULATE BROWNFIELD REDEVELOPMENT AND THE ECONOMY

In each of the two prior Task Force Reports, the Task Force recommended that (1) Brownfield development programs be funded in the amount of \$75 million to provide the financial assistance programs established in Public Acts 07-233 and 08-174, with \$25 million each year for the next five years; (2) the Bond Commission shall fully allocate all funds to the Brownfield remediation and development account and allow the funding to be administered by the Commissioner of DECD (through a capital account) without returning to the Bond Commission; (3) the sunset date for the CDA Brownfield Tax Incrementing Financing program be eliminated; and (4) a tax credit be established for developers to utilize for Brownfield projects. These recommendations remain necessary in order to stimulate Brownfields redevelopment and, also, our economy.

This year, a report was released that further buttresses the rationale for a robust funding program. The Northeast Midwest Institute (“Institute”), the primary think-tank for Brownfield issues, issued a draft report prepared by Evans Paull in July 2008 entitled *The Environmental and Economic Impacts of Brownfield Redevelopment*. The conclusions in this report buttress the Task Force’s position that public funding and financial tools are not only necessary for Brownfield redevelopment but also serve to strengthen the economy. In the Institute’s Report, a number of key findings are made. First, they state that the average clean up cost is approximately \$600,000 - \$1,000,000 (excluding gas stations/petroleum cleanup sites). Second, the Report reiterates that every year, the U.S. Conference of Mayors reports that “funding for cleanup” ranks as the top impediment for redeveloping Brownfields. From its survey, they project that redeveloping Brownfield sites could lead to \$2.2 billion in local tax revenue annually. Third, 4.5 acres of “greenfields” are saved for every 1 acre of Brownfield developed. Fourth, jobs are created. For a prototypical 5 acre Brownfield site, with \$24 million in site investment, **90 jobs** are created. The Institute further reports that for the \$1.3 billion invested under the EPA Brownfields program, 48,200 jobs are created and \$11.3 billion in new investment is initiated. In summary, they report that:

- \$1 of public money leverages \$8 total
- \$1 of public money for site preparation costs leverages \$20 total
- \$1 of public money in weak markets leverages \$3.60 total
- it takes \$10,000-13,000 in Brownfields public investments to produce ONE job compared to HUD and Commerce Department investment, which takes \$35,000 to produce one job
- property values within ¾ mile of the clean up increase 5-15%
- public investments in Brownfields are recouped from local taxes in five years
- the external societal costs associated with transportation issues (e.g., parking) are estimated to be \$26,960 per acre per year LESS for residents of Brownfield sites relative to Greenfield sites.

Funding is needed. In 2007 and 2008, the Task Force proposed a Brownfield program with an initial capitalization of \$75 million, with an additional \$25 million/year for the next five years. While Public Act 07-233 §§ 3-5 did create a new program and Public Act 08-174 clarified and expanded the types of programs available (which the Task Force applauds), the new programs are primarily funded "subject to the availability of funds." From Public Act 07-07, it appears that this program *for the entire state* was proposed to be funded at \$2.5 million a year for two years, which is significantly below the Task Force's recommendation and well below what other states are doing and what the federal government has and is doing. In addition, the Task Force proposed that the pilot program established almost two years ago in Public Act 06-184 be funded at \$16 million. But, only \$4.5 million a year for two years was authorized.

The reality of the funding is that out of the \$14.5 million the legislature did authorize, only \$2.25 million was ultimately provided to the agency by the State Bond Commission. These funds were awarded in October 2008, through a competitive bid process, to five Brownfield sites in the state.

Such lack of funding will not spur new investment in the state, create jobs or restore a tax base. *Rather, the message that is sent is that no business opportunities exist in this state.* Therefore, the Task Force recommends meaningful funding, consistent with other states, the federal programs, and consistent with the recognition that Brownfields remediation is an important economic stimulus initiative.

Tax Credits are needed. Alternatively, or in combination with funding, tax credits should be provided to developers. As we stated in our 2008 report, states with robust Brownfield programs rely on either strong funding programs or comprehensive tax credits and incentives. Currently, Connecticut has neither. Brownfield tax credits, historic tax credits focused on commercial and industrial development, mixed use and housing will play an important role in stimulating development. The historic tax credit program should not be eliminated; rather it should be extended to cover commercial and mixed use in order to stimulate growth. Such credits provide incentives that lead to construction jobs and the restoration of property and should be retained and expanded so that Brownfield sites are part of the package.

