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## **Brownfield Redevelopment Legislation: Too Little, But Never too Late**

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# BROWNFIELD REDEVELOPMENT LEGISLATION: TOO LITTLE, BUT NEVER TOO LATE

*Lynn Singband*

## INTRODUCTION

Private developers, even those innocent of contributing by action or relationship to the release or threatened release of a hazardous substance, face potential liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>1</sup> and similar state statutes, such as the Spill Compensation and Control Act of New Jersey (Spill Act).<sup>2</sup> Under CERCLA and the Spill Act, liability may potentially attach to a developer as the owner or operator of a contaminated or potentially contaminated facility, or as an arranger for transport or transporter of hazardous substances.<sup>3</sup> Many environmentalists, community leaders, business people, and developers assert that this potential liability contributes to the abandonment of contaminated property, otherwise known as 'brown-fields'.<sup>4</sup> As a result, the federal and many state governments have

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1. 42 U.S.C. §§ 9601-9675.

2. N.J. STAT. ANN. 58:10-23(g)c.

3. § 107(a) of CERCLA lists the potentially responsible parties facing liability. N.J. STAT. ANN. 58:10-23.11g(c) is the parallel section under NJ law.

4. The definition of brownfield under CERCLA is "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." 42 U.S.C.A. § 9601 note (B) (including exceptions for facilities subject to a planned or ongoing cleanup under CERCLA, facilities on or proposed for addition to the National Priorities List, facilities subject to some administrative or court order pursuant to CERCLA or another environmental provision, and more). Included in the definition are sites that are contaminated by petroleum or a petroleum product excluded from the definition of hazardous substance under CERCLA if deemed of relatively low

enacted legislation designed to protect such private developers from strict, joint, and several liability, under CERCLA and the Spill Act, as part of their effort to cleanup and redevelop brownfields.

Brownfield revitalization statutes that focus on limiting developers' liability ignore other considerations pertinent to a decision of where to build. In addition to potential liability, developers will consider cost, business opportunity, and the area's overall suitability when choosing a site.<sup>5</sup> By ignoring these other factors, legislative attempts to redevelop brownfields are unlikely to have a significant impact on brownfield redevelopment. The state and federal legislatures should reform the statutes so as to account for the potentially high costs (both financial and otherwise) involved in cleaning brownfields, as well as to reduce the threat to the public health and safety and to the environment. As part of this endeavor, state and federal governments need to provide adequate financial incentives to innocent developers, and the federal government needs to set clear cleanup standards sufficient to protect public health and safety, and the environment.<sup>6</sup>

This article offers an assessment of the likelihood that the amendments to CERCLA, codified as the Brownfields Revitalization and Environmental Restoration Act, and the New Jersey Brownfield and Contaminated Site Remediation Act, will encourage private innocent developers to perform cleanups of brownfield sites in a manner that is both mindful of human health and safety, and protective of the environment.<sup>7</sup> The article highlights New Jersey because New Jer-

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risk and for which there is no "viable responsible party and which will assessed, investigated, or cleaned up by a person that is not potentially liable for cleaning up the site" and is not subject to any order under the Solid Waste Disposal Act [RCRA]. *Id.* at (D)(ii)(II)(aa-cc).

5. Robert H. Abrams, *Superfund and the Evolution of Brownfields*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 265, 277-87 (1997) (citing various reasons for development of greenfields).

6. In this article the term "innocent" developer or owner refers to those people who did not contribute, through action or relationship, to the contamination of a site.

7. Cleanup includes anything acceptable under the NJ law, including use of institutional/engineering controls. *See* N.J. STAT. ANN. 58:10B-1 (defining remedial action as "those actions taken at a site or offsite . . . as may be required by the department, including

sey was one of the first states to pass brownfields legislation; it is the most densely populated state, which makes development pressure in the state enormous; and its legislation is a good example of a typical response to brownfields.<sup>8</sup>

Part I of the article explains how the brownfield problem developed, and specifically, how CERCLA and the Spill Act contributed to an explosion in the number of brownfield sites. Part II reviews the legislative response of New Jersey, and the federal government to brownfields. This section describes the limited liability and funding provisions of CERCLA and the New Jersey Brownfield and Contaminated Site Remediation Act. Part III comments on the potential for these legislative responses to increase brownfield redevelopment by considering three issues: liability, cost, and cleanup standards. This section concludes that current brownfield revitalization statutes will do little to increase brownfield redevelopment because they focus on limited liability rather than on cost issues and public and environmental health and safety. The conclusion proposes a brownfield revitalization program modeled on educational loan repayment programs, encouraging the desired behavior by paying to get it.

### I. PROBLEM: CREATION OF BROWNFIELDS

In enacting CERCLA, Congress hoped to facilitate the cleanup of hazardous substances under a polluter-pay principle.<sup>9</sup> As a result, CERCLA classifies virtually anyone who touches contaminated property or its contaminant, as strictly, jointly, and severally liable

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the removal, treatment, containment, transportation, securing, or other engineering or treatment measures . . . designed to ensure that any discharged contaminant at the site or that has migrated or is migrating from the site, is remediated in compliance with the applicable health risk or environmental standards”).

8. John M. McGahren & Jeffrey P. LaJava, *Brownfield Redevelopment in the Garden State*, 15 SPG NAT. RESOURCES & ENV'T 224, 224 (2001).

9. Christine Kolodij Carver, *Brownfields Blues*, 22 SETON HALL LEGIS. J. 241, 245 (1997).

for cleanup of the property.<sup>10</sup> The threat of CERCLA liability arguably caused, and continues to cause, the abandonment of many properties as potentially responsible parties choose to leave possibly contaminated property rather than face tremendous cleanup costs.<sup>11</sup> Properties remain abandoned because developers' fear state and federal liability attaching upon any contact with the property, even if that contact is minimal.<sup>12</sup> Developers reject the benefits brownfields offer, such as existing infrastructure and proximity to services, and instead, turn to greenfields<sup>13</sup> for their building needs.<sup>14</sup>

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10. This includes liability to the government and to private parties. See Abrams, *supra* note 5, at 269-73 (describing the vast reach of CERCLA in terms of sites and liable parties); CERCLA *supra* note 3 (listing potentially liable parties).

11. John M. Scagnelli, *Brownfields Redevelopment: Is There a Need for Additional Legal Incentives?*, 16 No. 5 ENVTL. COMPLIANCE & LITIG. STRATEGY 1 (Oct. 2000); Judith Evans, *Cleaning Up the Nation's 'Brownfields': Critics Want Some Assurances Industrial Sites Aren't Repolluted*, WASH. POST, November 25, 1995, Real Estate, at E01; ABRAMS, *supra* note 5, at 276-77 (arguing that CERCLA isn't such a deterrent).

