

Report to the Vermont Legislature
by the
Brownfields Advisory Committee
Established by
Act No. 67 of the 2007-2008 Legislative Session

Senate Committee on Economic Development, Housing and General Affairs

Senate Committee on Natural Resources and Energy

House Committee on Natural Resources and Energy

DECEMBER 19, 2007

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PART ONE: Executive Summary

Act 67 of the 2007-2008 legislative session (“Act”) establishes a Brownfields Advisory Committee (“Committee”) to serve in an advisory role to the Agency of Natural Resources and the Agency of Commerce and Community Development. The Committee is also charged with performing a study and submitting a report to the legislature by November 15, 2007. The report is to include proposed legislative recommendations on ways to promote the redevelopment of contaminated properties (also known as “brownfields”).

The primary focus of the Act is to have the Committee study the redevelopment of contaminated properties program (“Program”) and make recommendations intended to promote better utilization of the Program. This document is the product of the study. It constitutes the report and contains the findings and recommendations of the Committee.

The Committee convened its first meeting on October 10, 2007, shortly after all member appointments were completed. The Committee acknowledged the short time period in which it had to produce the report. Two subcommittees, liability and funding, were established to expedite the study process. These subcommittees met separately and reported back to the full Committee with recommendations. The Committee also produced its own separate recommendations with regard to topics not addressed by the subcommittees. At its last meeting, November 14, 2007, the Committee voted on several recommendations of the subcommittees, as well a number of previously circulated draft recommendations and certain other items raised at that meeting.

The Committee’s overarching recommendation is to establish a Standing Committee on Brownfields in order to continue the work that the Committee has begun, and to explore additional ideas and make additional proposals for which time did not permit.

The findings and recommendations of the Committee are summarized below. They are discussed in detail in Part Three of this report.

- **A Standing Committee on Brownfields needs to be established to serve in an advisory capacity to the Secretary of ANR and the Secretary of ACCD.**

- **The Committee recommends adoption of an active mission statement that establishes clear goals and objectives for the Program.**

- **The Committee recommends that the current Federal definition of “brownfields” be utilized by the Program.**

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- **All potential applicants should be required to attend a pre-application meeting with ANR prior to submitting an application to the Program.**

- **10 V.S.A. §6615a must be rewritten so that it is presented in a more logically organized and readable format.**

- **The Program needs to adopt the New Hampshire approach to provide participants with personal liability protection that attaches upon approval of a corrective action plan.**

- **The legislature should consider the creation of a “super exemption” from liability for Regional Development Corporations that engage in brownfield redevelopment projects.**

- **Additional options for limitations on liability and related issues need to be considered by the Standing Committee on Brownfields.**

- **The Program should adopt performance measures (A) through (F) as set forth in the Act, as modified by the Committee.**

- **The Standing Committee on Brownfields should consider additional metrics that will add value as a measure of performance.**

- **There presently exists a funding gap of \$10.2 million which will negatively impact the ability to prepare the approximately fifty active brownfield properties for redevelopment.**

- **The legislature, or the Standing Committee on Brownfields, must identify ways to address this funding gap.**

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- **Solutions to the funding gap issue should include identifying ways to fund projects that are ineligible for funding under existing programs.**
- **A dedicated funding source that provides sufficient revenue for the Environmental Contingency Fund to be viable needs to be identified.**

PART TWO: Act 67 and the Brownfields Advisory Committee

Act 67 (S.190) of the 2007-2008 Legislative Session (“Act”) establishes a Brownfields Advisory Committee (“Committee”) to develop statutory and programmatic recommendations to promote the redevelopment of contaminated properties and to serve in an advisory role to the Agency of Natural Resources and the Agency of Commerce and Community Development.

The primary focus of the Act is to have the Committee study the redevelopment of contaminated properties program, 10 V.S.A. §6615a (“Program”), and make recommendations intended to promote better utilization of the Program. The Act is silent as to the extent of the Committee’s existence beyond the “summer study” that the Committee is to perform. The Act requires that the Committee submit a report to the legislature by November 15, 2007. The report is to address the following areas:

(1) Recommendations for a clear mission statement that defines “brownfields,” clearly states the multiple objectives and benefits of redevelopment, and makes a commitment to facilitating redevelopment of brownfields sites in a manner that best attains these objectives and provides these benefits in a manner consistent with the public health;

(2) Recommendations for guidelines by which the department of environmental conservation can reasonably commit to expeditious application processing that is within the budgetary and human resources capacities of the department;

(3) Recommendations to the department of environmental conservation that include specific means by which some form of liability limitation can be provided to innocent landowners and developers earlier in the application, compliance, and remediation process.

