Mothballing brownfields. Warehousing sites. Companies just paying taxes and mowing lawns. We have heard so much on the subject that it has become a cliché of complaint. It comes down to the same issue — what's to be done about properties withheld from the market due to known or potential environmental contamination?

Brownfield developers care because they see some of the best opportunities dangling just out of reach. Communities care because idled properties can be black holes sucking the potential out of their revitalization plans. And regulators care because they are frustrated in their efforts to find out if there even is a threat at these properties.

How big a problem is mothballing? No one really knows — no registry exists and likely never will except by a few intrepid souls at the local level. Information is still largely anecdotal. Only a few studies have even been attempted and they bog down in details of ownership and usage. Nobody posts a "Not for Sale" sign.

Warehoused sites can be explained away with many reasons — investment potential, weak markets, expansion plans, rights-of-way or even development buffers.

But sometimes we get a peek behind the curtain and companies openly discuss their corporate policies and strategies for keeping brownfields off the market. That is when it becomes clearest that the situation needs more attention — that the market is working toward perverse results and calls out for correction.

The reasons for mothballing brownfields are well known and have been extensively discussed. Owners fear regulatory action, cleanup costs and third-party liability. The potential costs of cleanup and litigation are judged to outweigh the benefits of sale and reuse. It's a business calculation without regard to the ultimate costs borne by communities through frustrated neighborhoods, stymied plans, and blocked projects.

Here is a survey of some of the leading ideas that have been put forward, a mix of carrots and sticks:

Environmental Disclosure

Broad security reforms are roiling the financial reporting waters and environmental disclosure has risen to the top of many lists as an area needing attention. In particular, the Sarbanes-Oxley Act may have a strong impact on the brownfields market by increasing scrutiny on environmental disclosure in financial statements.

Brownfield experts are suggesting that this could be a powerful new crowbar to pry properties loose from mothballing owners. The thinking is that disclosure will encourage companies to deal with brownfields that currently can be safely warehoused without upsetting shareholders and investors. If that's going to happen, however, it will likely be by non-regulatory means.

Those hopes were dashed by the July 2004 GAO report showing almost no environmental disclosure enforcement by the SEC over the past 25 years. Rather than calling for increased enforcement efforts as some had hoped, GAO suggested instead that regulators should do a better job of tracking and sharing information.

The new GAO report scrutinized how well SEC and EPA have monitored and enforced environmental disclosure requirements. Although the report did not come to a conclusion about the adequacy of enforcement and compliance, it was hard to miss GAO's call to make environmental disclosure information more available to the public so investors could make more-fully-informed financial decisions.

GAO left the door open to non-regulatory, voluntary disclosure initiatives. The report suggested a variety of approaches that could work, including environmental management systems, public databases, shareholder initiatives and trade association standards.

Secondary markets, such as insurance and financial services, could take the lead in incorporating environmental information into their financial assessments. Financial disclosure could be a way to get more brownfields on the market, but probably not due to federal action. It has been left up to the private sector, particularly the insurers and accountants, to handle environmental disclosure in the 10-Ks and other financial filings.

Liability Protection for Sellers

Understandably, this is what owners ask for the most and is the least likely to happen. Owners argue that the new Brownfields Law exempted the naive (innocent landowners), the neighbors (contiguous property owners) and the newbies (prospective purchasers) and left them holding the bag.

But the idea of protecting owners, even cooperating ones, runs smack into the principle of "polluter pays," and that is the fatal third-rail of hazardous waste policy. Nothing will happen here at the federal level in the foreseeable future. Perhaps states will be more willing, but the politics on this one are treacherous.

Cleanup Guarantees

Taking a page from state experiments with liability and financial protections for completed cleanups, EPA has taken the first step of issuing comfort letters called "ready for reuse certificates." Still not legal or financial guarantees, comfort letters show a willingness to reward good behavior and send a positive message to sellers and buyers.

How far EPA is willing to go in this direction depends on how the comfort letters are received by the market. However, given the federal government's strong reluctance to approve cleanups done under other programs, I would not look for any national cleanup guarantee programs in the near future.

Risk Management

Fortune 100 companies point to the fear of being the only

deep pockets around as their reason for mothballing. New tools have emerged in the last few years to deal with these concerns, combining financial assurance and bonding for cleanups with insurance policies covering the remaining long-term concerns. Engineering and institutional controls help further manage long-term risk to sellers and provide community protection.

The willingness of federal and state regulators to understand and adopt tools will go a long way toward reducing seller anxiety. EPA has been working to bring itself up to speed on these new approaches to managing risk that go way beyond the old comprehensive general liability policies.

Environmental Enforcement

As they say in sports, sometimes the best offense can be a good defense. Credible enforcement programs reduce the rewards for recalcitrant owners and encourage voluntary action to clean up properties.

A little extra attention to mothballing companies within the overall scheme of enforcement priorities could do wonders for bringing properties to market.

Land Use Tools

Energetic local governments have found all sorts of ways to get key properties out of mothballs. Health and safety enforcement, variable tax rates that penalize idled land, tax foreclosure, land swaps and eminent domain have all been used successfully.

However, given our national reluctance to involve the federal government in local land use decisions, EPA's role is largely limited to helping get the word out on local successes and best practices, as mentioned in the next idea.

Information Sharing

Markets need information to operate efficiently. It has been suggested that in the brownfields arena, the federal government can best help by providing information and getting out of the way.

EPA has funded conferences, workshops, training, reports and technical assistance to increase owner willingness to put brownfields on the market. These have been a good investment, as brownfields continue to be one of the best-leveraged federal programs.

