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BROWNFIELDS AT 20:
A CRITICAL REEVALUATION

Joel B. Eisen*

I. INTRODUCTION

The revitalization of brownfields,¹ once a theory, is now an industry. This industry, however, is not yet mature. It has been only twenty years since Congress attempted to give prospective purchasers of real estate a defense to liability under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”),² and a little more than a decade since the majority of states began to embrace voluntary cleanup programs for abandoned or under-used sites.³ The ink is barely dry on the 2002 CERCLA amendment that promises to reduce the risk of federal liability for brownfields developers.⁴

¹ New Jersey’s definition of a brownfield is “[a]ny former or current commercial or industrial site that is currently vacant or underutilized and on which there has been, or there is suspected to have been, a discharge of a contaminant.” N.J. STAT. ANN. § 58:10B (West 2006).

² See Comprehensive Environmental Response, Compensation, & Liability Act of 1980, 42 U.S.C. § 9607(b) (2000); see also id. §§ 9601–9675; Susan Opp & Sarah Hollis, Contaminated Properties: History, Regulations, and Resources for Community Members, Univ. of Louisville Ctr. for Envtl. Pol’y & Mgmt., Practice Guide No. 9, at 6 (2005), http://cepm.louisville.edu/Pubs_WPapers/practiceguides/PG9.pdf (stating that “SARA [the Superfund Amendments and Reauthorization Act] added the innocent landowner defense, which sought to ease the liability on people who had inherited or purchased property without knowledge of potential contamination”).


Even in these relatively early days, brownfields remediation and reuse is almost universally viewed as a done deal—a major environmental success story.\textsuperscript{5} Many point to state cleanup programs that have processed thousands of sites successfully, and there are numerous high-profile stories of successful conversions of neglected sites to profitable reuse.\textsuperscript{6} Still, relatively little empirical work has been done to assess whether state and federal brownfields policies have been an unqualified success.\textsuperscript{7} Getting a handle on their value requires, among other things, accounting for the wide variety in state program features, the numbers of cases handled, and the types and numbers of results. It also requires looking longitudinally at a statistically significant sample of sites to see whether environmental problems develop or persist after a period of years.

The optimism about brownfields policies has considerable staying power, in part because it rests on a foundation of specific expectations about brownfields, their cleanup and reuse, and assumptions about the typical site and typical developer. These expectations relate to “the nature of brownfield properties; the expectations and behavior of public and private parties involved in the development, environmental, and financial risks; the importance of subsidies; and the investment climate of host communities.”\textsuperscript{8} In this Article, I term this foundation the “brownfields


\textsuperscript{6} Kris Wernstedt et al., \textit{The Brownfields Phenomenon: Much Ado About Something or the Timing of the Shrewd?} 4 (Resources for the Future, Discussion Paper 04-46, 2004), available at \url{http://www.rff.org/Documents/RFF-DP-04-46.pdf} [hereinafter Wernstedt et al., \textit{Brownfields Phenomenon}] (noting that “[i]f one compares the state of affairs vis-à-vis the redevelopment of brownfields today to that of 10 years ago, it is clear that federal and state promotion of brownfields has yielded numerous success stories of idled and underutilized contaminated properties that now house a variety of economic activities”); see also infra note 54 and accompanying text (discussing success stories in Rust Belt cities).

\textsuperscript{7} See David A. Dana, \textit{State Brownfields Programs as Laboratories of Democracy?}, 14 N.Y.U. ENVTL. L.J. 86, 86 (2005) (noting that “state brownfields programs represent a lost opportunity—the opportunity to empirically test different approaches to real property remediation”); Wernstedt et al., \textit{Brownfields Phenomenon}, supra note 6, at 4 (noting that “[t]he empirical literature on brownfields—a topic that cuts across many disciplines and scales and is open to a wide range of methodological approaches—remains undeveloped relative to its potential”).

\textsuperscript{8} Wernstedt et al., \textit{Brownfields Phenomenon}, supra note 6, at 4.
story,” and suggest that it is time for a more detailed analysis of this story after a decade of experience with brownfields remediation and reuse, and, as a consequence, a re-examination of whether brownfields programs meet their original goals, and whether those goals were the right ones.

Those involved in brownfields remediation pin many hopes on the process. They seek to discover and rehabilitate neglected sites, reverse the decay of urban cores, and, in some cases, link with smart growth strategies by slowing the march of development to suburban and exurban America. The parcel-by-parcel approach to brownfields remediation and reuse, however, cannot possibly guarantee all that. There are thousands of brownfields sites and each has a different experience.9 As a leading study pointed out, “[e]ach brownfield redevelopment decision can trigger a variety of concerns related to the long-term vision of a community, threats to public health and nature, economic livelihoods, social equity, and public participation.”10 The paradox of brownfields programs is that they may have considerable legitimacy when one looks at the successful remediation and reuse of individual parcels, but as a whole, the policies may or may not be contributing measurably to the long-term health of communities throughout the nation.

It is time to decide how nascent state programs could best promote a comprehensive approach to urban redevelopment. This in turn requires us to decide whether the assumptions about brownfields programs’ success are substantiated in practice. I am not at all suggesting that brownfields revitalization needs to end, yet, as I argue in this Article, the brownfields story is partly incorrect. Consider this recent summary: “Many of the premises [of brownfields policies] may have a factual base, while others may be rooted in unsubstantiated assertions of mixed quality or outright misunderstandings.”11 As a result of this partial breakdown of the story, it is time for a reorientation of brownfields law and policy that moves it toward a development-centered approach to brownfields, not one that caters specifically to developers.

In this Article, I will look at brownfields policies in one state, New Jersey, and suggest how to make the approach of brownfields remediation and reuse work better. It is time for a more detailed analysis of this story after a decade of experience with brownfields remediation and reuse, and, as a consequence, a re-examination of whether brownfields programs meet their original goals, and whether those goals were the right ones.

9. For an early but still relevant and important discussion of a number of different experiences, see generally EDITH M. PEPPER, NORTHEAST-MIDWEST INST., LESSONS FROM THE FIELD: UNLOCKING ECONOMIC POTENTIAL WITH AN ENVIRONMENTAL KEY (1997), http://www.nemw.org/lessons.htm.
10. Wernstedt et al., Brownfields Phenomenon, supra note 6, at 4.
11. Id.
revitalization more development-centered and less developer-centered. New Jersey’s program is worth examining for a number of reasons. First, it has processed a large number of sites. There are an estimated 10,000 brownfields sites in the state (though not all have commercial potential), and a number of developers proceeded successfully to cleanups using the state Memorandum of Agreement (“MOA”). In the state’s Voluntary Cleanup Program (“VCP”), a party who wants to remediate a site enters into an MOA with the state’s environmental agency, the Department of Environmental Protection (“NJDEP” or “DEP”). The MOA, as is typical for similar programs in other states, establishes the scope of assessment and remediation activities, including anything from preliminary assessment at the site to remedial actions and reuse of the site. New Jersey’s program is a typical one that allows all sites (not just those designated as brownfields) to enter into the VCP, but also has elements tailored specifically to brownfields, including a statewide task force and an “Office of Brownfield Reuse.”

There are some analyses and some limited empirical evidence.


14. Id.


17. See, e.g., Lynn Singband, Brownfield Redevelopment Legislation: Too Little, but Never Too Late, 14 FORDHAM ENVTL. L. REV. 313, 314–15 (2003) (analyzing New Jersey’s program “because New Jersey 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”).

about the program, as it was one of the earliest brownfields programs and has been in place for over a decade. New Jersey is also attempting to use second-generation approaches to improve the relationship of brownfields cleanups and urban redevelopment, most notably the Brownfields Development Area (“BDA”). In short, the brownfields program is maturing and growing, and well worth the analytical look.

