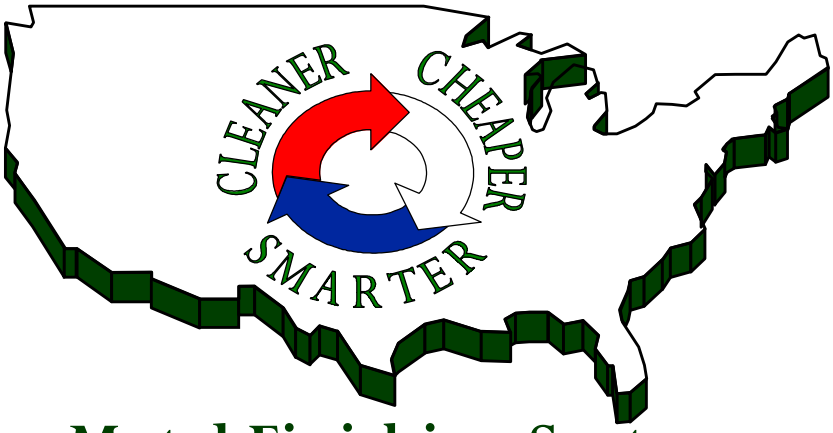
Environmentally Responsible Site Transition

Common Sense Initiative



Metal Finishing Sector

Tier 3 Site Transition "Cookbook" Template

Addressing the "Brownfields Prevention" needs of Tier 3 metal finishers – an enabling action of the CSI Metal Finishing National Strategic Goals Program.

Addressing the needs of "Tier 3" metal finishers is a major enabling action of the CSI Metal Finishing National Strategic Goals Program. Tier 3 firms are generally old and outdated. They desire to transition – out of business, to a new location, or a new owner – but are unable to do so because of a lack of funds and/or a fear (real or perceived) of on-site contamination, remediation, or facility decommissioning issues.

The CSI Metal Finishing Subcommittee's workgroup on Environmentally Responsible Site Transition identified metal finishers' general lack of knowledge about the site transition process as a major factor in their being unable to complete a responsible site transition. Many of these firms continue operating (often times in a non-compliant manner) while others are abandoned, resulting in brownfields.

The purpose of this document is to provide a template for state-specific guidance documents which can be prepared for metal finishers and will walk them through the site transition process. The document was designed to assist you in creating a site-transition "cookbook" by identifying the types of information you should fill in, based on feedback

PROBLEM DESCRIPTION

Numerous small businesses, particularly those having handled hazardous materials, face great uncertainty when trying to sell their property or transition it to a new use. Much of the uncertainty is due to concerns -- whether real or perceived -- about environmental site contamination. Unable to easily cease operations, many continue operating longer than they wish. While some firms ultimately handle site transition responsibly, others fail to internalize the cleanup burden. In many instances, firms siphon off as much cash as possible from the business, declare bankruptcy, and abandon their sites.

This cycle of failing to address potential environmental liabilities or to plan in advance for responsible site transition negatively impacts industry, the environment, and the taxpayer.

Excess Capacity Decreases Profitability Across the Industry. Without a viable exit strategy, businesses operating beyond their competitive life keep industry capacity artificially high, depressing profit margins across the industry. In addition, firm owners who wish to retire or move on are often left with businesses of low or even negative value, and are thus unable to reap any economic benefit from years of hard work.

Struggling Firms Exacerbate Environmental Problems. As they continue to operate, these marginal firms also continue to generate waste and emissions, and many have a higher pollution intensity than newer, more viable entities. Firms failing to address existing environmental problems may also harm the environment by neglecting to address possible contaminant migration.

Site Abandonment is Expensive to the Public Sector. By abandoning their sites, these firms contribute to the existing pool of brownfield properties that often require public-sector expenditure to clean up and return to productive use.

Firms currently in business often have little incentive to reduce uncertainty about potential environmental liabilities or to address known problems because they expect the costs to outweigh the benefits. In too many cases, managers are reluctant to identify and pay to remediate problems today when they think they can ignore and possibly avoid paying for them altogether in the future. Even though ignoring these problems will often affect a firm's ability to access capital (most lenders avoid loaning to firms with potentially contaminated collateral) or to sell their site and/or business, short-term considerations often prevail.