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by Frank Veale

COUNTERPOINT | UNCERTAINTY A STUMBLING BLOCK

Sven-Erik Kaiser's appeal to return known or potential brownfield properties to active and productive use has obvious merit. Many parties, including owners of such properties, would like to see each property returned to a use that eliminates an eyesore, presents a more positive view of the company and the community and generates a positive cash flow for the owner and the municipality. It appears to this observer that all should welcome the end result Mr. Kaiser's article seeks to elicit.

The article goes on to present his perception as to why brownfield properties are not redeveloped and offers a welcome thumbnail sketch of sources of potential help. And, as such, it furthers the goal of returning brownfield properties to meaningful use.

Unfortunately, the article adopts a suspicious, if not hostile, tone toward all potential brownfield property owners and does not acknowledge the legitimate concerns of current owners of some of these properties. It may even be read to imply that all seek to attempt to avoid their responsibilities and the law, and disregard their community neighbors.

It is possible that properties are legitimately retained for future development, to serve as noise or visual buffers, to allow for future expansion and/or use as rights of way. These need not be interpreted as the "market working towards perverse results." Additionally, only disreputable reasons are given for not developing brownfields (fear of regulatory action, cleanup costs and third party liability); but a common and prudent reason is never specifically mentioned: uncertainty.

No one making investment decisions is comfortable with uncertainty. Banks will not loan, insurers will either not insure or demand premiums that are prohibitive, private individuals will seek more predictable investments. Uncertainty is arguably the main reason most potential brownfield sites are not redeveloped.

Some brownfield restoration programs recognize the key role uncertainty plays and attempt to offer some relief (although infrequently used) – in the form of publicly underwritten insurance programs and covenants not to sue. While the article does mention these, it does not mention the legitimate concern which gives rise to the need for these tools.

It will undoubtedly fall to creative teams composed of members drawn from governmental bodies, quasi-governmental bodies (redevelopment authorities, economic development authorities) and the private sector, to put in place a combination of tools tailored to a specific site, to dispel brownfield property owner uncertainty, and thus create the climate needed to encourage the return of brownfields to productive use. Not least of the benefits may be sparing the development of dwindling greenfields.

Frank Veale is Environmental Health & Safety Manager at Texas Instruments.

by Greg Rogers

COUNTERPOINT | MOTHBALLING AND THE BALANCE OF PAIN

Change does not automatically occur when people see what is in it for them, but people do change when they perceive that the pain of changing is less than the pain of not changing. Properties with known or suspected contamination are mothballed because corporate decision makers perceive the pain of doing so to be less than the pain of going to market.

The pain of change (going to market) is fear — fear of personal accountability for voluntarily exposing the organization to an indeterminate and potentially catastrophic loss. Right or wrong, many attorneys advise their clients that they have no legal duty under environmental laws to investigate owned properties with suspected but unconfirmed contamination. Let the sleeping dog lie.

On the other hand, if one investigates and confirms contamination above regulatory levels, there is a clear legal duty to notify the government and thereafter take necessary corrective action, no matter what the cost. This legal analysis is the root of the "don't ask, don't tell" policy.

The pain of not changing (mothballing) is cognitive — not emotional — and far less compelling. Mothballing undeniably results in non-value-added carrying costs for insurance, taxes, maintenance and security. It also carries the risk that conditions will get worse over time leading to future uninsured toxic tort claims that could have been avoided. And, of course, mothballing denies the company of any net proceeds from the sale of the property.

Opportunity costs associated with mothballing, however, are rarely measured and evaluated. The decision to mothball therefore carries little or no risk of personal accountability for decision makers. Mothballing is the safe choice.

Mothballing will persist until the balance of pain is reversed and the fear of mothballing exceeds the fear of going to market. Short of fundamental changes in our nation's environmental laws, there is only one way for this to happen. Corporate decision makers must perceive and fear personal accountability for the severe potential consequences under the federal securities laws of systematically failing to estimate the liabilities associated with known or reasonably suspected contamination.

For now, the mothballers and their professional advisors are, for the most part, blissfully ignorant of the trap that has been set by the Sarbanes-Oxley Act and certain recently adopted financial accounting and auditing standards. The July 2004 GAO report avoided the thorny issue of "don't ask, don't tell."

Mothballers, however, should not take comfort. A dynamic interaction of governmental and market forces is irreversibly driving corporate America towards increased environmental transparency and accountability — outcomes that are incompatible with willful blindness. The question is not if, but when, the balance of pain will shift. The wise will begin preparing for the future today.

There is a modern parable that if you throw a frog into boiling water, he will jump out, but if you increase the heat of the water slowly, he will get accustomed to the increasing heat and eventually get cooked. Attention mothballing frogs, "The water is heating up!"

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We publish select op/ed pieces on hot topics and letters to the editor. We are also looking for people to write counterpoints to Sven-Erik Kaiser's articles.

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The Brownfield Community

by Barry Hersh

David D'Addario

There is now a brownfield community. Friendships have flourished as individuals meet, work together and share their experiences. The past few months have been especially hard on too many of the hearts of that community.

We note with great regret the untimely passing of David D'Addario this May. David was a professional engineer and especially proud of having been one of EPA's first interns. His long career with North American Realty Advisors, most recently as executive vice president, involved working with many major corporations on property disposition and redevelopment.

Dave was a consistent attendee and presenter at the EPA national brownfields conference, known for his business acumen and sharp wit (a favorite: his picture of a "for sale" sign, covered by overgrown weeds, which he described as a "typical brownfields marketing program"). It is hard to imagine the upcoming Brownfields 2004 conference without him.

Barry Hersh is a Professor of Real Estate and Urban Planning at City University of New York.

David's photo of "a typical brownfield marketing program."