Following a basic description of the New Jersey program, I will discuss two specific developments, the BDA initiative and the recent “Grace Period Rule,” that changed some aspects of the program. My aim is more modest than a full-scale re-evaluation of all brownfields programs (or indeed of the New Jersey program in its totality); instead I look at the experience within one program to assess whether there is movement toward the development-centered approach. I find that some developments in New Jersey are positive, notably the BDA’s approach to addressing multiple brownfield sites concurrently in the same location. On the other hand, the Grace Period Rule introduces the prospect for additional delay in cleanups that is unwarranted given the current program structure.

II. DRAWBACKS OF THE BROWNFIELDS STORY

The prevailing brownfields story has been repeated so often that it is essentially unchallenged. The story looks something like this: a developer, perhaps a hospital or university that has no prior experience with the environmental enforcement scheme, decides to look at a piece of abandoned or underused urban property, typically located in a declining Rust Belt city. While the abandoned property was most likely a site with a history of industrial uses (although, with its former owner out of the picture, it may be hard to tell), its primary attribute is that no one has touched it for the last decade or more. The site’s advantages are clear: it is large enough for development and located near railroads and other forms of transpor-
The abandoned site that had been previously used for manufacturing will become an apartment complex or a ballpark, and yield a bushel of economic benefits to the municipality.

The prospective developer, inexperienced with environmental enforcement, does not know where to start. It is afraid to contact the state environmental protection department because it fears the unknown. As much literature has explained, the developer may face potential liability as an owner or operator under CERCLA (or one of its state counterparts) as a result of taking ownership, or even by undertaking to clean up and reuse the property.22

In most cases, the story assumes that residual contamination is not all that serious—otherwise the site would have presumably attracted attention from state regulators who force site cleanups in state CERCLA-like programs.23 So, the future of the developer when it tackles an urban brownfields site is hardly a complete imponderable. The site might be more difficult to develop than its greenfield counterpart24 and presents the potential of environmental risk. The developer faces two possible outcomes, with one far more likely than the other. In the first scenario, the developer steps in with the aid of incentives that tip the scale in favor of taking on risk. It finds that the site is not all that contaminated and cleanup is therefore neither costly or difficult. It cleans up the site, utters the proverbial sigh of relief, gets a state’s signoff through some form of liability release, and moves on to build a Wal-Mart or ballpark. In the second (less likely) scenario, the site is tossed back into the enforcement hopper because a serious environmental problem is discovered.

21. See Opp & Hollis, supra note 2, at 1.
22. See Eisen, Brownfields of Dreams, supra note 3, at 898. This is somewhat internally inconsistent: it presumes that the developer has little knowledge of environmental matters but understands federal law well enough to know that if it becomes involved with the property then it faces liability.
23. See id. at 899–900.
It is the uncertainty about whether a given site is a scenario one site or a scenario two site that hampers remediation and reuse. The developer prepared a business case for its project which showed that if the environmental cost (a number plugged into the ubiquitous spreadsheet) becomes anything more than a de minimis amount—half a million dollars, a million, or even more—it will sink the profit of the development. Therefore, the developer, fearing the unknown, flees to the suburban greenfield location where things are much more predictable; there is no environmental remediation cost and the land cost is less, therefore the project cost is a known commodity. Moreover, the development is not subject to the vagaries of the urban political landscape. Starting at the pristine greenfield location, the developer can proceed with its development in a relatively short timeframe: one year, maybe two, but little more. The biotech research park is then open for operation, or the shopping mall with its trendy stores is turning out denim and dollars. The urban brownfield site remains undisturbed, awaiting a savvier, less risk-averse developer.

At the outset, then, the brownfields policymaker puts herself in the developer's shoes and asks, "Why would anyone run the risk associated with urban brownfields sites?" The "why," of course, is increasingly addressed by programs that come to the aid of developers, attempting to make it possible for them to assess the environmental risks on properties, clean them up if necessary, and then proceed to reuse, all in a streamlined fashion.

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25. Id. at 12–13.
26. See, e.g., id. at 3 (noting that “[g]reenfield sites (previously undeveloped properties) are usually in such higher demand areas, cost less per acre to develop, and do not involve as much risk and uncertainty for investors”).
27. This assumes the suburban or exurban site is not a brownfield. As a study by the group Resources for the Future explains, this may not be the case. See Wernstedt et al., Brownfields Phenomenon, supra note 6, at 7 (“Numerous brownfield sites can be found in mining areas and more generally throughout rural America.”).
28. In his comments at the signing of the 2002 CERCLA amendments, President George W. Bush stated:
   Many communities and entrepreneurs have sought to redevelop brownfields.
   Often they could not, either because of excessive regulation or because of
   the fear of endless litigation. As a consequence, small businesses and other
   employers have located elsewhere—pushing development farther and far-
   ther outward, taking jobs with them, and leaving cities empty.
29. See, e.g., VanLandingham et al., supra note 24, at 3 (noting that “[t]he situation changed in the 1990s as states passed laws and regulations including Voluntary
Thus, from the beginning, the foundation of brownfields law and policy has been developer-centered, not development-centered.\textsuperscript{30} Grounding revolutionary changes on liability protection for potential accidental and unforeseen victims of environmental liability enshrined the prominence of facilitating the real estate transaction at a brownfields site.\textsuperscript{31} New Jersey describes its brownfields remediation process as “user friendly”\textsuperscript{32} and, compared to CERCLA, claims that it is the height of responsiveness, not enforcement “hide the ball.” The developer voluntarily signs a contract with the state that specifies precisely what obligations it will undertake and what cleanup it will perform.\textsuperscript{33} Since the inception of brownfields remediation programs, there has been a sea of change in attitudes toward the remediation of contaminated sites. To the development community, the attitude change is a welcomed relief.

The result, not surprisingly, has been considerable interest in the brownfields revitalization process, and it is no wonder that there are many tools developed and sources available for pragmatic brownfields redevelopment. There is an array of sources for financing, even insurance (which, even though underused at present, has been developed in creative ways for brownfields redevelopment),\textsuperscript{34} and there are numerous guides to federal brownfields initiatives and state voluntary cleanup programs.\textsuperscript{35} Annual national

\textsuperscript{30} See Singband, supra note 17, at 315 (noting 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”).

\textsuperscript{31} In the “go-go” real estate development market of the 1990s, this message resonated deeply. See, e.g., Opp & Hollis, supra note 2, at 8 (noting that “[t]he booming economy of the late 90s undoubtedly also contributed to the increase in development projects of all kinds”).

\textsuperscript{32} N.J. Dep’t of Envtl. Prot., Voluntary Cleanup, supra note 13.


\textsuperscript{35} See, e.g., CHARLES BARTSCH ET AL., COMING CLEAN FOR ECONOMIC DEVELOPMENT: A RESOURCE BOOK ON ENVIRONMENTAL CLEANUP AND ECONOMIC DE-
brownfields conferences attract thousands of participants.\textsuperscript{36} New Jersey maintains a “site mart” that matches prospective developers and prospective sites, a kind of eBay for brownfield sites in New Jersey.\textsuperscript{37} The prevailing sense is that states are open for business when it comes to brownfields. Indeed, brownfields incentives are now one part of the increasing trend of localities offering incentives to attract real estate development.\textsuperscript{38}

The primary brownfields incentives, of course, are those offered by the voluntary cleanup programs now available in all but one state that provide road maps for developers to approach state environmental agencies or brownfields revitalization agencies (if they exist) and deal directly with the states.\textsuperscript{39} The new federal law pro-

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vides some shelter for a developer that engages with the state, reducing the risk (claimed to exist well over a decade ago) that the Environmental Protection Agency (“EPA”) will overfile and conclude that a cleanup completed successfully in a state program is not acceptable at the federal level. The EPA’s new “all appropriate inquiries” rule apparently ensures that if a developer follows procedures that are rapidly becoming widely accepted industry standards it should have little to fear from the EPA.