Providing information to business owners on why environmentally-responsible site transition makes sense, and how it can be accomplished, will reduce the existing problems outlined above, and will help mitigate some of the uncertainty and anxiety that businesses face regarding the transition process. Helping firms to plan ahead for site closure and to ask the right questions as transition nears will also reduce the magnitude of problems to be addressed at the time of sale or closure. This, in turn, will reduce the number of new sites ultimately requiring public bailouts.

The decision makers in this arena are owners and upper managers of small firms with potential environmental liabilities; it was therefore this group of people that the guidance document was targeting. Both firms currently facing a transition decision and those wanting to plan today for responsible transition in the future, can benefit from the document. However, the number of

transition options tends to decline the closer one is to the desired time of site transition.

METHODOLOGY

As our focus was on developing guidance materials for firm owners, our research centered on identifying needs from the perspective of business rather than public sector policy makers. While a number of public sector programs have been implemented to support site transition, the emphasis in the guidance document was on developing answers and approaches (of which public programs are but one) to help firms better manage their transitions.

Our objective was to develop a brief, user-friendly guidance document. To balance brevity with the detail needed to provide practical guidance to small business managers, we planned to use a sectional approach. Following a general overview of the transition process, the guidance document would contain separate sections, each covering one key element of transition. Each component section, in turn, would contain a general summary at the front, followed by additional detail to guide businesses through the issues likely to arise. This additional detail would be available when needed to support transition planning and execution, but would not unduly make the general information inaccessible to managers short on time and interested in a quick overview.

To ensure that the document would meet the needs of the target audience, we began by developing a detailed outline which we distributed to individual firms, industry trade associations, regulators, and environmental professionals to solicit feedback on the key issues and questions to address. In addition to soliciting feedback on our outline, we gathered information from individual metal finishing firms regarding their views on the site transition process.

While this project was part of the Metal Finishing Sector of the Common Sense Initiative, we recognized that many industrial sectors characterized by a large number of small businesses with potential environmental liabilities face similar issues regarding the site transition process. Thus, we spoke with trade associations representing several industry sectors to determine the extent to which the guidance could meet the needs of their members as well, and whether they would be willing to provide information for the document.[1]

Along with identifying the issues to cover in the guidance, we began researching relevant public sector resources and assistance programs of possible interest to firms. We also began researching the existing site transition and succession planning literature, since a number of issues facing business with environmental liabilities have been heavily examined in the context

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[1] *Other trade associations with whom we spoke included the National Association of Manufacturers, the Synthetic Organic Chemical Manufacturers Association (SOCMA), the Service Station Dealers of America, the New York State Association of Service Stations, and the Massachusetts Service Station Dealers. While each group indicated that their members would benefit from site transition guidance, the state-level service station dealer associations expressed the most enthusiasm about this effort. We found this encouraging because those at the state level are likely to be more familiar with the day-to-day concerns and informational needs of their members than their counterparts at the national level. Several of the groups also expressed interest in peer-reviewing the completed transition guidance and in distributing the document to their members.*

of general business succession.

FINDINGS

This section summarizes findings from our initial research, covering some of the major areas of the guidance document.

The Buyer's Perspective

Without a buyer, site transition will not happen. To show businesses how prospective buyers might evaluate their site and business, and to identify various transition options, we spoke with the owner of a large firm that has purchased over a hundred industrial sites and with an environmental consultant who has conducted numerous environmental assessments as part of merger and acquisition deals.

While a number of factors contribute to a purchase decision, environmental liabilities are a primary concern. Few, if any, potential purchasers will consider a site without knowing, with an acceptable degree of uncertainty, the magnitude of its environmental liabilities. Purchasers will always conduct Phase I environmental assessments and often conduct at least one Phase II assessment to further reduce uncertainty. Other liability concerns include off-site liability at disposal sites and from third-parties possibly affected by contaminant migration from a site. Some purchasers also require compliance audits of existing facilities which serve as an indicator of environmental responsibility.