(4) Recommendations for measures to be considered as a part of an annual performance evaluation. The committee shall consider the following measures as a part of their recommendations:

(A) The number of projects and sites that enter each of the program areas.

(B) The number that complete the program and are certified or that receive site management action completed certificates.

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(C) The amount of federal and state money applied by the department of environmental conservation and by the regional planning commissions to assist site investigation and remediation.

(D) The number of projects and sites that proceed to redevelopment during the year.

(E) The acreage that is certified for redevelopment.

(F) The amount of redevelopment money leveraged by the state's investment in remediation assistance services and funding.

(G) Other parameters of performance that the department of environmental conservation, the advisory committee, or the general assembly requests for inclusion in the evaluation.

Act No. 67 (Senate Bill, S.190) (June 5, 2007)

A majority of the fifteen Committee members were appointed by the governor as required by the Act. The Committee was convened once all appointments were made. A list of the Committee membership is attached as **Appendix A**.

The first meeting was held on October 10, 2007. At that meeting, the Committee reviewed its statutory charge, was presented with an overview of the Program by ANR staff, and identified liability and funding as the two critical issues related to promotion of brownfields redevelopment in Vermont. The Committee established separate subcommittees to study these two issues and report back to the full Committee with recommendations. The Committee at large studied the remainder of the topics identified in the Act.

Subsequent meetings were held of both the liability and funding subcommittees and of the full Committee on the following dates utilizing a compressed schedule in an effort to meet the Act's reporting deadline of November 15, 2007.

October 18: Liability Subcommittee

October 23: Funding Subcommittee

October 23: Committee

October 30: Liability Subcommittee

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November 1: Funding Subcommittee

November 1: Committee

November 14: Committee

Draft reports and recommendations were circulated for review and comment prior to the Committee's final meeting on November 14. The Committee met on November 14 and voted on the pending recommendations as well as some additional recommendations made at that meeting.

This document constitutes the report and the findings and recommendations of the Committee. The specific findings and recommendations are discussed in detail in Part Three of this report.

PART THREE: Findings and Recommendations

The following Sections contain the findings and recommendations of the Committee. These findings and recommendations address the four topics identified by the Act, as well as two additional topics identified as significant by the Committee.

The first of these recommendations, establishment of a Standing Committee on Brownfields (“Standing Committee”), is intended to provide a platform for continuing the work that was begun by the Committee established through the Act. The Committee believes the Program would benefit from the existence of the Standing Committee for vetting of new ideas between the state agencies involved in brownfields redevelopment in Vermont and other interested parties as identified by the Committee.

I. Standing Committee on Brownfields

The Committee recognized very early in the study process that brownfields involve myriad issues and that the success of a brownfields program is impacted by a significant number of variables. The Committee did not have enough time to examine all pertinent issues and opportunities envisioned by the Act

Therefore, the Committee recommends the following.

A. A Standing Committee on Brownfields needs to be established to serve in an advisory capacity to the Secretary of ANR and the Secretary of ACCD.

The Standing Committee would function in a manner similar to the committee that advises ANR on the Petroleum Cleanup Fund. The Standing Committee would have the ability to draw on expertise from other areas when necessary to examine specific issues. The makeup of the Standing Committee should be as follows:

- the secretary of ANR, or designee;
- the secretary of ACCD, or designee;
- a redeveloper with brownfields experience;
- a representative of the Vermont Association of Planning and Development Agencies;
- a commercial real estate licensee with brownfields experience;
- a representative of the Department of Health;
- a representative of the Office of Attorney General;
- an environmental consultant;
- a representative of an environmental advocacy organization; and
- a representative of the banking industry.

The Standing Committee could address topics that were not able to be adequately explored by the Committee and other unforeseen future opportunities.

II. Mission Statement

The statute which establishes the Program lacks a clearly announced purpose and mission statement. The Committee agrees that a mission statement would provide a measure of benefit to the Program and its participants. The Act asks for a mission statement with three major components:

Recommendations for a clear mission statement that defines “brownfields,” clearly states the multiple objectives and benefits of redevelopment, and makes a commitment to facilitating redevelopment of brownfields sites in a manner that best attains these objectives and provides these benefits in a manner consistent with the public health.