This brownfields story has led to certain basic trends in remediation and reuse. First and foremost, developers are treated as a monolithic group in most voluntary cleanup programs. Virtually anyone willing to tackle the remediation and reuse of a site can do so, with few exceptions. Because developers engage voluntarily with the state, they presumably lack culpability and, therefore, control the timing, sequencing, and even the comprehensiveness of remediation and reuse. The developer that takes the lead at a brownfield site dictates the terms of the cleanup and redevelopment strategy, otherwise it is assumed that it would not be worthwhile to proceed. The result is a level of trust unheard of in other contexts. The MOA or a similar document empowers the developer to clean up the site, and the state’s role is limited to that of overseer. This means that the remediation outcome is only as good as the state’s ability to verify the results.

What does the state get in return for ceding control? When a developer comes to the state, it presumably has alternatives, including the option of no action. Without a developer ready to take on the risk of developing a brownfield site (which is presumptively

40. See generally Eisen, Brownfields of Dreams, supra note 3.
41. See Opp & Hollis, supra note 2, at 7 (noting that “[t]his act works to limit ‘overfiling’ by the EPA when a cleanup occurs through a state program”).
42. See Standards and Practices for All Appropriate Inquiries, 40 C.F.R. § 312 (2005). The EPA’s “All Appropriate Inquiries” page is located at http://www.epa.gov/brownfields/regneg.htm. Some commentators have observed that this rule may not offer sufficient protection to brownfields developers. See, e.g., Strickland, supra note 4, at 790. At the very least, there is residual uncertainty. See Opp & Hollis, supra note 2, at 7 (“Because the Act is still recent, its full effect on the status of brownfields is not yet clear. While it does ease CERCLA liability and promote redevelopment of sites, the provisions are lengthy and will undoubtedly be modified as the EPA provides further guidance and new judicial decisions arise.”).
43. See Eisen, Brownfields of Dreams, supra note 3, at 965–70.
44. See id. at 1021.
45. See id. at 968–69.
deemed to be higher than that of a greenfield site even though it may not be), the brownfield site would remain fallow. In return for its streamlining of the environmental law scheme, the state receives a promise that the locality will see certain economic benefits once the property is back in use in its commercial, retail, residential, or other setting.46

This story, though appealing, may well turn out to be inaccurate in whole or part in many cases. Brownfields policies were put into place on the basis of considerable faith in the power of fear and the resulting need to stop punishing developers, not the strength of available data. On the whole, there is not as much knowledge about the brownfields revitalization process as originally thought in the 1980s and 1990s.47 There is a lack of satisfactory empirical evidence because, with roughly a decade of experience, studies of brownfields law and policy are just now starting to emerge.48

There are essentially two types of studies underway: (1) those involving problem characterization (how many brownfields sites are in a given state or locality; how many of these have commercial potential; and so forth);49 and (2) those developing a knowledge base of success stories that prospective developers can use to develop their own roadmaps for successful cleanups at their sites.50 The latter includes case studies of individual brownfields sites in Trenton,51 Worcester,52 Baltimore,53 and other ideal Rust Belt can-

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46. Wernstedt et al., Brownfields Phenomenon, supra note 6, at 10 (discussing the importance of economic benefits to brownfields redevelopment projects).

47. See id., at 4 (noting that empirical literature on brownfields remains undeveloped).

48. An intriguing proposal to spur more studies is set forth in Dana, supra note 7, at 86-87 (calling for “an amendment to the federal CERCLA statute that would limit liability for participants in brownfields cleanups in states that employ a system of standardized data-collection regarding the development, implementation, and outcomes of at least a significant sample of their approved brownfields cleanups”).

49. Wernstedt et al., Brownfields Phenomenon, supra note 6, at 5-6 (noting that “a small number of studies have relied on original surveys to systematically collect information on the scope of the brownfields problem”). The National Center for Neighborhood and Brownfields Redevelopment at Rutgers University has collected data on the number and attributes of mothballed brownfield sites. See generally Greenberg et al., Brownfields Redevelopment, supra note 18.

50. Wernstedt et al., Brownfields Phenomenon, supra note 6, at 5 (noting that “much of what we know about brownfields and the barriers to their redevelopment has come from case studies of individual redevelopment projects”).


52. The Northeast-Midwest Institute’s Lessons from the Field discusses the $200 million “Medical City” project that “involved cleaning up and reusing 24 acres of blighted downtown property, and which is expected to create 3,000 new jobs and have
didates for brownfields policies (as well as a number of others),54 where striking successes have been documented. Yet this anecdotal evidence of success, given the wide variety in approaches and results, is perhaps most useful as a process guide for other cities, not as a comprehensive justification of brownfields policies.55

Brownfields programs have not been studied in an overall systematic way,56 and it is possible that comprehensive studies would show that the vast majority of sites involve a win-win of successful remediation and benefits to the host community. Certainly those high-profile sites trumpeted by the EPA and the states are, in fact, places where benefits have materialized.57 Yet, the supporting data is just now emerging.58

Does this relative lack of certainty matter? If redevelopment potential is stymied by the fear of contamination at an urban site, a suburban site, or even an exurban site, that any remediation and reuse activity is better than the “no action” alternative. Yet just as the status quo may be preferable to environmentally damaging activities in other contexts,59 it may be so here as well, where the benefits of “no action” may outweigh the costs of increased human activity at a brownfields site.60

a total direct economic impact of $875 million within its first ten years of operation.” PEPPER, supra note 9, at ch. 1.


55. Wernstedt et al., Brownfields Phenomenon, supra note 6, at 3-4 (noting that “most brownfield efforts have taken a property-by-property approach that aims at supporting the highest and best use of individual properties,” but “[w]hether these [brownfield success stories] have helped to revitalize distressed areas and contribute to a more sustainable community is a more difficult question, however.”).

56. Id. at 1 (noting that “[u]nfortunately . . . the enthusiasm for brownfields reuse generally has not been matched by systematic, careful documentation of actual practice at a wide range of sites”); see also Dana, supra note 7, at 101 (noting that as of 2005, the “paucity of our knowledge about the actual results of state brownfields programs”).

57. See Brownfields Success Stories, supra note 54.

58. See generally Wernstedt et al., supra note 6, at 4-6 (discussing empirical studies conducted as of 2004 and their limitations).

59. The example I have in mind is the requirement in the National Environmental Policy Act to study the alternative of “no action” because it may turn out to be preferable to a federal agency’s chosen course of action. See 42 U.S.C.A. § 4332 (West 2000).