12. Tony Freemantle, *Brownfields Law Will Funnel Money to Houston to Clean Polluted Sites*, HOUSTON CHRONICLE, January 12, 2002, at 33 ("Daunted by the cost of cleaning the sites, and by the potential liabilities, developers tend to look instead to the suburbs and outlying areas for projects."); *Residential Brownfields Redevelopment: An Idea Whose Time Has Come?*, available at [http://www.blsj.com/blsj/home\\_buyers/growthplans.cfm](http://www.blsj.com/blsj/home_buyers/growthplans.cfm) (last viewed Aug. 6, 2003) ("the major impediments to the redevelopment of contaminated properties have been the potential liability for cleanup, property damage and personal injury claims associated with the contamination, inflexible or uncertain cleanup standards, cumbersome governmental procedures for obtaining cleanup approval and costs.").

13. "Greenfield sites are usually located on the periphery of a built-up area. Their defining characteristic is that they are previously unused land, in the sense that they have not been home to non-agricultural commerce or industry." Abrams, *supra* note 5, at 273; see also Scagnelli, *supra* note 11.

14. JOHN S. APPLGATE, JAN G. LAITOS, & CELIA CAMPBELL-MOHN, *THE REGULATION OF TOXIC SUBSTANCES AND HAZARDOUS*

For any number of reasons parties reject the option of cleaning brownfields and redeveloping them for residential, commercial, or even industrial use, and instead favor development in the suburbs and in commercial and industrial parks.<sup>15</sup> Brownfields are typically located in urban areas, and abandonment of brownfields has contributed to the degradation of many urban neighborhoods, often populated by low-income minority groups.<sup>16</sup> The properties sit empty and ugly, their liability threat and cleanup costs deterring the arrival of new businesses that would offer jobs and economic revitalization to the community.<sup>17</sup> Development in the suburbs deprives urban areas, while costing the state significant sums, by depleting open space and requiring the addition or expansion of infrastructure like roads, water, power, and sewer systems, to accommodate the new development.<sup>18</sup> Recognizing the potential for brownfields to meet development needs, without expanding developed areas or causing further harm to urban areas and their residents, state and federal legislatures have attempted to establish incentive programs designed to encourage brownfield reuse and redevelopment.

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WASTES 1026 (Foundation Press 2000). *But see* Joel B. Eisen, *Brownfields of Dreams?: Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883, 891-92 (1996) (explaining that flight to greenfields occurred before enactment of CERCLA in 1980).

15. Edwin Chen, *The Nation 'Brownfield' Cleanup Law Signed by Bush Land*, L.A. TIMES, January 12, 2002, at A12 (quoting President Bush talking about developers' fear of endless litigation and resulting development farther outward leaving cities empty); Freemantle, *supra* note 12; Abrams, *supra* note 5, at 269-73 (citing economics as the cause for development of greenfields rather than redevelopment of brownfields).

16. Eisen, *supra* note 14, at 891 (explaining that brownfield sites are concentrated in "aging, predominantly minority and lower-income neighborhoods").

17. Eisen, *supra* note 14, at 893-95; McGahren & LeJava, *supra* note 8.

18. Eisen, *supra* note 14, at 895-97.

## II. SOLUTION: STATE AND FEDERAL LEGISLATION LIMITING CLEANUP LIABILITY

The federal government and many state governments have passed legislation that limits the cleanup liability of certain parties who come in contact with brownfields. Instead of being bound by one absolute cleanup standard, current brownfield legislation allows parties to perform a lesser cleanup determined by land use and other factors. Often, the legislative acts also provide funding for assessment, investigation, and cleanup of brownfields.<sup>19</sup> For example, in January, 2002, President Bush signed into law amendments to CERCLA.<sup>20</sup> These amendments clarify who is eligible for limited liability, and expand the financial resources available to people willing to cleanup brownfields. Coupled with protection from state liability under the Spill Act, and the Environmental Cleanup Responsibility Act provided by the New Jersey Brownfield and Contaminated Site Remediation Act, innocent developers finally have the liability protection viewed by many to be critical in encouraging redevelopment of brownfields. However, it remains unclear if this is enough to solve the brownfields problem.

### A. *New Jersey's Response to Brownfields*

In 1976, New Jersey enacted the Spill Act.<sup>21</sup> The Spill Act holds that any person who is in any way connected to the discharge of hazardous substances, or to the contaminated property upon which the hazardous substance was released, can be held strictly, jointly, and severally liable for all cleanup and removal costs.<sup>22</sup> Under the original Spill Act, innocent developers interested in contaminated properties had to perform the cleanup, and either pay for it themselves or try to bring a contribution action against previous owners or operators.<sup>23</sup>

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19. *E.g.*, N.J. STAT. ANN. 58:10B(4-7).

20. Brownfields Revitalization Act, Pub.L. 107-118.

21. N.J. STAT. ANN. 58:10-23.g.c.

22. McGahren & LeJava, *supra* note 8, at 225. If the state Department of Environmental Protection performed the cleanup, the state could recover three times the cost of the cleanup from the responsible party.

23. *Id.*

In 1983, the state legislature passed the Environmental Cleanup Responsibility Act (ECRA). ECRA requires that upon the transfer or closing of property, the owner or operator must remediate the land as a condition of transfer or cessation of operation.<sup>24</sup> In an attempt to accomplish the hoped for cleanups of contaminated properties that the Spill Act and ECRA failed to accomplish, the state legislature approved an amendment to ECRA called the Industrial Site Recovery Act (ISRA) in 1993. ISRA established an exemption from liability for “persons who lack knowledge of a pre-existing discharge, despite the performance of a site review . . .”<sup>25</sup> Understandably, this did little to increase the number of cleanups, as virtually any site review would result in knowledge of contamination.<sup>26</sup>

Pursuant to authority granted by ISRA, the New Jersey Department of Environmental Protection (NJDEP) initiated operation of its Voluntary Cleanup Program (VCP). The VCP allows any party to voluntarily remediate “non-priority contaminated sites that pose no immediate threat to human health or the environment.”<sup>27</sup> The first step in the VCP process is for the party conducting the cleanup to enter into a Memorandum of Agreement (MOA) with the NJDEP. The MOA establishes the scope of the cleanup, and allows for flexibility in scheduling the various aspects of the cleanup.<sup>28</sup> Once the party completes remedial activities at the site, the NJDEP issues a No Further Action Letter (NFA) to the party.<sup>29</sup> An NFA letter indicates that the state approves the completed remediation, and does not foresee the need for additional remediation.<sup>30</sup> When the department

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24. See generally Norman W. Spindel, *N.J. Environmental Liability – From Innocence to Enlightenment*, 13 No. 11 ENVTL. COMPLIANCE & LITIG. STRATEGY 7 (1998).

25. *Id.*

26. *Id.*

27. VOLUNTARY CLEANUP PROGRAM, *SRP Voluntary Cleanup*, at <http://www.state.nj.us/dep/srp/cas/volclean/>.

28. N.J. ADMIN. CODE tit. 7, § 26C-2.2, 3 (2002).

29. N.J. ADMIN. CODE tit. 7, § 26C-2.6 (2002). The statute defines a no further action letter as a “written determination . . . that . . . there are no discharged contaminants present at the site . . . or that any discharged contaminants present at the site . . . have been remediated in accordance with applicable remediation regulations.” N.J. STAT. ANN. 8:10B-1, Definitions (2002).

