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Loves Lies Bleeding: Brownfields in the New Millennium

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NOTE

LOVE LIES BLEEDING: BROWNFIELDS IN THE NEW MILLENNIUM

*Leonard O. Townsend**

What went wrong at Love Canal was not the way Hooker had disposed of the waste material but what happened to the property during the following 25 years when Hooker no longer owned or had any management responsibility over the property.¹

If you take the Military Highway . . . from Buffalo to Lewiston, you will pass through a formidable wasteland. Landfills stretch in all directions where enormous trucks – tiny in that landscape – incessantly deposit sludge, which great bulldozers, like yellow ants, then push into the ground. These machines are the only signs of

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1. *Hooker Chemical Company Public Relations Brochure*, in ALLAN MAZUR, A HAZARDOUS INQUIRY: THE RASHOMON EFFECT AT LOVE CANAL 20 (1998).

life, for in the miasma that hangs in the air, no birds, not even scavengers, are seen. Along colossal power lines that crisscross this dismal land, the dynamos at Niagara push electric power south, where factories have fled, leaving their remains to decay. To drive along this road is to feel the awe and sense of mystery one experiences in the presence of so much energy and so much decadence.²

INTRODUCTION

The events occurring in Love Canal, New York during the late 1970's and early 1980's had all the elements of a made-for-television movie.³ From community relocation, to chromosomal damage, to the taking of hostages, Love Canal, a suburb near Niagra Falls, New York, all too clearly demonstrated the suffering that can arise from the irresponsible co-mingling of hazardous waste and human beings.⁴ The result was that by 1990, "the state and Federal governments [had] spent some \$275 million studying the site, cleaning it up and buying homes abandoned by residents."⁵

The Love Canal debacle originated in the 1930's "when Hooker Chemicals and Plastic Corp. loaded its industrial waste into metal

2. MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW AND THE ENVIRONMENT* 25 (1988).

3. See WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* 682 (2d ed., 1994).

4. For example, on August 2, 1978, New York Health Commissioner, Robert Whalen, announced that "there was a health 'emergency' at Love Canal involving a 'great and imminent peril to the health of the general public.'" MAZUR, *supra* note 1, at 14. On August 7, 1978, N.Y. Governor Hugh Carey "promised that the state would purchase those houses [abutting the original Love Canal]. Two days later the White House announced its support for relocation." *Id.* at 14-15. In response to the release of a previously undisclosed EPA study that found chromosome damage in eleven of thirty-six Love Canal residents who had been tested . . . EPA representatives flew to Niagara Falls to belatedly explain the test results. They found an enraged community on the verge of riot. This anger came to a head on May 19, [1980] when homeowners, led by Lois Gibbs, took two EPA officials hostage as a means of pressuring the White House to provide relief.

Id. at 15.

5. Philip Shabecoff, *Government Says Abandoned Love Canal Homes are Safe Now*, N.Y. TIMES May 15, 1990, at B4.

drums and buried them.”⁶ In the early 1950’s, the company sold the land containing the metal drums and the parcel was deeded to the Niagara Falls Board of Education, which built a school and allowed developers to construct homes adjacent to the site.⁷ Rain eventually penetrated the soil around the drums and in 1976, residents began noticing a stench and oozing slime.⁸ Several children were born with birth defects to families living on one particular block, and adults residing nearby reported liver maladies and nervous disorders.⁹ It was discovered that the toxic waste from the metal drums had leaked, seeping into the basements of area houses,¹⁰ and the waste was blamed for a high rate of birth defects and cancer.¹¹ The State of New York declared a health emergency and evacuated 200 families.¹² Hooker Chemicals Company was later sued for both cleanup costs and punitive damages.¹³

While some commentators have stated that “Love Canal was the impetus behind the Superfund law (CERCLA) that President Carter signed in 1980,”¹⁴ in truth, “the Superfund law was well along the evolutionary path towards enactment before Love Canal burst into public prominence.”¹⁵ Despite the enactment of the Comprehensive Environmental Response, Compensation and Liability Act of 1980¹⁶ (“CERCLA” or “Superfund”) and the events at Love Canal, the country is still plagued by brownfields.¹⁷ A brownfield site is

6. James N. Baker & John J. Krieger, *Update: Labors of Love*, NEWSWEEK, Dec. 11, 1978, at 16, 18.

7. *See id.* at 18.

8. *See id.*

9. *See id.*

10. *See, e.g.,* Dick Kirschten, *The New War on Pollution is Over the Land*, NAT’L J., Apr. 14, 1979, at 603, 605.

11. *See id.*; *see also* H. James Saxton, *N.Y. Times Abstracts*, N.Y. TIMES, Dec. 24, 1978, at 16.

12. *See* Margot Hornblower, *EPA Proposes Regulations On Toxic Substances Disposal*, THE WASH. POST, Dec. 15, 1978, at A2.

13. *See* United States v. Hooker Chems. & Plastics Corp., 850 F. Supp. 993 (W.D.N.Y. 1994).

14. MAZUR, *supra* note 1, at 217.

15. RODGERS, *supra* note 3, at 682.

16. 42 U.S.C. §§ 9601-9675 (1994).

17. *See* EPA, BROWNFIELDS ECONOMIC REDEVELOPMENT INITIATIVE, QUICK REFERENCE FACT SHEET 1 (Oct. 2000) [hereinafter ECONOMIC REDEVELOPMENT INITIATIVE], at <http://www.epa.gov/swerosps/bf/pdf/econinit.pdf>.

“[a]ny real property where the actual or suspected presence of contamination is an impediment to redevelopment.”¹⁸ Academic commentators have argued that the large number of brownfields¹⁹ in New York State and in the country today is due to the fact that CERCLA works almost too well.²⁰ CERCLA has draconian liability jaws that tend to scare away potential developers and purchasers who might otherwise utilize sites where hazardous waste is present.²¹ In addition to CERCLA, “[t]here is a confusing labyrinth of overlapping federal and state statutes and regulations” addressing how and when the cleanup of brownfield sites must be executed.²² “This lack of [statutory] clarity has resulted in cleanup decisions being made on a site-by-site basis, producing a system that is neither transparent nor predictable.”²³ Because of this lack of clarity, the debate over how best to approach the problem of brownfields rages on.

Although a great deal of information regarding brownfields is available, it seems a significant amount of this information in terms

18. THE BROWNFIELDS COALITION, FINAL REPORT 2 (1999) [hereinafter FINAL REPORT], at <http://www-1.nysba2.org/sections/environment/coalitionCoalitio.pdf>.

19. See Keith Schneider, *U.S. Said to Lack Data on Threat Posed by Hazardous Waste Sites*, N.Y. TIMES, Oct. 22, 1991, at C5 (reporting that as of 1991, more than 1,100 of the country’s worst hazardous waste sites remained to be cleaned up); see also Linda Kanamine, *Groups Seek Review of Toxic ‘Malpractice,’* USA TODAY, July 1, 1992, at 9A (stating that “[n]early one person in six lives within four miles of a present or former toxic waste site.”).

20. See, e.g., RODGERS, *supra* note 3, at 58 (discussing Superfund as “a liability regime that is without parallel in U.S. domestic law.”); but see Heidi Gorovitz Robertson, *One Piece of the Puzzle: Why State Brownfields Programs Can’t Lure Businesses to the Urban Cores Without Finding the Missing Pieces*, 51 RUTGERS L. REV. 1075, 1084 (1999) (stating CERCLA alone is not responsible for the country’s numerous orphaned brownfields as “[t]he abandonment and deindustrialization of many urban cores began long before CERCLA and the state Superfund laws.”).

21. See Robertson, *supra* note 20, at 1083.

22. THE BROWNFIELDS COALITION, SUMMARY OF LEGISLATIVE PROPOSAL 1 (last modified Jan. 21, 2000) [hereinafter SUMMARY OF LEGISLATIVE PROPOSAL], in FORDHAM ENVTL. L.J., Symposium 2000 CLE Manual, *Earth, Wind and Fire: Brownfields in the Coming Millennium* § 7 (Mar. 22, 2000) (on file with the FORDHAM ENVTL. L.J.).

23. SUMMARY OF LEGISLATIVE PROPOSAL, *supra* note 22, at 2.

of solutions, is rhetoric. These solutions may seem convincing at first glance, but once subject to careful consideration, they prove to be unworkable. This article suggests several new ways of considering solutions to the brownfields crisis within an urban context. Part I provides a brief analysis of the statutory and common law framework under CERCLA that is relevant to brownfields. Part II contains observations for considering brownfields in the urban context and discusses why brownfields are currently underutilized. Part III suggests new directions regarding liability for cleanup of these sites and provides a moral analysis of the brownfields dilemma. In order to better illustrate these new directions, I have created a hypothetical case in Part IV, entitled, *6,000 Parcels v. People of the City of New York*.²⁴ Finally, Part V explores the future of brownfields in the urban arena.

I. STATUTORY AND COMMON LAW FOUNDATIONS

New York State sued Hooker Chemicals Company in 1979 for negligence and punitive damages, even though the company had

24. The name "6,000 Parcels" is based on information from two experts in the field, Annette Barbaccia and Jody Kass. See E-mail from Annette Barbaccia, Director of Mayor's Office of Environmental Coordination, to the author (July 20, 2000) (on file with author).

We don't have an actual list of brownfield sites, but we estimate that there are between 5,000 to 6,000 vacant industrial sites within the City of New York. This is based on secondary sources of data from 1997, such as land use, zoning, tax data, etc The sites vary in size from 500 sq. ft. to hundreds of acres. The basis of our effort in 1997 was to get a macro-level perspective on the extent of the issue and the areas of the city that we should target our efforts.

Id.; see also E-mail from Jody Kass, Director of Regulatory Initiatives, New York City Partnership, to the author (July 18, 2000) (on file with author).