The Committee believes that the Program would benefit from an active mission statement and that the Program’s definition of “brownfields” should be updated. The Committee makes the following recommendations in this regard.

A. The Committee recommends adoption of an active mission statement that establishes clear goals and objectives for the Program.

B. The Committee recommends that the current Federal definition of “brownfields” be utilized by the Program.

The Committee intends for these recommendations to be incorporated into the statutory rewrite discussed in Section III, Limitation of Liability, of this report. The reasoning behind the Committee’s recommendations, and proposed language for incorporating these changes into the Program, is discussed in greater detail as follows.

A. The Committee recommends adoption of an active mission statement that establishes clear goals and objectives for the Program.

The Committee believes that the Program’s mission statement should be action oriented and clearly identify the goals and benefits of the Program and brownfields redevelopment generally. The Committee recommends that the following themes be utilized for the mission statement.

It shall be the mission of the program to promote the following objectives:

- (1) Reduce and eliminate threats to human health and the environment;
- (2) Reuse historically productive properties;
- (3) Target and maximize public investment and technical assistance; and
- (4) Address legal liability risks to parties who assume responsibility for property remediation.

**B. The Committee recommends that the current Federal definition of
“brownfields” be utilized by the Program.**

The Program limits participation to properties that meet the statutory definition of brownfields, which is: (i) A vacant, abandoned, or substantially underutilized property as defined by the secretary. (ii) To be acquired by a municipality.¹ This definition has remained essentially unchanged since the Program was established in 1995.

In January 2002, the federal Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”)² was amended by the Small Business Liability Relief and Brownfields Revitalization Act (“Brownfields Act”)³ in an effort to further encourage and promote the reclamation and redevelopment of brownfields. The Brownfields Act established a federal definition for brownfields. A number of states have subsequently adopted the federal definition.

Use of US EPA grant funds discussed in Section VI of this report is also tied to whether a property meets the federal definition. Utilization of the federal definition would expand the number of properties eligible for participation in the Program. Therefore, the Committee recommends that Vermont adopt the current federal definition of a “brownfield” for the Program.

The federal definition, subject to the exclusions as set forth in the Brownfields Act, is as follows: “The term ‘brownfield site’ means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”⁴

¹ See, 10 V.S.A. §6615a(f)(1)(C).

² CERCLA is also commonly referred to as “Superfund” and is intended to comprehensively address cleanup and liability issues as they relate to contaminated properties, including brownfields.

³ Public Law 107-118 (H.R. 2869).

⁴ Under the federal law, the term ‘brownfield site’ does not include:

- (i) a facility that is the subject of a planned or ongoing removal action under this title; (ii) a facility that is listed on the National Priorities List or is proposed for listing; (iii) a facility that is the subject of a unilateral administrative order, a court order, an administrative order on consent or judicial consent decree that has been issued to or entered into by the parties under this Act; (iv) a facility that is the subject of a unilateral administrative order, a court order, an administrative order on consent or judicial consent decree that has been issued to or entered into by the parties, or a facility to which a permit has been issued by the United States or an authorized State under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), the Federal Water Pollution Control Act (33

III. Application Processing

Program requirements provide that applications are to be reviewed by ANR within 30 days of submittal. 10 V.S.A. §6615a(e)(2). The Committee examined the status of the application process and determined that ANR responds expeditiously and certainly within the statutory timeframes. It is unclear then, to the Committee, what the Act seeks to accomplish in this regard. If the Act sought to review the entire Program process from application through remediation to a certificate of completion, that review was not undertaken by the Committee and could be performed by the Standing Committee.

The Committee does make the following recommendation concerning the application process.

A. All potential applicants should be required to attend a pre-application meeting with ANR prior to submitting an application to the Program.

ANR staff performed a review of the application process in response to the Committee's request. The Committee reports that ANR received seven new Program applications for the period between November 1, 2006 and October 31, 2007. All seven applications were reviewed and applicants were notified of approval as to eligibility within 30 days of the applications being deemed complete. The average review time was actually 16 days.