30. N.J. ADMIN. CODE tit. 7, § 26C-2.6 (2002).

issues an NFA letter, it also issues a covenant not to sue.<sup>31</sup> The terms of the covenant not to sue are consistent with the conditions and limitations of the NFA letter, and remain effective as long as those conditions and limitations are met.<sup>32</sup> A covenant not to sue includes a release, for the person performing the cleanup, from all civil liability to the State to perform any additional remediation or cleanup, and a requirement to maintain any institutional/engineering controls where applicable.<sup>33</sup>

The VCP went a long way toward providing developers with an incentive to touch brownfields. The MOA defined their cleanup liability, and if the developer performed the agreed upon cleanup, the state issued an NFA letter upon which the developer could rely as protection from further liability. The VCP could only provide so much encouragement though. Anyone who touched a brownfield was still subject to reopener provisions in the NFA letter, and to federal liability.<sup>34</sup> In 1998, in an attempt to close the state liability loophole, the state legislature ratified the New Jersey Brownfield and Contaminated Site Remediation Act, the state statute that defines

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31. *Id.*; N.J. STAT. ANN. 58:10B-13.1. "A party liable under the Spill Act is not eligible for a covenant not to sue." Spindel, *supra* note 24, at 7. "Dischargers and property owners and operators remain forever liable for site contamination. However, persons who acquire property after a discharge occurs may obtain protection against state-imposed civil liability after a cleanup is completed and against private third-party liability upon commencement of site remediation. The actual protection to be realized by property purchasers in the future for pre-acquisition discharges will be a function of the scope and extent of cleanup performed by the purchaser." *Id.*

32. N.J. STAT. ANN. 58:10B-13.1(a) (including a revocation clause for failure to sustain institutional or engineering controls).

33. Developers of property in qualified cities will get protection from 3<sup>rd</sup> party costs if they did not cause the past contamination and they have cleaned the site in accordance with DEP regulations. SITE REUSE OPPORTUNITIES AND CLEANUP TOOLS, *SRP Brownfields*, at [http://www.state.nj.us/dep/srp/brownfields/site\\_reuse.htm](http://www.state.nj.us/dep/srp/brownfields/site_reuse.htm) (last visited Aug. 6, 2003).

34. *See, e.g.* N.J. STAT. ANN. 58:10B-13(f) (requiring additional remediation if engineering controls are "no longer protective of public health, safety, or the environment"); N.J. ADMIN. CODE tit. 7, § 26C-2.6 (2002).

what liability exposure parties performing a cleanup have, what the cleanup standards are, and what funding is available.<sup>35</sup>

### B. *The Federal Response*

In 1980, Congress enacted the original Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in an effort to identify, investigate, and remediate contaminated sites, and in order to provide a source of funding for cleanup of these sites. Unlike previous environmental statutes, CERCLA addresses past action and requires a response, in part, to avoid future harm caused by the release of hazardous substances. One of CERCLA's most controversial provisions is the imposition of strict, joint, and several, liability on a party deemed "responsible" for the contamination of a site.<sup>36</sup> An oft-heard critique of CERCLA blames this enormous threat of liability for the abandonment of contaminated properties that then become classified as brownfield sites.<sup>37</sup>

The federal government has attempted to respond to the brownfields issue in a variety of ways, including limiting liability exposure under CERCLA. Most recently, President Bush signed into law a bill entitled the Brownfields Revitalization and Environmental Restoration Act of 2001.<sup>38</sup> This law attempts to encourage redevelopment of brownfields by expanding the categories of people eligible for limited liability under CERCLA in exchange for performing a cleanup, and by offering more financial assistance for remediation plans.

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35. N.J. STAT. ANN. 58:10B-1 *et seq.* (codifying the VCP to a large degree).

36. The term responsible is used loosely as a responsible party under CERCLA need not have actually contributed to the contamination of the site. CERCLA, *supra* note 3 and accompanying text. Also, CERCLA does not explicitly impose strict, joint and several liability. The courts have interpreted liability to be such. APPLGATE, *et. al.*, *supra* note 14, at 870.

37. *See supra* notes 11-18, and accompanying text.

38. Pub. L. No. 107-118 (2002).

### C. *Legislative Detail*

#### i. *Liability Exceptions*

The CERCLA amendments provide for three new categories of property owners who escape liability if a series of conditions are met.<sup>39</sup> The first category is the owner of land in danger of contamination by a hazardous substance from a contiguous property, which is not owned by that person. The contiguous property owner is omitted from the category of owner or operator if they did not cause the contamination, and cannot be potentially liable for response costs through a familial, contract, corporate, or financial relationship. They also must have conducted an appropriate inquiry, and have had no reason to know the property was contaminated. The second category, the “bona fide prospective purchaser,” consists of anyone who fails to meet the requirement of having conducted an appropriate inquiry upon acquisition of the property.<sup>40</sup> To obtain future liability protection,<sup>41</sup> the bona fide prospective purchaser must have acquired the property after enactment of these amendments; all disposal of hazardous material on the site must have occurred before his acquisition; and the purchaser must not be affiliated with any potentially liable person.<sup>42</sup> The final category is the innocent landowner. This is a party who had no reason to know of the contamination, as demonstrated by having conducted an appropriate inquiry.<sup>43</sup>

In addition, the CERCLA amendments prevent any enforcement action in the case of a release at an eligible response site<sup>44</sup> if a re-

39. 42 U.S.C.A. § 9607(q)(1)(A) (2002).

40. *Id.* at (C).

41. The EPA may “issue an assurance that no enforcement action under this Act will be initiated against” such a person, and may “grant [such] a person . . . protection against a cost recovery or contribution action.” 42 U.S.C.A. § 9607 (q)(3).

42. 42 U.S.C.A. § 9601(a)(40).

43. 42 U.S.C.A. § 9601 sec. 223.

44. An eligible response site includes a site the President determines, on a site by site basis and after consultation with the State, appropriate for liability limitations that will protect human health and the environment and promote economic development or facilitate the creation of, preservation of, or addition of green spaces, unless the site may be listed on the National Priorities List, has un-

sponse action is being conducted or was completed, and the response action is in compliance with a State program.<sup>45</sup> A State response program must involve response actions that protect human health and the environment in accordance with federal and state law.<sup>46</sup>

Under the New Jersey brownfields redevelopment law, anyone who performs a remedial action in compliance with the rules and regulations of the NJDEP is eligible for an NFA letter and a covenant not to sue.<sup>47</sup> Parties liable for the contamination of the property under state or federal law<sup>48</sup> are not eligible for a covenant not to sue

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dergone a preliminary assessment or site inspection by the President, or warrants particular consideration. 42 U.S.C.A. § 9601(41).