At sites where the existing business will remain as a going concern, purchasers often assess future compliance costs and factor these into the purchase price. Purchasers will also often evaluate existing zoning and/or land use restrictions that might impede the ability to expand the facility at some point in the future. As holds true in all real estate transactions, location and proximity to infrastructure can significantly affect property values and the desirability of a site.

The Impact of Environmental Liabilities on the Ability to Sell

While environmental liabilities will reduce the value of a business or property, reducing uncertainty is the most critical step in improving site transition prospects. Many firms currently in business believe that contaminated sites cannot be sold. We found, however, that firms will consider purchasing contaminated sites if they can bound the magnitude of the liabilities. Thus the step that owners and managers fear most -- looking for problems on their site -- is the most important step in improving their chances of selling. Most purchasers of industrial sites recognize that some contamination is likely, and will figure remediation costs into a purchase offer. In this case, reducing uncertainty about cleanup costs may help the existing owner negotiate a better sale price. For example, if expected cleanup costs range from $50,000 to $100,000, the prospective buyer will use the maximum estimate to negotiate a sale price. If, on the other hand, the current site owners demonstrate that cleanup will cost closer to the lower end of the range, their chances of negotiating a favorable sale price improve dramatically. Many purchasers of industrial sites predetermine a cleanup cost "ceiling" representing the upper bound of their willingness to pay for

cleanup. While this level obviously varies according to a number of factors, the key points are that contaminated sites can be sold, and that reducing uncertainty often works to the existing owner's advantage.

Unfortunately, many firms fail to recognize the benefits of reducing uncertainty, or believe the costs of doing so exceed the benefits. When asked whether it made sense to conduct environmental assessments and reduce uncertainty about environmental liabilities, most of the firms with whom we spoke expressed little interest in identifying problems about which they do not already know, even though their failure to do so limits their ability to access capital and will affect their ability to transition when the time comes.

Determining the Magnitude of Environmental Liabilities

While those wishing to sell their sites will often need to conduct formal environmental assessments, there are several useful methods of "ballparking" the presence of environmental problems. A site owner who has owned a property for the entire business life-span will know how hazardous materials have been handled on the site. Sites that have had a number of previous owners and uses are often more likely to have a contamination problem. Facilities operating prior to passage of RCRA in 1976 and CERCLA in 1980 are often more likely to have handled hazardous materials irresponsibly in the past. Indeed, the longer a site has been used for industrial purposes, the more likely it becomes that some environmental liabilities exist. In addition, firms operating on smaller properties are often less likely to have dumped wastes on site than those with more open space. Site owners can prepare for transition by getting their records in order to make a Phase 1 less expensive and more useful for prospective purchasers. A potential purchaser might conduct several Phase II assessments to more definitively bound the extent of contamination. Again, site specific information that the current owner may have on past uses and local resources (e.g., groundwater, rivers) can help mitigate concerns purchasers have regarding potential liabilities.

Moving Forward: Risks and Opportunities

Navigating the site transition process requires weighing the costs and benefits of various strategies and identifying ways to avoid making common mistakes. The most important first step in facilitating transition -- reducing uncertainty about environmental liabilities -- is perhaps the biggest stumbling block for most firms. Firms fear high cleanup costs, possible enforcement actions, and lawsuits from neighbors and other third parties. Firms often expect the worst and fail to recognize that the costs of reducing uncertainty might be less than expected. For example, environmental assessments might reveal that cleanup is unnecessary or will cost less than anticipated.

Recent regulatory changes placing an emphasis on risk-based corrective action (RBCA) and site-specific clean-up levels often result in less expensive remediation options. In cases where more expensive cleanup is required, the cleanup will likely be accomplished in several stages, allowing the site owner to avoid paying the costs in one lump sum. Beginning the transition process early can help spread costs, and may enable some remediation (such as treating on-site water contamination) to be conducted with the plant's existing equipment.

Firms that do discover problems can participate in voluntary remediation programs that provide legal protections for participants against further regulatory action at a site. Letters of no further action and certificates of completion are two examples. These documents were described by one of the firms we spoke with as "gold-like" during property transactions.

