

A Comprehensive Plan for Brownfield Redevelopment in New Brunswick

Department of Environment

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Be innovative



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FOREWORD – WHAT IS A BROWNFIELD?

Many New Brunswickers are probably familiar with the term “contaminated site,” which is used to describe any property that has been affected by spills or leaks of contaminants. The term is most commonly used in reference to sites that have been affected by petroleum spills, such as properties where service stations are or have been located.

In most cases, these contaminated sites would not be considered “brownfields.” This term is typically used to describe abandoned, derelict, or otherwise underutilized former commercial and industrial properties that might have become contaminated in the past.

Brownfields can be found in most New Brunswick communities. Although many of these sites are now regarded as unusable due to their past uses and current contamination, they actually hold great potential for redevelopment. Furthermore, there are many ways in which New Brunswick can benefit from brownfield redevelopment. Through the remediation and redevelopment of existing brownfields, New Brunswick can address past environmental damage, reduce development pressure on pristine lands surrounding municipalities and alleviate stress on municipal infrastructure, primarily water and sewage systems.

As a result of brownfield redevelopment, New Brunswick also stands to benefit both socially and economically. As municipal brownfield properties are revitalized and returned to productive use, they will contribute to the long-term sustainability of provincial communities, provide for economic growth and ultimately support New Brunswick’s progress toward self-sufficiency by 2026.

For these reasons, the Government of New Brunswick is taking action to promote and encourage brownfield remediation and redevelopment throughout the province with the following comprehensive plan. The aim of this plan is to foster brownfield redevelopment efforts by improving New Brunswick’s contaminated site regulatory system, developing appropriate incentives for redevelopment, harmonizing New Brunswick’s approach with neighbouring jurisdictions, and improving government’s brownfield educational and outreach initiatives.

In developing this plan, the Government of New Brunswick has relied upon the significant past efforts and recommendations of the New Brunswick Brownfield Development Working Group, the National Roundtable on the Environment and Economy (NRTEE), and the Canadian Council of Ministers of Environment. On behalf of all New Brunswickers, the Province commends these groups for their pioneering work in advancing many of the ideas and approaches described herein.

CONTAMINATED SITES AND BROWNFIELDS – A HISTORICAL PERSPECTIVE

New Brunswick has experienced significant societal benefits as a result of a century of industrialization. However, this progress has not come without cost. As we move to redevelop many former industrial and commercial properties, we discover unintended environmental effects that past uses have had on these sites. New Brunswick is not alone in this position. Indeed, communities across Canada are discovering and dealing with similar environmental impacts of industrial activity.

Decades ago, the negative environmental and human health impacts associated with spills, leaks, and discharges of contaminants were not well understood. In the event that a site was contaminated, the immediate and obvious pollution was usually cleaned up but people often unknowingly left contamination behind. Fortunately, New Brunswickers now understand the need to avoid these situations, as well as the importance of conducting effective cleanups.

Although contamination has been recognized as a significant issue for some time, it was not until the 1980s that New Brunswick dedicated government resources to identifying and cleaning up contaminated sites. The issue at the time was the discovery of large amounts of contamination associated with leaking underground petroleum storage tanks. To address this issue, New Brunswick introduced the *Petroleum Product Storage and Handling Regulation* under the *Clean Environment Act* in 1987. Using the

powers provided under the act and regulation, the Department of Environment began the assessment and enforced removal of non-compliant tanks.

However, these efforts were hindered by technological limitations and the absence of standards to direct the cleanup of associated contamination. The power to order site remediation was in place, but there were no recognized standards for site assessment and remediation. Without such standards in place, it was a time-consuming and difficult task to determine an appropriate approach for each site.

By 1992, New Brunswick had adopted generic clean-up standards for petroleum contamination in soil and groundwater. This improved the situation, but failed to address many site-specific characteristics. It was also acknowledged that the standards, although prudently developed and based on the best available information, were not based on any rigorous scientific analysis.

It was not until 1999 that a fully science-based approach was adopted for contaminated site assessment and remediation. It was then that the Atlantic provinces, working in partnership, developed and adopted the Atlantic Risk Based Corrective Action (RBCA) methodology for environmental site assessment and remediation. This approach provides a comprehensive method for site assessment and remediation that focuses on eliminating environmental and human health risks. Since 1999, the RBCA model has proven its worth in the successful assessment and remediation of more than 1,500 properties in New Brunswick.

