



Chapter 3

Cite as 21 Energy & Min. L. Inst. ch. 3 (2001)

Application of State Brownfields Laws and Principles to the Electric Utility, Oil & Gas, and Mining Industries

Joseph K. Reinhart

Stacia A. Christman

Babst Calland Clements and Zomnir, P.C.

Pittsburgh, Pennsylvania

Synopsis

Table listing sections 3.01 through 3.07 with sub-sections and page numbers. Includes Introduction, Federal Brownfields Program, State Brownfields Programs in General, Pennsylvania's Land Recycling and Environmental Remediation Standards Act, West Virginia's Voluntary Remediation and Redevelopment Act, Ohio's Voluntary Action Program, and Kentucky's Voluntary Cleanup Program.

**§ 3.08. Conclusions..... 128**  
 [1] — Pennsylvania’s Act 2 Program..... 128  
 [2] — West Virginia’s VRRRA..... 129  
 [3] — Ohio’s VAP ..... 129  
 [4] — Kentucky’s VCP ..... 129

**§3.01. Introduction.**

In order to provide incentives to the re-use of industrial properties commonly known as “brownfields,” states have enacted legislation which limits the environmental liability of landowners, operators and developers and authorizes the use of “risk-based” remediation techniques.<sup>1</sup> In many instances, this legislation may apply to property which has been affected by spills and releases of chemicals from oil and gas development, coal mining activities, and operations associated with the generation and transportation of electricity. In particular, state brownfields laws may provide reasonable cleanup standards and limit liability for contamination associated with the release of chemicals commonly associated with the manufacture and development of fossil fuels. This chapter illustrates that certain industries responsible for environmental impacts caused by fossil fuels have been very successful in taking advantage of state brownfields laws to limit liability for environmental conditions, whereas other industries associated with the development of fossil fuels have not realized the same benefits under state brownfields laws.<sup>2</sup> In some cases, state

---

<sup>1</sup> Risk-based remediation standards are chemical concentrations considered acceptable for a given exposure scenario based on estimated risk to potential receptors. *Final Draft Guidance Document, Tier 1 Risk-Based Corrective Action*, Montana Department of Environmental Quality, p. iv (Mar. 2000). For a more detailed review of the scientific principles behind risk-based remediation, see, Rocco, J. R and Hay Wilson, L., “The Evolution of Risk-Based Corrective Action,” American Society of Civil Engineers Geo Congress 1998, Boston, MA.

<sup>2</sup> For instance, spills and releases of petroleum and other pollutants associated with oil and gas exploration and development are not commonly handled under state brownfields laws even though petroleum releases from other sources are frequently addressed by these laws. Similarly, parties addressing soils and groundwater impacted by releases of chemicals associated with coal (such as metals and polyaromatic hydrocarbons) from electric utility generation facilities may be eligible for liability protection under state brownfields laws, whereas discharges from coal mines themselves are ineligible under the same laws.

brownfields programs preclude application of key legal provisions associated with successful state brownfields laws, such as “releases of liability,” “deemed approvals” of reports, and “no further action” letters to the coal mining or oil and gas industry<sup>3</sup> due to concerns about potential conflicts with other state and federal programs regulating the discharges and emissions of pollutants from these industries. However, in other cases, where state brownfields programs are not expressly limited to narrow classes of remediators, brownfields principles have been applied creatively to encourage economic development and environmental cleanups consistent with federal law. In order to illustrate these potential opportunities and explain important differences in state programs, this chapter examines brownfields laws in Pennsylvania, West Virginia, Ohio, and Kentucky as they may apply to the remediation of sites affected by the oil and gas, mining, and electric utility industries.<sup>4</sup>

### **§3.02. Federal Brownfields Program.**

As a preliminary matter, it is important to note that the federal government has established programs which provide incentives to the redevelopment of “brownfields,” but which are more limited in scope and application than the state programs described in this chapter. The United States Environmental Protection Agency (USEPA) has recognized that brownfields may include a wide variety of “abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.”<sup>5</sup> USEPA’s programs are primarily geared toward financial

---

<sup>3</sup> These mechanisms form the incentives to participate in a voluntary remediation program because they provide some protection from state enforcement actions and continued liability for the environmental conditions on the site. USEPA, Brownfields-Related Law and Regulations (visited July 27, 2000) < <http://www.epa.gov/swerosps/bf/gdc.htm#vc> >.

<sup>4</sup> Although any party investigating the potential benefits of remediations conducted under state brownfields laws should carefully consider the technical merits offered by such programs (such as the reasonableness of cleanup standards for constituents of concern), such an analysis is beyond the scope of this report which focuses on legal considerations.

<sup>5</sup> USEPA, Tool Kit of Information Resources for Brownfields Investigation and Cleanup, EPA 542-B-97-001, p.1 (1997).