

“IT’S NOT ABOUT THE CONTAMINATION” A Brownfields Success Story from Many Perspectives

M.S. Robinette, New England EnviroStrategies, S. McMahon, Windham Regional Commission,
P. Van Oot, Esq, Downs Rachlin & Martin, T. Moffitt, Commonwealth Dairy, and
H. Martínez Cazón,, Vermont Agency of Natural Resources

Introduction

On March 23, 2011, Commonwealth Dairy welcomed guests to its grand opening in Brattleboro, Vermont. Governor Peter Shumlin of Vermont led a distinguished group of speakers and guests celebrating the successful opening of the \$32 million, state-of-the-art, Class II dairy processing facility. The 39,000-square foot production plant, built on 6 acres of land formerly occupied by an auto salvage yard, will initially process over 100 million pounds of milk per year, integrates LEED principles into its design, and will ultimately utilize alternative energy sources to provide for much of its energy needs. The plant provides 35 new jobs in the Brattleboro area.



The Commonwealth Dairy story is one of a successful brownfields redevelopment. What marked this effort, as well as other successful brownfields, was the recognition that contamination was only part of the story, indeed only one among many challenges to overcome in the process. Successful redevelopment of an abandoned or underutilized property only happens when many parties with various perspectives resources and responsibilities work collaboratively towards a common goal of creating value in a community. Redevelopment happens with thoughtful site selection, imaginative financing, strong negotiation and communication efforts, proactive and supportive redevelopment, municipal and planning entities, practical and nimble application of regulatory requirements, priority responses to tight schedules and respect for construction schedules. Residual

contamination on a site is just one piece of the puzzle.

Background

The concept of a ‘brownfields’, a piece of abandoned or underused industrial or commercial real estate stigmatized by the presence of environmental contamination, has been around since the early 1990s. The idea developed from the need to balance the forcible approach of joint and several environmental liability taken in the 1980 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund law) with some kind of protection for prospective purchasers interested in underutilized properties. The intent of CERCLA to “make the polluter pay” worked in many situations, but over time, it became clear that it inhibited the sale and redevelopment of properties that may exhibit some contamination.

In response to this, the law was changed to make redevelopment easier. Provided one followed the rules, including EPA’s All Appropriate Inquiry standard, under the 2002 Small Business Liability Relief and Brownfields Revitalization Act (the ‘2002 Brownfields Law’) a buyer could

take possession of a contaminated property and yet not own the environmental liability. Remediation might have to take place, but it did not have to ascend to the level of a Superfund cleanup. Remediation at a brownfields site had to match the needs and risk levels of the redevelopment.

Equally important, dollars were proffered to make redevelopment financially possible. The 2002 'Brownfield Law' and previously the EPA's Brownfields Pilot Programs has provided some funding. Additionally, the 2009 American Recovery and Reinvestment Act (ARRA) provided a significant infusion of cash to the EPA and State Brownfields programs. Those dollars, in concert with other financial mechanisms such as the New Markets Tax Credit Program, have expanded brownfields' redevelopment potential considerably.

Case Study History

This paper presents some key factors of success in a brownfields redevelopment in Brattleboro, Vermont, an effort that transformed a vacant former automobile recycling site into a state-of-the-art yogurt manufacturing facility. The primary focus of the redevelopment was really never about the residual contamination, but instead on the focused efforts and collaboration of numerous players.

The site had previously been used as an automobile salvaging operation sometime between 1960 and 1985, ending in the mid to late 1990s. When the salvage business was shut down, some soil remediation took place in the late 1990s, consisting primarily of removal of free phase petroleum product from wetlands and a nearby brook as well as soil excavation, stockpiling and sampling. The stockpile was covered and eventually deemed remediated, the soil spread thinly in a central area of the site, and the action closed by the Sites Management Section (SMS) with a Site Management Activity Completed (SMAC) letter. However, the extent of the excavation and associated confirmatory testing was incomplete, leaving potential residual contamination remaining that could affect the site's redevelopment.