Although the adoption of the RBCA model has spurred remediation efforts for many sites in New Brunswick, the past nine years have revealed further, non-technical issues that are also serving to prevent the timely remediation of contaminated sites and the redevelopment of brownfield lands. Many redevelopment projects are undermined due to concerns associated with “regulatory liability.”

At issue is the fair allocation of responsibility for compliance with regulatory requirements, and uncertainty with respect to potential future regulatory actions. Remediation costs can also be a significant deterrent, and access to financing is limited for these sites, as lenders are wary of the associated risks. It must also be acknowledged that the current regulatory approach does not provide the legal certainty that many investors need in order to take on the challenge of redeveloping a brownfield site. Clearer rules are needed to provide planning certainty.

Recognizing the shortcomings of the approaches currently taken throughout the country to address these issues, the NRTEE released a report entitled “Cleaning up the Past, Building the Future: A National Brownfield Redevelopment Strategy for Canada” in 2003. The report focused on many of the outstanding legal, regulatory and liability issues that are preventing the remediation and redevelopment of brownfield properties. The report also presents a strong public policy business case for taking action by identifying the many significant environmental, economic, and social benefits of brownfield redevelopment.

New Brunswick has reviewed the NRTEE’s recommendations, similar ones put forward by the Canadian Council of Ministers of Environment, and those of the

New Brunswick Brownfield Development Working Group, and concluded that there is merit in many of the ideas that have been put forward. The comprehensive plan proposed herein adopts many of the core brownfield redevelopment principles recommended by those earlier initiatives. The Government of New Brunswick believes that applying these principles in brownfield redevelopment will play a central role in our province’s efforts to be environmentally, socially and economically sustainable.



BROWNFIELD REDEVELOPMENT PLAN

The main goal of New Brunswick's comprehensive plan for brownfield redevelopment is to improve environmental stewardship and promote sustainability throughout the province. One way to accomplish this goal is to facilitate redevelopment. By removing unnecessary impediments to remediation, government can make brownfield redevelopment more attractive to investors. Therefore, the actions proposed herein focus on making it easier to remediate and redevelop brownfield properties without compromising existing standards of environmental protection.

This plan targets four key areas: improved regulatory certainty, incentives, Atlantic harmonization and outreach. Some of these actions can be implemented immediately, while others will require further participation from a broad range of government, industry and stakeholder groups.

Specific actions to remove unnecessary impediments and otherwise promote the remediation and redevelopment of brownfield lands are detailed as follows:

1. Improved Regulatory Certainty

New Brunswick currently relies on the Guideline for the Management of Contaminated Sites as the technical and policy basis for its contaminated sites management program. This guideline is also used for the purposes of promoting and facilitating brownfield redevelopment. The underlying legal authority for this approach stems from the *Clean Environment Act*. Under the act, the Minister of Environment may "order" the cleanup of contaminated sites in accordance with the guideline. Although seemingly clear and straightforward, there are a number of pitfalls associated with this approach. The following is provided as an overview of each regulatory issue that is currently undermining remediation and redevelopment efforts, and the actions that will be taken to address these issues:

a) A Contaminated Sites Regulation

Although the Guideline for the Management of Contaminated Sites has been highly successful in ensuring that contamination

is adequately cleaned up, it is considered weak as a tool for promoting brownfield redevelopment. Its status as a guideline, as opposed to a regulation causes uncertainty in the business community. Some developers and other parties that might take over responsibility for a brownfield site will not commit to substantive investments without the assurance that a regulated remediation process provides.

Government will therefore move to turn its current guideline process and remediation standards into regulation. This will serve to provide regulatory certainty in the minds of lawyers, developers, bankers and other stakeholders. This kind of certainty will attract more players to opportunities for brownfield redevelopment in New Brunswick, improve access to financing for brownfield projects, and serve to strengthen the legal framework supporting contaminated sites management.

b) Defining the Responsible Parties

Currently, the Minister of Environment has broad powers, under certain circumstances, to identify any party as being legally responsible for the cleanup of contamination. This creates an uncertain legal environment, which is a significant impediment to brownfield redevelopment for the various parties involved. Prospective purchasers, developers and lenders fear the possibility of gaining regulatory liability for the actions of former owners of brownfield lands.