45. 42 U.S.C.A. § 9628(b) (listing exceptions including imminent and substantial endangerment to public health or welfare or the environment and additional response actions are necessary to prevent or limit the release).

46. A state response program must include the following elements: “timely survey and inventory of brownfield sites in the state; oversight and enforcement authorities or other mechanisms, and resources, that are adequate to ensure that a response action will protect human health and the environment and be conducted in accordance with applicable Federal and State law.” 42 U.S.C.A. § 9628(a)(2).

47. N.J. STAT. ANN. 58:10B-2(c), 58:10B-13.1(a) (explaining that once a NFA letter is issued a covenant not to sue will also be issued). *See supra* notes 27-33, and accompanying text. If the property was acquired prior to Sept. 14, 1993, the owner of the property on which there has been a discharge obtains liability protection if the person acquired the property after the discharge; at the time of acquisition the person did not know about the discharge; the person is not in any way responsible for the discharge or hazardous substance; and the person gave notice of the discharge upon discovery. Lack of knowledge is established by performing an appropriate inquiry into the previous ownership and use of the property according to generally accepted good and customary standards. N.J. STAT. ANN. 58:10-23.11g(d)(5)

48. This group includes “any person who is liable for cleanup and removal costs pursuant to subsection c. of section 8 of P.L. 1976, c. 141 . . . and who does not have a defense to liability pursuant to subsection d. of that section.” N.J. STAT. ANN. 58:10B-13.1(e).

even if they have an NFA letter, unless they have a defense to liability.<sup>49</sup>

## ii. *Requirements*

While both the federal legislation and New Jersey's legislation list a series of requirements with which a property owner or developer must comply to qualify for limited liability, neither, as the following description shows, offers specifics as to exactly what a cleanup entails. The legislation uses broad and ambiguous terms such as reasonable steps,<sup>50</sup> and protection of public health and safety and the environment.<sup>51</sup>

Under the CERCLA amendments, all three categories of persons eligible for limited liability must take reasonable steps to stop any

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49. N.J. STAT. ANN. 58:10B-13.1(e). The defenses to liability now also include the developer who meets the following requirements: acquired the property after the discharge and on or after Sept. 14, 1993; at the time of acquisition the person did not know about the discharge; the person is not in any way responsible for the discharge; and the person gave notice of the discharge upon discovery. Lack of knowledge is established by performing an appropriate inquiry into the previous ownership and use of the property through performance of a preliminary assessment, and site investigation, in accordance with department rules and regulations. If applicable, the person must also meet the following conditions: acquired the property after the discharge, which was discovered upon acquisition through appropriate inquiry; performed an approved remediation or relied on a no further action letter previously issued and established and maintained all required engineering and institutional controls. If the person receives a no further action letter, or relies on one previously issued, she isn't liable for any further remediation including any changes in a remediation standard if the remediation was for the entire site and the hazardous substance was discharged before she acquired the property. A person who complies with a previously issued no further action letter gets no liability protection for any discharge that occurred between the time the no further action letter was issued and the time the person acquired the property. N.J. STAT. ANN. 58:10-23.11g(d)(2)(a)-(e).

50. See 42 U.S.C.A. § 9607(q).

51. N.J. STAT. ANN. 58:10B-2(b).

continuing release, prevent any future release, and prevent or limit human, environmental, or natural resource exposure to any hazardous substance on the property. They must also cooperate by providing access to persons authorized to conduct a response action,<sup>52</sup> and remaining in compliance with any requests for information, requirements for notice, and land use restrictions.<sup>53</sup> Finally, at the time of acquisition, all eligible persons must have conducted an appropriate inquiry into the state of the property.<sup>54</sup> The federal act instructs the EPA to establish standards and practices to clarify what constitutes an appropriate inquiry into the state of the property.<sup>55</sup>

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52. The Prospective Purchaser and Windfall Lien section exempts a bona fide purchaser from liability for a release or threatened release if he “does not impede the performance of a response action or natural resource restoration.” Such property, however, is subject to lien if there are unrecovered response costs incurred by the United States. 42 U.S.C.A. § 9607(r) (assuming certain conditions are met).

53. 42 U.S.C.A. § 9601 sec. 223.

54. *Id.*

55. 42 U.S.C.A. § 9601. There are different requirements for property bought before May 31, 1997. In setting the standards EPA should include: the results of an inquiry by an environmental professional; interviews with relevant people in order to determine the likelihood of contamination at the site; review of historical documents to determine previous uses of the property; searches for recorded environmental liens; reviews of all government environmental records; visual inspection of the property; specialized knowledge of the developer; relationship of the purchase price to the value of the property if uncontaminated; readily available information about the property; the obviousness of contamination; and, the ability to detect contamination by investigation. Until EPA issues regulations governing what constitutes an appropriate inquiry the statute requires owners of property to comply with the Phase I environmental site assessment in accordance with the American Society for Testing and Materials. 42 U.S.C.A. § 9601(36)(B)(iv)(II). Currently, private developers need only conduct a site inspection and title search that reveals no basis for further investigations. 42 U.S.C.A. § 9601(36)(B)(i). The bona fide prospective purchaser must have made all appropriate inquiries into the previous ownership and use of the site in accordance with “generally accepted good commercial and customary standards and practices.”

The federal statute does not define what an owner must do to satisfy the requirement of reasonable steps to stop or prevent the release of hazardous substances on the site. According to one interpretation of the legislative history, appropriate care involves something similar to removal actions, as opposed to remedial actions.<sup>56</sup> It is possible that all an owner would have to do is notify the government of the contamination, and erect or maintain signs or other barriers.<sup>57</sup>

Under the New Jersey Brownfield and Contaminated Site Remediation Act, developers of brownfields must remediate the discharge in accordance with an NJDEP oversight document executed prior to acquisition of the property,<sup>58</sup> and must adhere to cleanup standards developed by the NJDEP that minimize the threat to public health and safety and the environment.<sup>59</sup> In setting the standards, the department should consider in no particular order: the location of the property, the property's surroundings, the intended use of the property, and the surrounding ambient conditions.<sup>60</sup> The statute further instructs the department to identify the risks associated with a contaminant, and determine whether exposure to that contaminant will increase the incidence of adverse health effects in humans.<sup>61</sup> Developers using the property in a way other than for residential use may

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56. Larry Schnapf, *Superfund Revisions of 2002*, DAILY ENVIRONMENT, February 7, 2002, at B-1.

57. *Id.*

58. N.J. STAT. ANN. 58:10-23.11g(5)(f)(4).

59. N.J. STAT. ANN. 58:10B-2(a) ("The department shall "adopt rules and regulations establishing criteria and minimum standards necessary for the submission, evaluation and approval of plans or results of preliminary assessments, site investigations, remedial investigations, and remedial action work plans and for the implementation thereof"); 58:10B-2(b) (variations are allowed if it would be as protective of human health, safety, and the environment); N.J. ADMIN. CODE tit. 7, § 26E-6, Remedial Action (2002).