There is no exact number [of brownfields sites] for either the City or the State. And, there is a lot of controversy over identifying/listing sites -- for fear of stigmatization. Nevertheless, the City has estimated that there are about 6,000 vacant and abandoned sites (representing 3,500 to 4,000 acres) that are zoned industrial. One can presume that these sites have some contamination, which is surely an impediment to reuse There are also many, many commercial and residential sites in NYC that have the vestiges of previous uses or illegal dumping where the contamination is an obstacle. There are no estimates on the number of these sites.

Id.

not owned the Love Canal property since 1954.²⁵ New York State had the ability to bring this action pursuant to CERCLA,²⁶ which is triggered whenever “any hazardous substance is released or there is a substantial threat of such a release into the environment.”²⁷ CERCLA’s framework is unique among environmental statutes because it relies on federal common law to provide gap fillers.²⁸ This reliance on federal common law has made CERCLA “the legal equivalent of a termite colony—undergoing constant structural change as a result of the aggregation of local endeavors.”²⁹ Premised on the concept of shovels first, lawyers later,

[i]t appears that with the dangers or potential dangers caused by hazardous substances, shooting first and asking questions later was the intent of Congress, making it clear that under CERCLA the EPA should have and has full reign to conduct or mandate uninterrupted cleanups for the benefit of the environment and the populus.³⁰

CERCLA prescribes first cleaning up the hazardous contaminants by any means necessary (including attaching liability to force past and present owners and operators to pay for the cleanup of a site) and only then allowing judicial review to correct any inequities.³¹

25. See *United States v. Hooker Chems. & Plastics Corp.*, 850 F. Supp. 993, 997-98 (W.D.N.Y. 1994).

26. See 42 U.S.C. § 9613 (1994); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985) (“CERCLA . . . applies ‘primarily to the cleanup of leaking inactive or abandoned sites and to emergency responses to spills.’” (footnote omitted)).

27. 42 U.S.C. § 9604(a)(1) (1994).

28. See *United States v. Aceto Agric. Chems. Corp.*, 699 F. Supp. 1384, 1390 (S.D. Iowa 1988) (finding “that where the statutory language and legislative history of CERCLA are inconclusive and the legislative history shows that the common law was intended to fill such gaps, the common law is a proper source of guidance.”).

29. RODGERS, *supra* note 3, at 683.

30. *B.R. McKay & Sons, Inc. v. United States*, 633 F. Supp. 1290, 1294 (D. Utah 1986).

31. See 42 U.S.C. § 9613(h) (1994); *Voluntary Purchasing Group v. Reilly*, 889 F.2d 1380, 1387-88 (5th Cir. 1989) (“CERCLA explicitly limits judicial review of remedial and removal plans where such review will delay cleanup.” (footnote omitted)).

These cleanups, if necessary, may initially be paid for out of a fund financed by industry taxes.³²

CERCLA defines the term "hazardous substance" and requires that the government be notified when a release of such substances occurs.³³ The notice provision provides, in part:

any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to section 9602 of this title, immediately notify the National Response Center established under the Clean Water Act.³⁴

Failure to notify the National Response Center may result in both criminal³⁵ and civil liability.³⁶

When notified of a release, the Environmental Protection Agency ("EPA") performs its own analysis, has a right of access to the facility, and is

authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan.³⁷

If the EPA determines that a site merits cleanup, it can perform the cleanup itself, or can direct a responsible party to perform it.³⁸ The

32. See 126 Cong. Rec. 26,338 (1980) (statement of Rep. Florio) ("It is wholly appropriate and equitable for the industries which have benefited most directly from cheap, inadequate disposal practices, and which have generated the wastes which imposed the risks on society to contribute a substantial portion of the response costs.").

33. See 42 U.S.C. § 9601(14) (1994).

34. *Id.* § 9603(a) (citation omitted).

35. See *id.* § 9603(b).

36. See *id.* §§ 9609(a)-(b).

37. *Id.* § 9604(a)(1).

38. See *id.* § 9604(a)(1).

EPA may seek a private solution before undertaking a cleanup, but is not required to do so.³⁹

CERCLA is often perceived as an unforgiving measure that operates in counter-intuitive fashion because of its awesome liability jaws.⁴⁰ Liability for cleanup costs may attach to present owners and operators,⁴¹ lessees,⁴² generators,⁴³ and past owners.⁴⁴

39. See, e.g., *United States v. Miami Drum Servs. Inc.*, No. 85-0038, mem. op., 1986 WL 15327, at *10, 25 Env't Rep. Cas. (BNA) 1469, 17 Env't'l L. Rep. (Env't'l. L. Inst.) 20539 (S.D. Fla. 1986) (holding that "[a] reading of [CERCLA] so as to require the government to contact all potentially responsible parties and attempt to work out a private party cleanup would seriously undermine the expeditious cleanup of toxic waste sites.").

40. See RODGERS, *supra* note 3, at 58.

[T]he Superfund law is best known for a strict and unforgiving liability imposed upon many powerful (and quite surprised entities)--banks that have taken over properties to protect a security interest, corporations with subsidiaries that own polluted properties, unlucky buyers of commercial real estate, chemical and aerospace companies whose wastes were shipped to a dump site years ago, and cities and municipalities who are owners and operators of the local landfill.

Id. (citation omitted).

41. See 42 U.S.C. § 9607(a)(1) (1994); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985).

Congress intended to cover different classes of persons differently. Section 9607(a)(1) applies to all current owners and operators, while section 9607(a)(2) primarily covers prior owners and operators Prior owners and operators are liable only if they owned or operated the facility 'at the time of disposal of any hazardous substance'; this limitation does not apply to current owners.

Id.

42. See *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 843 (4th Cir. 1992) (finding that "a defendant operates a 'facility' only if it has authority to control the area where the hazardous substances were located." Thus, "while liability under § 9607(a)(2) is strict . . . it nonetheless extends only to those who have authority over the area where hazardous substances are stored." *Id.* (citation omitted)).

43. See *United States v. Wade*, 577 F. Supp. 1326, 1333 (E.D. Pa. 1983). CERCLA

appears to be imposing liability on a generator who has (1) disposed of its hazardous substances (2) at a facility which now contains hazardous substances of the sort disposed of by the generator (3) if there is a release of that or some other type of hazardous substance (4) which causes the incurrence of response costs.

Liability is usually strict,⁴⁵ in addition to joint and several.⁴⁶ It may extend from a subsidiary to a parent company,⁴⁷ from a predecessor to a successor company,⁴⁸ and may even pierce the corporate veil to

Id.; see also *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989) (finding since ownership of the hazardous substance had not passed to the formulator, and since spillage was an inherent part result of the manufacturing process, liability should attach to the generator).

44. See 42 U.S.C. § 9607(a)(2) (1994); *Nurad* 966 F. 2d at 846 (“The trigger to liability under [42 U.S.C.] § 9607(a)(2) is ownership or operation of a facility at the time of disposal, not culpability or responsibility for the contamination.”).

45. See, e.g., *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 897 (5th Cir. 1993).

CERCLA is a strict liability statute, one of the purposes of which is to shift the cost of cleaning up environmental harm from the taxpayers to the parties who benefited from the disposal of the wastes that caused the harm Often, liability is imposed upon entities for conduct predating the enactment of CERCLA, and even for conduct that was not illegal, unethical, or immoral at the time it occurred.

Id. (citation omitted).

46. See *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 807 (S.D. Ohio 1983) (“The fact that the term joint and several liability was deleted from a prior draft of the bill . . . in and of itself, is not dispositive of the scope of liability under CERCLA.” (citation omitted)); *Wade*, 577 F. Supp. at 1338 (suggesting a presumption that “joint and several liability should be imposed in cases brought under § [9607] of CERCLA unless the defendants establish that a reasonable basis exists for apportioning the harm amongst them.”).

47. See *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 22 (D.R.I. 1989) (stating that the “parent corporation’s control over the subsidiary’s management and operations is an essential element of proving operator liability on the parent’s part.” (citation omitted)).

48. See *United States v. Carolina Transformer Co., Inc.*, 739 F. Supp. 1030, 1039 (E.D.N.C. 1989) (finding successor liability based on the following factors: “[w]hether the business of both employers was the same, whether the employees of the new company were doing the same job, and whether the new company produced the same product for essentially the same customers.” (citations omitted)). *But see* *United States v. Mex. Feed and Seed Co., Inc.*, 980 F.2d 478, 489 (8th Cir. 1992) (finding liability did not pass to a successor company because the successor did not “continue” the business). The successor company did not consist solely of the former company’s assets; the successor company was a

larger, pre-existing corporation, which bought [the former company’s] assets in an arm’s-length transaction in order to

hold corporate officers and employees liable.⁴⁹ Liability may also pass to a mortgagee,⁵⁰ or a secured creditor.⁵¹ As if this were not formidable enough, the Internal Revenue Service has ruled, and various courts have held, that the costs associated with cleaning up a contaminated site are not deductible repairs, but must be capitalized and depreciated.⁵² Even with CERCLA's strict liability

service one of its several re-refineries and, [the successor company] had no knowledge of the offending tanks nor [at the time of the transaction] had [the former company] been identified as a potentially responsible party for CERCLA purposes in regard to the tanks.

Id.

49. *See* 42 U.S.C. § 9601(21) (1994); *United States v. N.E. Pharm. & Chem. Co.*, 810 F.2d 726, 745 (8th Cir. 1986) (stating that "imposing liability upon only the corporation, but not those corporate officers and employees who actually make corporate decisions, would be inconsistent with Congress' intent to impose liability upon the persons who are involved in the handling and disposal of hazardous substances." (citations omitted)).

50. *See, e.g.*, *United States v. Md. Bank & Trust Co.*, 632 F. Supp. 573, 579 (D.Md. 1986) (stating that in order to impose CERCLA liability on a secured creditor, the security interest in the property "must exist at the time of the clean-up.").

51. *See, e.g.*, *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1558 (11th Cir. 1990) (finding that "a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal if it so chose." (footnote omitted)).