60. See, e.g., Dana, supra note 7, at 93–94.

One might argue that, regardless of the quality of a brownfields cleanup, and even if the quality is significantly lower than would be required under CER-CLA, some cleanup is better than no cleanup. All else being equal, perhaps
First, state programs are not limited to urban sites with potential for development. As a recent study explains, “[i]n theory, brownfields programs focus on sites in urban areas and VCPs focus on any site. The truth is that state programs often do not make such distinctions.”61 Urban sites’ perceived advantages, in terms of transportation, jobs, and so forth, turn out to be applicable to a much smaller number of brownfields sites than envisioned by the prevailing wisdom.62 More importantly, the promise of economic benefits through redevelopment is not a requirement for a developer’s entry into the voluntary cleanup process. Some states such as Michigan, New Jersey, and Pennsylvania63 attempt to make some connection between brownfields cleanups and redevelopment efforts (but even those states typically tie a brownfield designation to eligibility for funding64 or other state benefits,65 not to some cleanup is always better than no cleanup. But all else is not equal: before a brownfields cleanup, a site may well not be in use or may be only minimally in use, such that there are no or few contact points between site contamination and human beings. After a cleanup and redevelopment, a site may be the subject of intensive, daily use by a large number of people. In other words, while one effect of a brownfields cleanup may be to reduce the level of contamination, another effect may be to increase human exposure to the contamination on the site. To the extent that the second effect dominates the first, a brownfields cleanup may, putting other benefits from redevelopment aside, make matters worse. Some cleanup, in certain instances, may be worse than none.

Id.

61. Opp & Hollis, supra note 2, at 9.

62. Wernstedt et al., Brownfields Phenomenon, supra note 6, at 7. Nor are these sites necessarily the former industrial sites envisioned by the model. One recent study found that a minority of brownfield sites had “hosted light/heavy industry.” Id. (“Our environmental insurance survey of nearly 50 private developers of brownfield sites found that sites under redevelopment most commonly had hosted light/heavy industry (32%), mixed use (26%), commercial (22%), and residential (11%) activities.”).

63. VanLandingham et al., supra note 24, at 8 (“The states with the most active VCPs also tend to have special economic stimulus packages targeting brownfields, or to regions or locations that are likely to contain them. Michigan, for example, provides special incentives to its ‘Renaissance Zones;’ Pennsylvania has a ‘Special Industrial Areas’ cleanup standard and other states have targeted their federally designated Empowerment Zones or Enterprise Communities or their own state enterprise zones for brownfields incentives.”).

64. The New Jersey DEP works with the state’s Economic Development Authority to provide money from the Hazardous Discharge Site Remediation Fund for site remediation. Under state law, a developer that enters into a redevelopment agreement may potentially recoup up to seventy-five percent of her cleanup costs. See N.J. Dep’t of Envtl. Prot., Hazardous Discharge Site Remediation Fund, http://www.nj.gov/dep/srp/finance/hdsrcf/ (last visited Mar. 31, 2007); see also Martha N. Donovan, How to Deal with NJDEP Violations, METROPOLITAN CORP. COUNS., Apr. 2006, at 29, http://www.metrocorpcounsel.com/pdf/2006/April/29.pdf (noting that “[t]he New Jersey Commerce and Economic Growth Commission and the Depart-
eligibility to enter a VCP. VCPs, however, are not primarily concerned with the prospective developers’ motives. A developer that plans to mothball a site is just as eligible as one who plans a massive urban redevelopment project. Even where developers plan for urban growth, the promised economic benefits may fail to materialize. This is an area, of course, that has been studied extensively in urban policy literature and arose recently in Kelo v. City of New London, where Justice O’Connor, in dissent, opposed a taking by the city of New London in part because it was grounded on a redevelopment plan with hazy promises of future economic benefits.

The fear of environmental contamination and the high cost associated with remediation have proven less important to prospective brownfields redevelopers than previously thought. One study found that only eight percent of the cost of developing a brownfield site is attributable to the cost of environmental remediation. Another author observed that even after developers do some environmental assessments at brownfield sites, they still tend to overestimate the need for cleanup.

65. See, e.g., Opp & Hollis, supra note 2, at 9-10.
67. This phenomenon is discussed in Greenberg et al., Brownfields Redevelopment, supra note 18, at i (noting that “[o]nly anecdotal information exists . . . about the prevalence of the problem”).
68. 545 U.S. 469 (2005).
69. Id. at 495 (O’Connor, J., dissenting).
70. See Wernstedt et al., Brownfields Phenomenon, supra note 6, at 9 (“Recent work also has explored the economics of brownfields redevelopment, suggesting that contamination may not be as significant a constraint to property transactions as the prevailing sentiment of the 1980s and early 1990s suggested.”).
71. See Greenberg et al., Affordable Housing, supra note 12, at 518 (citing a study by the Council for Urban Economic Development [now the International Economic Development Council, or IEDC]).
timate the remaining environmental risk. More importantly, studies based on surveys of real estate developers found many reasons other than environmental risk that led developers to shun urban sites, including “basic real estate fundamentals.”

There are two sets of potential problems relating to treating developers as a monolithic group. First, a developer, unlike the “newbie” volunteer of the brownfields story, may not be so innocent. Consider two different but related possibilities. The developer, far from being unfamiliar with the environmental enforcement system, may in fact be quite savvy and manipulate the system by enrolling a less meritorious site in the state’s voluntary cleanup program (perhaps even one that should be subject to state environmental enforcement). While states are supposed to have checks in place to ensure this does not happen, there are instances where sites may fall through the cracks for one reason or another. There may not be the resources or political will for vigorous gatekeeping.

Second, the conduct of a cleanup can fall off the rails and come up far short of the one that we expect from an innocent developer. The cleanup program, of course, can encourage or discourage inadequate cleanups by its structure. A cleanup can take a long time under an MOA if a developer does not do what it promised to do, or if the cleanup takes longer than expected and the state does not devote enough oversight attention to it.

There is also a temporal element to this. A developer may attempt to conduct remediation in the right way, but it may later be discovered that it was not done correctly. This failure can be attributable to cleanup standards that are streamlined in voluntary cleanup programs, which is one of the program’s major attrac-

72. See VanLandingham et al., supra note 24, at 12 (noting that prospective brownfields developers “tend to exaggerate the project uncertainty that remains even after completion of a site assessment that meets the [American Society for Testing and Materials] ASTM standards”).

73. See Wernstedt et al., Brownfields Phenomenon, supra note 6, at 9 (finding that “basic real estate fundamentals often pose more significant obstacles to redevelopment of any previously used urban land than does contamination”).

74. See Dana, supra note 7, at 87 (noting that “brownfields programs are likely to be used to address even very seriously contaminated sites that are not already subject to a CERCLA cleanup”).

75. There are other possibilities; for example, differing results due to variations in the skill and competence of consultants hired to do cleanups. See Shari Shapiro, The Effectiveness of Pennsylvania’s Act 2: Are Good Mechanics Enough?, 24 Temp. Env’tl. L. & Tech. J. 441, 455 (2005).

76. Or perhaps a process of assessing the site that requires hasty judgments. See Greenberg, Editorial, supra note 38, at A74.
tions. These streamlined cleanup standards often allow developers to use “institutional controls,” the popular means of fencing, zoning controls, deed, or covenant restrictions that do not involve actual cleanups at the sites. It is conceivable that this harnessing of contamination (rather than an actual cleanup) could fail years later. This may be yet another indication that the program adopts

Environmental scientists working in state and local government may find brownfields cases placed at the top of their action list, with a demand for action in a matter of a few weeks or a month, rather than months or years. Environmental health scientists in companies will be pressed to develop and use monitoring equipment that provides quick and decisive information to investors.

Id. 77. Eisen, Brownfields of Dreams, supra note 3, at 933; see also Wernstedt et al., Brownfields Phenomenon, supra note 6, at 13 (observing that “the relative effectiveness of nonfinancial interventions—a change in regulatory requirements such as reducing cleanup standards or liability relief that releases ‘innocent’ parties at contaminated sites from long-term damage claims—may be even more critical to success of brownfields remediation and reuse”).