60. N.J. STAT. ANN. 58:10B-12(a). The statute recognizes three levels of land use, unrestricted use, limited restricted use, and restricted use, and each one coincides with a different set of cleanup standards. *Id.* at 58:10B-12.

61. N.J. STAT. ANN. 58:10B-12(d) (including cancer risk allowance of an additional one in one million for carcinogens and a limit on the Hazard Index for any given effect not to exceed one for non-carcinogens)

employ institutional or engineering controls as part of the remediation plan.<sup>62</sup> When engineering controls are used, the department may require additional remediation if the engineering controls no longer protect public health and safety or the environment.<sup>63</sup> The department may allow a party to use an alternate remediation standard, if it is consistent with EPA exposure guidelines, and protects public health and safety and the environment.<sup>64</sup> The department may also amend the remediation standards to maintain the health risk standards established by the statute, but not to establish a more protective health risk standard.<sup>65</sup> A party may be compelled to comply with a different remediation standard only if the difference between the new remediation standard and the old one differs by an order of magnitude.<sup>66</sup>

### iii. Funding

The CERCLA amendments give the President the authority to grant financial assistance in the cleanup of brownfields where doing so will protect human health and the environment, promote economic development, and lead to the creation of recreational open

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62. Engineering controls include any “mechanism to contain or stabilize contamination or ensure the effectiveness of a remedial action.” Institutional controls include “a mechanism used to limit human activities at or near a contaminated site, or to ensure the effectiveness of the remedial action over time, when contaminants remain at a contaminated site in level or concentrations above the applicable remediation standard that would allow unrestricted use of that property.” N.J. STAT. ANN. 58:10B-1. *See also* N.J. STAT. ANN. 58:10B-13 (indicating special conditions imposed on use of engineering and institutional controls); *and Residential Brownfields Redevelopment An Idea Whose Time Has Come?*, available at [http://www.blsj.com/blsj/home\\_buyers/growthplans.cfm](http://www.blsj.com/blsj/home_buyers/growthplans.cfm) (last viewed Aug. 6, 2003) (explaining that engineering and institutional controls must be reviewed periodically).

63. N.J. STAT. ANN. 58:10B-13(f); *See Technical Requirements*, available at [http://www.state.nj.us/dep/srp/brownfields/site\\_reuse.html](http://www.state.nj.us/dep/srp/brownfields/site_reuse.html) (last viewed Aug. 6, 2003).

64. N.J. STAT. ANN. 58:10B-12(f).

65. *Id.* at 12(l).

66. *Id.* at 12(j).

space or use of the land for nonprofit purposes.<sup>67</sup> The President may also establish a program that provides grants to eligible entities (government entities and Indian tribes)<sup>68</sup> so that they may create a revolving loan program to provide assistance for the remediation of brownfield sites to qualified parties (site owners, site developers, and others).<sup>69</sup> The President's grants to eligible entities for capitalization of a revolving loan fund may not exceed \$1,000,000 per eligible entity, though additional grants may be awarded.<sup>70</sup> No part of a loan from the revolving loan fund (capitalized by federal funding) may be used to cover a response cost at a brownfield site, for which the recipient is potentially liable under CERCLA or any federal law.<sup>71</sup> The money can be used for investigation and identification of the extent of contamination, design and performance of a response action, or monitoring of a natural resource.<sup>72</sup> Any grant or loan made pursuant to this section of the statute requires inclusion of an agreement requiring that the recipient comply with all federal and state law and "ensure that the cleanup protects human health and the environment."<sup>73</sup>

People in New Jersey may take advantage of this federal funding through the Hazardous Discharge Site Remediation Fund. Parties who voluntarily undertake cleanup of a brownfield site may request

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67. 42 U.S.C.A. § 9601(k)(C). The statute directs the following considerations in distributing funding to eligible entities or nonprofits: to the extent the funding is used redevelop the land for recreational open space or other nonprofit purposes; to the extent that the funding will meet the needs of the community which can't otherwise offer funding for environmental remediation; to the extent the money will facilitate the use or reuse of existing infrastructure; and other similar factors.

68. 42 U.S.C.A. § 9604 (k)(1).

69. *Id.* at (3)(B).

70. *Id.* at (3)(A)(i-ii) and (4)(A)(ii). Grants of \$1,000,000 may be added to in years following the year of the initial grant upon consideration of the number of sites and number of communities addressed by the grant, the demand from other entities not yet recipients of grant money, and the demonstrated ability of the recipient to use the money to enhance remediation. *Id.* at (4)(A)(ii)(I-IV).

71. *Id.* at (4)(B)(i).

72. *Id.* at (4)(B)(ii).

73. *Id.* at (9)(B).

financial assistance to conduct the cleanup from the Hazardous Discharge Site Remediation Fund.<sup>74</sup> The party may qualify for a loan for the cost of remediation up to a cumulative amount of \$1,000,000 per year.<sup>75</sup> An award of money from the NJDEP carries a variety of administrative requirements such as submission of reports to the NJDEP indicating that the recipient is spending the money as intended, a provision of access to the site for inspection purposes, and payment of a fee for receipt of the funds.<sup>76</sup>

In addition to having access to funding streams, any developer in New Jersey can enter into a redevelopment agreement with the state.<sup>77</sup> A redevelopment agreement allows for reimbursement of 75% of cleanup costs. To qualify, the developer cannot be liable under the Spill Act for the cleanup, and must enter into an MOA with the NJDEP.<sup>78</sup> The state and the developer can only enter into such agreement if the potential state tax revenues from the redevelopment project will be in excess of the amount needed to reimburse the developer.<sup>79</sup>

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74. N.J. STAT. ANN. 58:10B-6(10)(c). The program provides funds for preliminary assessment of suspected contaminated sites, investigation to collect and evaluate data about the environmental contamination of a site, remedial investigation to examine contamination and the problems associated with it, and remedial action to design cleanups of contaminated sites. New Jersey Economic Development Authority, *NJEDA Announces Seven New Grants to Municipalities for Environmental Cleanups*, Press Release, at [http://www.njeda.com/pr\\_070501.html](http://www.njeda.com/pr_070501.html) (July 5, 2001). At least 10% of the money in the remediation fund shall be given as financial assistance to people who volunteer to perform the cleanup of hazardous substances on a site. N.J. STAT. ANN. 58:10B-6(4).

75. N.J. STAT. ANN. 58:10B-6(b); *Site Reuse Opportunities and Cleanup Tools*, available at [http://www.state.nj.us/dep/srp/brownfields/site\\_reuse.html](http://www.state.nj.us/dep/srp/brownfields/site_reuse.html) (last viewed Aug. 6, 2003).

76. N.J. STAT. ANN. 58:10B-8, 9.

77. N.J. STAT. ANN. 58:10B-27 (stating the state cannot enter into a redevelopment agreement with a developer liable under 58:10-23.11g for contamination of the site).