52. *See, e.g.*, *INDOPCO v. Comm'r*, 112 S. Ct. 1039, 1042 (1992) (stating while 26 U.S.C. § 162(a) "allows the deduction of 'all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business,'" it "allows no deduction for a capital expenditure -- an 'amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate.'" (citations omitted)); Elliott Milhollin, Note, *Taxation of Superfund Cleanup Costs: How the IRS Continues to Frustrate CERCLA's Twin Policy Goals*, 5 WIS. ENVTL. L.J. 213, 214-15 (1998).

The IRS examines superfund cleanup costs like any other business expense. It does not take into account the effect its ruling might have on how soon the site is cleaned up, and on who will ultimately pay for the cleanup. Given the high cost of remediation efforts under CERCLA, the tax consequences of being able to deduct superfund cleanup costs in the current year may be quite significant.

Id. (footnote omitted); Glenn R. Carrington & Robert A. Kilinsikis, *Tax Treatment of Environmental Remediation Costs*, 437 PRACTICING LAW

standard, brownfields continue to plague the national landscape, with no consistent natural solution in place to address the statute's shortcomings.

II. WHY ARE BROWNFIELDS BROWN AND WHO IS TO BLAME?

The Environmental Protection Agency historically utilized Superfund monies to clean up sites that are on the National Priorities List ("NPL").⁵³ As the level of contamination at brownfields sites however, is usually far below what would cause a

INSTITUTE, TAX LAW AND ESTATE PLANNING COURSE HANDBOOK SERIES 55, 59 (Feb.-Mar. 1999).

The IRS first addressed the deductibility of these expenditures in two published technical advice memoranda (TAMs) -- one on soil remediation for PCB contamination and the other on asbestos. The analysis in the TAMs was based on whether the costs are similar to deductible 'incidental repair' costs or whether they are 'capital improvement or betterment' costs. The TAMs held the latter in both situations and generated numerous letters from Congress and taxpayers requesting that the Service reconsider its positions. In response to those requests, the IRS set up a task force made up of IRS and Treasury personnel to consider the deductibility of environmental cleanup costs. The Service later issued a second TAM on asbestos holding that costs were capitalizable where asbestos was removed, but were deductible where asbestos was encapsulated. The IRS also issued Rev. Rul. 94-38 holding that certain soil and groundwater remediation costs may be deducted. While Rev. Rul. 94-38 defused much of the controversy surrounding the soil remediation TAM, extensive controversy still exists with respect to asbestos removal and storage tank removal costs.

Id. Thus, the IRS may be changing their "legislative grace" (as deductions are referred to in *Interstate Transit Lines v. Comm'r*, 319 U.S. 590, 593 (1943)) to allow Brownfield Empowerment Zones to deduct clean up costs rather than to capitalize them.

53. See *Eagle-Pitcher Indus., Inc. v. EPA*, 759 F.2d 922, 932 (D.C. Cir. 1985).

[T]he NPL is not in itself remedial action—inclusion on the NPL requires no cleanup nor any other action by site owners. Instead, the NPL is simply a rough list of priorities, assembled quickly and inexpensively to comply with Congress' mandate for the agency to take action straightaway. Utilizing the NPL, EPA will thereafter perform in-depth examinations of each site on the list to determine whether remedial action is necessary. If EPA determines at that later stage that the release of a 'pollutant or contaminant' at a particular site does not present 'an imminent and substantial danger,' then no remedial action will be taken.

Id. (footnote omitted).

site to be listed on the NPL, brownfields have the unique distinction of attracting CERCLA liability without access to Superfund money.⁵⁴ While a unanimous definition of a brownfield has yet to emerge, most parties involved in the debate over brownfields would concede that far too many orphaned sites remain fallow.⁵⁵ In contrast, greenfield sites continue to be developed.⁵⁶ This trend may exacerbate the problems of undersized, and perhaps outdated, public transportation systems, lead to lower tax revenues, and contribute to urban sprawl and decentralization.⁵⁷

Brownfields are often situated in ideal locations, accessible to major transportation routes and near large potential workforces.⁵⁸ Yet developers regularly choose more remote sites on which to develop industrial or commercial facilities because, as greenfields

54. *Id.*

55. See Robertson, *supra* note 20, at 7.

56. See Walter E. Mugdan, *EPA's Role in Brownfields Development*, SE55 A.L.I.-A.B.A. 75, 77 (Feb. 9, 2000) ("Due in part to the risks associated with brownfields, developers have turned instead to 'greenfields,' land previously undeveloped (or used for agricultural purposes).").

57. See Robertson, *supra* note 20, at 1079 (stating that brownfields "affect[] the economic viability of the communities in which they are located. Brownfields drive down surrounding property values and the local tax base, provide no employment to local residents, and constitute blights on communities." (footnotes omitted)); Suzannah Lessard, *Critique*, 188 ARCHITECTURAL REC. 55 (Aug. 2000).

The most confounding aspect of sprawl is not that it turns the American Dream into a nightmare, or that it generates traffic congestion that only increases as more roads are built, but rather that sprawl dissolves the distinction between city and country Even more devastating [is] that sprawl, in its latest permutation, is no longer necessarily contingent on cities at all.

Id.; William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 59 (1999).

Urban sprawl causes many direct and indirect societal and environmental harms. sprawling metropolitan development requires substantial new infrastructure investments by all levels of government and generally requires more costly infrastructure investments than more concentrated forms of development. Urban sprawl also threatens biodiversity and contributes to transportation-caused air pollution and the deterioration of river water quality as development destroys green areas, displaces agricultural uses, creates impervious surfaces and adds to river discharges.

Id. (footnote omitted).

58. See, e.g., Robertson, *supra* note 20, at 1078-79.

(which are outside CERCLA's fearsome liability), they are unaffected by the ambiguities inherent in CERCLA liability.⁵⁹ When a developer purchases a brownfield site, he or she becomes a present owner, and is liable for all costs pertaining to the cleanup.⁶⁰ In order for an owner to theoretically avoid this burden, CERCLA has provided what is called the "innocent purchaser defense."⁶¹ In a commercial sales transaction, if the purchaser had no reason to know contaminants were present on the property, the purchaser may escape liability for cleanup of these contaminants.⁶² This breaks down since brownfield sites, by definition, have some degree of contamination. Such contamination should be detected if the site has been inspected during an appropriate inquiry. However, even performing a detailed inspection may not shield the developer from liability,⁶³ because by conducting all appropriate inquiry, the developer has reason to know of the contamination, and therefore should be liable. Consequently, it seems illogical for a developer to buy property where it will incur the additional financial burden of cleaning up a previous owner's contamination.⁶⁴ Furthermore, even if a developer undertakes this additional burden, there may exist

59. See, e.g., *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H., 1985) ("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history." (citations omitted)).

60. See RODGERS, *supra* note 3, at 59 (pointing out that in the case of an EPA-administered cleanup, "[s]ome of the government cleanups have been so expensive and so incompetently conducted as to encourage many private parties to do the job before the government does it for them at twice or three times the cost.").

61. 42 U.S.C. § 9601(35)(A)-(C) (1994).

62. See *id.* § 9601(35)(B).

63. See ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 299 (2d ed., 1996) (noting that courts have not precisely interpreted the parameters of "all appropriate inquiry").

64. See RODGERS, *supra* note 3, at 59.

The strict-liability approach of Superfund has shaken the incentive structure of the private business world in ways unimagined by traditional command-and-control regulation. By casting such a wide liability net and deputizing so many potential enforcers, Congress 'imposed a burden on the business community to anticipate, avoid and clean up environmental contamination that knows only ill-defined limits.'

Id. (citation omitted).

unforeseen contamination below the surface that could result in future liability.⁶⁵ Due to the challenges faced by potential developers, we are left with the following brownfields dilemma: there are many sites, often located in urban areas, where it is difficult to find a purchaser willing to develop contaminated property in light of CERCLA liability.⁶⁶ These sites, in the absence of contamination would be prime candidates for redevelopment, producing needed taxes, housing, and social amenities for urban areas.⁶⁷

Since it is normally very difficult to prove or disprove whether contamination causes health problems,⁶⁸ the better view is to conclude that any contamination within is a clear and present health danger or risk. Unfortunately, this risk is spread unevenly. Brownfield sites often exist in close proximity to those who consume the least and are least able to deal with potential health and economic problems--the urban poor.⁶⁹

The many brownfield sites must be cleaned up to prevent further deterioration of our economic and physical health, yet no viable industry exists which can finance such a cleanup. Paradoxically, these same brownfield sites are usually located in areas least able to deal with the situation. While in the past we may have successfully avoided or sidestepped the problem of brownfields, it has finally become a significant obstacle to the efficient functioning of our society. In some sense, we have achieved the nightmare that Garrett Hardin presaged in his essay entitled *The Tragedy of the Commons*.

65. See, e.g., *O'Neil v. Picillo*, 883 F.2d 176, 183 (1st Cir. 1989) (holding, in response to the defendant's argument that it was not liable for any future remedial action because the state had not shown that any work will be needed, that "[w]e see no problem with the court [below] giving the state (and EPA) time to conduct further tests. If after conducting the necessary tests, the government concludes that there was in fact no harm to the area's groundwater, then [defendants] will have nothing to worry about.").

66. See Robertson, *supra* note 20, at 1084.

67. See *id.* at 1079.

68. See, e.g., PERCIVAL, *supra* note 63, at 160 (highlighting "enormous uncertainties concerning the sources and impacts of various pollutants.").

69. See *id.* at 446 ("Race proved to be the most significant among variables tested in association with the location of commercial hazardous waste facilities, with household income being second.").

In a reverse way, the tragedy of the commons reappears in problems of pollution. Here it is not a question of taking something out of the commons, but of putting something in—sewage, or chemical, radioactive, and heat wastes into water; noxious and dangerous fumes into the air; and distracting and unpleasant advertising signs into the line of sight. The calculations of utility are much the same as before. The rational man finds that his share of the cost of the wastes he discharges into the commons is less than the cost of purifying his wastes before releasing them. Since this is true for everyone, we are locked into a system of “fouling our own nest,” so long as we behave only as independent, rational, free-enterprisers.⁷⁰

Now that we have succeeded in “fouling our own nest,” what model will we use to clean house?