78. See Wernstedt et al., Brownfields Phenomenon, supra note 6, at 10. Cleanup approaches at many brownfield properties often rely on legal mechanisms referred to as “institutional controls”—such as zoning, property easements and covenants, and well drilling bans—to restrict property uses at a site with residual contamination. In our environmental insurance study, for example, 38% of the developers noted the use of one or more institutional controls, most commonly government controls such as zoning and permitting requirements.

Id. 79. This is an accepted means of dealing with brownfield sites in New Jersey:

There are several ways to comply with DEP’s cleanup standards and criteria. And, while permanent remedies are preferred, it is understood and recognized in New Jersey statutes that it does not always make sense to remove all contamination at a site. When a “cleanup” limits workers’ and residents’ exposure to contamination and is protective of human health and the environment, DEP can and has approved such remedial actions.


81. Enforcement of these restrictions down the line against subsequent landowners, largely a creature of real property law, can also prove difficult. See generally Andrea Ruiz-Esquide, The Uniform Environmental Covenants Act-An Environmental
a developer-centered approach that is not sufficiently protective of the environment.82

Experience with state voluntary cleanup programs may tell us that they need to be revised, and yet the early record has not frequently led to fine tuning of programs. New Jersey made some adjustments, so it is worth seeing whether the state critically examined the brownfields story and took additional steps to protect the environment.

III. NEW JERSEY’S VOLUNTARY CLEANUP PROGRAM:
TESTING THE BROWNFIELDS STORY

New Jersey’s VCP began in 1992, making it one of the oldest in the country.83 The program is governed by oversight rules available on the DEP’s website,84 and it allows developers flexibility to conduct remediation at their own schedule, which is a critical element in any brownfields or voluntary cleanup program.85 Additionally, the developer may terminate the MOA on its own if it so desires, and parties may select a partial investigation or cleanup without fear of penalties.86 Like other VCPs, not all contaminated sites qualify.87 Sites subject to the state superfund-like law, known as the “Spill Act,”88 or the federal CERCLA program are not eligible to take part in the VCP.89 Also, under the oversight rules, the


82. See Greenberg, Editorial, supra note 38, at A74.
83. N.J. Dep’t of Envtl. Prot., Voluntary Cleanup, supra note 13.
85. N.J. Dep’t of Envtl. Prot., Voluntary Cleanup, supra note 13; see also supra note 43 and accompanying text.
86. N.J. Dep’t of Envtl. Prot., Voluntary Cleanup, supra note 13.
87. Id.
89. See N.J. ADMIN. CODE § 7:26C-2.2.

If the Department, in the exercise of its enforcement discretion, chooses to allow a person who is not subject to the Industrial Site Recovery Act or the New Jersey Underground Storage of Hazardous Substances Act to conduct remediation at a known or suspected contaminated site or area/areas of concern at a site, which the Department has not scheduled for publicly funded
DEP may terminate an MOA if it establishes that a property is “heavily contaminated and possesses an immediate environmental concern.” In that case, the DEP conducts a cleanup using funds from the Spill Compensation Fund, New Jersey’s equivalent of the Superfund, and recovers the cost of the cleanup from the responsible party.

The VCP is not limited to brownfields sites. Indeed, the state says “the VCP has also dovetailed nicely within the department’s brownfields initiatives for providing a tool for easier and faster re-use of formerly contaminated facilities.” Subchapter Three of the DEP’s Oversight Rules provides the framework for conducting voluntary cleanups, known as the “Administrative Process for Voluntary Cleanups.” This subchapter identifies the general requirements for an MOA, the process to request the DEP’s oversight of the brownfields cleanup, and the procedures for termination of an MOA. It provides a one-step application for the entry into an MOA with the DEP and sets forth specific content requirements, including “the applicant shall conduct all remediation pursuant to the Technical Requirements for Site Remediation.” Thus, the cleanup standards are the same as for other contaminated sites. Under these rules, MOAs can be processed in one step. Once the department determines that an application is administratively complete, the MOA is in place.

The recent Grace Period Rule (“Rule”), promulgated on September 20, 2006, modifies the voluntary cleanup program oversight
The Rule was promulgated in response to a 1993 New Jersey statute, popularly known as the “Grace Period Law” (“GPL”), intended to allow those charged with “minor” violations of state environmental laws to fix them within a designated period of time (hence the name) without penalty. The Rule revised the DEP’s imposition of penalties for violations of a number of New Jersey’s enforcement laws. Specific grace periods, ranging from thirty to sixty days or more, are made available for specified violations deemed minor. Part of the Rule amends Subchapter Three. Under current law, the DEP may terminate an MOA in three different sets of circumstances: if the person responsible for conducting remediation has (1) “not made scheduled submissions to the department pursuant to the schedule set forth in the MOA application; (2) has failed to pay the department’s oversight cost; or (3) has failed to submit documents required by an [MOA] in accordance with the technical requirements.” The Rule adds that the termination of an MOA allows the DEP to “pursue an enforcement action against the responsible party for violations of any statute or implementing rule, conduct the remediation using public funds, and recover those costs from the responsible party or any other actions permitted under law.” Thus, the remediation of a site where an applicant had its MOA terminated is governed

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101. As the preamble explains:
   The Department of Environmental Protection hereby adopts amendments to the Department Oversight of the Remediation of Contaminated Sites Rules, N.J.A.C. 7:26C (Oversight Rules) to set forth penalties for violations of the Underground Storage Tank Rules, N.J.A.C. 7:14B (UST Rules), the Industrial Site Recovery Act Rules, N.J.A.C. 7:26B (ISRA Rules), the Oversight Rules, N.J.A.C. 7:26C, and the Technical Requirements for Site Remediation Rules (Technical Rules.), N.J.A.C. 7:26E, and identify these violations as either minor or non-minor for the purpose of providing grace periods in accordance with P.L. 1995, c. 296 (N.J.S.A. 13:1D-125 et seq.), commonly known as the Grace Period Law. The amendments to these rules set forth how the Department will respond to any violation identified as minor.
102. See id.
103. N.J. ADMIN. CODE § 7:26C-3.3(c).
104. Id. § 7:26C-3.3(c)5 (2006).
by an Administrative Consent Order, the familiar document mandating cleanup under the Spill Act.105

In purported compliance with the requirement of the GPL, the DEP also extended the period of time allowed to correct the three deficiencies that would ordinarily allow the DEP to terminate an MOA.106 The new rule reads as follows: “The department may provide the person responsible for conducting the remediation a period of time to correct the deficiency identified in (c)(1).i through iii, above, in order to achieve compliance with the memorandum of agreement and avoid termination of the memorandum of agreement pursuant to (c)(3) below.”107

While the DEP deems this comparable to the specific grace periods extended to responsible parties conducting cleanups under enforcement-driven laws, it clearly is not. For enforcement-driven laws, the new Rule provides tables and charts establishing the range of “minor” violations with specific grace periods and time limits. By contrast, the language “a period of time” is not defined in the new language in Subchapter three. It appears that a brownfield developer operating under an MOA could argue for an indefinite extension of time to complete a cleanup. The DEP’s comments on the Rule imply that the DEP will do everything it can to accommodate developers.108 Any action undertaken pursuant

105. See Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10 (West 2006); see also N.J. Dep’t of Envtl. Protection, Voluntary Cleanup, supra note 13.
106. N.J. ADMIN. CODE § 7:26C-3.3(c)3.
107. Id.