Staffing is needed. OBRD's scope is quite broad. It has to assist developers, municipalities, streamline the process, identify potential sources of funding and develop procedures for expediting the application of funds, identify and prioritize state-wide Brownfields development opportunities, provide assistance and information concerning the state's technical assistance, funding, regulatory and permitting programs, and develop a communication and outreach program to educate municipalities, property owners, economic development agencies, and other organizations on the state's Brownfields programs. To date, it has administered the pilot programs and the other programs, it has sought and received funding from EPA. A \$1,000,000 grant from the EPA was previously awarded to provide funds for the cleanup of environmental contamination and the OBRD is currently seeking \$1.75 million from EPA for its revolving loan program.

Currently, OBRD has three full time staff people from DECD and DEP has designated one liaison. A nationwide search has been underway for a director for over a year. For this office, its mission, and the program to be effective, adequate staffing with program managers, fiscal analysts, planners, project managers and program educators dedicated to Brownfields development is essential. In our 2007 & 2008 reports we requested \$3.5 million, adjusted on an annual basis, for purposes of hiring the appropriate personnel and implementing the marketing, education and outreach programs. The Task Force again requests additional staffing and funding to the DEP, DECD and OBRD to carry out the Brownfield programs.

B. INCENTIVES ARE NECESSARY TO ENCOURAGE INVESTMENT BY THE PRIVATE SECTOR

Limitations on Investigation and Remediation. In addition to funding and tax credit programs, other incentives are needed to encourage investment by the private sector. In our prior reports, we recommended that individuals and companies who have no prior connection to a property be shielded from liability from third party claims and DEP action provided that they enter a program and clean up the property in accordance with the state's remediation standard regulations. The Task Force, however, believes that this "white knight" developer be shielded not only from this liability but from chasing contamination emanating from the site to other parcels or to sediments or following downstream river impacts. For a new company evaluating the cost and risks of a site, these costs (and the uncertainty associated with chasing contamination in a riverbed when there are likely upgradient and downgradient sources) is too much to bear. This requirement is too much for the state to ask of a new property owner. A developer is already asked to investigate and clean up the site, redevelop the property, bring in jobs, pay taxes, etc. Through the cleanup, the source of pollution will be addressed, therefore, the Task Force does not believe that any more should be asked of this "white knight". Therefore, we recommend that Section 22a-133aa(f) be amended to include the following:

(f) A "Brownfield investigation plan and remediation schedule" means a plan and schedule for investigation, and a schedule for remediation, of any abandoned or underutilized site where redevelopment and reuse has not occurred due to the presence of pollution on the soil or groundwater that requires remediation prior to or in conjunction with the restoration, redevelopment and reuse of the property. The commissioner may determine for each property whether the commissioner will oversee the investigation and remediation of the property or whether such oversight will be delegated to a licensed environmental professional. For each property subject to a covenant under this section based on an approved Brownfield investigation plan and remediation schedule, the owner or prospective purchaser shall perform all investigation and remediation activities under the direction of a licensed environmental professional, and shall ensure that all documents required to be submitted contain a written approval of a licensed environmental professional, even at properties for which the commissioner has

not delegated oversight to a licensed environmental professional. Each investigation plan and remediation schedule shall provide a schedule for activities including, but not limited to, completion of the investigation of the property in accordance with prevailing standards and guidelines, submittal of a complete investigation report, submittal of a detailed written plan for remediation, completion of remediation in accordance with standards adopted by said commissioner pursuant to section 22a-133k, and submittal of a final remedial action report. At a minimum, the detailed written plan for remediation shall be submitted, pursuant to the schedule, for the commissioner's review and, as appropriate, approval. In any detailed written plan for remediation submitted under this section, the owner or prospective purchaser shall only be required to investigate and remediate conditions existing within the property boundaries and shall not be required to investigate or remediate any pollution or contamination that exists outside of the property's boundaries, including any contamination that may exist or has migrated to sediments, rivers, streams or off site. If the commissioner approves the detailed written plan for remediation, the plan shall be considered incorporated by reference into the covenant not to sue. The commissioner may require submittal of other plans and reports for the commissioner's review and approval.