The Key Players

The success of the brownfields redevelopment effort at this site was directly related to specific individuals who saw common interest in reviving this property in the Town of Brattleboro. No one person would have had the wherewithal to bring this project to a successful conclusion. Only by working in concert, bringing skill, knowledge and a willingness to communicate actively and timely, in support of everyone's decision making authority, was this project able to succeed.

- Susan McMahon is a planner and Associate Director with the Windham Regional Commission. Susan's office committed critical ARRA Brownfields funds to support the initial due diligence (Phase I) and subsequent investigations (a Phase II and the development of a Soils and Materials Management Plan (SMMP) for the site.
- Peter Van Oot is an environmental attorney in Brattleboro who advised the buyer of the property, Commonwealth Dairy with regard to potential liabilities and permitting issues with the sites under consideration.
- Hugo Martínez Cazón is a Remedial Project Manager with the Vermont Agency of Natural Resources (ANR) and manager of the Sites Management Section (SMS) Brownfields Program. Hugo was responsible for technical review and expediting regulatory review and approval.

- Tom Moffitt is President of Commonwealth Dairy and lead businessman for site selection and financing and liaison with its German parent company to redevelop the site as a yogurt factory in a state known for its dairy production.
- Muriel Robinette is an environmental consultant with New England EnviroStrategies, Inc. who worked initially for the Windham Regional Commission for the initial environmental work and subsequently for Commonwealth Dairy during construction.

The Issues

- Site Selection: “*Location, Location, Location*”

From the perspective of the buyer (Commonwealth Dairy), site selection was a critical step, and not only from a logistics perspective such as transportation access and infrastructure. For this particular development, the site had to fall within a designated geography for State and Federal incentives to qualify for New Market Tax Credits. A section of southeastern Brattleboro fit the bill. Other factors that influenced site selection included the State of Vermont’s and the Town of Brattleboro’s commitment to the dairy industry. The size of the state helped as well: Moffitt and Commonwealth Dairy could talk to the right people quickly. Commonwealth had looked in other states for possible factory sites, but found relatively tepid interest. The State of Vermont and the Town of Brattleboro, on the other hand, very much wanted Commonwealth.

Once Commonwealth Dairy decided on the Brattleboro area, Peter Van Oot embarked on a comparison of permit challenges and likely contamination among three sites in the area under consideration. The clear preference that was located within the key financing zone was the six acre former auto salvage site in western Brattleboro.

The Windham Regional Commission provided financial support for environmental work (Phase I, Phase II) once the site was selected. Her job was made much easier as a clear plan for reuse and funding of site development and construction were in place and thus she readily committed funds on an expedited schedule.

Muriel Robinette and New England EnviroStrategies initially became involved working for the Windham Regional Commission. The job was made challenging due to the fact that relatively minimal information was available for the site and what information that did exist conflicted.

From the regulatory perspective, Hugo Martínez Cazón recognized that the ‘cleanup’ of the former auto salvage yard likely had not been done on the basis of detailed environmental investigations. He was, understandably, demanding of clarity on recognized environmental conditions (RECs) once Commonwealth selected its site, clarity that came from expedited field investigations, regular email and telephone communications, and environmental reports.

- Financing: “*Show me the Money*”

Brownfields redevelopment takes money. Evaluating and dealing with site contamination is only one part, and usually the smaller part, of the financial burden of a major redevelopment of a site. Definition of any residual contamination was clearly the focus of the Windham Regional Commission financial support of the project in its early stages. Windham provided funding under its Brownfields programs and facilitated additional funding from the State Brownfields program.

Site residuals had to compete with other equally important issues for Commonwealth Dairy’s attention. Commonwealth’s concerns focused on obtaining financing for the \$32M project, both through private sources and Federal programs via New Market Tax Credits. Advice from Peter Van Oot on tax implications helped, but the process was complicated and very quick moving.

The Federal financing portion alone for Commonwealth involved multiple banks, state and federal financing parties and their attorneys, all of whom were primarily concerned with minimizing risk.

