

PERSPECTIVES FROM THE FIELD

The Rhode Island Brownfields Program and Recent State-Funded Grant Opportunities

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The beneficial reuse of environmentally contaminated properties in Rhode Island remains a vast opportunity for practitioners to consider grant applications, creative financing, transactional cleanups, and/or Court-supervised cleanups. There are hundreds of re-developed, formerly contaminated sites all over the state of Rhode Island, which can be remediated under the Rhode Island Department of Environmental Management's Brownfields program. In September of 2015, the RIDEM's Brownfields program was significantly enhanced by state administration, providing for grants to conduct investigation and cleanup of contaminated sites. Funds are and will be available for pre-development planning, remedial investigation, redevelopment and marketing plans, remedial design, construction of remedies, and associated work. The trigger for any Brownfields remediation, and in turn, eligibility for funding, continues to be notification of a release of hazardous materials. Once under RIDEM's jurisdiction, any responsible party must adhere to the site remediation site management process.

The grant money may be applied to investigation of soil, groundwater, soil gas, indoor air and infrastructure/building materials. Funds are also available for site assessment, remediation, hazardous material abatement, waste disposal, long term monitoring, institutional controls, environmental consulting costs, and marketing. The Brownfields grant program provides new and diverse opportunities for environmental professionals to assist their clients in the Brownfields process.

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There is a scene in the television show *The Big Bang Theory* in which Sheldon is visiting his friend, Raj. Sheldon comments that Raj's apartment seems to be in a very old building. Raj responds proudly, "Sixty years. It used to be a watch factory." Sheldon asked, "Don't you worry about the residual radium from the luminous dials?" Raj looked around nervously and answered, "Not until now!"

That brief conversation captures the essence of the Rhode Island Brownfields program: the reuse of real property that causes anxiety about the potential harmful health effects resulting from the prior use. There are hundreds of such re-developed, formerly contaminated sites all over the state. State elementary schools, churches, and offices may be a brownfield site. Even the Rhode Island Department of Environmental Management (DEM) offices and the Rhode Island Save the Bay headquarters are former contaminated properties that have been resurrected for new purposes. The DEM estimates that Rhode Island has over 10,000 potential brownfield properties.¹

The Rhode Island Brownfields program began in 1995 with the enactment of the state's Industrial Property Remediation and Reuse Act.² The passage of this legislation was driven largely by lenders and investors who were reluctant to finance development projects with the specter of costly environmental cleanups and years of uncertainty hampering the return on their investment. Prior to the Brownfields program, a property could be classified in only two ways: pristine or contaminated. For a property with any hazardous materials on site, the DEM required cleanup to pristine condition. There was no middle ground, even if the intended use did not necessitate the property being virginal.

The Rhode Island Brownfields program provided flexibility for the cleanup standards to be matched to the site's expected future use. This meant, for example, that contaminated soil under the foundation of a building in

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downtown Providence would not have to be removed if the intended use of that building would not disturb that soil and the hazardous materials were not migrating offsite. The cleanup is now risk based rather than simply “dirty to clean.” This approach satisfied both the developers (who were able to proactively manage their environmental liabilities) and the environmentalists (who cheered cleanups at many abandoned contaminated sites).

The Rhode Island Brownfields program also creates an enormous prospect for environmental professionals in its remediation process. The beneficial reuse of environmentally contaminated properties in Rhode Island remains a vast opportunity for practitioners to consider grant applications, creative financing, transactional cleanups, and/or court-supervised cleanups.

Many acres of brownfields occupy prime commercial/industrial locations within the state’s urban corridor.³ A “brownfields site” is defined by the Grant Regulations as “a property where a known or suspected release of petroleum and/or hazardous material presents a barrier to the sale, reuse, or redevelopment of the site, or where uncertainty on the costs of remediation adversely impacts the value of the property” (Grant Regulations, Section 6.00).

In September of 2015, the DEM’s Brownfields program was significantly enhanced by state administration, providing for grants to conduct investigation and cleanup of contaminated sites. Attorneys who can navigate the new “free money” application process undoubtedly will be popular with their clients.

DEM promulgated its Rules and Regulations for the Brownfields Remediation and Economic Development Fund last year, which outline the process for application and criteria for selection of projects for funding of certain Brownfields projects; specifically, “the investigation, assessment, [and] remediation...” of contaminated properties.⁴ Funds are and will be available for pre-development planning, remedial investigation, redevelopment and marketing plans, remedial design, construction of remedies, and associated work.