U.S.C. 1321), the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), or the Safe Drinking Water Act (42 U.S.C. 300f et seq.); (v) a facility that—(I) is subject to corrective action under section 3004(u) or 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6924(u), 6928(h)); and (II) to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures; (vi) a land disposal unit with respect to which— (I) a closure notification under subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.) has been submitted; and (II) closure requirements have been specified in a closure plan or permit; (vii) a facility that is subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States, except for land held in trust by the United States for an Indian tribe; (viii) a portion of a facility— (I) at which there has been a release of polychlorinated biphenyls; and (II) that is subject to remediation under the Toxic Substances Control Act (15 U.S.C. 2601 et seq.); or (ix) a portion of a facility, for which portion, assistance for response activity has been obtained under subtitle I of the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.) from the Leaking Underground Storage Tank Trust Fund established under section 9508 of the Internal Revenue Code of 1986. Public Law 107-118 (H.R. 2869).

ANR staff indicated that this turnaround time is representative of the applications received within the past three years as well.⁵

ANR has proposed requiring a pre-application meeting and the Committee agrees that this requirement would have a positive impact by providing a mechanism for identifying potential issues, explaining the Program process and addressing questions and concerns early on. This procedure can be established without the need for a statutory amendment. The Committee recommends that this change be accomplished programmatically, not statutorily. Along these same lines, the recently filled position of brownfields project manager, which among other functions liaises between ANR and ACCD, should serve as a single point of contact for developers considering participation in the Program and for performing brownfield outreach efforts.

IV. Limitation of Liability

Act 67 asked the Committee to examine ways in which limitation of liability could be used to encourage redevelopment of contaminated properties, and to make recommendations to DEC as to the provision of these protections to redevelopers. This section is intended to respond to the specific charge that the Committee provide:

Recommendations to the department of environmental conservation that include specific means by which some form of liability limitation can be provided to innocent landowners and developers earlier in the application, compliance, and remediation process.

Limitation of liability is a fundamental principle underlying both the federal Brownfields Act and state laws designed to encourage cleanup and redevelopment of brownfields, including the present iteration of 10 V.S.A. §6615a. Recognizing this prominent role, and the singling out of this topic in the Act 67 charge, the Committee established a subcommittee to examine liability. The subcommittee met separately and reported its findings and recommendations to the Committee. The Committee makes the following findings and recommendations for the purposes of this report.

A. 10 V.S.A. §6615a must be rewritten so that it is presented in a more logically organized and readable format.

B. The Program needs to adopt the New Hampshire approach to provide participants with personal liability protection that attaches upon approval of a corrective action plan.

⁵ In comparison, New Hampshire's brownfields law also requires a 30 day review period. New Hampshire brownfields staff informed the liability subcommittee that New Hampshire rarely meets the 30 day deadline.

C. The legislature should consider the creation of a “super exemption” from liability for Regional Development Corporations that engage in brownfield redevelopment projects.

D. Additional options for limitations on liability and related issues need to be considered by the Standing Committee on Brownfields.

Each of these recommendations is addressed in further detail below.

A. 10 V.S.A. §6615a must be rewritten and presented in a more logically organized and readable format.

The Committee determined that despite substantial advancements in Program outreach efforts over the past year, there remains a great degree of misunderstanding concerning the existing liability protections provided by the Program. For example, all Program participants currently receive early liability protection in the form of forbearance from state enforcement action while they are “implementing, in good faith,” their site investigation and corrective actions.⁶ 10 V.S.A. §6615a(c)(5).

The Committee concluded that an underlying problem lies with the draftsmanship of the statute itself, and that the only way to establish a platform on which the Program can be advanced to the level desired by all constituents is to perform a comprehensive rewrite of the legislation. The perception that the Program is overly complex, time-consuming and expensive is attributable, in part, to the unwieldy format and lack of clarity of the present legislation. The manner in which the statute has been amended substantively four times over the last ten years has not helped this situation.

Therefore, the Committee recommends the statute be rewritten in a format that focuses on eligibility and the liability protections offered to Program participants. It is the intention of the Committee to work with ANR and ACCD, and their legal counsel, to draft a rewrite that will be presented to the legislature by January 15, 2008.

B. The Program needs to adopt the New Hampshire approach to provide participants with personal liability protection that attaches upon approval of a corrective action plan.