Insuring that the Polluter Pays. (a) Cost Recovery Actions. Right now, under the existing statutes, the message that is currently sent in Connecticut is that the property owner -- existing or new -- is the one that pays to clean up contamination that occurred years or decades ago. That message is sometimes sent through an action by DEP but mostly it arises in the context of a transaction that occurs under the Connecticut Transfer Act. Rarely, under Connecticut law, does the polluter or historical property owner or operator pay. The Task Force believes that the polluter should be held responsible and accountable for remediation in Connecticut.

Many sites that have become Brownfields are currently held or were once owned or leased by still viable organizations who have intentionally vacated the site. Particularly for municipalities, these sites are quite problematic. Municipalities (as well as any new developer) should have the tools available to pursue cost recovery actions against the responsible parties. Such actions provide contribution costs to the cleanup and defray the cost to the municipality or a developer who has to solely bear the cleanup cost. For too long these parties have escaped responsibility. Therefore, in the Task Force's prior reports, we recommended that the state's private party cost recovery statute be modified so that these parties are held accountable. Meaningful opportunities for individuals who clean up properties should be afforded to recover costs from the individuals/companies who polluted those properties.

Currently, such claims exist under section 22a-452 of the Connecticut General Statutes and such actions have been barred by the courts under a variety of reasonings. First, a very short statute of limitations period has been found to exist, a strict reading of the "negligence or other actions" standard is often made, and the costs must first be

expended by the “white knight” or municipality. Advancement of costs has been determined to be a condition precedent to any such claim. Given that these properties take time to assess, investigate and remediate, the statute of limitations is unworkable as not enough time is allowed for a claim to be analyzed and fully understood. Second, since the statute requires reimbursement only, a site that takes 10 years to cleanup would require the party to return to court several times, and may ultimately be time barred claim. Third, proving negligence in such actions places a very high (and further costly) burden on the “white knight”. Fourth, requiring the municipality (or developer) to expend funds first and to undertake litigation costs places an unfair and inequitable burden on the municipality (or developer).

Therefore, in our 2007 Report, we recommended that Connecticut should revise its cost recovery statutes to provide meaningful opportunities for developers, property owners, and municipalities to recover the costs of cleanup from the responsible parties. In 2006, a bill was introduced that resolves these outstanding issues (SB 415) but it was never enacted. That bill was the product of a working group formed by DEP and members of the Environmental Law section of the Connecticut Bar Association. The Task Force recommends that this bill or its elements be resurrected in order to allow municipalities and other parties the ability to recover from the responsible party (i.e., the polluter) the costs of clean up. In brief, this bill was based upon the standard, strict liability scheme previously existing under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 USC § 9601 et seq, which we believe should be used as guidance to Connecticut judges when they are reviewing these claims.

We believe, however, that the cost recovery mechanism must be tempered to insure that “white knights” and municipalities that take over these properties are not ensnared in the liability web. It remains the Task Force’s position that these individuals should be shielded from liability if they are undertaking such clean up diligently and were not otherwise responsible for the existing conditions. As far as municipalities are concerned, a municipality should not be held responsible unless it was the direct responsible polluter.

(b) Transfer Act Actions. Similar to the state adopting a viable cost recovery action, a statute of limitations allowing for meaningful claims under the Transfer Act is needed. Recently, the courts have adopted a very short statute of limitations, which does not recognize the reality of the length of time it takes to investigate and remediate a site. In one recent private party case, a judge ruled that a plaintiff could not recover under the strict liability provisions of the Transfer Act because the Transfer Act was governed by the three-year statute of limitations provided by §52-577 or the two-year statute of limitations provided by §52-577c. In large part, the court adopted a standard tort statute of limitations because no other limitations period was provided for these actions. Therefore, our proposal is to provide a six year limitation for such claims directly in section 22a-134b. Any action to recovery such damages should be commenced not later than six years after the later of either the due date for filing the Transfer Act form or the actual date of the filing.

C. ALL MUNICIPALITIES SHOULD BENEFIT IF THEY SEEK TO ADDRESS & REDEVELOP BROWNFIELDS

Municipal Transfer Act exemptions. In our prior reports, the Task Force recommended that municipalities involved in the pilot program be offered liability relief. However, given the pace of this program, we believe that liability relief and relief from the Transfer Act be extended to all municipalities who receive state funds for cleanup. In addition, if a municipality acquires the property by eminent domain, no transfer act filing should be required for either the acquisition or the subsequent transfer of the property, provided that the buyer is not related to any predecessor in title or former site operator (i.e., is a “white knight”) and the property is in and remains in one of the voluntary remediation programs administered by DEP. Therefore, we recommended the following changes to Connecticut General Statutes Section 22a-134 (1):