III. NEW WAYS OF THINKING ABOUT THE BROWNFIELDS LIABILITY ISSUE

As inhabitants of the earth, we theoretically have the right to enjoy this planet and all of its beauty and wonder. With this right also comes an obligation to care for it.⁷¹ This obligation may be broken down into three legal concepts: stewardship, tenancy, and trusteeship. If we owe duties under the principles of stewardship, tenancy and trusteeship to future generations, and if brownfields represent a disinheritance to future generations as well as a clear and present economic and health danger, and further, if there are none of the usual responsible parties available from whom to demand cleanup costs, then liability for cleanup costs should shift to the parties possessing the next level of control. In light of the current brownfields situation, therefore, I suggest making “People of the City of New York” defendants in a hypothetical lawsuit, “*6,000 Parcels v. People of the City of New York*.” This lawsuit is designed to raise sufficient funds to clean up all brownfields sites in the City of New York. Using various analogies to be explained below, I propose shifting liability for the clean up to New York

70. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1245 (1968).

71. See Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 *AM. J. INT'L. L.* 198, 203 (1990).

City's citizens. In essence, in the words of Pogo, "[w]e have met the enemy and *he is us*."⁷²

Though humanity may not own the planet, it can be asserted that we are its keepers. As bailees of this planet, we have "the rightful possession of goods by one whom is not the owner."⁷³ As such, we are responsible for accounting for or returning the item in the same condition that we received it.⁷⁴ The failure of previous bailees to live up to their obligations does not give us the right to repeat their failures. The obligation is imposed on us anew and the same standard is set for each successive generation.

As tenants in possession of property, we are under an obligation to keep the property in good condition and prevent it from becoming unusable. "The gist of [this idea] is that the holder of the present estate is to a considerable extent inhibited by the law of waste from permanently damaging the land or things on it, i.e., from doing damage that will still be present when the landlord's reversion becomes possessory."⁷⁵ This idea is present in the writings of John Locke.

'[I]f gathering the acorns, or other fruits of the earth, etc., makes a right to them, then any one may ingross as much as he will.' To which I answer: not so. The same law of nature that does by this means give us property does also bound that property, too . . . As much as any one can make use of to any advantage of life before it spoils, so much he may by his labor fix a property in; whatever is beyond this is more than his share and belongs to others.⁷⁶

Therefore, as tenants of this planet, we can change things so long as the changes comport with the law of good husbandry and do not amount to waste.⁷⁷ *Melms v. Pabst Brewing Co.* adopted the

72. THE BEST OF POGO: COLLECTED FROM THE OKEFENOKEE STAR 163 (Walt Kelly & Bill Crouch, Jr., eds., 1982) (emphasis added).

73. WILLISTON ON CONTRACTS § 1030 (Jaeger 3d ed., 1967).

74. *The Winkfield* (C.A. 1900-1903) All E.R. Rep. 346, 352.

75. ROGER A. CUNNINGHAM, ET AL., THE LAW OF PROPERTY 275 (2d ed., 1993).

76. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT 19 (Thomas P. Peardon ed., 1952).

77. *Melms v. Pabst Brewing Co.*, 79 N.W. 738, 740 (Wis. 1899).

Waste is

the principle that the reversioner or remainder-man is ordinarily entitled to receive the identical estate, or, in other words, that the identity of the property is not to be destroyed,

doctrine of meliorating waste “which, without changing the legal definition of waste, still allowed the tenant to change the course of husbandry upon the estate if such change be for the betterment of the estate.”⁷⁸ Consequently, as tenants, we do have some discretion to use the planet for our benefit, but we may not so radically change it so that prohibitions under the doctrine of waste are violated.

Humanity also holds a trusteeship for future generations, triggering a duty to preserve the opportunity to benefit from the planet. “All generations are inherently linked to other generations, past and future, in using the common patrimony of the earth,”⁷⁹ and since we all have the right to equally share in the benefits of the planet, this relationship may be termed a partnership. As partners, we must preserve the environment for future generations to enjoy.

The obligation to protect the environment for future generations is derived from ideas beyond stewardship, tenancy and trusteeship. Several passages in the Old Testament have been interpreted by scholars as broadly defining the relationship of man to his environment. “[T]he first man and woman were ‘blessed’ by God and ordered (or authorized) to ‘[b]e fruitful and multiply, and fill the earth and subdue it,’ and to have ‘dominion’ over other living creatures.”⁸⁰ Indeed, God’s covenant with Noah “was made ‘with

still remains, and it has been said that changes in the nature of buildings, though enhancing the value of the property, will constitute waste if they change the identity of the estate.

Id.

78. *Id.* at 739.

79. Weiss, *supra* note 71, at 199.

80. Richard H. Hiers, *Reverence for Life and Environmental Ethics in Biblical Law and Covenant*, 13 J.L. & RELIGION 127, 130 (quoting Gen. 1:26-28).

In recent years, many morally serious writers have urged that Judaism and Christianity are to be blamed for the contemporary environmental crisis because religious and non-religious people throughout the world in ensuing centuries allowed themselves to be guided by these and other biblical mandates. This kind of complaint fails to take seriously the biblical context in which the primordial pair were so instructed. According to Genesis 1:26-28, only the aboriginal man and woman were authorized to subdue the earth and have dominion. Moreover, everything in Genesis one preceded the time of the Great Flood (Gen. 6-9), after which the whole structure of relations among humans, other creatures, and God was altered radically. It therefore seems likely that these

every living creature . . . , the birds, the cattle, and every beast of the earth . . . , as many came out of the ark.”⁸¹ The “implication of this covenant is that all life forms were valued by God and that human participants in the covenant should therefore affirm their value as well.”⁸²

The Founding Fathers referred to our obligations to future generations at the very beginning of the Constitution: “[w]e the People of the United States, in order to form a more perfect Union, establish justice . . . and secure the Blessings of Liberty to ourselves and our Posterity”⁸³ Distinguished jurists have also occasionally addressed issues related to our obligations to the environment. Justice Douglas’ dissent in *Sierra Club v. Morton*⁸⁴ comes tantalizingly close to suggesting that our role to husband may have ended, and the environment should have its own standing to sue its polluters and defilers.

The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.⁸⁵

In response to the *Morton* majority’s reference to Alexis de Tocqueville,⁸⁶ Justice Blackmun quoted from John Donne with an appropriate reference to our discussion.

commands were understood to have applied only to conditions during that antediluvian era.

Id.

81. *Id.* at 136 (quoting 1 Gen. 9:9-10).

82. *Id.* at 137.

83. U.S. CONST. pmbl. Despite this obligation, courts have unfortunately, never found a federal or state constitutional right to a clean environment. *See, e.g.,* *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 535 (S.D. Tex. 1972) (“The Ninth Amendment, through its ‘penumbra’ or otherwise, embodies no legally assertable right to a healthful environment.” (citations omitted)).

84. 405 U.S. 727 (1972).

85. *Id.* at 749-50 (Douglas, J. dissenting).

86. *See id.* at 740-41 n.16 (quoting ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 102 (1945)).

No man is an Iland, intire of itselſe; every man is a peece of the Continent, a part of the maine; if a Clod bee washed away by the Sea, Europe is the leſſe, as well as if a Promontorie were, as well as if a Mannor of thy friends or of thine owne were; any man's death diminithes me, becauſe I am involved in Mankinde; And therefore never ſend to know for whom the bell tolls; it tolls for thee.⁸⁷

My analysis and proposal for addressing the brownfields crisis begins with the question raised by Justice Blackmun in his *Morton* dissent. "Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?"⁸⁸

The existence of brownfields throughout the country can be seen as antithetical to the legal, moral, and common sense principles explored above. In the past, it has been easy for society to point its collective finger at industry and scream 'you are to blame for polluting our earth;' legislators then legislated, regulators then regulated and industry then paid.⁸⁹ Everyone, in the exhilaration of finger pointing, neglected to note that what industry produces, it produces in anticipation of what consumers want, from Frisbees to refrigerators. If consumers did not purchase these products,

It will be seen, also, that by leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis of a prosecution.

Id.

87. *Morton*, 405 U.S. at 760 n.2 (quoting JOHN DONNE, DEVOTIONS XVII).

88. *Id.* at 755-56 (Blackmun, J. dissenting).

89. See BRUCE YANDLE, THE POLITICAL LIMITS OF ENVIRONMENTAL REGULATION: TRACKING THE UNICORN 119 (1989).

As currently constituted, Superfund and CERCLA make an attractive politician's pork barrel. Demand for EPA's services far exceeds supply. Politicians can put on shining armor and make a name for themselves with the homefolks by bringing home the bacon. But unlike traditional pork barrel projects (like dams, canals, bridges, and roads), whether justified or not, Superfund sites stir a deep emotion among people who live near them.

Id.

industry might very well produce less pollution.⁹⁰ What has happened in the brownfields arena is unique in that society can no longer point a finger at industry, because the particular industry that contaminated the brownfields may very well have since vanished. CERCLA, essentially a liability statute, only works to clean up brownfields when a responsible party can be found. Without a responsible party, we are then left with the tools of CERCLA, which by themselves cannot adequately fix our brownfields problem.

IV. IN RE 6,000 PARCELS V. PEOPLE OF THE CITY OF NEW YORK

As a theoretical means of demonstrating the process by which we as citizens may be liable for contribution to the cleanup of brownfields, I propose to further explore the case, which I named, *6,000 Parcels v. People of the City of New York*. As to precisely how the lawsuit would start, imagine that several citizens have formed a corporation that will adopt an orphaned parcel of land and represent its interests in a lawsuit against the citizens of the City of New York. In this way, an 'innocent,' legal 'person' is created. The process of the parcel's adoption could be roughly based on adoption law already in place in New York State where a party may petition the court to adopt a child and thereby terminate the legal and parental obligations of the biological parents.⁹¹ More corporations could be formed to adopt other orphaned parcels and then all of the parcels could join together to form a class action lawsuit. The remedy would be in the form of funds for cleanup of the contaminated parcels.