78. N.J. STAT. ANN. 58:10B-27; 58:10B-28(b)(2) (MOA requirement).

79. N.J. STAT. ANN. 58:10B-27.

## III. IS THE SOLUTION SUFFICIENT?

Under New Jersey law and federal law, a release from liability is contingent on performance of some remedial action, and a demonstration that the party bears no potential liability for the contamination.<sup>80</sup> While there are hundreds of thousands of brownfield sites around the country, the number of developers interested in such abandoned industrial properties, which lack any potential liability for the discharge and who are willing to undertake cleanup with the promise of limited liability, is both finite and small. Considering the remaining burdens associated with the redevelopment of a brownfield site discussed below, it appears unlikely, that this small group of developers can do any more than make a nominal dent toward reducing the number of abandoned brownfields.

A. *False Sense of Security: 'Limited Liability' is a Misnomer*

Under New Jersey law, liability protection does not extend to any future discharge, and does not release the party from future compliance with the laws and regulations, including any changes to remediation standards.<sup>81</sup> Furthermore, it does not release the developer from third party liability.<sup>82</sup> CERCLA also says nothing about third party liability or liability under a state statute like the Spill Act. Compliance with a state remedial program, especially if approved by the EPA, will likely protect a party from CERCLA liability under the new amendments,<sup>83</sup> unless there is an indication of imminent and substantial endangerment to the public health and welfare or the environment.<sup>84</sup> Such protection, however, hinges on presidential recognition of the site undergoing remediation as an eligible response site, which may be difficult to obtain.<sup>85</sup>

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80. *See supra* Part II.

81. *See supra* Part IIA, B; *see infra* note 97.

82. The statute gives no indication that a party who voluntarily performs a cleanup obtains third party liability protection.

83. *See supra* note 44, and accompanying text.

84. 62 Fed. Reg. 47,495 (1997).

85. *See supra* note 44-46, and accompanying text.

B. *Ambiguous Cleanup Standards: No One Benefits*

Much of the brownfield redevelopment legislation remains vague and ambiguous. The New Jersey statute, for example, requires a land-use based cleanup plan designed to minimize the threat to public health and safety and to the environment, but offers no guidance for the requisite level of cleanup beyond a base health and safety risk standard.<sup>86</sup> The CERCLA amendments do not define what constitutes reasonable steps to stop or prevent a release, or threatened release, of hazardous substances. The amendments also do not clearly state that performance of a cleanup pursuant to an approved state remedial program satisfies the reasonable steps and appropriate inquiry requirements. Furthermore, the statute allows the administration to designate those response sites, undergoing a cleanup pursuant to a state remedial program, which are eligible for federal liability protection on a case-by-case basis, but does not provide baseline requirements for state programs.

Some argue that this flexibility in cleanup standards is good because it allows developers to work with the state to set a cleanup level that makes sense in light of the property's planned use. Others argue that any mistakes in such a decision will be borne by the community through health risk and potential costs of cleanup if the standard is deemed inadequate in the future.<sup>87</sup> Flexibility, thus, transfers the cleanup burden and health risk to the community, which will then attempt to shift the responsibility back to the developer through negotiations over the cleanup plan. This happens because once the developer completes the required remedial action, the state will offer the developer an assurance that no further liability will attach by issuing an NFA letter and a covenant not to sue.<sup>88</sup> Then, if any future cleanup is required, the community has to pay the additional cleanup costs. The community also assumes the health risks

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86. *See supra* note 61, and accompanying text.

87. *Compare* Eisen, *supra* note 14, with Robert Hersh & Kris Wenstedt, *Out of Site Out of Mind: The Problem of Institutional Controls*, 2 RACE POVERTY & THE ENVIRONMENT 15 (2001).

88. *See supra* Part IIIA for discussion of potential future liability; *see also* N.J. STAT. ANN. 58:10B-13 ("no person ... shall be liable for the cost of any additional remediation that may be required by a subsequent adoption by the department of a more stringent remediation standard for a particular contaminant").

that may accompany a lower level cleanup, but are as of yet unknown. Some statutes and regulations attempt to protect local communities by requiring the developer to negotiate its cleanup plan with the community. This compromise, however, undermines the original benefit of flexibility by imposing additional costs on the developer. These costs include the time and money involved in negotiating a cleanup plan with additional parties, and the potential additional cleanup costs imposed by a community unwilling to assume any health risks, even those which are unknown. By imposing a baseline cleanup that assures public health and safety and protects the environment, and also considers the planned land use and surrounding conditions, the state can simultaneously reassure the community and promise the developer limited liability upon completion of the agreed upon cleanup.

The state will benefit from a baseline cleanup as well. Current cleanup standards are exceptionally complicated. They operate on a case-by-case basis, allowing the state to issue variances to accommodate developers who claim that the standard set by the law and/or regulation is unnecessarily stringent. Government, at all levels, must maintain a range of expertise sufficient to evaluate the potentially innumerable cleanup plans. This places an additional burden on a public enforcement system already overburdened and under funded. It also further burdens the community, which will inevitably attempt to fill the enforcement gap through private enforcement actions. Limited funding for Superfund and CERCLA helped contribute to the creation of brownfields. Placing additional burdens on a poorly funded system will only result in haphazard enforcement, with the already suffering community bearing the health and financial consequences. Having a baseline cleanup level provides a floor against which, at the very least, any cleanup can be evaluated. This alleviates the need for site-specific expertise and lessens the enforcement burden on the community.

### C. *Where's the Savings? Potential for High Costs Despite Limited Liability*

#### i. *Financial Burden*

The presumed incentive to develop brownfields is the ability to acquire well-situated inexpensive, albeit contaminated, property. The guarantee of limited liability in exchange for a defined cleanup reduces the potential costs associated with cleanup, and is essential to

encourage brownfield redevelopment. Limited liability is assured by the state issuing the developer and NFA letter upon completion of the agreed remedial action. The underlying assumption of this process is that the developer will participate because he will achieve cost savings by eliminating potential litigation over liability and minimizing cleanup costs. However, nothing indicates that cleanup of a brownfield site pursuant to amended CERCLA and the New Jersey Brownfield and Contaminated Site Remediation Act will entail anything less than what CERCLA or the Spill Act have always required.

After negotiating a cleanup plan with the state or community, the developer may find that either, or both, will demand no less than the maximum possible cleanup. Since many brownfields are located in urban areas, and many cities are pushing for repopulation of cities in response to urban sprawl and related environmental concerns (such as pollution and loss of open space), it is more than possible that a brownfield will be located in a mixed-use area. Even if the developer plans to use the brownfield for industrial purposes, its proximity to residences, schools, hospitals, or even businesses, may mean that minimal cleanup is no longer possible. Even if the cleanup standard is purported to be lower, that does not necessarily translate into cost savings. Implementation of institutional or engineering controls can be costly on their own, and may be more so because of continuing maintenance requirements.<sup>89</sup> Additionally, much of the available financing underwriting brownfield redevelopment cannot be used for institutional and engineering controls.<sup>90</sup> As a result, developers cannot assume that cleanup of a brownfield today will cost any less than it would have prior to enactment of state and federal brownfields redevelopment statutes.