Site owners can often negotiate shared cleanup and liability arrangements with parties interested in purchasing the site. These arrangements typically address both existing and potential liabilities, with a cost sharing schedule negotiated at the time of sale. Thus an agreement might be negotiated where the existing owner pays to remediate known problems at the time of sale, with each party agreeing to pay for a percentage of future liabilities resulting from the existing owner's actions. For example, the two parties might agree upon a sliding scale for sharing future liability costs: in the first year with the existing owner paying for 90 percent, with the percentage paid by the existing owner decreasing and that paid by the prospective owner increasing, over time. These agreements often include both on site and off site liability, illustrating the importance of reducing uncertainty about *all* environmental liabilities to help site owners negotiate deals that shift future liabilities to the new owners.

Many of the firms we spoke with were concerned about audit disclosure laws and expressed interest in legal protections provided by state voluntary remediation programs. Firms often fear enforcement actions and third-party lawsuits resulting from requirements to disclose the results of good faith efforts to identify environmental problems. The guidance document should, to the extent possible, provide an overview of these issues.

Resources Available to Help with Transition

Firms embarking on the site transition process will benefit from outside legal, financial, environmental, and real estate expertise. Utilizing these resources will help avoid common mistakes and will maximize both the chances of a successful transition and the economic benefits derived from the transition. For an excellent overview of the role each of these parties should play in a transition deal, as well as useful tips on the various financial aspects and sale options available, we recommend a CCH Incorporated publication, *Start Run & Grow A Successful Small Business*, which contains several chapters on the key issues to consider when exiting business.

Firms can also benefit from a number of public-sector resources and programs designed to encourage site remediation and transfer. These resources vary by state, and include site assessment and remediation grants, voluntary remediation programs, and industrial site closure and transfer programs. One of the firms we spoke with which has acquired a number of contaminated sites believes that a good state property transfer program -- one which clarifies liability and allows deals to proceed quickly -- can often improve the chances of successful transition. Because these public resources vary across localities, and often change quickly, we planned to provide much of this data via the EPA web site, rather than in the written document. This would enable the Agency to keep its listings current.

Finally, firms might also consider utilizing environmental insurance products to protect against cleanup cost overruns, high legal fees, and third-party lawsuits. While some environmental insurance options are often considered to be prohibitively expensive, not all are. In addition, some

of the people with whom we spoke expected that insurance costs would likely decrease as the relatively new policies become more widely used and insurers have sufficient data to set rates based on claims histories.

The Importance of Planning in Advance

Many of the firms with whom we spoke currently do little in the way of transition planning. When asked about their transition options, most had few ideas. Rather than selling their firm outright, some managers thought selling off their equipment and customers and then leasing their site would be a more attractive option. This would also enable them to avoid conducting the environmental assessments that would be required if the site were sold. Unfortunately, unlike occurs when the property is fully transitioned, the leasing approach often does little to address the environmental problems at the site.

To maintain the widest range of options as the time of transition nears, firms should plan ahead. This includes identifying and implementing actions that will enhance their chances of selling their site. Making early progress will increase their chances of selling their site and business for a profit, passing along an asset, rather than a liability, to their heirs. One of the firms we spoke with is setting aside money now to pay for anticipated cleanup when the business is closed. This concept has gained popularity in recent years. While the approach is a step in the right direction, firms that defer addressing necessary cleanup will likely continue to face difficulty accessing capital despite their partial funding of post-closure environmental liabilities.

RECOMMENDATIONS FOR FUTURE EFFORTS

- **Target Site Transition Guidance at Multiple Sectors**. Most industry sectors characterized by a high number of small firms that handle hazardous materials are likely to need help with site transition planning. This document should reach as wide an audience as possible without losing the necessary detail. Future efforts should begin with identifying and developing relationships with industry sectors likely to benefit from this document.

- **Solicit Feedback from the Target Audiences at Early Stages of Guidance Development.** A site transition document that does not answer the key questions of the target audience will be of little value. We found that talking with industry helped identify key issues to address in this document. Firms facing transition decisions and those having transitioned sites in the past should be consulted and utilized as peer reviewers of the guidance materials.

- **Walk the User Through Each Step of the Site Transition Process.** The firms we spoke with are most interested in a document that walks them through each step of the process and highlights the key factors to consider and mistakes to avoid.