Several issues would then arise over whether this case could be heard by a court. First, does 6,000 Parcels have standing to sue and does it have justiciable privileges? Second, would a federal court have jurisdiction over this case? Finally, can the citizens of New York City be reached to attach liability for brownfields contamination?

The corporations that assemble in *6,000 Parcels* may form an association instead of suing independently. Such associations have

90. See PERCIVAL, *supra* note 63, at 134 (arguing that consumer choices affect market forces which in turn, can effectively influence industry environmental practices).

91. See, e.g., N.Y. DOM. REL. LAW § 110 (McKinney 1999).

been found to have blanket standing if the association satisfies certain elements:

An association has standing to sue on behalf of its members when three requisites have been fulfilled: (1) at least one of the members possesses standing to sue in his or her own right; (2) the interests that the suit seeks to vindicate are pertinent to the objectives for which the organization was formed; and (3) neither the claim asserted nor the relief demanded necessitates the personal participation of affected individuals. These prerequisites for associational standing ensure that Article III's case or controversy requirement is satisfied in a given situation.⁹²

6,000 Parcels may immediately satisfy two of these three elements of standing for associations. The association was formed primarily with the goal of these plaintiff parcels being put to productive use once again. Since the plaintiff parcels are all contaminated, the relief sought in the form of a cleanup, is similar. As for personal participation of the parcel, this is a nullity except for its citizen representatives. But this does not necessarily negate standing for the association. The final issue, whether one of the members has standing to sue in his or her own right, warrants further analysis. Case law has established the elements of standing:

First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) 'actual or imminent', not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'⁹³

I will address each of these elements in turn.

In exploring whether 6,000 Parcels has a legally protected interest, references and analogies to a wide variety of sources are in

92. *United States v. AVX Corp.*, 962 F.2d 108, 116 (1st Cir. 1992) (citations omitted).

93. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted).

order. Scholars have struggled for years with the concept of how a body that is essentially disassociated from a human being may still be recognized by law. I argue that for functional reasons in limited circumstances, and based on public policy considerations, brownfields should be awarded legal standing.

Current environmental laws may already accord 6,000 Parcels legal 'privileges,' by inference.⁹⁴ CERCLA regulates the release of hazardous substances and imposes liability on a variety of Potentially Responsible Parties ("PRP's") for certain releases.⁹⁵ In other words, a parcel has a privilege to be cleaned up from the release of hazardous substances and the responsible party must pay to make the parcel whole again. Similar, albeit limited, privileges for environmental objects may be implied in the Clean Water Act.⁹⁶ Bodies of water have a limited privilege to reject any quantities over a statutorily established amount of pollutants from a point source.⁹⁷ This is also true of the Clean Air Act where a locale has a limited privilege to take action when various pollutants exceed the established limits.⁹⁸

In addition, a limited privilege has been granted to certain buildings to refuse alteration or demolition. For example, New York City's Landmark Preservation Law⁹⁹ declares it is "unlawful for any person in charge . . . to alter, reconstruct or demolish any improvement constituting a part of [the landmark] . . . or to construct any improvement upon land embraced within such site . . . unless the [landmarks preservation] commission has previously issued [the appropriate certificate] . . ." ¹⁰⁰ The owner or person in charge "shall keep [it] in good repair"¹⁰¹ and this requirement of good repair is "in addition to all other provisions of law requiring [the structure] to be kept in good repair."¹⁰² Buildings or sites designated as landmarks enjoy a limited privilege to be free from

94. I use the term "privileges" instead of "rights" to imply that these are not absolute (as are constitutional "rights"), but arise solely to assist in the clean up of brownfields.

95. 42 U.S.C. § 9607 (1994).

96. 33 U.S.C. §§ 1251-1387 (1994).

97. *Id.* § 1313.

98. 42 U.S.C. § 7661 (1994).

99. *See* N.Y. COMP. CODES R. & REGS. tit. 25, § 301-321 (1992).

100. *Id.* § 305(a)(1).

101. *Id.* § 311(a).

102. *Id.* § 311(d).

alteration or demolition (excluding those approved by the commission) and as to repairs also have a greater privilege than other buildings or sites without landmark status. This privilege is usually vested on a site-by-site basis, and violations of the law may call for restoration of the landmark¹⁰³ along with penalties and possible imprisonment.¹⁰⁴

Corporations, also non-human entities, can sue and be sued, buy and sell property, and, of course, pay taxes.¹⁰⁵ Hence a corporation may have standing.¹⁰⁶ Similar to corporations, ships are another example of a non-human object that can be sued independently of its owners.

A ship is the most living of inanimate things. Servants sometimes say 'she' of a clock, but every one gives a gender to vessels It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical.¹⁰⁷

In fact, with lawsuits involving ships, the name of the ship is often listed as the defendant.¹⁰⁸ Holmes explains that "[t]he owner [of the vessel] . . . is not to blame [for any damage that the vessel may have caused], and he cannot even be charged on the ground that the damage was done by his servants. He is free from personal liability on elementary principle."¹⁰⁹ Countries, states, and associations

103. *See id.* § 25-317(e).

104. *See id.* § 317(b).

105. *See* HARRY G. HENN & JOHN R. ALEXANDER, *LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* 125 (3d ed., 1983) (explaining that "[b]y definition, then, a corporation, is an entity, and is so regarded for most legal purposes.").

106. *See, e.g.*, N.Y. BUS. CORP. LAW § 626(a) (McKinney 1999).

107. OLIVER WENDELL HOLMES, *THE COMMON LAW* 25 (Mark DeWolfe Howe ed., 1963).

108. *See, e.g.*, *Md. Nat'l Bank v. Vessel Madam Chapel*, 46 F.3d 895 (9th Cir. 1995); *Mobile Marine Sales, Ltd. v. M/V Prodomos*, 776 F.2d 85 (3d Cir. 1985); *S.C. State Ports Auth. v. M/V Tyson Lykes*, 867 F. Supp. 1357 (D.S.C. 1993); *Rainbow Line, Inc. v. M/V Tequila*, 341 F. Supp. 459 (S.D.N.Y. 1972).

109. Holmes, *supra* note 107, at 25 ("Yet it is perfectly settled that there is a lien on his vessel for the amount of the damage done, and

share many of these same qualities as ships and corporations. Thus, many entities, human and non-human, may have the standing necessary to sue or be sued, depending on the circumstances.

To extend standing to brownfields, however, would mean extending standing to a completely unrecognized legal entity. In surveying the current standing jurisprudence in terms of environmental cases, it becomes evident that standing might be interpreted broadly should public policy dictate. For example, in *Friends of the Earth, Inc. v. Laidlaw Env'tl. Serv., Inc.*, both the dissent and majority agreed that "demonstration of harm to the environment is not *enough* to satisfy the injury-in-fact requirement unless the plaintiff can demonstrate how he personally was harmed."¹¹⁰ However, the majority nevertheless held that standing existed because the alleged environmental contamination "directly affected . . . [the plaintiff's] recreational, aesthetic, and economic interests."¹¹¹ As demonstrated by *Laidlaw*, if the courts are protective of a single person's recreational activities, perhaps they might extend this same logic to include 6,000 Parcels' interests in being contamination free, which is a direct result of public policy concerns.

To satisfy the injury in fact element of standing, 6,000 Parcels could present documentation of a typical parcel's contaminants while proving that this contamination does not exist naturally, and that it was produced as a by-product of the manufacturing process. A history of the parcel, along with records of exactly what chemical compounds were used or stored on the site, would help prove injury to the site. In addition, 6,000 Parcels could show that this hazardous contamination does not exist on parcels outside the association. This would show that the injury is specific to the

this means that that vessel may be arrested and sold to pay the loss in any admiralty court whose process will reach her." (footnote omitted)).

110. 120 S.Ct. 693, 714 (2000) (Scalia, J. dissenting) (emphasis in original).

111. *Id.* at 705 ("We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity."); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992) ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." (citation omitted)).

parcels involved in the lawsuit. This preliminary information may be enough to prove to a court that a concrete injury exists.

To satisfy the actual and imminent prong of the injury in fact element of standing, 6,000 Parcels might show that, due to the migratory nature of the hazardous wastes on the parcel, the injury is continuing and quite possibly will continue into the foreseeable future. This is because “[t]he environmental harms do not stem from the act of dumping when waste materials slide off the dump truck but rather after they land and begin to seep into the ground, contaminating soil and water.”¹¹² Thus, it is the waste seeping into the soil that causes actual harm. The contaminants could continue to seep into the soil in the future, causing imminent harm.¹¹³

To satisfy the redressability prong of standing, 6,000 Parcels must demonstrate to the court that it is likely its injury will be corrected by a favorable decision.¹¹⁴ First, specific injury determination is essential for each parcel, and then a proposed remedy must be assigned. This can be achieved by designing a system where each parcel would be personalized to allow specific consideration of each parcel’s injuries.

The corporation that owns 6,000 Parcels could personalize the parcels by providing each parcel with a name or number. For inanimate objects such as ships or vessels, the necessity of a name is actually a statutory requirement of their Vessel Identification System.¹¹⁵ A corporation must be identified with a name as well.¹¹⁶ While the New York City Department of buildings and title companies uses addresses to name a site, such a method may not be sufficient for naming parcels.¹¹⁷ Using a parcel’s lot and block number may be a more appropriate form of identification than an address. To further delineate the parcel as a special entity, use of the designation “Brownfield Parcel” may be used while cleanup is in progress. Ultimately, the “Brownfield Parcel” prefix would be discarded when the parcel’s cleanup is successfully completed.

112. *Gache v. Harrison*, New York, 813 F. Supp. 1037, 1041 (S.D.N.Y. 1993).

113. *See id.* at 1043.

114. *See Lujan*, 504 U.S. at 561.