⁶ The Program eligibility determination letter that is sent to applicants was revised substantially in November 2006. One of the goals was to more clearly advise Program participants of this liability limitation and other program procedures and benefits. The revised form of letter has been sent to all seven Program applicants who received favorable eligibility determinations in the past year, and has been positively received for the way in which it conveys useful and necessary information.

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The Committee asked the liability subcommittee to review New Hampshire's statutory brownfields program insofar as the New Hampshire program permits withdrawal with some form of liability protection prior to completion of remediation (the primary charge of Act 67 as it relates to liability issues).

New Hampshire's statute allows participants to withdraw at any stage before or after approval of the remedial action plan. See R.S.A. 147-F:8. The Vermont Program contains a similar provision. See 10 V.S.A. §6615a(e)(3).

However, upon approval of a remedial action plan, participants in New Hampshire's program can also receive a covenant not to sue as approved by the New Hampshire Department of Justice. This covenant protects them from state liability for contamination identified by the approved remedial action plan. This "personal" covenant remains in effect even if the participant withdraws from the program (provided none of the below apply) before completing the cleanup. See R.S.A. 147-F:8. The New Hampshire covenant not to sue is voidable if the holder of the covenant:

- (1) Engages in activities at the property that are inconsistent or interfere with the approved remedial action plan;
- (2) Withdraws from the program before completion of the remedial action plan and fails to stabilize the property in accordance with RSA 147-F:8⁷;
- (3) Violates any use restrictions imposed on the property by the department in accordance with RSA 147-F:15; or
- (4) Fails to comply with program requirements under RSA 147-F:16

The New Hampshire covenant is intended to allow for a controlled withdrawal in the event that the developer determines it does not have the financial resources necessary to complete the remedial action at the site. The covenant is limited to the personal liability of the developer. It does not run with the land and cannot be transferred to successors.

According to personnel who administer New Hampshire's program, the withdrawal with covenant provision has never been utilized by program participants. Despite lack of actual use by developers, New Hampshire program staff believes that offering this limited covenant not to sue provides an incentive for participation in the Program.⁸

⁷ Site stabilization is limited to those actions necessary to ensure that work conducted at the property has not caused greater risk to human health and the environment than existed before the remedial work was commenced, and to ensure that the property will not pose an imminent hazard to human health or the environment.

⁸ The Committee notes that there does not appear to be significantly greater program participation in New Hampshire when taking into consideration population and density of development differences between the two states. In fact, in the twelve months preceding this report, Vermont has actually enrolled seven new participants to New Hampshire's six. Historic participation is as shown in the following table:

Therefore, the Committee recommends that the New Hampshire personal covenant approach be added to Vermont's Program. The covenant is to be contingent on site stabilization; is to be limited to the personal liability of the Program participant (i.e., it is not transferable); and is to be offered only to participants who enter the Program as prospective purchasers.⁹ The Committee intends to include this provision in the statutory rewrite that will be submitted in January.

C. The legislature should consider the creation of a “super exemption” from liability for Regional Development Corporations that engage in brownfield redevelopment projects.

The full Committee voted to recommend that the legislature investigate providing a “super exemption” from statutory liability to Regional Development Corporations when they acquire brownfield properties.¹⁰ The proposed “super exemption” would go beyond that which is presently provided to municipalities as an exception to the strict liability that applies to owners or operators of contaminated properties under Vermont's waste management laws generally. In that sense, this proposal has the potential to reach beyond the Program and would require an amendment to the strict liability law. 10 V.S.A. §6615.

(footnote 8 continued)

<u>Participation since inception</u>	<u>Vermont</u>	<u>NH</u>
Applicants	22	47
Certificate of Completion (COC)	5	17
Certificate of No Further Action (NFA)	N/A*	1

*The total of Vermont participants completing the program is 5 to date. There are presently two more COCs in draft, pending approval. Vermont doesn't have a CNFA by name, but a comparison of the benefits and tests for Vermont's COC confirms that it provides broader protection to the recipient than both the COC and CNFA do in New Hampshire. The New Hampshire COC is issued at the point of implementation of the corrective action plan and generally requires continued monitoring as would be expected in a remedy that involves groundwater cleanup. The protections afforded by both the New Hampshire COC and CNFA are limited to the contaminants identified in the remedial action plan, while the Vermont COC provides the holder with site-wide protection; a significantly broader benefit.