In supporting the principle of "polluter pays," the Province will bring certainty to the process of identifying a responsible party by clearly identifying in regulation the types of potentially responsible parties. This will serve to entice third-party developers and financiers to come forward with redevelopment projects without fear of becoming burdened with regulatory responsibility for the past actions of others.

c) Voluntary Remediation Program

The Minister of Environment's order-making authority is the key power that enables him or her to ensure that contamination is cleaned up. Unfortunately, some environmental certification and auditing programs treat the existence of a ministerial order as a form of

non-compliance with the law. However, there is no other regulatory process in place in New Brunswick to accomplish the same end.

The Province will therefore introduce a Voluntary Remediation Program (VRP). Under the provisions of the VRP, a party will be able to volunteer to clean up a contaminated site. In volunteering, this party would not be assuming responsibility (i.e., accepting blame). A document describing the remediation to be undertaken and an associated timeline would then be developed between the proponent and the regulator. Once approved and issued, the voluntary remediation plan would shield the proponent(s) from punitive enforcement measures as long as the plan is being followed and benchmarks are being met.

The voluntary remediation program will also contain an important environmental regulatory liability protection element for parties that wish to work with the volunteering party or parties. Removal of this potential liability allows developers, contractors and financiers to become involved in brownfield redevelopment projects without fear of future environmental regulatory liability.

d) Performance-Based Regulation

In the interests of allowing remediation proponents to pursue a wide variety of options and approaches for the cleanup of contamination, the Province will no longer specify or require pre-approval of remediation technologies or methods. The regulation will instead focus on the outcomes and timelines for achieving them. Proponents will be free to pursue performance-based remediation contracts. The Department of Environment will concern itself only with the end product of their efforts, and not the specific methods used to achieve them.

e) Transfer of Regulatory Liability

When brownfield lands are sold and transferred, agreements are often struck between the buyer and the seller with respect to any future environmental liability. However, no opportunity exists under the current legislation to allow the Minister of Environment to recognize the transfer of responsibility.

Consequently, the sale of a property merely serves to expand, for regulatory purposes, the list of potentially responsible parties. While this would appear to offer some benefit to the regulator, the reality is that this serves as a disincentive for developers and lenders ever to become involved. Furthermore, it provides no incentive for property owners to divest themselves of an unwanted property. This reality stands as a significant impediment to the sale and redevelopment of affected (and formerly affected) properties in New Brunswick.

To address this issue, the Province will institute the legislative and regulatory changes necessary to accommodate the permanent transfer of regulatory liability. Under this system, the buyer and seller may enter into an agreement concerning the transfer (or retention) of liability that could also be signed by the Minister of Environment, indicating that the transfer of regulatory liability would come into effect on the date that the regulated remediation process was complete, or immediately if no remediation is required.

Safeguards will be instituted to ensure that this system is not abused (e.g., with regulatory liability intentionally transferred to a party without the stability and financial resources necessary).

f) Alternate Dispute Resolution

Litigation involving the cleanup of contaminated sites has a history of being costly and time-consuming. Experience in New Brunswick, and especially in the United States, has shown that the costs of such litigation can often exceed the costs associated with cleanup for some sites. The Province believes that financial resources dedicated to brownfield redevelopment should be spent on cleanup and redevelopment, rather than on legal fees.

Alternate dispute resolution (ADR) mechanisms are gaining support in Canada as an approach to a timelier and more cost-effective method for resolving issues of responsibility and liability. Such systems typically involve some form of binding

arbitration, rather than the courts, to settle such disputes. Thus, in the interests of minimizing the legal expenses associated with brownfield redevelopment, the Province will implement an alternate dispute resolution mechanism to help mediate disagreements over regulatory responsibility.

g) Reporting Requirements

The current remediation process requires that notification be placed in the New Brunswick Land Gazette whenever a property is involved in the remediation process. This approach is intended to provide assurance that future owners of the property will be aware of the contamination that occurred at the property and any remedial measures taken. This practice serves an important purpose for sites that have been “conditionally closed” — that is, sites that require the use and maintenance of infrastructure or land-use constraints to ensure that environmental and human health impacts are prevented (i.e., some residual contamination may remain at the site, but does not represent a threat, provided that certain controls are put in place). The notice ensures that future owners are aware of these circumstances as well as their responsibility to manage the site appropriately.