115. *See* 46 U.S.C. § 12502(a)(3), (d) (1994).

116. *See, e.g.*, N.Y. BUS. CORP. LAW § 402(a)(1) (McKinney 1999).

117. *See* N.Y. ADMIN. CODE § 26-129 (1999).

Proof of redressability would include involvement by the same community groups that were created to adopt the orphaned brownfield sites. This participation serves two distinct functions. First, the community group could serve as a repository of information about the specific parcel's hazardous contents, monitor how the cleanup is going, and provide timely reports to the court.¹¹⁸ Second, the community group would serve as an advocate to parties interested in developing the parcel once it has been cleaned. This proposed system should satisfy the redressability prong by enabling community groups to demonstrate that holding the citizens of New York City liable will remedy the injury done to brownfields, since these same citizens may be linked to liability for its contamination.

The final element of standing is the causal connection between the injury and the alleged wrong. The causal connection issue simultaneously addresses whether 6,000 Parcels can reach the People of the City of New York in order to assign liability. To establish a causal connection between the contamination of 6,000 Parcels and the citizens of the City of New York, foundational analogies may be culled from the law of negligence. One case that considers how far liability for an act might be traced back to the original source is the famous *Palsgraf v. Long Island R.R. Co.*¹¹⁹ The basic issue in *Palsgraf* was whether the plaintiff could sue the railroad without suing the other parties involved. Agency law protected the railroad employee from suit;¹²⁰ the man with the package vanished, the stampede of people could not be located, and the scales could not be held liable, as they were inanimate objects.

118. As an analogy, consider the citizen suit provisions of the Clean Water Act where citizens are allowed, in limited circumstances, to initiate a suit on their own behalf for injunctive relief against polluters. 33 U.S.C. § 1365 (1994). See also The Clean Air Act, 42 U.S.C. § 7604 (1994); The Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (1994); The Toxic Substances Control Act, 15 U.S.C. § 2619 (1994).

119. 248 N.Y. 339 (Ct. App. 1928).

120. See RESTATEMENT (SECOND) OF AGENCY § 8A (1958). It is inevitable that in doing their work, either through negligence or excess zeal, agents will harm third persons or will deal with them in unauthorized ways. It would be unfair for an enterprise to have the benefit of the work of its agents without making it responsible to some extent for their excesses and failures to act carefully.

Id.

Thus, the only party left to seek recovery from was the railroad. While the majority according to Judge Cardozo refused to stretch liability this far, Judge Andrews' dissent addresses the justification for limiting liability:

What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics We may regret that the line was drawn just where it was, but drawn somewhere it had to be The words we used were simply indicative of our notions of public policy.¹²¹

Hence, limits on liability may merely be a matter of circumstances, a judicial sense of fairness, or more importantly, public policy.

Public policy is an important basis for extending liability to include the citizens of New York City. While public policy has never been succinctly defined in United States Supreme Court decisions,¹²² eminent jurists have attempted to define the term in other writings.

The very considerations which judges most rarely mention, and always with an apology are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences

121. Palsgraf, 248 N.Y. at 352-53.

122. See Richard H. W. Maloy, *Public Policy-Who Should Make It In America's Oligarchy?*, 1998 DET. C.L. MICH. ST. U. L. REV. 1143, 1145-46 (1998).

The Supreme Court has not rendered a precise definition of public policy. In fact, Justice Brown said it was 'impossible to define with accuracy.' Other Justices have described it in similar terms: 'vague,' 'variable,' 'a very uncertain thing.' In particular, Justice Gray said that 'no fixed rule can be given by which to determine what is public policy.'

Id. (footnotes omitted); Alan B. Handler, *Judging Public Policy*, 31 RUTGERS L.J. 301, 303 (2000) ("A precise definition of public policy is elusive. It is rooted in the definition of law itself. Public policy may be defined broadly to include both utilitarian and moral considerations.").

and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.¹²³

Should a court be allowed to set public policy without exceeding its jurisdiction in relation to the Separation of Powers doctrine?¹²⁴ While the judiciary may not per se proclaim public policy, where an interpretation of public policy is necessary, the court may do so as long as it proceeds with extreme caution.¹²⁵ "The courts may make public policy, but only when the people through their constitutions and statutes have not done so [T]his limitation on the courts' power to make public policy does not prevent them from making some very important public policies, in the absence of conflicting legislation."¹²⁶ Since "[p]ublic policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests,"¹²⁷ 6,000 Parcels should argue that public policy considerations mandate both the cleanup of hazardous wastes and the productive utilization of orphaned sites.

In addition to public policy, there are portions of certain environmental statutes and case holdings that provide conceptual justifications for extending liability to citizens. The Resource Conservation Recovery Act ("RCRA") states that liability for hazardous waste may attach to any party "who has contributed or who is contributing to" the disposal of hazardous waste.¹²⁸ CERCLA also attaches liability for cleanup costs to parties who have "otherwise arranged" for the disposal of hazardous

123. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (4th ed., 1923).

124. See Handler, *supra* note 122, at 302.

At the core of [concerns regarding judicial 'activism'] is the perception that public policy, which is the central concern of other agencies of government and society, has unduly intruded into judicial decisions. The intriguing question this tense debate raises is whether public policy appropriately figures in judicial decisions and, in exploring that question, whether it is possible to identify, define, and explain public policy and to draw a line between inappropriate and essential judicial incorporation of public policy in judicial decision making.

Id.

125. See Maloy, *supra* note 122, at 1159 (footnote omitted).

126. *Id.* (citations omitted).

127. *Id.* at 1162 (citation omitted).

128. 42 U.S.C. § 6973(a) (1994).

substances.¹²⁹ Nowhere do the above statutes define the words "contributed" or "otherwise arranged." These words may be defined using their common usage since "[t]he literal meaning is that which the words express, taking them in their natural and ordinary sense; that is, giving to words of common use their commonly accepted meaning."¹³⁰ By defining these terms in this manner, it is possible to interpret them as holding citizens liable for their role in the contamination of brownfields.

In holding citizens liable for cleanups, it must be determined whether industry contaminated the site at society's behest. Consumers are the intended beneficiaries of products. Toxic by-products are inherent in the manufacturing process of these products.¹³¹ Consumers know that through the manufacturing process industry is contaminating the environment.¹³² This effectively means that consumers are contaminating the environment themselves by purchasing products.¹³³ Industry is extraordinarily sensitive to consumers' wishes. As a result, consumers have the ability to send a clear message to industry that they will not accept contamination of the environment, by refusing to purchase these products. In turn, it is likely that industry would respond immediately.¹³⁴ Consumers have some degree of control

129. 42 U.S.C. § 9607(a)(3) (1994).

130. FRANCIS J. MCCAFFREY, *STATUTORY CONSTRUCTION: A STATEMENT AND EXPOSITION OF THE GENERAL RULES OF STATUTORY CONSTRUCTION* 3 (1953).

131. *See, e.g.*, *United States v. Aceto Agr. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989) (discussing contamination as an inherent part of the pesticide manufacturing process).

132. *But see* Michael B. Gerrard, *Demons and Angels in Hazardous Waste Regulation: Are Justice, Efficiency, and Democracy Reconcilable?*, 92 N.W. U. L. REV. 706, 713 (1998) (book review) ("Products are not labeled to disclose the hazardous waste generated in their manufacture, so consumers (except when buying such obvious items as paint thinner) have no idea of the effects of their purchases. They also have no control at all over the mode of manufacture.").

133. *See, e.g.*, PERCIVAL, *supra* note 63, at 208 (citing H.R. REP. 94-1491, 94th Cong., 2d Sess., at 10-11 (1976) ("The House committee report accompanying [the 1976 RCRA] legislation noted that each year Americans discarded 71 billion cans, 38 billion jars and bottles, 35 million tons of paper, 7.6 million televisions, 7 million cars and trucks, and 4 million tons of plastics.")).

134. *See, e.g.*, PERCIVAL, *supra* note 63, at 134.

over industry's decision to dispose of toxic waste the cheapest way. With control comes responsibility, and with responsibility comes the obligation to change one's lifestyle for the common good.

A case that establishes some guideposts for attaching liability to consumers is *United States v. Aceto Agric. Chems. Corp.* ("*Aceto I*").¹³⁵ In *Aceto II*, the issue was whether a manufacturer of a hazardous substance was liable for contamination caused at a subcontractor's site when the owner sent the substance to the subcontractor for mixing and formulation.¹³⁶ The court began its analysis by stating, "CERCLA places the ultimate responsibility for clean up on 'those responsible for problems caused by the disposal of chemical poisons.'"¹³⁷ In response to the defendant's argument that they did not control the handling and disposal of the hazardous waste, the court countered that not imposing liability "would allow defendants to simply 'close their eyes' to the method of disposal of their hazardous substances, a result contrary to the policies underlying CERCLA."¹³⁸

The *Aceto II* case links liability through an independent subcontractor to the manufacturers of toxic chemicals by using four interesting rationales. First, Aidex, the formulator subcontractor, was declared bankrupt in 1981.¹³⁹ Since funds available for cleanups are limited, and since cleanup costs for each site may be

When consumers are well-informed and free to choose, market forces can generate remarkably effective pressure to stop practices that cause environmental damage. For example, although the Marine Mammal Protection Act limits the number of dolphins that tuna fishers can kill each year, environmentalists . . . launched a boycott of tuna that succeeded when a major seafood processor announced that it would no longer purchase tuna that had been captured using fishing practices that result in harm to dolphins The enormous influence of consumer preferences was demonstrated when, *within hours of the announcement*, the company's two leading competitors announced similar policies of purchasing only tuna caught using dolphin-safe methods.

Id. (citation omitted) (emphasis added).

135. 872 F.2d 1373 (8th Cir. 1989).

136. *See id.* at 1375.

137. *Id.* at 1377 (citation omitted).

138. *Id.*

139. *Id.* at 1375.

tremendously expensive,¹⁴⁰ it is essential to find an entity that has sufficient funds to contribute to cleanups.

