An Examination of Urban Contamination

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An Examination of Urban Con
When Erie County Commissioner of Environment and Planning Richard M. Tobe ‘74 decided to investigate what could be done to solve the complex “brownfields” problem in Western New York, he turned to his alma mater and Professor Robert S. Berger for help.

So-called “brownfields” are abandoned industrial and commercial properties in core urban areas and their immediate suburbs. They are so ubiquitous here in Erie County that the region’s vitality — perhaps even its economic survival — is threatened, Tobe believes. Brownfields pose health risks, drive down the tax base, create blight and cost jobs at the same time costly development despoils pristine rural “greenfields.”

Several factors contribute to the brownfields dilemma, says Berger, including a changing business climate and environmental regulation — particularly the federal Superfund law which imposes strict liability on the owners of polluted sites.

Berger is interested in the relationship between Superfund liability and the difficulty of redeveloping brownfield sites as a result of the “Superfund Program” seminar he co-taught last fall with Alice J. Kryzan, an environmental attorney and adjunct professor. Berger and Tobe agreed that this problem should be addressed in the new Environment and Development Policy Research seminar that Berger planned to teach.

Professor Berger and six seminar students consequently spent the spring semester researching myriad legal questions, sorting through a labyrinth of state and federal statutes and regulations, and tracking down information on brownfields programs in other parts of the country. Their goal was to find ways to encourage reuse of minimally contaminated industrial sites without compromising the underlying premise that polluters should pay for the environmental damage they cause.

The effort resulted in a comprehensive report, “Recycling Industrial Sites in Erie County — Meeting the Challenge of Brownfields Redevelopment,” which was released at a May 1994 press conference.

“This project achieved a number of goals which I had established,” says Tobe. “First, it contained first-rate legal research on a rapidly evolving area of law.

“Secondly, it helped our government focus more clearly on a problem that we did not have time to fully explore. Third, it brought real-world problems and pressures to the Law School.

“Finally, the fine work product will propel UB Law into the forefront of an important national debate that has significant consequences for our region,” Tobe says.

“It turned out to be a massive undertaking,” Professor Berger says, “but the six students successfully met the challenge. It was a tough job from the very beginning. Even arriving at a workable conceptual definition of ‘brownfields’ was difficult. We wanted to fully explore the issue in order to call attention to the problem and suggest that, if nothing else, it can’t continue to be ignored.”

The report succeeded in the goal of calling attention to the problem. It has already reached experts across the country and generated widespread response, including a two-part editorial which appeared in the Buffalo News.

“A well-researched report done by University at Buffalo law students for the Erie County Department of Environment and Planning details ways of encouraging redevelopment of lightly contaminated urban sites without sacrificing the Superfund principle that polluters must pay for cleanups,” the News editorial said.

“Treating used urban commercial areas as throwaways makes no sense. It robs cities of the potential for needed tax revenue and steals away green space in the country.
farming, politics and government.”

“There were times when we couldn’t even agree on what questions we should be asking, let alone how to come up with answers,” says Marsh.

“But we stuck with it. Writing the report as a group forced us to work through our differences,” Campbell added. “And believe me, the differences sometimes seemed overwhelming.”

Says Berger, “There were days when I felt more like a referee than an instructor. These students were dedicated, worked extremely hard, and really cared about these issues. Writing a report as a group is quite difficult. All the grappling, though, resulted in a report that is balanced, straightforward and realistic. The end product was not only a significant contribution to an important public policy debate, but also a wonderful educational experience for these students and for me.”

The students agree. “The reports’ conclusions and proposed solutions allow for both business revitalization and social reform,” says Crolle.

“This project has allowed our group to approach policy and legislation from a creative and proactive angle,” adds Solo. “Legislative policy that is purely reactive generally rights one wrong with little regard for other effects. We have made great efforts to take both a holistic and realistic approach.”

UB Law School remains committed to being part of the solution, according to Dean Barry B.Boyer, a well-known environmental activist. That commitment includes a continuation of the seminar research program that began last spring. Five of the original six students will be working again with Professor Berger and Commissioner Tobe. They have been joined by third-year students Eric M. Falkenberry and John D. Finley along with Kathryn Bryk Friedman, a Ph.D. candidate in the University’s political science department. A master’s degree candidate from the School of Architecture and Planning will be meeting with the group to coordinate his work on this topic with theirs.

“The report has been very well received, but we all knew it was only a beginning,” says Berger. “Extension of the seminar, inclusion of other University departments in an expanded research effort, and continuing cooperation with Erie County, the City of Buffalo and other levels of government are important additional steps in an ongoing effort. All of us are looking forward to the challenge and the opportunity to have the Law School and the University assist in finding solutions to this serious problem.”

