'Brownfields' Definition Key To Energy Community Tax Credits

By **Louise Dyble** (December 14, 2023)

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When it comes to claiming the community energy tax credit under the Inflation Reduction Act, determining what qualifies as a brownfield may be one of the trickiest questions facing investors and developers.[1]

Tax credits for clean energy projects include incentives for locating projects within what the IRA calls "energy communities." Such projects may include those located in qualified statistical areas, on or adjacent to a former coal mine or coal-fired power plant, or on property that qualifies as a brownfield.[2]

Two out of three eligibility categories have clear criteria based on employment characteristics or specific historical land uses. The brownfields eligibility category, in contrast, is broad and amorphous.

A project qualifies if it is located on a property that meets the definition of a "brownfield site" under the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA, also known as the Superfund law — that is, if its "expansion, redevelopment, or reuse ... may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."[3]

There are some limiting factors in the statutory definition. In particular, sites that are subject to cleanup requirements, that are under federal control, or that are affected only by petroleum or a petroleum product are excluded.

But beyond these constraints, an enormous number of properties potentially qualify. The mere possibility of complications resulting from potential contamination is all that is required.

Last month, the Internal Revenue Service issued a proposed rule that sharpened the definitions of "energy property" and "energy project," but did not include any clarification of the parameters of brownfields.[4]

IRS guidance issued earlier this year established a safe harbor for claiming a brownfields credit based on the results of environmental site assessments, but did not address how much, where and in what form hazardous substances, pollutants or contaminants need to be present, or the meaning of "may be complicated."[5]

A look at the origins and purpose of brownfields programs reveals that the breadth and inclusivity of the statutory definition of "brownfields" was deliberate at the time of its adoption, and remains deliberate and appropriate today. Early state brownfields programs reflected a desire to counteract unintended consequences of CERCLA as it was implemented in the 1980s and 1990s.

That definition of "brownfields" was aimed at reversing underinvestment in properties that did not require significant remediation, but nonetheless were perceived to pose a risk of unknown future liability to new owners or operators. As a standard for tax credits under the IRA, it continues to serve the goal of creating opportunities for investment that can

revitalize and transform communities in the context of a changing economy.

The Idea of Brownfields

The idea of a brownfield is based on a comparison. Sites that have never been developed and that are far removed from any potential source of contamination — usually on the metropolitan periphery, or in rural areas — are "greenfields."

Brownfields, in contrast, are often — but not always — located in the urban core or in older suburbs, and inherit the legacy of previous uses. Given the rapid evolution of environmental laws and standards over the last century, this legacy almost inevitably includes some risk that a "hazardous substance, pollutant, or contaminant," as these terms are defined today, will be present.

Construction materials that once were common — including lead paint and asbestos insulation — now qualify as hazardous materials subject to special handling and disposal requirements. Nearly all structures near a gas station or a dry cleaner are at risk for vapor intrusion, whereby contaminated groundwater threatens indoor air quality.

Pesticide and fertilizer residues can accumulate in soil and groundwater at toxic levels on property previously used for agriculture or recreation. And the list of substances with the potential to cause complications keeps growing, as regulations are adopted to manage emerging contaminants such as per- and polyfluoroalkyl substances, known as "forever chemicals."

The risks that the presence of these materials will require cleanup can be vanishingly low — the vast majority of brownfield properties have very little or no contamination. However, even the potential for contamination comes with legal and consulting costs that can deter investment.

After 1980, when Congress adopted strict, retroactive liability for contaminated properties within the Superfund program, and states followed suit with their own strict liability cleanup requirements, these costs and risks were heightened. Properties that are perceived to be at risk of contamination cost more to develop than those that are not.

Consulting and legal costs, regardless of whether any actual contamination is present at such sites, proved to be enough to shift investment away from previously used properties and toward greenfields. Brownfields programs were designed to restore the balance, support redevelopment and investment in unused or abandoned properties, and, in the process, revitalize local communities.

Brownfields incentive programs began locally. By the end of the 1990s, dozens of states had brownfields investment incentives that varied considerably in emphasis and scope.

Most of these programs focused on industrial and commercial properties. Former factories, dry cleaners, gas stations and commercial centers, including abandoned shopping malls, were among the most common early projects.