⁹ It is noted that the legislature recognized in its most recent amendments to the statute to convey special status to prospective purchasers of property and this discrimination in benefits is appropriate and should be continued in any future benefits conveyed to participants.

¹⁰ The genesis of the “super exemption” idea lies with a California program. The Committee, due to time constraints, did not have the opportunity to examine the California program and determine what its elements are. It is recommended that this exercise take place as part of the consideration of this concept.

The Committee recommends that the legislature work with the Committee to further consider the benefits and impacts that would result from the creation of such a “super exemption.”

**D. Additional options for limitations on liability and related issues
need to be considered by the Standing Committee on Brownfields.**

There are a number of other options related to limitations on liability that should be considered. These include the standardization of requirements for posting performance bonds at the time of corrective action plan approval, as well as approaches that provide the state with the ability to address unknown contamination or an unexpected degree of contamination that results in withdrawal from the program by a developer (and a subsequent public demand for action to remediate the site). Enhanced limitations on liability, such as inculpable party status, should also be explored. The Committee recommends that these, and other, liability related concepts be considered as a means for further Program improvements.

V. Performance Measures and Evaluation

The Committee believes that tracking and evaluating annually Program performance is a valuable exercise and recommends the following.

A. The Program should adopt performance measures (A) through (F) as set forth in the Act, as modified by the Committee.

B. The Standing Committee on Brownfields should consider additional metrics that will add value as a measure of performance.

The Act required that the Committee consider specific performance measures in developing its report and recommendations. These measures, to be part of an annual performance evaluation, as identified by the Act are:

(A) The number of projects and sites that enter each of the program areas.

(B) The number that complete the program and are certified or that receive site management action completed certificates.

(C) The amount of federal and state money applied by the department of environmental conservation and by the regional planning commissions to assist site investigation and remediation.

(D) The number of projects and sites that proceed to redevelopment during the year.

(E) The acreage that is certified for redevelopment.

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(F) The amount of redevelopment money leveraged by the state's investment in remediation assistance services and funding.

(G) Other parameters of performance that the department of environmental conservation, the advisory committee, or the general assembly requests for inclusion in the evaluation.

Generally speaking, a majority of the performance measures identified in the Act are consistent with a number of measures that ANR has been considering, or is currently conducting, for its own tracking purposes. The Committee believes that it would be of value to formalize such tracking as a Program requirement. Therefore, the Committee recommends the following.

A. The Program should adopt performance measures (A) through (F) as set forth in the Act, as modified by the Committee.

Recommendation of adoption of these measures is based on the Committee's understandings and modifications discussed below.

With regard to measure (A) as described in the Act, the Committee interprets "each of the program areas" to mean projects enrolled in the Program and for which a certificate of completion will be issued, and projects that are proceeding on a course outside of the Program and for which a SMAC letter will be issued. Both of these numbers are currently tracked by ANR and will continue to be done.

With regard to item (C), the Committee found that there is no single report that compiles all of this financial information, but that it would not be unreasonable to do so. The Committee recommends that in addition to the DEC and Regional Planning Commission financial assistance data, the brownfields revitalization fund data, which is administered by ACCD, should also be tracked and included in the report.

The Committee also notes that while there is benefit to tracking sites that "proceed to redevelopment," it may be more indicative of overall performance to report on properties that are "ready for redevelopment," have been sufficiently characterized, or that have obtained an approved corrective action plan. ANR experience indicates that many projects stall at the cleanup or redevelopment stages for a variety of reasons. The Committee recommends that this metric also be tracked.

B. The Standing Committee on Brownfields should consider additional metrics that will add value as a measure of performance.

The Committee also recommends that the Standing Committee consider ways to define and track additional metrics that hold significant value as a measure of performance, but which were neither identified by the Act nor able to be sufficiently explored by the Committee due to time constraints. Remedial metrics for tracking positive environmental

and human health impacts and project consistency with state-wide policy goals could be considered.

VI. Funding

The Committee concluded at the outset of its study that the provision of appropriate financial support is a key component of a successful brownfields program. A funding subcommittee was therefore established to examine the funding issue. A significant funding gap was identified by the second Committee meeting. Additionally, the development community represented that if a dedicated brownfields fund existed, similar to the Petroleum Cleanup Fund, the level of developer participation in the Program would increase. With regard to the development community, the Committee learned that financial assistance is a potentially greater incentive to participation than the broad liability protection afforded by the Program.