[T]his adoption amends the provision at N.J.A.C. 7:26C-3.3(c)2 to allow a volunteer remediating a site pursuant to an MOA a period of time to correct a deficiency in complying with the MOA prior to termination. This will further encourage voluntary remediation including the remediation of brownfields by giving the volunteer every possible opportunity to succeed in the remediation process. If the volunteer is deficient in complying with the terms of the MOA (e.g., fails to submit a document in accordance with the schedule that the volunteer submitted to the Department), the Department will notify the volunteer of the deficiency, and allow the volunteer time to correct the deficiency. During that time period, the Department encourages dialogue between the volunteer and the Department’s case manager to resolve any differences, thus fostering a more collegial relationship. This positive relationship and experience can only lead to more developers seeking to develop brownfield sites, thus promoting smart growth and the economic well being of the State.

Id. (emphasis added).
to an MOA properly could be viewed as “minor” under the terms of the Rule and subject to an extension of time.

This prospect for delay could be deleterious to the success of the program in the case of a developer who is not innocent, as the brownfields story assumes. The DEP’s staff prepared a “Vulnerability Assessment” in 2002,\(^{109}\) essentially a description of areas where the environmental programs administered by the state were not meeting legal requirements either because they were understaffed, underfunded, or simply overwhelmed. The DEP staff generated information about the VCP,\(^{110}\) which stated in part that seven percent of the sites with MOAs governing cleanups are “non-performers” because they are not meeting their legal obligations under their MOAs.\(^ {111}\) This figure is perhaps even more surprising when one considers that a number of sites with MOAs governing cleanups are residential real estate transactions where potential buyers are concerned with the condition of petroleum storage tanks. These tank cleanups are conducted with a “speedy turnaround,” the goal being to allow sellers “to present a ‘No Further Action Letter’ to buyers in time for settlement.”\(^ {112}\) Given the likelihood that most residential tank cleanups are done in short order, the seven percent non-performer figure is probably higher for developers remediating more typical brownfields sites.

There is reason for concern about the pace of cleanups undertaken under developers’ control. The DEP’s internal Vulnerability Assessment stated in part, “[t]here are 4921 active MOAs with an


\(^{110}\) See N.J. Dep’t of Envtl. Prot., Site Remediation & Waste Mgmt. Program, supra note 109. The final “Vulnerability Assessment” did not include the information about the VCP; the confidential internal assessment was later made available to the New Jersey chapter of PEER. See News Release, Inspector General, supra note 109; E-mail from Bill Wolfe, Director, N.J. PEER, to Joel B. Eisen, Professor of Law, University of Richmond School of Law (Sept. 22, 2006, 10:00:31 EST) (on file with author).

\(^{111}\) See N.J. Dep’t of Envtl. Prot., Site Remediation & Waste Mgmt. Program, supra note 109.

\(^{112}\) N.J. Dept. of Envtl. Prot., Voluntary Cleanup, supra note 13.
average age of 3.5 years.” The length of three and one half years is in and of itself fairly striking, being longer than the quick turnaround in the brownfields story. It is a sizeable fraction, roughly one-third to one-half, of the time period of the average CERCLA cleanup. Given that a number of sites handled by MOAs involve residential tank cleanups, it appears that other sites involve remediation periods beyond the three and one half year average. This is inconsistent with the brownfields story’s notion that the developer comes in, remediates quickly, and moves on. Without more empirical analysis, it is hard to discern the root cause of this problem. It may be that developers are addressing more seriously contaminated sites in the VCP when the sites should be handled elsewhere. It may also be that the state has every intention of handling a site quickly, but a developer delays the process.

The standards governing cleanups are the same in either case, so the primary difference between enforcement sites and those in the VCP inheres in allowing developers proceeding under MOAs to control the cleanups. If the developer controls the cleanup, there are fewer guarantees that it will be handled properly, and it is difficult for a state to discern whether the developer has followed the MOA’s terms. The three and one half year figure suggests that some developers may in fact fail to follow their MOA obliga-


114. See Jonathan Cannon, Adaptive Management in Superfund: Thinking Like a Contaminated Site, 13 N.Y.U. Envtl. L.J. 561, 592 (2005) (noting that “EPA has estimated the average time from proposal for listing on the NPL to completion of the remedial action at approximately eight years, but a recent study by Resources for the Future calculates the average instead at over eleven years”).

115. E-mail from Bill Wolfe, supra note 10 (stating that “[a]nd that 3.5 years is an AVERAGE—it includes lots of residential tank pulls, which can be done in weeks or months, not years.”).

116. Without a harder look at state records, this would be extremely difficult to assess. Yet that discerning analysis is most urgently needed. This trend is unfortunately all too common in brownfields law and policy. There is a dismaying tendency across the nation to evaluate state brownfields programs by relying on formal statutes and regulations, not by digging down to “[l]ess formal agency documents, such as written policies and memos, as well as any actual anecdotes or aggregate data regarding brownfields projects.” See Dana, supra note 7, at 101.


118. See, e.g., Amy Pilat McMorrow, Note, CERCLA Liability Redefined: An Analysis of the Small Business Liability Relief and Brownfields Revitalization Act and Its Impact on State Voluntary Cleanup Programs, 20 GA. St. U. L. Rev. 1087, 1120 (2004) (noting that “[e]ven if the cleanup is sufficient, varying degrees of site cleanliness throughout a city or state may become a monitoring burden for the EPA or state environmental agencies”).
In its response to comments on the draft Rule, the DEP acknowledged that “the department has found that all too often the volunteer chooses not to follow the terms of the MOA even though it is the volunteer that proposed them in the application.”

New Jersey also appears to be moving toward having more licensed consultants supervise brownfield cleanups without additional state oversight. As in other states where this is a model for remediation, this too adds to the prospect of a developer running amok.

A recent and notorious New Jersey case highlighted the potential disaster involved with allowing developers to control their own cleanups. It involved perhaps one of the worst possible nightmares for state regulators: residual toxic contamination at a day care center, which was brought to the entire state’s attention by sick children and front page articles in major newspapers. The “Kiddie Kollege” day care site was previously the location of a factory used for manufacturing thermometers and related instruments. Throughout the 1980s, the DEP monitored pollution at the site and oversaw hazards caused by mercury discharges. In 1994, the manufacturer ended its operations. Under New Jersey’s environmental transfer act (the Industrial Site Recovery Act, or “ISRA”), this should have triggered a cleanup of the mercury at the site. Instead the manufacturer, Accutherm, went bankrupt and failed to comply with ISRA’s requirements.


120. New Jersey instituted a “Cleanup Star” program, under which the DEP “will pre-qualify environmental consultants meeting rigorous education, experience and professional requirements as ‘Cleanup Stars.’” N.J. Dep’t of Envtl. Prot., Voluntary Cleanup, supra note 13. As the VCP web page indicates, “[t]hese ‘Cleanup Stars’ will be permitted to investigate and remediate certain low-priority sites and areas of concern with limited NJDEP oversight. NJDEP will strictly audit Cleanup Stars’ work to ensure regulatory compliance and protection of public health and the environment.” Id.


122. See News Release, Mercury-Laden Day Care, supra note 121.


124. See Sam Wood et al., supra note 121, at A01.
Various investigations were done at the site between 1994 and 1995. In 1996, the DEP requested that the EPA regional office perform an assessment of the property, which found “several small droplets of mercury were located on the floor of an area believed to be one of the production rooms.” In 1996, however, the site was deemed ineligible for a removal action conducted under CERCLA. The property was transferred to Navillus Group in 1997. In 2002, Jim Sullivan, Inc. purchased the site from Navillus and two years later converted the property to a day care center.

In April, 2006, the DEP contacted the new property owner, Jim Sullivan of Jim Sullivan, Inc., to determine what measures, if any, had been undertaken to address site contamination. A discussion ensued and on June 21, 2006, DEP informed Sullivan that he should enter the VCP and submit an MOA application. One month later, the sampling found mercury in the building and “based on these findings and consultation with NJDEP and NJDHS [New Jersey Department of Health and Senior Services] technical staff, it was determined that the building was not fit for occupancy at this time.” Thus, a site which should have been cleaned up as a mercury hazard wound up (at least for a period of time) being considered for the VCP.