Mitigation of such concerns became a focal point for New England EnviroStrategies as exacting attorneys representing the lending entities required reliance letters and language for the ASTM Phase I and subsequent documents. The job demanded a very quick timetable, on the order of days rather than weeks or months to meet the financial deadlines for the project.

From the State's standpoint, there was clear understanding that the project's funding was on a critical path. Without funding in place, the deal would die, and Hugo Martínez Cazón made sure that the State's review process was quick, direct and timely.

- Communication: *"Who's on First?"*

A project with the degree of complexity and tightness of schedule demanded an extremely high level of communication, and that implied the need for an equally high level of trust among the project participants.

It also implied active communication at multiple levels, a combination of simultaneous top-down and bottom-up communications. Connection had to be made at a variety of levels from CEOs and bankers to consultants and regulators rather than relying on a highly linear and directed system of protocols. This kind of seamless and active communication was exemplified by Susan McMahon's decision to allow open communication among her consultant, the project attorneys and the State regulators. Multiple parties were copied on email and written correspondence, and no one created roadblocks that might hold up progress. If documents sat on someone's desk for any length of time, the project would not have survived. A critical part of its success involved understanding what each party needed so that information could be provided in a timely manner to continue the project's forward momentum.

Communication was not always an easy process, and there were some difficulties, especially at the beginning of the project. Commonwealth Dairy, an out-of-state company, and its foreign parent company, were unfamiliar with Vermont's Brownfields process. However, once the project began in earnest, and particularly as project participants recognized the need for speed in order to obtain funding and make the project succeed, direct, open communication flourished. Knowing when and how to talk to the right people, developing good rapport with decision makers on all fronts and achieving clarity on the hard deadlines needed to make this work led to open and collaborative interchange.

- Regulations: *"I'm from the Government and I'm here to help you"*

Regulations have sometimes stood in the path of redevelopment of brownfields sites. As noted above, the whole concept behind the 2002 Brownfields Law was to provide a mechanism whereby the rigors of one law (CERCLA) could be tempered by the provisions of another.

In this case, not only did regulation not stand in the way, the State was a huge positive asset to the project. Early in the project the environmental attorney (Van Oot) and environmental consultant (Robinette) conveyed the urgency for speed and the role of the project to the State and region to Hugo Martínez Cazón of ANR. All regulations had to be met and standards achieved, but in an almost unheard of shortened timeframe. In some ways the project was lucky, as the site contamination, while present, was primarily restricted to soils, not a migration hazard and not of exotic character. The State embraced its pivotal role in ensuring environmental protection while facilitating the creation of jobs and bettering the environment.

- Construction: *“If you build it, he will come”*

Commonwealth Dairy broke ground for the construction of its facility on March 18, 2010, roughly nine months after the initial project was envisioned and initiated for the Brattleboro site. That construction schedule could not slip or the essential New Market Tax Credits would be threatened. It was critical that everyone understood how not starting construction by a certain time was a deal killer. All involved needed to do their respective jobs well and quickly. Everyone had to push.

The Windham Regional Commission funded expedited laboratory turnaround on investigations to speed up the process. Susan McMahon also allowed simultaneous review of all technical deliverables with the client and ANR. Muriel Robinette facilitated the environmental work so that the construction sequence was not impacted and kept regular dialogue going with the State in concert with the client. Site conditions were clearly documented and communicated regularly to the State. For his part, Hugo Martínez Cazón responded to communications rapidly and reports with alacrity, content in having quality, regular communications during the initial construction activity that involved the Soils and Materials Management Plan. When regulatory decisions had to be made, they were made quickly so that construction did not wait.

The Site Today

Brattleboro has a new industry in its midst, with 35 new jobs for the community. The Town also has the redevelopment of an underutilized site, mitigation of residual environmental concerns, and the benefit of an expanded tax base. The State of Vermont has a new buyer of milk, which ultimately helps enhance Vermont's agricultural economy, working landscape and its historical sense of place. The goal of brownfields was achieved, creating real worth out of something of negligible worth....and contamination was the least of the challenges.