The Committee concludes that the Program is presently underfunded and makes the following findings and recommendations.

A. Presently a funding gap of \$10.2 million exists which impedes clean up and redevelopment progress on the approximately fifty “currently active” brownfield sites.

B. The legislature, and the Standing Committee on Brownfields, must identify ways to address this funding gap.

C. Solutions to the funding gap issue should include identifying ways to fund projects that are ineligible for funding under existing programs.

D. A funding source that provides sufficient revenue for the Environmental Contingency Fund to be viable needs to be identified.

Each of these recommendations is addressed in further detail below. The funding subcommittee recommended action items A and B above. Item C was raised separately at the final meeting of the Committee. Item D was recommended by the liability subcommittee.

A. Presently a funding gap of \$10.2 million exists which impedes cleanup and redevelopment progress on the approximately fifty “currently active” brownfield sites.

VT DEC is presently managing approximately fifty active brownfield sites. One dozen of those sites are also enrolled in the Program. The fifty sites range in status from some that are just entering the contamination investigation stage to those that have approved Corrective Action Plans pending implementation or nearing completion. Based on these active sites, Program personnel have estimated the average cost of preparing a property

for redevelopment to be \$300,000.¹¹ At fifty sites, this presents a current funding need of \$15 million to advance these properties to the redevelopment stage.¹²

Current sources and amounts of funding available and dedicated to brownfields in Vermont were identified. These generally consist of EPA grants that Regional Planning Commissions have obtained; grants the state has obtained (both ANR and ACCD); and state funds committed to brownfields. Current funding totals \$4.8 million. This presents a funding gap of \$10.2 million based on fifty active sites. Funding issues beyond the active sites were not examined, however it is acknowledged that numerous additional brownfields exist in Vermont, and offer redevelopment opportunities. A balance sheet illustrating the funding need, sources and gap is attached as **Appendix B**.

The most significant funding gap is in the area of cleanup costs. The Regional Planning Commissions have done an excellent job obtaining EPA grants that can be used for site investigations. They continue to apply for and receive such funds. However, those funds may not be used for cleanup. Until recently, very little cleanup funding assistance existed. It was only this summer when the state actually received the \$1 million in EPA cleanup funds that were awarded last year.

Under the state's grant agreement with EPA the \$1 million in cleanup funds are for use as loans, not grants. They are also intended for use only in connection with projects that are enrolled in the Program. Outreach efforts in anticipation of receipt of this funding have already led to one loan application, which has been determined eligible and for which a closing is anticipated. Discussions are ongoing with another potential applicant.

Seven new projects entered the Program in the past year. As these, and the pre-existing projects, work through the Program, it is projected that demand for cleanup funds will increase. Additional cleanup funding will be needed to meet demand as more new projects enter the Program. In addition, substantially increasing funds available for grants, as opposed to loans, is necessary to achieve full utilization of the fifty active sites.¹³

B. The legislature and the Standing Committee on Brownfields, must identify ways to address this funding gap.

The Petroleum Cleanup Fund, was identified by the development community, as a model program that is utilized for keeping commercially productive properties productive in the face of environmental challenges. VT DEC makes use of the PCF for brownfields

¹¹ This cost includes the contamination investigation (typically referred to as Phase I and Phase II), corrective action planning and performing the cleanup.

¹² It is noted that not all properties require an investment of \$300,000 to reach the redevelopment stage. Some will need less than \$50,000, while others could exceed \$1 million in cleanup costs alone depending on the nature of the contamination and the proposed redevelopment.

¹³ Only \$170,000 out of the \$1,170,000 current balance in the Brownfields Revitalization Fund is presently available for grants as opposed to loans. Most inquiries for cleanup assistance are seeking grants, especially municipally led projects (of which there are a significant number).

projects when those opportunities present themselves. However, a similar funding mechanism for dealing with the non-petroleum contaminants at brownfields sites does not exist. The development community identified the creation of such a fund as a necessary element of a successful brownfields program.¹⁴

The Committee has determined that such a funding mechanism dedicated to brownfields would greatly increase developer participation with brownfield sites, and result in greater utilization of these properties for redevelopment. The Committee recommends that the legislature investigate options for addressing this need.

C. Solutions to the funding gap issue should include identifying ways to fund projects that are ineligible for funding under existing programs.