The new grant program does not change the site remediation process that is detailed in the DEM’s Rules and Regulations for the Investigation and Remediation of Hazardous Material Releases (“Remediation Regulations”).⁵ The new program simply makes funding available from the State for this cleanup. The trigger for any brownfields remediation, and in turn, eligibility under the Grant

Regulations, continues to be notification of a release of hazardous materials. The grant funds are only available for sites that have been previously identified by DEM as a Brownfields site or new sites for which a notification of release has been submitted to the DEM.⁶ Once under DEM’s Remediation Regulations jurisdiction, any responsible party must adhere to the site remediation site management process.

At least twice per fiscal year, DEM will announce new rounds of funding. The announcement will state the amount of funds available and the application deadline. The application must be submitted on the application form supplied by DEM and electronic applications will also be acceptable.

The payment of the grant will be in the form of reimbursement. Grant recipients will be required to provide documentation of eligible expenses which will then be reimbursed by the DEM.

There are four categories of grants that will be considered: pre-development planning grants, redevelopment grants, site preparation grants, and small business assistance grants. The specific definitions of each of these categories can be found in the Grant Regulations, but generally, the difference between these categories is the status of the site in the remediation process. If the site was previously investigated and the DEM already approved a cleanup plan, the grant application falls into the “redevelopment” category. If the site has previous investigations, but no plans were approved by DEM, the funding category is “pre-development.” If the site is new to the site remediation process and needs initial investigation and assessment, it would likely fall into the “site preparation” category.

The grant money may be applied to investigation of soil, groundwater, soil gas, indoor air, and infrastructure/building materials. Funds are also available for site assessment, remediation, hazardous material abatement, waste disposal, long-term monitoring, institutional controls, environmental consulting costs, and marketing.

Applications for cleanup grants will be reviewed by a “Review Committee” comprising three DEM employees and one other member from outside the DEM who is to be named by the DEM Director. The Review Committee will evaluate each application and award funding based upon various criteria outlined in the Grant Regulations. Although the Regulations do not define the relative weights that will be given to each review criteria, the relative economic

development potential of the project will be given significant consideration. The Regulations refer to “economic impact,” job creation and enhanced tax revenues as factors for funding. How the Review Committee will analyze other stated review criteria such as the financial solvency of the developer, the permanency of the jobs created and the “likelihood of success” of the project is left unanswered in the Grant Regulations.

The Grant Regulations are also silent as to whether the Review Committee may request that applicants supplement or explain their proposals. The Regulations do not state whether the Review Committee evaluation meetings are open to the public or whether the applicants are invited to attend.

After the Review Committee completes its scoring of the grant applications, the Committee submits its non-binding award recommendations to the DEM Director. The DEM Director may disregard the recommendations of the Review Committee and has sole authority to award grants.

The Grant Regulations also do not state whether the amount of funding requested in the application may be raised or lowered by the Review Committee or the DEM Director in the ultimate grant award. As to the amount of the awards, the Grant Regulations do not state whether the Review Committee or the DEM Director will apportion the total grant funding available in that period to among several applicants based upon the scoring or whether one application may receive the entire grant for that funding period. The Regulations do not explain whether the entire funding amount available in the award period will be disbursed in that period or whether the funds may be rolled back into the program for disbursement in a future grant period.

After the grant awards are announced, the applicants may request a “de-briefing” with the Review Committee to discuss their application package scoring. The Grant Regulations do not provide for such a de-briefing with the DEM Director if the Director overruled the Review

Committee’s recommendation. The request for this meeting must be made within 30 days of the award announcement and the meeting shall take place within 90 days.

Upon the announcement of the remediation grant awards, successful applicants will receive a grant offer specifying the amount, duration, and conditions of the award. The Grant Regulations do not explain how the duration of the offer will be defined by the DEM or whether there are any limitations on the conditions that may be included with the offer from DEM. The offer, however, will be in the form of a binding contract and the applicant must sign it within (45 days of the offer being mailed by DEM.

The Brownfields grant program provides new and diverse opportunities for environmental professionals to assist their clients in the brownfields process. Reviewing and filing the grant application, monitoring the Review Committee evaluation, participating in the “de-briefing” and documenting the eligible expenses for reimbursement are some of the steps in the grant program in which industry practitioners should play an active role.

Notes

- 1 Section 1.00, RIDEM Rules and Regulations for the Brownfields Remediation and Economic Development Fund.
- 2 R.I. Gen. Laws §23-19.14-1 *et seq.*
- 3 Section 1.00 of DEM’s Rules and Regulations for the Brownfields Remediation and Economic Development, September 22, 2015 (“Grant Regulations”).
- 4 *Id.*
- 5 “Proposed projects must be on a Brownfields site known to [DEM].” Grant Regulations, Rule 10.01.
- 6 *Id.*

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