- **Emphasize that Firms Must Reduce Uncertainty About Their Environmental Liabilities for Successful Transition to Occur.**

- **Provide Detailed Support to Help Firms Bound their Environmental Liabilities**. Firms will not acquire sites without bounding the extent of environmental liabilities. The guidance document needs to emphasize the importance of reducing uncertainty about environmental liabilities and demonstrate that contaminated sites can be transitioned. Consider developing case studies illustrating this point.

- **Illustrate the Costs of Inaction**. Where managers must choose between doing nothing and embarking on a confusing and complicated path of environmentally responsible site transition, inaction will always win if they believe the costs of doing nothing are small. Thus, the Guidance needs to provide some illustrations of the consequences of failing to act or of abandoning ones site. Consider developing case studies that demonstrate the costs of inaction, not only in terms of legal action, but also in terms of lost opportunities to sell the site and/or realize the value in ones business.

- **Emphasize the Importance of Planning for Transition in Advance.** Firms that begin planning for transition in advance will have a wider array of options to steer the process to their advantage, and are more likely to ultimately sell their property and/or business for a profit.

- **Leverage Private Sector Relationships and Channels to Develop and Distribute Guidance Materials.** Certain members of the regulated community might look skeptically at guidance materials developed by EPA. To ensure that these materials reach the target audience, future efforts should concentrate on achieving "buy-in" from trade associations and other industry groups. Several of the trade associations we spoke with expressed interest in distributing the finished guidance materials.

Attachment

Site Transition Guidance Brochure Outline

1. Overview

1.1. Transitioning a business to a new use or new users is a natural part of the business life cycle, though sometimes a difficult one.

1.2. Where a business has been involved with hazardous chemicals and site contamination is a possibility, transition becomes even more difficult.

1.3. Purpose of this brochure is to help both small businesses with real or perceived environmental liabilities and prospective purchasers of those businesses navigate this transition more effectively.

- 1.3.1. Provides an overview of the key issues one should consider when thinking about transitioning such a firm.
- 1.3.2. Provides information on private sector, state, and federal resources and institutions that can help guide you through the process.
- 1.3.3. Gives suggestions about steps you can take now to gradually address liabilities so that you can transition your company more easily when you do decide to do so.
- 1.3.4. Directs you to EPA and other on-line resources for more detailed follow-up information on the topics covered here.

1.4. We have illustrated portions of the brochure with examples from actual facilities, and have used input from people in the industry to identify the issues of greatest concern as one tries to transition the business.

2. Factors affecting the site transition decision: a checklist of considerations

2.1. How are sites with potential environmental liabilities valued? How do prospective purchasers view them?

2.2. How will environmental liabilities affect my ability to sell the property and/or business?

2.3. Are there any "rules of thumb" that I can use to gauge the general magnitude of my environmental liabilities?

2.4. How can I get a better idea of how big my environmental liabilities are likely to be?

2.5. What will happen to me if I come forward looking for help with potential environmental liabilities and site transition? Enforcement actions? Remediation costs? Why should I come forward?

2.6. What pitfalls should I be aware of as I proceed: legal issues, financial issues, market issues?

2.7. What will happen to me if I don't come forward? (Perhaps include an enforcement case study).

2.8. What resources exist to help me address environmental concerns on my site?

2.9. What steps can I take now so that I pass on a usable site to my heirs or new owners?

3. How will a prospective purchaser look at my site?

3.1. Value as a going concern (i.e., as a continuing corporation similar to the one now operating)

3.2. Value broken up: can my business contacts be used to supply customers to another plant? Can my assets -- equipment, buildings, and property -- be sold to other users?

3.3. In either case, contamination affects how much a site is worth. With environmental liabilities, perception is reality: people's perceptions of contamination will affect their valuation of your business.

4. How will environmental liabilities affect my ability to sell the property and/or business?

4.1. Makes it more difficult, but not impossible. Value of property/business = value of next use of property [going-concern or break-up] - cost of remediation - cost of redevelopment + incentives/tax breaks.