Related to the issue of closing the current funding gap is the need to look for solutions for providing financial assistance to projects that are not eligible for funding assistance under existing programs. The Brownfields Revitalization Fund, with very limited exception, is only available to projects that are enrolled in the Program. Since the \$1 million in cleanup loan funding is housed in the Brownfields Revitalization Fund, the Program is essentially the gatekeeper to those funds. Therefore, projects that presently do not qualify for the Program do not have access to those funds.¹⁵

D. A funding source that provides sufficient revenue for the Environmental Contingency Fund to be viable needs to be identified.

The Committee notes that there is no specific contingency fund for the state to use to address unknown or unexpected contamination discovered after the issuance of a Certificate of Completion to a Program participant.¹⁶ Such a fund could also be valuable in enabling the state to complete remedial actions following a participant's withdrawal from the Program prior to implementation of a cleanup. This scenario may become more likely as result of adoption of the Committee's recommendation to provide participants with a personal covenant as in the New Hampshire program. This becomes a more urgent issue when potentially liable parties are nonexistent or are unable to effectuate a cleanup, which is often the case with brownfields.

¹⁴ The majority of cleanup activities required at the currently active brownfields properties are not eligible for assistance under the petroleum cleanup fund.

¹⁵ It is noted that one of the Committee's recommendations is to expand significantly the Program's definition of a "brownfield." This will open the Program to projects that are presently ineligible.

¹⁶ Contamination discovered at this stage would typically no longer be the responsibility of the developer. However, the contamination may still need to be dealt with. In fact, the redevelopment and occupancy of a formerly vacated or underutilized property may result in the creation of a risk to human health or the environment that previously did not exist. In this instance, the state may be required to take action to eliminate or mitigate the risk.

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December 19, 2007**

The state's current Environmental Contingency Fund (ECF) does not have an adequate revenue source and the ability of the ECF to meet projected remediation costs for known sites, and future sites, is insufficient. Therefore the Committee recommends establishment and maintenance of a source dedicated, and viable, contingency fund. Augmenting this fund with insurance vehicles should also be considered.

Appendix A

Brownfields Advisory Committee Membership

Name	Organization and Title
John Sayles	Agency of Natural Resources, Deputy Secretary
Jim Saudade	Agency of Commerce and Community Development, Deputy Secretary
Ernie Pomerleau	Pomerleau Real Estate, President
Susan McMahon	Windham Regional Commission, Senior Planner
Bonnie Waninger (alternate)	Northwest Regional Planning Commission, Assistant Director
Peter Van Oot, Esq.	Downs Rachlin Martin PLLC, Director
Jeffrey Nick	J.L. Davis Realty, President
Christine Hart	Brattleboro Housing Authority, Vice-Chair
Donna Rizzo, PhD.	University of Vermont, Assistant Professor
Wolfgang Dostmann, PhD.	University of Vermont, Assistant Professor
David Deane	Stantec
Kevin Doering	Vermont Department of Health
Holly Harris, Esq.	State of Vermont, Assistant Attorney General
Daniel Hecht	Vermont Environmental Consortium, Executive Director
Megan Cicio	Northfield Savings Bank
George Pratt	Bradford Oil Company, Inc., President

Appendix B

Brownfields Balance Sheet – November 2007

Current Liabilities

Fifty active sites @ \$300,000/site	<u>\$15,000,000</u>
	\$15,000,000

Total Liabilities **\$15,000,000**

Current Assets

Assessment Only Funds

Regional Planning Commissions	
EPA Assessment Grants	<u>\$2,405,000</u>
	\$2,405,000

Combined Assessment/Cleanup Funds

VT ANR	
128a funds	\$325,000

VT ACCD/ANR	
BRF (state funds)	<u>\$170,000</u>
	\$495,000

Cleanup Only Funds

VT ACCD/ANR	
EPA Revolving Loan Fund Grant	\$1,000,000

Southern Windsor RPC	
EPA Revolving Loan Fund Grant	<u>\$ 900,000</u>
	\$1,900,000

Total Current Assets **\$4,800,000**

Required Capitalization *

Present Funding Gap	<u>\$10,200,000</u>
	\$10,200,000

Total Required Capitalization **\$10,200,000**

Total Assets **\$15,000,000**

Note: * Additional funds needed to get the fifty active sites ready for redevelopment.