Second, the court links control of the site and the product using language such as "contributed to" and "arranged for." Stating that "Congress used broad language in providing for liability for persons who . . . 'arranged for' the disposal of hazardous substances . . . courts have concluded that a liberal judicial interpretation is consistent with CERCLA's 'overwhelmingly remedial' statutory scheme."¹⁴¹ The court further noted that "courts have not hesitated to look beyond defendants' characterizations to determine whether a transaction in fact involves an arrangement for the disposal of a hazardous substance."¹⁴² The court advocated imposing liability "on those who had the authority to control the disposal, even without ownership or possession."¹⁴³ Liability follows control; here control is not restricted to actual control, but the potential ability to control.

Third, the court uses a principle of common law, vicarious liability for abnormally hazardous operations, to further link the manufacturer to the acts of its subcontractor. "[Vicarious liability] means that, by reason of some relation existing between A and B, the negligence of A is to be charged against B, although B has played no part in it, has done nothing whatever to aid or encourage it, or indeed has done all that he possibly can to prevent it."¹⁴⁴

Finally, the court links ownership of the resultant hazardous waste back to Aceto. "[Aceto] contracted with Aidex to formulate their technical grade pesticides; they retained ownership of the pesticide throughout the process; and inherent in the process is the

140. See, e.g., David J. Benson, Comment, *CERCLA Vicarious Liability After United States v. Aceto Chemical Corporation: More Than a Common-Law Duty?*, 76 IOWA L. REV. 641, 646 (1991) ("As of November 30, 1986, the EPA had spent \$10,013,700.00 on these response actions. As of March 1, 1987, the State of Iowa had incurred expenses of \$95,451.00 and was committed to the EPA to pay an additional \$780,000.00." (citations omitted)).

141. *Aceto II*, 872 F.2d at 1380 (citations omitted).

142. *Id.* at 1381.

143. *Id.* at 1382 (citing *N.E. Pharm. & Chem. Co., Inc.*, 810 F.2d 726 (8th Cir. 1985)).

144. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 499 (5th ed., 1984).

generation of wastes."¹⁴⁵ Therefore Aceto is responsible for the cleanup.¹⁴⁶

In light of the above analysis, 6,000 Parcels should argue that liability attaches to the citizens of New York City for several reasons. First, since funds are currently unavailable for cleanup, public policy¹⁴⁷ directs that liability be shifted to the next available party in this specific situation. Second, the hazardous waste contaminating 6,000 Parcels was an inherent by-product of items that were produced for the benefit of citizens and at their behest, and since responsibility follows control, public policy holds that it is proper in this instance to expand the definition of control to include these specific circumstances. Third, since the original wrongdoers are unavailable, liberal judicial interpretation is necessary to further the clear intents of both CERCLA and RCRA in the brownfields situation. Ownership of the hazardous wastes should be linked to the goods produced. Since consumers now own these items, liability should extend to consumers who now also own the hazardous wastes inherent in their production.

Assuming that 6,00 Parcels is found to have standing, the final issue would be whether a federal court would have the jurisdiction

145. *Aceto II*, 872 F.2d at 1383.

146. See Benson, *supra* note 140, at n.54 (citing *United States v. Aceto Agr. Chems. Corp.* 699 F. Supp. 1384 (S.D. Iowa 1988) ("*Aceto I*"). The *Aceto I* court

never explicitly said that liability was imposed because the defendants still owned the hazardous substance. This can be implied, however, because of the court's statement that 'the reasoning necessary to extend § 107(a)(3) liability to cover these defendants cannot necessarily be limited to defendants who owned the pesticides throughout the process.'

Id.

147. See *Acme Fill Corp. v. Althin CD Medical, Inc.*, 1995 WL 597300, at *11 (N.D. Cal. 1995) (stating "it is worth noting that the essential public policy and Congressional intent underlying CERCLA 'is to place the ultimate responsibility for cleaning up hazardous waste on those responsible for problems caused by the disposal of chemical poison.'" (citation omitted)); *Castlerock Estates, Inc. v. Estate of Markham*, 871 F. Supp. 360, 366 (N.D. Cal. 1994) ("[P]ublic policy mandates that CERCLA be applied broadly in order to effect its remedial provisions.").

to hear this case.¹⁴⁸ The Constitution provides for which cases may be heard by a federal court:

The judicial power shall extend to all Cases, in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; --to all Cases affecting Ambassadors, other public Ministers and Consuls; --to all cases of admiralty and maritime Jurisdiction; --to Controversies to which the United States shall be a Party; - -to Controversies between two or more States; --between a State and Citizens of another State; --between Citizens of different States; --between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.¹⁴⁹

6,000 Parcels may be heard in federal court based on federal question jurisdiction. "The federal district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."¹⁵⁰ I argue that the brownfield issue may be traced to federal law (CERCLA), therefore a federal court would have jurisdiction.

V. BROWNFIELDS IN THE SCHEME OF THINGS

The generation growing up in the 1950's and 1960's was witness to countless governmental endeavors, some great, some mediocre, and some bordering on lunacy. Somehow the notion was formed that throwing money at a problem would solve it. As an example of this, consider the massive federally funded high-rise urban renewal projects of the 1950's and 1960's that, while intending to

148. See *United States v. Nicolet, Inc.*, 712 F. Supp. 1193, 1201 (E.D. Pa. 1989) (stating where "overriding federal interests exist, courts should fashion uniform federal rules of decision" (citations omitted)). The better forum for establishing uniform rules for application nationwide is the federal system. As a result, I have chosen to explore this mythical lawsuit in the context of the federal court system.

149. U.S. CONST. art. III, § 2; cl. 1; see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992) (stating that this is important because "the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.").

150. 28 U.S.C. § 1331 (1994).

rejuvenate communities, resulted in destroying them further.¹⁵¹ These projects were designed under the naïve assumption that constructing something new would magically revitalize a neighborhood, thus transforming the impoverished residents of the area into productive members of our society. As a society, we learned the hard way that this was definitely not the way to successfully solve a problem. We should now realize from this urban renewal debacle that we cannot solve a problem simply by throwing money at it.¹⁵² What is required is the intelligent and sensitive understanding of the problem in relation to the larger system. In the brownfields arena, the question is how the brownfields problem may fit into the urban fabric as a whole.

151. See generally OSCAR NEWMAN, *DEFENSIBLE SPACE: CRIME PREVENTION THROUGH URBAN DESIGN* (1972) (analyzing why these high-rise housing projects failed); see also DEP'T OF HOUS. AND URBAN DEV., 2020 MANAGEMENT REFORM PLAN, available at <http://www.hud.gov:80/reform/mrindex.html#contents> (last visited Aug. 6, 2000).

Architect Frank Lloyd Wright once said that a doctor can bury his mistakes, but an architect can only advise his clients to plant vines. It's the same at HUD, our failures were spectacular, three-dimensional and out there like an eyesore for all the world to see. And since our job was to help the poor, and there were still poor, then we must have failed.

Id.

152. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 4 (1961).

There is a wistful myth that if only we had enough money to spend—the figure is usually put at a hundred billion dollars—we could wipe out all our slums in ten years, reverse decay in the great, dull, gray belts that were yesterday's and day-before-yesterday's suburbs, anchor the wandering middle class and its wandering tax money, and perhaps even solve the traffic problem. But look what we have built with the first several billions: Low-income projects that become worse centers of delinquency, vandalism and general social hopelessness than the slums they were supposed to replace. Middle-income housing projects which are truly marvels of dullness and regimentation, sealed against any buoyancy or vitality of city life. Luxury housing projects that mitigate their inanity, or try to, with a vapid vulgarity. Cultural centers that are unable to support a good bookstore. Civic centers that are avoided by everyone but bums, who have fewer choices of loitering place than others. Commercial centers that are lackluster imitations of standardized suburban chain-store shopping. Promenades that go from no place to nowhere and have no promenaders. Expressways that eviscerate great cities. This is not the rebuilding of cities. This is the sacking of cities.

Solely focusing on brownfields would be decidedly myopic without the reestablishment of a practical connection between brownfields and the rest of the urban fabric. Three questions must be answered: (1) what are the immediate versus long-term goals, (2) what standards should be used for cleanup, and finally (3) how should these ideas be applied.

I propose that the entire process must begin with brownfields cleanup first, and this is why I have focused much of the earlier part of this writing on the *6,000 Parcels* lawsuit. The *6,000 Parcels* case has the potential to raise the capital necessary to clean these sites, to residential levels. Sites cleaned to residential levels will result in optimizing development alternatives for future generations, thus comporting with our duties of stewardship, trusteeship, and tenancy.

It will take time to begin to craft a sensitive and intelligent approach to the brownfields problem in general, as well as brownfields in urban areas, specifically. A new sensitivity and environmental awareness on the part of urban planners and designers has developed, and hopefully, this process will continue and expand.¹⁵³

Many factors, other than contamination however, lead to the non-use of land.¹⁵⁴ Several non-environmental factors that typically affect the market value of a site, as well as the feasibility of reuse of the property include: site location;¹⁵⁵ site accessibility;¹⁵⁶ site size; site configuration;¹⁵⁷ existing buildings; infrastructure;¹⁵⁸

Id.

153. See, e.g., Cathy Lang Ho, *Waste Not, Want Not*, ARCHITECTURE 80 (Nov. 2000) (exploring the transformation of Ford Motor Company's 1200-acre plant into an environmentally friendly zone).

154. See Robertson, *supra* note 20, at 1084 (arguing that while liability for environmental contamination under CERCLA is an important barrier to the reuse of Brownfields sites, it is but one piece of the complex puzzle explaining why reuse is stymied).

