Environmental Law and the Brownfield 'Energy Community' Clean Energy Tax Credit Bonus Under the IRA

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The Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (Aug. 16, 2022), among other things creates tax incentives for clean energy development. The IRA enhances those tax credits for energy projects located on a "brownfield." That enhancement will increase development pressure on "brownfield" sites. There may be some confusion over how "brown" a "brownfield" has to be to qualify, but just the label connotes an increased risk of residual liability to those associated with the site to clean up contamination. Therefore, these tax provisions create a demand for the conventional environmental practice tools that manage that risk.

Most environmental practitioners break into hives or a cold sweat when faced with the Internal Revenue Code. Many project developers run screaming from the room when the project site poses an environmental risk. But there is profit to be had by confronting those fears, embracing the inner dork and collaborating.

Two alternative forms of income tax credit use location on a "brownfield" to enhance the tax benefits to an energy project. Section 45 and 45Y of the Internal Revenue Code provide a renewable energy production credit keyed to the amount of electricity produced from a "qualified facility." 26 U.S.C. Sections 45, 45Y. Sections 48 and 48E provide for an investment credit taken all at once for "energy projects," but to the exclusion of the production credit. Sections 48, 48E. Sections 45 and 48 apply to facilities and projects put in service by the end of this year; the others to later projects. These credits only apply to energy from "qualified facilities" or "energy projects," including many forms of renewable or otherwise favored electricity production. The sections with earlier and later applicability have somewhat different definitions of "qualifying facility" or "energy project."

In each case, production from, or investment in, a qualified facility or project obtains up to 110% of the calculated tax credit if the "qualified facility" or "energy project" (as the case may be) is also in an "energy community." See 26 U.S.C. Sections 45(b)(11), 45Y(g)(7), 48(a)(14), 48E(a)(3). Section 45(b)(11)(B) defines "energy community" to include certain areas with a high proportion of employment in fossil fuel industries, a recently closed coal mine, or a recently retired coal-fired power plant. But the definition also includes "a brownfield site … as defined in subparagraphs (A), (B), and (D)(ii)(III) of section 101(39)" of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. Section 9601(39)(A), (B), (D)(ii)(III), without regard to any connection to fossil fuels. 26 U.S.C. Section 45(b)(11)(B)(i).

Section 101(39) of CERCLA defines "brownfield site" for purposes of the brownfield revitalization grant program established by Section 104(k), 42 U.S.C. Section 9604(k); see also Information on Sites Eligible for Brownfields Funding under CERCLA Section 104(k). CERCLA brownfield grants allow certain parties who are, among other things, not liable under Section 107(a) of CERCLA, to obtain grants to investigate a brownfield site or to assist in remediating a brownfield site, all for the purpose of facilitating reuse of the property.

A "brownfield site," then, is "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." It also includes property scarred by mining.

There is a lot of nuance in the application of the CERCLA definition and the guidance that I elide over here, including the ability for a regulator to make a site-specific determination that a property is a "brownfield site." However, in general, any site that is the subject of regulatory interest or enforcement—a site included on the National Priorities List as a "Superfund site" or a RCRA corrective action site, for example—is more problematic for a grant; the enforcement should lead to response by the responsible parties or, if they refuse, governmental response using the Hazardous Substance Response Superfund. The government might not readily provide grants to unrelated people to study or to clean up those sites outside the enforcement process. Therefore, those sites are typically excluded from the definition of a "brownfield site." Why that rationale ought to apply to the tax credits is a bit obscure. If reusing contaminated sites makes sense, why would reuse of CERCLA or RCRA sites not make sense? But leave that aside.

Tax credits work best when one can know with confidence that one will receive the credit going forward. That allows a project to be financed with the tax advantage taken into account. How, then, can one know that a particular site's "expansion, redevelopment, or reuse … may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant"?

Hazardous substances are everywhere. Dirt, rock, grass, paper, coins in your pocket, concrete, asphalt, metal pipe, rainwater, and most everything else contains at least some concentration of at least one hazardous substance. Allow the list of chemicals to expand to "pollutants or contaminants" like road salt and one's certainty that any site contains at least some increases. Further, the definition of "brownfield site" does not require presence, but only "potential presence."

That presence or potential presence of a hazardous substance has to "complicate"—potentially—the "expansion, redevelopment, or reuse" of the site. What does that mean?

In the CERCLA context, a state grant program would direct scarce grants to the most appropriate "brownfield sites." It does not matter what sites are at the least appropriate; only the highest priority sites

would receive grants. Therefore, the minimum concentration to cause the minimum complication does not really have to be defined.

Not so with the tax credits. The Internal Revenue Service has been struggling with how to define how dirty a site has to be, at least potentially, in order to be sufficiently complicated to redevelop that it counts as a "brownfield site." IRS Notice 2022-51, 43 I.R.B. 331 (Oct. 24, 2022), seeks comments on whether further definition is required. In the meantime, the IRS has issued a notice that it intends to issue regulations and has provided guidance establishing a "safe harbor."

The safe harbor allows a taxpayer safely to claim that a property is a "brownfield site" if the site has previously been assessed under the CERCLA brownfield program, the site has been the subject of a Phase II Environmental Site Assessment under ASTM E1903 and that Phase II "confirms the presence on the site of a hazardous substance … or a pollutant or contaminant," or the project has a nameplate capacity below 5 megawatts and has been the subject of a Phase I environmental site assessment under ASTM E1527.

I leave it to the tax lawyers to figure out whether any property becomes a "brownfield site" if someone commissions a Phase II investigation that confirms the presence of any detectable hazardous substance. A Phase I investigation is geared to establishing a defense under CERCLA. See 40 C.F.R. pt. 312. A Phase II investigation is merely designed to resolve transactional uncertainties and has no defined trigger. Indeed, ASTM E1903 has not been revised since 2011. See https://www.astm.org/e1903-11.html.

The point of the credits, however, is to encourage more energy projects to be located on sites whose development could be "complicated" by contamination. Unless the contamination is literally incompatible with the construction—a circumstance likely to mean that the site would be the subject of enforcement—the "complication" would typically be a risk of liability to clean up the potential contamination present. Ordinarily, parties to the development project would consider mechanisms to manage that risk.

And here we are full-circle to conventional environmental legal services. Faced with potential liability for contamination, parties to transactions:

- Develop statutory defenses like the innocent purchaser or bona fide prospective purchaser defenses to liability beyond "reasonable care."
- Implement regulatory mechanisms to establish cleanup obligations and to satisfy them, such as putting a site through the "Act 2" process in Pennsylvania.
- Negotiate contractual allocations of responsibility with other parties to the transaction; off-load risk to insurers.
- If necessary, litigate statutory claims against responsible parties to fix responsibility on someone else.

That is pretty familiar stuff. The tax law about establishing entitlement to a tax credit may confuse we environmental practitioners, or it may prove intuitively unsatisfying. However, at bottom, this is just an incentive program furthering the overall federal purpose of putting contaminated or potentially contaminated sites into productive use. We know how to help do that.

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