Although the “notice” system remains a valuable tool that should continue to be used, it should be recognized that such notices result in many sites being labeled with the stigma of contamination where it is not warranted. This can include properties affected by minor spills, and other similar situations in which the contamination can be easily removed.

To address this issue, the Province will begin removing these notices in instances wherein future activity on the property would not be hindered due to residual contamination. It should be noted that this would not interfere with the necessary due diligence with respect to a property’s history during a real estate transaction. It would simply remove the notice placed in the New Brunswick Land Gazette for some sites.

New Brunswick also has requirements in place respecting the notification of government and “third parties” to a contamination event (e.g., a neighboring property that is affected by contaminants from a source property). Several challenges have been identified with the current approach over the past nine years. Notably, there have been instances when government and neighbouring property owners have been notified unnecessarily (e.g., contaminant amounts were negligible). In those instances, notification can have the unfortunate consequence of needlessly multiplying the number of properties that are affected by the stigma associated with contamination. As the Province now moves to incorporate the current site management process into a new regulation, these notification requirements will be improved and aligned with notification procedures that are proving successful in other jurisdictions.

h) Regulatory Closure

The current site assessment and remediation process, which is based on the Atlantic Risk Based Corrective Action methodology, has been widely accepted and is seen nationally as a leader. Nevertheless, there is no possibility under the current legislation to provide permanent closure for a remediation file. That is, the responsible party, and all future owners, must live with the possibility that government may change its remediation standards someday and require more work on a site. Such uncertainty has a negative effect on redevelopment efforts. The fear of perpetual regulatory liability is perhaps the largest single impediment to brownfield redevelopment.

To address this, the Province will explore the development of new legislation that would allow government to permanently “close” site files. As currently envisioned, this may require a fund to be created to house monies needed in the unlikely event that a closed site requires some more work to protect the environment or human health in the future (as the owners and other interests could no longer be compelled by government to carry out such work). In furthering this issue, the Province will conduct consultation efforts to develop a workable approach.

2. Incentives

The Government of New Brunswick has been reviewing some innovative programs offered in other jurisdictions to provide incentives and tax breaks for certain brownfield redevelopment activities. Interestingly, some of these approaches can be implemented on a cost-neutral basis, and would actually increase tax revenues to both the Province and the federal government. However, given the linkages between federal and provincial tax law, the Province cannot implement these innovations without buy-in and active support from the federal government.

The Province will therefore engage the federal government in discussions on innovative taxation policies in this area. Pending the success of these efforts, further specific actions might be implemented.

3. Atlantic Harmonization

Since 1997, contaminated sites management (including the promotion of brownfield redevelopment) has been greatly advanced through the efforts of the Atlantic Partners In “Rebecca” (RBCA) Implementation (PIRI) Committee. Atlantic PIRI, which represents all of the Atlantic provincial jurisdictions and key industrial stakeholders, works continuously toward the harmonization of contaminated sites management in Atlantic Canada. One of the group’s key successes has been the adoption of the RBCA approach across the region. This is notable for many reasons, but particularly with respect to its positive influence on brownfield redevelopment in the four provinces. The common approach allows potential developers and other players to be active throughout the region, eliminating the usual barriers to entry caused by differing provincial regulatory requirements.

Having learned this lesson with respect to the scientific and technical tools used in brownfield cases, all PIRI members have expressed a desire to see the overall policy approach to brownfield redevelopment similarly harmonized throughout Atlantic Canada. The Atlantic provinces have recently tasked Atlantic PIRI with this responsibility and initial work is underway.

The Province will continue to support Atlantic harmonization efforts through Atlantic PIRI, and will endeavour to ensure that New Brunswick’s actions are in line with those of our Atlantic partners.

4. Outreach

Recent studies have provided reliable information with respect to the environmental, economic and social spinoffs associated with brownfield redevelopment projects. In an effort to promote a widespread understanding of these positive effects, the Province recently supported a series of brownfield information sessions/workshops targeting lawyers, bankers, real estate professionals, and municipal and provincial decision-makers. Having witnessed the success of this approach in creating enthusiasm for brownfield redevelopment efforts, the Province sees significant value in proceeding with further outreach and consultation initiatives. These will target a broad range of stakeholders to ensure that innovation in this area continues into the future.