155. See *id.* at 1093.

156. See *id.*

157. Michael E. Porter, *The Competitive Advantage of the Inner City*, HARV. BUS. REV. May-June 1995, at 55, 62.

158. See Robertson *supra* note 20, at 1092 (noting "factors that will make a site attractive include access to interstate highways and an airport, high population densities, and an ability to generate consumer traffic.").

zoning and likelihood of rezoning;¹⁵⁹ state and local tax burden on the site property or applicable to site activities; labor for construction or business operations at the site; utility rates; liability insurance;¹⁶⁰ the degree of public safety; access to markets; site preparation costs; agglomeration of economies; local land use and environmental regulation; cost of land and labor;¹⁶¹ and community obstruction.¹⁶²

The tremendous energies devoted to the problem of brownfields revitalization are not sufficient in that they fail to address the elements that are equally crucial to successful revitalization. Since these other factors will take some time to even begin implementing, it seems logical to instead concentrate our energies on first cleaning up brownfield sites, while concurrently considering a system to enable the marketing of these sites. Cleanup is essential to protect both our physical health and the redevelopment that will protect our economic health.

The de-industrialization of our urban cores has continued for some time. This means that if successful, the “adaptive re-use” of a brownfield site will tend not to be for industrial use, but for other uses, such as housing, schools, and concomitant retail use.¹⁶³

159. *See id.*

160. Susan Neuman and Jerry Cavaluzzi, *Environmental Insurance for Brownfields Redevelopment (Part 1)*, 19 THE N.Y. ENVTL. LAW. 22 (Spring 1999) (“Environmental insurance can be a useful tool in the process of brownfields redevelopment, but it is underutilized Although insurance companies are now marketing these products aggressively, especially to environmental lawyers . . . prior experiences have created a general reluctance to rely on insurance for environmental liability risk.”).

161. *See Robertson supra* note 20, at 1092 (footnotes omitted).

162. *See id.* at 1090.

Communities are often concerned about contaminated lands in their neighborhoods and the lack of public involvement in the cleanup process. Economic developers and environmentally concerned communities and individuals have been at odds for years with respect to redevelopment issues. One reason is that the public is dubious about government’s and business’ ability to remove contamination safely.

Id.

163. *See, e.g.*, HARVARD UNIVERSITY JOINT CENTER FOR HOUSING STUDIES, THE STATE OF THE NATION’S HOUSING: 2000, at 1-2 (last visited Aug. 30, 2000), at <http://www.gsd.harvard.edu/jcenter> [hereinafter “Housing Studies”] (“As employment continues to decentralize, households are able to live and work at greater and greater

Residential uses require much higher levels of site cleanup than do industrial because of the presence of sensitive individuals such as children for much longer time periods. Accordingly, cleanup standards for brownfields should conform to residential guidelines. As stated above, this would provide maximum flexibility for reuse of contaminated parcels and also comport with society's duty as a bailee. There should be two limited exceptions to this rule: (1) existing small businesses, as discussed below, and (2) situations where removal of the contamination would be significantly more environmentally hazardous than encapsulation.¹⁶⁴ Economic factors should also be irrelevant. The argument should not be clouded by considerations of whether it is sensible to spend dollars to save lives.¹⁶⁵ Rather, it should be argued that the need to cleanup Brownfield sites is based on our duty to protect future generations. We have a responsibility to future generations, and a liability for our mistakes as a society. I will continue to stress these ideas as I discuss Brownfields in four categories: Brownfields that Aren't, Brownfields that Will, Brownfields that Might, and Brownfields that Won't.

A. Brownfields that Aren't

The first category refers to existing sites where functioning, small-scale industries are located and have contamination within. While these sites are not brownfields per se, they may very well be orphaned in the future. For example, local automotive repair shops may be contributing to contamination of sites and surrounding

distances from the urban core. As a result, low-density metro counties have witnessed explosive job and housing growth in recent years while activity in high-density counties has been limited.”).

164. See HEALTH EFFECTS INSTITUTE—ASBESTOS RESEARCH, *ASBESTOS IN PUBLIC AND COMMERCIAL BUILDINGS: A LITERATURE REVIEW AND SYNTHESIS OF CURRENT KNOWLEDGE*, 1-10 to 1-11 (1991) (Table 1) (cited in STEVEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 12,13 (1993) (footnotes omitted)); B.T. Mossman et al., *Asbestos: Scientific Developments and Implications for Public Policy*, 247 *SCI.* 294, 299 (1990) (arguing that, while regulations are essentially beneficial, there are certain areas where they are counterproductive).

165. *But see*, *United States v. Ottatti & Goss*, 900 F.2d 429 (1st Cir. 1990) (balancing the potential risk of harm to children resulting from contaminated soil, against the economic cost of cleanup).

neighbors because of lead and solvents in its paints, or improper disposal of the contaminants used in automobiles, such as oil, transmission fluid, and coolant. Moreover, local dry cleaners that have reduced perc¹⁶⁶ from their processes may still be faced with contamination in their establishments. While not orphaned, businesses occupying these sites may be financially unable to afford the necessary cleanups. Should the strict and unforgiving liability of CERCLA that we have used in the past also be used to decimate these businesses, or is there another solution?

These small-scale businesses are quite important in terms of improving the quality (such as it is) of urban life. On the other hand, the responsibility for maintaining a safe environment lies with all of us. In light of these two contradictory issues, I propose that such sites be classified as brownfields and that they be allowed to obtain funds for cleanup from the damage awards collected in cases such as *6,000 Parcels*. In exchange for having the site cleaned up, the business would be contractually bound to the adopting community group to eliminate and replace certain practices with environmentally safe methods designated by the community group. This may entail the purchase of new equipment, which would be financed with the help of the community group. The community group might then be able to direct more patrons to the business to provide financial rewards for participation in such a cleanup effort.

B. Brownfields that Will

This category includes the small number of sites that are ideally situated, and where the contamination is minor, and the potential for profit is high. Redevelopment of these sites is almost certain.

166. See NEIGHBORHOOD CLEANERS ASSOCIATION INTERNATIONAL, DRYCLEANING OWNER/MANAGER AND OPERATOR TRAINING AND CERTIFICATION MANUAL 14 (June 1999) [hereinafter "TRAINING AND CERTIFICATION MANUAL"] (copy kindly provided to author by Community French Cleaners, 114 Lexington Avenue, New York, N.Y.). "Perc" or perchloroethylene is "the solvent of choice for about 80% of the drycleaners nationwide.;" E-mail from Wayne Tusa, President, Environmental Risk & Loss Control, Inc., to author (Aug. 29, 2000) (on file with author) (stating perc is "'pollutant of the year' and political considerations may have a more significant impact on the selection of a remedy").

This situation may be a result of outside factors, such as the re-routing of a transportation artery, creation of a specific empowerment zone, re-zoning, or any number of changes in the political climate. Community groups must be aware of any changes in the environment that will cause a brownfield site to become commercially viable so as to incorporate all, or an economically reasonable portion of, cleanup funds already spent into the site's purchase price. This portion of the funds could be returned to the neighborhood in the form of community redevelopment projects.

C. Brownfields that Might

This class of brownfields includes those sites that contain moderate amounts of contamination, but due to economic burdens, are avoided because developers prefer to seek out greenfield sites. These are sites where tax credits, covenants not to sue,¹⁶⁷ comfort letters,¹⁶⁸ and creative leasing/purchasing options¹⁶⁹ may tip the scales in favor of development. In order to effectively advocate for a specific site, community groups must be aware of the site's potential development viability and of its contamination. Community groups would advocate changes in city infrastructure

167. See MARK S. DENNISON, *BROWNFIELDS REDEVELOPMENT: PROGRAMS AND STRATEGIES FOR REHABILITATING CONTAMINATED REAL ESTATE* 161 (1998).

This covenant prevents the state from taking any civil or administrative action against the brownfields developer/owner for any liability regarding existing contamination. Covenants not to sue, or other written assurances, must be recorded into the chain of title and run with the land to put owners and purchasers on notice of the status of brownfields sites. This could create some measure of certainty in transactions involving brownfields sites.

Id.

168. *Id.* ("These letters appear to be a promising and flexible tool. The EPA can send a letter stating the status of the site under consideration. While not as effective as a covenant not to sue, these letters can at least provide some level of assurance to potential investors."). *Id.*

169. *Id.* ("Another tactic recommended by the EPA is to forego an immediate purchase in favor of entering into a lease with an option to purchase. The prospective purchaser would remain a tenant while the site is being cleaned up . . . and then exercise the option to purchase only after the cleanup is completed."). *Id.*

and zoning which would be beneficial to the re-development of the site.

Although the community group's watch over cleanups would be on a day-to-day basis, the site's cleanup would commence independently. Concern over cleanup ability is a source of contention among community and business groups. Divorcing this facet from the process allows a more amicable relationship between businesses and grass roots organizations, both of which are essential to the revitalization of brownfields.

D. Brownfields that Won't

The final category of Brownfields refers to sites that, at the present time, are an impractical size, are situated in a poor location, or are affected by a combination of other factors, which make the parcel economically non-viable. Community groups must be creative in imagining a use for the parcel to allow it to once again contribute to the community. Cleanups would be performed to return the parcel to a residential standard, in keeping with the goal of providing property with as many options for use as possible for future generations.

CONCLUSION

A parcel, which is valueless today, may not be so tomorrow. Thirty years ago the Soho district in lower Manhattan was a dreary industrial area. Today it is home to some of the most fashionable locations in Manhattan. Cities like New York are living organisms and are subject to dramatic changes. It is our responsibility to leave our children with as many options for land use as possible.

When considering this complex legal and political anomaly, I realize that the amount of insight and dedication currently devoted to providing solutions for the brownfields crisis is truly extraordinary. It is my hope that the observations in this writing may contribute, in some small way, toward the creation of a sensitive and intelligent resolution of the complex brownfields dilemma. In adversity may lay buried a significant and transformative wisdom. For it has been said, "sweet are the uses of adversity, Which like the toad, ugly and venomous, Wears yet a precious jewel in his head; And this is our life, exempt from public

haunt, Finds tongues in trees, books in the running brooks,
Sermons in stones, and good in everything."¹⁷⁰

170. WILLIAM SHAKESPEARE, *AS YOU LIKE IT*, act 2, sc.1.