(1) "Transfer of establishment" means any transaction or proceeding through which an establishment undergoes a change in ownership, but does not mean (A) conveyance or extinguishment of an easement, (B) conveyance of an establishment through the exercise of eminent domain by a municipality, a foreclosure, as defined in subsection (b) of section 22a-452f or foreclosure of a municipal tax lien or through a tax warrant sale pursuant to section 12-157 or[, provided the establishment is within the pilot program established in subsection (c) of section 32-9cc,] a subsequent transfer by such municipality that has acquired the property through the exercise of eminent domain, foreclosed municipal tax liens or that has acquired title to the property through section 12-157, provided that (i) the party acquiring the property from the municipality did not establish or create the condition at the establishment and is not affiliated with such responsible person and (ii) the establishment enters or remains in the one of the voluntary remediation programs administered by the Commissioner. For purposes of this section, municipality includes any entity created or operating under chapter 130 or 132 of the general statutes, (C) conveyance of a deed in lieu of foreclosure to a lender, as defined in and that qualifies....

Municipal Access Rights. During 2008, the Task Force recommended that certain clarifications be made to section 22a-133dd of the general statutes regarding the ability of municipalities to access property without incurring liability for purposes of investigation prior to taking title. Some clarification was provided in Public Act 08-174, however, further clarification is needed as the statutory changes do not provide the necessary relief to municipalities. Therefore, we recommend that Section 22a-133dd (a) & (b) of the general statutes is amended as follows:

(a) Any municipality, any entity created or operating under chapter 130 or 132 of the general statutes, or any licensed environmental professional employed or retained by such municipality or entity may enter, without liability [to any person other than the Commissioner of Environmental Protection], upon any property within such municipality for the purpose of performing an environmental site

assessment or investigation on behalf of the municipality or entity created or operating under chapter 130 or 132 of the general statutes if: (1) the owner of such property cannot be located; [or] (2) such property is encumbered by a lien for taxes due such municipality; [or] (3) upon a filing of a notice of eminent domain; (4) the municipality's legislative body finds that such investigation is in the public interest to determine if the property is underutilized or should be included in any undertaking of development, redevelopment or remediation pursuant to chapter 130, 132, 445 or 581; or (5) any official of the municipality reasonably finds such investigation necessary to determine if such property presents a risk to the safety, health or welfare of the public or a risk to the environment. The municipality or entity created or operating under chapter 130 or 132 of the general statutes shall give at least forty-five days' notice of such entry before the first such entry by certified mail to the property owner's last know address of record.

(b) A municipality or entity created or operating under chapter 130 or 132 of the general statutes accessing or entering a property to perform an investigation pursuant to this section shall not [incur any liability pursuant to section 22a-432 of the general statutes for any preexisting contamination or pollution on such property, provided, however, a municipality may be liable for any pollution or contamination resulting from a negligent or reckless investigation] be liable under section 22a-432, 22a-433, 22a-451 or 22a-452 of the general statutes as long as the municipality or entity created or operating under chapter 130 or 132 of the general statutes did not cause or contribute to the discharge, spillage, uncontrolled loss, seepage or filtration of such hazardous substance, material, waste or pollution; does not exacerbate the conditions; and complies with reporting of significant environmental hazard requirements in section 22a-6u of the general statutes. To the extent that any conditions are exacerbated, the municipality or entity created or operating under chapter 130 or 132 of the general statutes is only responsible for responding to contamination or conditions directly caused by its activities.

D. BROWNFIELD REDEVELOPMENT IN FLOODPLAINS SHOULD BE STREAMLINED

Changes to the floodplain statutes regarding funding by DECD need to recognize further that redevelopment of existing Brownfield sites in floodplains should be readily encouraged. In prior years, the Task Force recommended changes to section 25-68d, which we believed limited the state's ability to provide funding for Brownfield projects in a 500 year flood plain. Many of our state's Brownfields are in floodplains as mills and factories were constructed close to rivers for power production and other such uses. Depending upon the type of development and the source of funds, a project may or may not have to be scrutinized under section 25-68d. For example, projects funded under CHFA or CDA do not have to follow these requirements. Only projects funded by state agencies have to follow this heightened standard of review, which is in addition to review

under the National Flood Insurance requirements. The bottom line is that Brownfield properties in floodplains should be able to be restored to a variety of uses utilizing the state programs and the statute needs to be made clearer to eliminate confusion. ..