Furthermore, brownfield redevelopment involves other costs in addition to cleanup costs.<sup>91</sup> Redevelopment of a brownfield rather than a greenfield carries the potential for significantly higher costs in land purchase, demolition and removal of debris, taxes, insurance, zoning approvals, community relations, and labor costs.<sup>92</sup> Parties are saddled with numerous administrative costs associated with filing

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89. *Residential Brownfields Redevelopment An Idea Whose Time Has Come?*, available at [http://www.blsj.com/blsj/home\\_buyers/growthplans.cfm](http://www.blsj.com/blsj/home_buyers/growthplans.cfm) (last viewed Aug. 6, 2003).

90. *Id.*

91. See Adams, *supra* note 5, at 277-87.

92. *Id.*

for an MOA, submitting reports and proof of cleanup, and requesting an NFA letter and covenant not to sue. Redevelopment of brownfields also involves significant government oversight, which reduces flexibility and freedom in development decision-making. This is not the mere purchase and development of a piece of property. Its status as a contaminated piece of property infuses it with a number of additional burdens. These burdens may not be any greater than the normal administrative requirements associated with any attempt to develop a piece of property, but that will not be ascertainable until the developer has already chosen to become involved with the property, at which point it becomes less cost effective to withdraw.

Finally, the developer cannot disregard the potential for litigation merely because the statute indicates limited liability if the developer satisfies the remediation plan and adheres to the conditions of the NFA letter. Someone will likely find a reason to sue, and the NFA letter and covenant not to sue are not guarantees of limited liability. Both include reopener clauses, increasing the odds of future litigation especially if a scientific study discloses some new threat or the potential for further discharge exists. At best, the presumed cost savings appear illusory.

#### ii. *Limited Financing*

Available funding for the private developer is limited. The CERCLA amendments provide no direct funding to private developers. In New Jersey, private developers can access federal funding through state revolving loan programs like the Hazardous Discharge Site Remediation Fund. New Jersey also offers a reimbursement plan, but it covers only up to 75% of the total remediation costs, and the expected tax revenue must exceed the reimbursement.<sup>93</sup> In order to obtain reimbursement, a party must enter into a redevelopment agreement with the state, and must then apply for reimbursement.<sup>94</sup>

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93. These costs include those involved in assessment, site investigation, remedial investigation, and remedial action. N.J. STAT. ANN. 58:10B-1.

94. N.J. STAT. ANN. 58:10B-28. Applications for reimbursement are approved if the costs pertain to an area subject to the redevelopment agreement, the developer entered into an MOA regarding the remediation of contamination on the site of the redevelopment project with the NJDEP after entering into the redevelopment agreement

The Commissioner of Commerce and Economic Development and the State Treasurer have sole discretion in entering into redevelopment agreements.<sup>95</sup> The redevelopment agreement regulates the reimbursement plan, including the amount, the frequency of payments, and the length of time over which reimbursement will be paid. The occupancy rate of the building or work area, located on the brownfield, determines the percentage of the reimbursement payment. Considering the various limitations on, and requirements for, acquiring a redevelopment agreement the state will likely find few people eligible for a redevelopment agreement, and therefore, for reimbursement of remediation costs. Certainly, developers should apply for a redevelopment agreement, but they should also recognize that the odds of qualifying are slim.

Even those who qualify for reimbursement do not have it easy. Reimbursement occurs after outlay of the remediation costs, for which a developer may only receive loans of up to \$1,000,000 a year. That amount may not cover the cleanup costs in a year. Reimbursement only covers 75% of the costs, and the periodic payment is contingent on building occupancy and tax revenues. A developer cannot plan for the future without projecting revenue, but such projections cannot be done without knowledge of building occupancy. This puts enormous, and unrealistic, pressure on a developer in entering lease agreements, and other contracts, in order to insure sufficient occupancy. It also impedes growth because it limits the devel-

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and is in compliance with the MOA, and the costs of remediation are reasonable. *Id.*

95. N.J. STAT. ANN. 58:10B-27. They should consider “the economic feasibility of the redevelopment project; the extent of economic and related social distress in the municipality and the area to be affected by the redevelopment project; the degree to which the redevelopment project will advance State, regional and local development and planning strategies; the likelihood that the redevelopment project shall, upon completion, be capable of generating new tax revenue [in excess of the reimbursement amount]; the relationship of the redevelopment project to a comprehensive local development strategy, including other major projects undertaken within the municipality; the need of the redevelopment agreement to the viability of the redevelopment project; and the degree to which the redevelopment project enhances and promotes job creation and economic development.” *Id.*

oper's appetite for risk. If anything changes in the business, the reimbursement rate may be cut, and the developer must assume the loan repayments. Long term planning for the business becomes a virtual impossibility. Only large developers, with other projects available to provide a cushion, can afford to redevelop brownfields under these conditions. This raises issues for the community regarding the trustworthiness of such parties in negotiating for a cleanup level sufficiently cognizant of health and safety concerns, and adequately protective of the environment.<sup>96</sup>

### iii. *Resale burden*

For the developer who chooses to assume these burdens, an additional consideration is the potential resale value. Often the interest in real property stems from its value as an investment. However, the liability protection available to the original developer of a brownfield is limited, and those limitations extend to future purchasers.<sup>97</sup> Furthermore, any subsequent purchaser of a redeveloped brownfield is bound by the NFA letter, and therefore must maintain institutional and engineering controls, and abide by any other conditions of the NFA letter. This affects the resale value of brownfields. While the original developer already covered most of the cleanup costs and administrative costs, the subsequent purchaser assumes government oversight, maintenance costs, and other responsibilities with acquisition of a redeveloped brownfield. These are costs that do not accompany the purchase of a greenfield.

#### a. *Are Misplaced Priorities to Blame?*

Critics of brownfields redevelopment legislation highlight the fact that the statutes allow for lower cleanup standards in their negative

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96. William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 *W. & MARY ENVIRONMENTAL L. & POL'Y REV.* 1 (1997).

97. This liability protection does not extend to liability for any discharge occurring after issuance of the NFA letter, for any off-site discharge, for post-acquisition discharge, for any negligent action, for failure to comply with the law and regulations or NFA letter, or for failure to maintain institutional or engineering controls. N.J. STAT. ANN. 58:10-23.11(g)(d)(2)(e).

assessments. They argue that lower cleanup standards threaten human health and safety and the environment. There are two general responses to such an argument. One response is that some cleanup is better than no cleanup. The second response is that no one knows as of yet if these cleanups present a threat. One commentator has suggested a third response, that our priorities are misplaced.<sup>98</sup> According to this commentator, the problem is not that lower cleanup standards are permitted, but that there is no baseline cleanup set and the legislation does not reflect sufficient concern regarding brownfields and their elimination.

i. *Federal Abdication of Responsibility*

One of the fundamental ways in which our priorities are misplaced is demonstrated by the federal government's abdication of responsibility for accomplishing redevelopment of brownfields. The federal government has turned to the states for a solution. While this article cannot address the many federalism issues inherent in environmental regulation, it is important to note that in relying on states to address the brownfields problem, the federal government has neglected its responsibility. Instead of setting a national standard, the federal government has established a system where each state can set its own cleanup standards, and then choose to seek federal government approval. Although the federal government will evaluate a state plan in light of statutorily enumerated criteria, the state still applies its standards on a case-by-case basis, leaving them with significant discretion.