The facts of the Kiddie Kollege scenario may be a bit unusual. The story does highlight, however, the possibility in states with voluntary cleanup programs whose eligibility is open to all sites, not just brownfields sites, to have contamination exceed the “light con-

126. Id.
127. Id.
128. Id. According to the timeline released by the DEP, the EPA concluded on January 16, 1996 “that based on air monitoring, soil sample analysis, wipe sample analysis and the condition and security of the building and surrounding property, the site does not present an immediate threat to human health or the environment.” Id. A “NJDEP Memorandum to the File” in June indicated that the EPA had “determined that the site was not eligible for a removal action; however, due to documented contamination present, the site require further investigation and remediation.” Id.
129. Id.
130. Id.
131. Id.
132. Id.
133. Id.
tamination” levels expected under the brownfields story. That a site such as Kiddie Kollege may fall through the cracks should serve as a warning to New Jersey and other states to revise the assumptions they make about brownfield sites and look for more of a demonstration from innocent developers up front. States should check the history of sites more thoroughly to see whether the site or any developer associated with the site is or should be involved in a pending enforcement action.

New Jersey and other states should also address what happens if remediation turns out to be inadequate. Some brownfields developers do not fit the story of the innocent developer who wishes to proceed quickly through a state voluntary cleanup program, receive liability protection, and move on with development. In this sense, New Jersey’s Grace Period Rule is the wrong approach because it gives recalcitrant developers more time for delay. The Rule gives developers an indefinite period of time to correct any deficiencies the DEP may have discovered while overseeing the remediation process; this is susceptible to manipulation by unscrupulous developers.

The DEP has the option under the Rule to terminate an MOA. The developer whose MOA is terminated may reapply and pay a $1,000 reapplication fee. In the context of a large site with considerable complexity, and perhaps extensive contamination, $1,000 is clearly de minimis. In contrast, the commenters on drafts of the Rule, nearly all of whom represented developers or were themselves developers, perceived that any change to the VCP to impose additional requirements on developers was clearly unwarranted. This is another unfortunate outcome of a developer-centered approach. It allows developers to believe that any hindrance to cleanup and reuse of a brownfield site, no matter how

134. See Kelley, supra note 121, at B2 (quoting public officials and representatives of public interest environmental groups who favor an overhaul of New Jersey’s cleanup programs in the aftermath of the Kiddie Kollege fiasco).
135. See 38 N.J. Reg. 3821(a) (Sept. 18, 2006) (codified in scattered sections of N.J. ADMIN CODE tit. 7), available at http://www.nj.gov/dep/rules/adoptions/2006_0815 grace.pdf (“Frivolous MOAs contribute to Departmental caseload management difficulties and require Department staff to direct their time towards cases in which there was never an intention by the person responsible for conducting the remediation to do any remedial work at the site.”).
136. See id.
137. Id.
138. Id.
small, is a “take back” that hampers the program. No one would doubt the ability of developers and their representatives to plead their case. Yet, catering to them makes a $1,000 reapplication fee a program “drawback,” even though the fee may have been imposed after a developer consistently flouted the Oversight Rules.

The DEP’s ability to terminate an MOA and move a site into the enforcement category appears, at first blush, a strong and credible threat. Yet the DEP itself stated that it does not intend to increase the number of MOAs it terminates. As Professor David Dana has expressed cogently, there are numerous reasons why a state environmental agency might not want to bring enforcement action at a brownfield site, most notably that it would have to admit that its oversight failed. In New Jersey’s case, the state made its intent quite clear. In its responses to comments on the Rule it stated, “[t]he Grace Period amendments do not apply to the Voluntary Cleanup Program; hence there will be no enforcement of MOAs.” Some expressed concern that even if the state were willing to act more forcefully, it lacks the resources to follow

139. State regulators may even believe that gathering more comprehensive data on cleanups and their efficacy might hamper a program’s progress. See Dana, supra note 7, at 103 (noting that “[d]evelopers might not want outcomes at their sites measured for fear that the data would be used by regulators as a basis for re-opening the brownfields cleanups pursuant to re-opener clauses in the agreements between developers and the state government”).

140. See 38 N.J. Reg. 3821(a) (stating that “[t]he Department does not intend to increase the number of MOAs that it terminates”).

141. See Dana, supra note 7, at 95.

142. See 38 N.J. Reg. 3821(a); see also E-mail from Bill Wolfe, Director, N.J. PEER, to Joel B. Eisen, Professor of Law, University of Richmond School of Law (Sept. 20, 2006, 21:10:39 EST) (on file with author).
through on enforcement (for example, to enter into more Administrative Consent Orders).\textsuperscript{143}

Assuming for the moment that the state could (or would) proceed with enforcement activities against a brownfields developer, the recent controversies surrounding the cleanup program cast doubt on the program’s ability to get sites cleaned up correctly and promptly. The New Jersey General Assembly has held hearings over the past year about cleanups at major sites that appear to have been botched.\textsuperscript{144} With respect to one aspect of toxic waste cleanup—proceeding to address the worst sites first—internal documents from the DEP made available to the organization Public Employees for Environmental Responsibility (“PEER”) show that the Spill Act program lags behind its statutory deadlines to provide and use a risk-based list ranking of the most dangerous sites.\textsuperscript{145}

\textsuperscript{143} Telephone Call from Bill Wolfe, Director, N.J. PEER, to Joel B. Eisen, Professor of Law, University of Richmond School of Law (Sept. 18, 2006) (transcript on file with author).


For an in-depth report on the mishandling of one site, see Jan Barry et al., Toxic Legacy, RECORD, Oct. 2-6, 2005, http://www.northjersey.com/toxiclegacy/series.html (five-part series about former Ford plant in Mahwah). Bruce Springsteen may have told a tragic tale of the fate of an auto worker who lost his job that begins, “[t]hey closed down the auto plant in Mahwah late that month,” BRUCE SPRINGSTEEN, Johnny 99, on NEBRASKA (Columbia Records 1982), but what happened later at that site is perhaps even more tragic.

\textsuperscript{145} N.J. Dept’t of Envtl. Prot., Site Remediation & Waste Management Prog., Hot Issue (Dec. 2004) (on file with author) (stating “[t]he Department never published a complete list of ranked sites and did not use the list to select sites for public funding”); see also N.J. Dept’t of Envtl. Prot., Site Remediation & Waste Management Prog., Remedial Priority System Options Paper (Sept. 2004) (on file with author) (“The Department has not ranked sites since approximately 2000. The group that ranked sites was disbanded so there is no group of people assigned to do this work.”).
In any event, the state should exercise more oversight over brownfields sites, not less. It should not allow theoretically unlimited periods of time for brownfields developers to decide whether to comply with MOAs. The state could have complied with the GPL by considering some paperwork submissions to be minor, but deemed technical deficiencies such as a failure to meet the technical specifications of the Oversight Rules to be major and corrected immediately. The DEP appears to use its discretion to decide whether a developer made a serious error. This runs the risk of inadequate and unsupervised cleanups, particularly if the hammer available to the state—revoking the MOA and moving to enforcement action—is not a credible threat.

IV. BROWNFIELDS POLICIES AND “SMART GROWTH”

The very thing that made the brownfields policy so compelling when it was first developed in the early 1990s is also the thing that makes it so vulnerable to criticism. . . That is, it tries to do several major things, like . . . bring back these sites and some kind of community benefit in the form of development. Every site is unique and rife with opportunities and incentives for political manipulation, corner-cutting and land-use mistakes . . .