Representatives from DEP and DECD understood the Task Force's concerns and prepared a guidance memo to try to alleviate these issues. We believe that a more formal approach is needed and the guidance should be codified to provide necessary certainty. The Task Force wants to make sure that if the historic foot print of a building is restored to either approximately the same square footage or less on a Brownfield site, that is permitted. Additionally, if the redevelopment varies slightly from the historic foot print (i.e., two or more buildings are developed where one once stood) the Task Force requests that the new facility be permitted as long as it does not go closer to the waterbody.

E. JOB TRAINING

The Task Force believes that job training is an important economic stimulus initiative. A number of Brownfield job training programs exist in the state funded primarily by EPA funds. These people should be put to work once trained. We believe that any Brownfield grant/loan fund recipient should be required to demonstrate a commitment to hiring people who are qualified and trained through a Brownfield job training program (e.g., the EPA Job Training Program). Therefore, we recommend that as a condition of receiving state funding by OBRD, the recipient be required to demonstrate that it is committed to hire and use individuals qualified and trained through a Brownfield job training program (e.g., the EPA Job Training Program).

F. PROPOSED REGULATORY CHANGES

Changes to the Remediation Standard Regulations (RSRs). DEP is developing modifications to the RSRs, which have not yet been released for public notice and comment. However, DEP provided the Task Force with a preview of the draft. The Task Force believes that any changes should reflect the need to spur investment in and the redevelopment of the state's Brownfield sites and that clarity should be provided to developers. In addition, DEP should recognize the ubiquity of urban fill in many areas in the state and its prevalence at Brownfield sites. Potentially, a different approach is recommended for Brownfield sites (and, particularly, those sites with urban fill). The Task Force expects that it will provide comments during the notice and comment period.

One area of concern for the Task Force is the proposal to require property owners to address contamination in sediments, downstream in rivers and streams, and to address off-site impacts. The Task Force is very concerned with the effect that these requirements will have on new property owners looking to redevelop Brownfield sites. Therefore, we believe that the "white knights" and municipalities should not be required to perform any investigation or remediation outside the boundaries of the existing site and that this is an overall policy direction that is required statutorily. The discussion and proposed language in section B above addresses this concern.

Changes to the Solid Waste Regulations. DEP is developing modifications to the solid waste regulations, which have not yet been released for public notice and comment. However, DEP provided the Task Force with a preview of the draft. Changes to the solid waste regulations should permit materials (urban fill, polluted fill or otherwise) to be reused on a Brownfield site. In the proposed definitions, DEP has developed three categories of fill: clean fill, regulated fill and conditional fill. We believe that maximum flexibility should be given to the reuse of all types of fill on Brownfield sites. Conditional fill should be able to be reused at any type of Brownfields site, including residential or mixed use sites, with the appropriate controls. In addition, the Task Force knows that ash is often mixed with soils and the other components identified in regulated fill. Therefore, ash should be included in the definition of regulated fill. The Task Force comments to the solid waste regulations are regulatory in nature and we expect to provide comments during the notice and comment rulemaking process.

IV. CONCLUSION

The Task Force is grateful to serve the interests of the State of Connecticut. It has been an honor for each of the Task Force members to participate in these important discussions and to make its recommendations each year.

In a couple of years, once the statutory changes have been vetted through experience by the agencies, the municipalities, the regulated community, the stakeholders and affected parties, we believe it makes the utmost sense to have a Task Force reconvened to benchmark whether the changes are effective and are working and/or whether another approach is needed. We do have hope that the OBRD will ultimately function as a true “one stop shop” and that complex Brownfields redevelopment will occur more readily and quickly. Such a goal, however, can only be achieved if the recommendations we set forth in this report and our prior two reports are enacted.

If the recommendations are not enacted, we believe that wholesale changes may be necessary – a new and comprehensive, programmatic approach may be warranted. For example, the State may be very well served to consider the adoption of a purely voluntary brownfield remediation program separate and apart from the state’s existing property clean up programs. We outlined this program in our first report. We have mentioned revolutionary change as opposed to evolutionary change in our reports, and the day may be approaching for such revolutionary change.

But, the Task Force fully supports the existing structure that has been created as it has much potential. We respectfully request the Legislature to adopt the recommendations set forth in this report (and all our reports), which will allow OBRD to achieve its potential and allow Brownfields to be redeveloped in this state and restored to a productive use.