No Quick Fix, the Report Warns

“Here is no ‘quick fix’ to the brownfields problem,” the report warns. “The people who will find and implement working solutions to the brownfields problem will need the vision to recognize that the problem is a multi-dimensional one that cannot solely be viewed from any one perspective.

“They will also require the courage to recognize that only a cooperative regional approach will be successful. Finally, they will need the benefit of intense research and thorough knowledge about many complex issues.”

The report provided an overview of the brownfields in New York State and identified major barriers to the redevelopment of brownfield sites, including the risk of state and federal Superfund liability for past contamination, the high cost of site assessment and cleanup, uncertain cleanup standards, lack of available public funding, public perception and lender liability.

Additional sections covered legislative background, liability and cleanup standards, liability exemptions for municipally owned property, and financial incentives.

The report concluded with a series of proposals:

- Erie County should actively pursue designation of a local site for inclusion in a pending state pilot program.

- State legislative changes offering appropriate liability releases to prospective purchasers of minimally contaminated brownfield sites should be developed and supported.

- State legislative changes encouraging certainty in New York State cleanup standards should be developed and supported.

- State legislative changes granting liability exemptions for land secured by municipalities through tax foreclosure and possibly eminent domain should be developed and supported.

- State legislative changes sanctioning the transfer of municipal immunity to an innocent purchaser should be developed and supported.
• The practicality and possibility of lease arrangements with innocent developers for municipally owned property should be further investigated.

• Erie County should consider creating a county-level revolving loan fund and using other financial devices as catalysts for brownfield redevelopment. Such funds could be designated for specific purposes, such as preliminary environmental assessments or for assistance to small businesses.

• Allocation of economic development funds for support of brownfield redevelopment should be encouraged.

• A coordinated cooperative effort by economic development agencies and environmental groups working together on brownfield redevelopment should be facilitated.

• A local brownfields redevelopment program should be established.

• Contacts with other brownfield redevelopment programs and initiatives around the country should be continued and expanded to ensure a full exchange of information and ideas.

• A series of meetings, conferences or seminars should be held with business leaders, insurers, educators, environmental groups, the media, lenders, government agencies, community groups and the general public.

• Erie County and the City of Buffalo should co-sponsor a task force with diverse representation to address the problem of building a regional consensus on how to solve the brownfields problem here.

Should We Trash the Superfund Program?

"Is the Superfund working? asked Walter Mugdan, an Environmental Protection Agency lawyer, in a speech he delivered as part of the Law School’s Mitchell Lecture Series.

“The purpose of the Superfund is to clean up hazardous waste sites and to have somebody else pay,” said the EPA deputy regional counsel.

“Based on these standards, the answer is yes. Superfund has had the worst press of any government program I can think of."

Mugdan has been a lawyer with the EPA for 18 years and teaches a Superfund class at Pace University Law School. He was introduced by Adjunct Professor Alice J. Kryzan, an environmental attorney who co-taught a seminar on the Superfund Program with Professor Robert S. Berger. “Mr. Mugdan probably knows more about Superfund and how it works than anyone else.” Kryzan said.

Mugdan’s visit to UB was part of an annual lecture series established in 1950 in memory of James McCormick Mitchell, a prominent Buffalo attorney who served as president of the University of Buffalo Council in the 1930s and 1940s.

“There is no doubt that Superfund is controversial,” Mugdan acknowledged. “The program is due to be reauthorized next year. Reauthorization is talk of the day. There are many criticisms and lots of room for disagreement. You won’t get broad societal agreement today.”

Many critics are asking whether Superfund should be reauthorized as is or whether changes should be made, particularly in the law’s rigid liability scheme. Mugdan believes that the program is working and that it should be reauthorized without significant change.

“Superfund liability is strict, joint, several, retroactive and perpetual,” Mugdan explained. “It may not be entirely fair, but it has resulted in payment of over 70 percent of cleanup costs by PRPs (potentially responsible parties), almost the maximum of what can be expected. This stringent liability scheme has resulted in an enormously efficient program, one that has operated without the addition of more bureaucrats. It’s a common myth that when government does things, they’re more expensive. But PRPs have discovered that this isn’t always true.” Mugdan cited another benefit of Superfund’s liability scheme that is not readily apparent. “Corporate managers now recognize that every time they select a site for hazardous waste, they’re going to be responsible forever. This leads to the most responsible possible operation. Perpetual liability has instilled a level of corporate concern that you couldn’t match any other way.”

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