Individual states are likely to weigh their development needs more heavily than environmental impact or human health and safety, which are intangible, difficult to measure, and lack a politically powerful base. Furthermore, states have an incentive to opt for the lowest cleanup level in order to meet their housing, employment, and other developmental needs. Consider New Jersey, which as the most densely populated state, has tremendous housing and employment demands. Powerful developers can capitalize on these demands in

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98. Kirsten H. Engel, *Brownfield Initiatives and Environmental Justice: Second-class Cleanups or Market-based Equity?*, 13 J. NATURAL RESOURCES & ENVIRONMENTAL L. 317 (1998).

their negotiations with the state to determine an appropriate cleanup plan.<sup>99</sup> Such developers will have the upper hand in negotiations.

State administrators are further disadvantaged by the inability to maintain a level of expertise regarding every potential contaminant and the state-of-the-art cleanup technologies available. Since they must determine cleanup plans on a case-by-case basis, they will necessarily rely on developers to certify the adequacy and quality of a cleanup. This further cedes their position of power to developers who may not be trustworthy.<sup>100</sup> Developers have a profit motive that does not necessarily consider environmental harm or public health and safety. Even though many state statutes require developers to work with the community, unless the community has a united, powerful voice, the developer can easily run roughshod with the apparent blessing of the state government. The federal government's failure to be at the forefront of brownfield redevelopment has thus left resolution of the issue in the hands of private developers who are often motivated by profit incentives rather than by concern for the public's health and safety or the environment.

ii. *Less is Not More*

Even without outside influences like developers and state development needs, the emphasis which federal and state brownfield redevelopment legislation places on limited liability and cleanup standards set according to land use, results in the potential for a cleanup plan that requires minimal cleanup. Admittedly, the sites at issue involve significantly less contamination than those on the National Priorities List or those eligible for cleanup via the Superfund. However, what does it mean to say something is less contaminated? If something is contaminated, by definition it presents some threat. Removal of that threat should be the priority. Cleanup standards should be determined considering the aggregate effect rather than the effect in a single case. New Jersey is again a good example. New Jersey is densely populated and has significant development needs

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99. Eisen, *supra* note 14, at 887-88 (describing concerns over state oversight of voluntary cleanup plans including ability of developers to influence state regulators).

100. See generally William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 W. & MARY ENVIRONMENTAL L. & POL'Y REV. 1 (1997).

and numerous brownfield sites. New Jersey should not set cleanup plans on a case-by-case basis because all brownfields have a collective effect on the community in which they exist. If contamination is bad, it needs to be remedied, and it needs to be remedied completely.

Rather than emphasizing cleanup at any cost, brownfield redevelopment efforts should focus on insuring brownfield cleanup sufficient to protect human health and safety and the environment. A lack of knowledge regarding the threat posed by lesser cleanups seems a poor reason to lower standards. Brownfield redevelopment requires our attention, but not in a half-hearted effort that offers more in the way of good press rather than in tangible results. Until more is known, the right response is to do more, because failure to redevelop brownfields impacts our communities and nation in increasingly dramatic ways.

When developers choose open space, both in and out of the cities, instead of redeveloping brownfields, we lose our parks, fields, forests, and wetlands. This loss impacts wildlife and further threatens already fragile plant and animal species. Development of open spaces expands urban sprawl. Urban sprawl increases motor vehicle use, which in turn increases air pollution. Industrial development in greenfields not only increases air pollution in those areas, but also increases pollution in surrounding areas because as we have seen with the coal-powered power plants, air pollution does not stay in one place. Furthermore, rain brings the air pollution into our water sources, and impacts our available drinking water and marine life. Run-off and increased population, caused by the development of greenfields, further increases water pollution. Rather than address these issues piecemeal, we should start at the root, the failure to redevelop brownfields. The solution is to make the redevelopment of brownfields our priority, and to do so in a way that will actually attract people to use brownfields.

#### CONCLUSION: THROW MONEY AT THE PROBLEM

If brownfields redevelopment legislation, as currently formulated, is not the solution, then what is? The problem with current attempts to redevelop brownfields is the focus on limited liability rather than on any of the other reasons people choose not to redevelop brownfields. To the extent responsible parties cannot be brought to justice and made to pay for the cleanup, the government must step in and provide sufficient funding to overcome the cost benefit of building

on greenfields. New Jersey provides a starting point for developing such a funding scheme with its redevelopment agreement and reimbursement plan. However, New Jersey's plan disintegrates once the fine print is read and it becomes clear that few people will qualify for the program. While responsible parties should not be eligible for funding, and every effort should be made to hold them liable, parties who did not contribute through actions or relationships to the contamination of a site should receive every encouragement to redevelop a brownfield site.

Upon purchase of a brownfield, an innocent owner should enter into an agreement with the state that sets cleanup standards, at a minimum, at a level sufficient to insure protection of public health and safety and the environment in light of existing information and technology. The agreement should also provide state financing of the remedial action to the extent the action costs more than development of an equivalent greenfield. The federal government should fund state programs through grants as currently done under the amendments to CERCLA. The federal government should also set baseline cleanup standards with which compliance is required to receive federal funding and not leave it to states that will defer to private developers. States may, however, opt to increase the cleanup standards as they may with other environmental statutes like the Clean Water Act. If the developer maintains the property as required by the agreement, for the length of time it takes the state to recoup the costs in taxes plus a percentage set according to the current interest rate, the developer need not repay the state for the cleanup costs. If the developer sells the property before the state can recoup its costs, then like a loan repayment program, the developer must repay the state a percentage of the cleanup costs according to the number of years the property was held and the number of years needed for the state to recoup its costs. The owner remains liable for cleanup of any future discharges as provided for under current brownfields redevelopment legislation. The states and federal government should offer loan programs similar to those now offered under brownfields redevelopment legislation to cover the costs of such a cleanup.

Such a program encourages people to redevelop brownfields without assuming any more of a risk than they would assume in embarking on any development project. It also encourages developers to make a commitment to the community by offering an incentive to stay for a period of time, which will help revitalize urban communities. Finally, such a program encourages full and early cleanup. This proposal offers a way to respond adequately to continuing con-

cerns of developers and the need to redevelop brownfields without sacrificing public health and safety or the environment. Brownfields contribute to crime, unemployment, urban flight, urban sprawl, open space destruction, and pollution. Until we prioritize their redevelopment, the nation will suffer their far-reaching affects.