Vacant and abandoned homes were also a major and growing concern, particularly in Midwestern cities experiencing declining populations. Michigan was the first state to adopt a strategy for redeveloping residential properties through nonprofit land banks. Other states followed, including Pennsylvania, Ohio and Maryland.

Rural properties, including former agricultural properties as well as sites affected by mining, were also included in the category of brownfields. Later, these sites would be important as locations for "brightfield" renewable energy projects, which are especially well suited for large properties in remote locations.

Small Business Relief and Brownfields Revitalization Act

In 2002, Congress adopted a two-pronged solution to the problem of underinvestment in potentially contaminated properties, with the Small Business Relief and Brownfields Revitalization Act.[6]

First, it did what states could not: It protected new owners and occupants of land from strict liability under CERCLA, so long as they carried out appropriate diligence prior to the purchase of properties, and did not contribute to or exacerbate any preexisting contamination. This was the basis for the "all appropriate inquiry" standard implemented through now-familiar Phase I environmental site assessments prior to the sale or lease of potentially contaminated properties.

Second, Congress adopted a broad definition of "brownfields" that includes all properties with potential contamination as the foundation for future federal incentive programs that now informs eligibility for energy community tax credits, among other programs.

This departed from the working definition that the U.S. Environmental Protection Agency had been using for administrative brownfields programs under the Superfund program since 1993, which was limited to "abandoned, idled or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination."

Congress chose not to limit federal brownfields programs to industrial and commercial facilities, while retaining eligibility for properties with potential contamination but no actual contamination. An estimated 450,000 properties nationwide qualified as brownfields under this definition.[7]

Congress understood that this definition of brownfields was critical to allowing communities and governments the flexibility to prioritize and pursue local goals. It was crafted to include the huge number and variety of vacant and abandoned properties that were being bypassed in favor of relatively simple greenfield projects.

Federal brownfields programs have been popular since their inception, with growing interest and support since 2002, and increasing appropriations to match. Nevertheless, hundreds of thousands of underutilized properties remain. The 2022 energy community tax credit is just one of a range of new programs and funding designed to continue the progress that has been made toward redeveloping properties for new uses and revitalizing communities in the process.

The concept of brownfields emerged in the context of efforts to revitalize places and communities experiencing decline. As stated in a U.S. Senate report prior to the passage of the Small Business Relief and Brownfields Revitalization Act, proponents sought to:

> reduce the environmental and health risks in our communities, particularly those which are disproportionally affected by these sites, capitalize on existing infrastructure, create a robust tax based for local governments, attract new businesses and jobs, and reduce the pressure to develop open spaces.[8]

IRA Energy Community Tax Credit

The IRS adopted its safe harbor provisions for properties that qualify for community energy tax credits to assure investors nervous about the vague and subjective definition of brownfields that they could take advantage of this important incentive for clean energy without undue risk.

Reducing hesitation to invest in properties that required investigation prior to redevelopment is exactly what Congress intended to do when it adopted an expansive definition of "brownfield site" in 2002.

Twenty years later, when Congress incorporated that definition into the IRA to qualify properties for the community energy tax credit, it did so with a similarly ambitious purpose — to encourage widespread investment that could transform the energy landscape and spur economic recovery.

The broad and amorphous definition of brownfields should be read in light of its history and purpose — and with the recognition that even potential contamination and potential complications can deter investment.

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[1] Pub. L. No. 117-169; 136 Stat. 1818 (Aug. 16, 2022).

[2] 26 U.S.C. §§ 45(b)(11), 48(a)(14), 45Y(g)(7), 48E(a)(3).

[3] 42 U.S.C. § 9601(39).

[4] 88 Fed. Reg. 82,188 (Nov. 22, 2023).

[5] IRS Notice 2023-29, issued in April, provided assurances that where the presence of a hazardous substance, pollutant or contaminant can be verified, the IRS will accept that the site meets the definition of a brownfields site; no minimum quantity or showing of actual complications is required. In June, IRS Notice 2023-45 confirmed that documentation of "potential contamination" would qualify projects with a nameplate capacity of under 5 megawatts for the safe harbor.

[6] P.L. 107-118, 115 Stat. 2356 (Jan. 11, 2002).

[7] U.S. Senate, Report on Brownfields Revitalization and Environmental Restoration Act of 2001 (March 12, 2001).

[8] Id.