4.2. Will reduce the value below what it would have been with no contamination. In some situations, the environmental liabilities associated with your business could exceed its value. In real-estate lingo, this is called an "upside-down" property because it has a negative value. Upside-down properties are the most difficult ones to transition.

4.3. Key issue is being able to estimate the scope of contamination relatively accurately. Once an estimate can be made, prospective purchasers can integrate the liability into their assessment of the site.

- 4.3.1. Your job is to work actively to correct misperceptions where they exist.
- 4.3.2. Correcting perceptions that your site is more contaminated than it is can help increase its value.
- 4.3.3. Hiding problems that might lower your site value if discovered can lead to harsher enforcement actions and litigation from a purchaser that discovers misrepresentation later.
- 4.3.4. Perhaps add a case study to illustrate how this process of site valuation occurs in reality.

5. Any rules of thumb in assessing the likelihood of environmental liabilities being a big versus a small problem? (This may include impacts on resale value, clean up costs, limitations on next use, etc.)

5.1. If your plant is located in a highly desirable location, you will have much more leverage in selling the site at a profit -- even if there is fairly extensive contamination -- because the value of the next use is high.

5.2. If your plant is located in an industrial zone with numerous sources of environmental contamination, you may have a better chance of transitioning the site to a new industrial use since groundwater cleanup may not be possible. Your state or locality may also have adopted standards that consider the property's future use when setting cleanup standards. Both of these factors would tend to reduce the cost of site remediation.

5.3. You know how carefully you have managed your operations and your wastes over the past decades. While not a precise indicator, this may allow you to make a rough assessment of how likely environmental contaminants are to have entered your site (though will not give you information on migration of the pollutants).

6. How can I get a better idea of how big my environmental liabilities are likely to be?

6.1. Site assessments (phase 1 & phase 2)
- 6.1.1. Private contractors
- 6.1.2. Any federal, state, or local programs?
- 6.1.3. Evaluation of current and past owner's practices as a rough gauge of the likelihood of site contamination.

7. What happens to me if I come forward? What pitfalls should I be aware of as I proceed: legal issues, financial issues, market issues?

7.1. These should be filled in based on concerns raised during discussions with small business owners and firms that have purchased contaminated sites.

7.2. An uncertainty is that coming forward for help can bring either support or enforcement actions.
- 7.2.1. Both may be necessary: the exit strategy should not absolve all firms of their responsibility for past environmental negligence.

7.2.2. EPA needs to think about how to define the line dividing "let's help them exit" from "they profited a lot in the past from their pollution and sucked the money out of their firm and should be penalized."

8. What happens to me if I don't come forward?

8.1. Potential enforcement actions: penalties, time tied up in litigation.
8.2. Other issues?

9. What resources exist to help me address environmental concerns on my site? [This will be general information, referenced to more detailed appendices or to a web site].

9.1. Legal resources
9.2. Site assessment and remediation resources.
9.3. Public subsidy resources (insurance, financing, technical support).
9.4. Private sector financial resources
9.5. Private sector insurance resources.
9.6. EPA/trade association resources:
  9.6.1. Web site with more on site transition.
  9.6.2. MF Guidebook
  9.6.3. National Metal Finishing Resource Center (with Web address)
  9.6.4. Other potential trade association resources: NAMF, NFIB.

10. What steps can I take now so that I pass on a usable site to my heirs or new owners? Why should I worry about site transition now?

10.1. Planning ahead of time enables transition planning to be done with relatively small annual funding levels.
10.2. Set aside remediation funding (e.g., Brownfields IRA).
10.3. Purchase post-closure insurance policies (need to research the details on these)
10.4. Getting better control of existing operations:
  10.4.1. Clean break program: other amnesty programs that help get you back on track.
  10.4.2. New investment into P2/pollution control.
  10.4.3. POTW as a resource
  10.4.4. Insurance policies: use premiums as a yardstick of environmental performance.

10.4.5. Voluntary Remediation to prevent further contaminant migration and reduce liability (no further action letter, certificate of completion, etc.). A small investment in cleanup now might prevent higher costs later.

10.5. Become part of an industry program of continuous environmental improvement (e.g., MF CSI strategic goals program).

ATTACHMENT 2 – EPA Regional Brownfields Coordinators

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