Even if a brownfield site is remediated effectively, we should still ask whether the specific economic development at that site is appropriate. Every community will have a different perspective on this, so defining appropriate metrics for measuring success presents a difficult problem. In this Part, I test one claim that proponents of brownfields revitalization routinely make: that it is an essential component of “smart growth” strategies.147 “Smart growth” management of land use has the potential to be a “revolution” in land use law.148 As New Jersey defines it, “[s]mart growth is the term used to describe well-planned, well-managed growth that adds new homes and creates new jobs, while preserving open space, farm-

146. Alexander Lane, From Hazard to Hope?: Redeveloping Old Industrial Sites Can Be a Boon or a Bust, STAR-LEDGER, May 23, 2004, at 1 (quoting Prof. William Shutkin of the Massachusetts Institute of Technology).


land, and environmental resources.”

Space does not permit a full description of the wide variety of locality-specific options that a smart growth strategy would employ to check the increasing sprawl at suburban and exurban sites.

While brownfields policies and smart growth gained enormous traction at roughly the same time in the 1990s, the link between the two is hardly coincidental. There are essentially two aspects of this. First, urban locations are ideal for the higher-density, pedestrian-friendly, resource-conserving infill developments sought by smart growth advocates. Some major success stories attributed to brownfields policies are mega-developments bringing stores, apartments, and parks together in one urban place. This has led at least one observer to note that VCPs and a generally more favorable attitude toward infill developments have gone hand in hand.

The second part of the “brownfields redevelopment is

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150. New Jersey’s smart growth “principles” are broad-ranging and include “mixed-use development, walkable town centers and neighborhoods, mass transit accessibility, sustainable economic and social development and preserved green space.” Id. These could be carried out in a specific context by a whole host of different techniques.
152. A good example of a governmental program linking brownfields redevelopment and smart growth in specific communities is the EPA’s “Smart Growth in Brownfield Communities” initiative, which claims that, “[b]rownfield redevelopment is an essential component of smart growth, as both seek to return abandoned and underutilized sites to their fullest potential as community and economic assets.” U.S. Envtl. Prot. Agency., Smart Growth in Brownfield Communities, http://www.epa.gov/piedpage/brownfields.htm (last visited Mar. 31, 2007).

Principles of Smart Growth are epitomized by “[c]ompact, transit accessible, pedestrian-oriented, mixed-use development patterns and land reuse” in a system which “refooses a larger share of regional growth within central cities, urbanized areas, inner suburbs and areas that are already served by infrastructure.” Such goals are achieved through measures including “[t]ax incentives, brownfield redevelopment, elimination of sprawl-enhancing subsidies, [the development of] urban growth boundaries, and transferable development rights.”

Id. (citations omitted).
154. Opp & Hollis, supra note 2, at 8 (“The popularity of VCPs and the increase in their use over the past 10 years could be attributed in part to a changing attitude towards infill projects, and the growing realization by city planners, development pro-
smart growth” linkage is that an infill development might preclude the need for new development at a suburban location. The brownfields story assumes that mega-developments would proceed at greenfields sites if not for incentives to clean up and reuse the urban sites. As a result, there is an almost one-for-one tradeoff between a brownfield site saved and a greenfield site protected. This does not necessarily make growth “smart”; it simply makes it inevitable.

Reuse of urban space in New Jersey and many other states is seen almost reflexively as smart growth. Indeed, several New Jersey programs are conducted within the state’s Office of Smart Growth (“OSG”). Yet when we look at the brownfields programs and the experiences with them, it is not clear that all brownfields revitalization achieves smart growth. The number of brownfields sites with useful development potential is a relatively small subset of the overall number. In addition, because a developer of a brownfields parcel with development potential dictates the terms of the redevelopment strategy on a parcel-by-parcel basis (in most jurisdictions, brownfields revitalization occurs one site at a time), there is no guarantee that the growth it promises to provide is “smart.”

The controversy surrounding the recent plan for the “Atlantic Yards” area of Brooklyn is perhaps typical. The plan envisions a “large-scale, mixed-use real estate development” on a brownfields site with “a long history of rail, industrial, storage, 

professionals and citizens that reuse projects are both economically practical and important for a high quality of both urban and rural life.”


156. See, e.g., Greenberg, Editorial, supra note 38, at A74.

For every brownfields site that is on 10 or more acres, is well located with respect to transportation and other infrastructure, and will host a redevelopment of = $100 million, there will be 20 or more that will be on less than 3-acre sites located in an unfavorable location that has little obvious appeal to private investors.

Id.


158. Id.
manufacturing, and commercial uses,”159 “that would consist of a 19,000-seat basketball arena; 4,500 units of housing; over 2.4 million square feet of office and retail space; and six acres of open space and parking for 3,000 cars.”160 This development has been fiercely opposed by a number of community groups.161

The mega-development chosen for the urban brownfield site may pay some attention to smart growth principles, as in the case of Atlantic Yards. Others, however, might argue that development is not “smart” if it consists of expensive sports stadiums or high-priced condominiums that defeat neighborhood expectations of affordable housing.162 Local officials’ promises may not necessarily equate to beneficial outcomes, particularly if community residents have little say in planning for the remediation and reuse at the site. The brownfields process, like any urban land use development process, is subject to capture by well-heeled, politically savvy developers and a resulting distrust by local residents.163 As one story on brownfields projects in New Jersey puts it, “with millions of dollars in government incentives at stake, and with the design and approval of cleanup remedies subjective and malleable from site to site, the brownfields process is seen as particularly open to political manipulation.”164 The story cited “revelations that former Governor Jim Florio and some partners cut a deal for a bargain price on a publicly owned brownfield in Jersey City,” and the “recent decision to pull Kearny’s Standard Chlorine site—one of the state’s most polluted sites—from the federal Superfund list so a developer

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161. See id. (providing links to these groups, including “Brooklyn Against Destructive Development” and “Field of Schemes”).

162. Lane, supra note 146, at 1 (quoting Joe Morris of Jersey City’s Interfaith Community Organization, who observes that, “[i]f you ask 100 people in Jersey City what should be done with vacant land, 99 of them tell you affordable housing . . . [b]ut that never gets factored in when a brownfields developer pops in from out of town”); see also Jennifer Steinhauer, A Cleanup That’s Easier Legislated than Done, N.Y. TIMES, Dec. 4, 2005, at 47 (noting the frustration by environmental and neighborhood advocates about the slow pace of New York’s brownfields program in getting sites for affordable housing into the program).

163. See, e.g., Greenberg, Editorial, supra note 38, at A74 (noting that “[i]n our public surveys, it is clear that the public does not necessarily trust its local elected officials’ and developers’ characterizations of environmental risk, nor their assertions that the local infrastructure and schools can meet added demands caused by redevelopment”).

164. Lane, supra note 146, at 1.
can build warehouses there.”165 This latter development highlights another point made earlier, that “the brownfields model works well on modestly contaminated sites, but to use it to address a massively contaminated site is asking the market to do more than it can.”166

Controversy of this sort does not in and of itself mean that brownfields development should not proceed. Instead, it simply tells us that even though the brownfields story assumes development is preferable to inertia, the merits of the proposed real estate project must be tested in each individual case. There is a means available to New Jersey to examine whether its policies are having the desired effect. It has data available that would allow for a more thorough analysis of whether brownfields developers in New Jersey are consistently providing promised economic benefits in return for involvement with and remediation of their sites. The state maintains two extensive databases; a “Known Contaminated Sites” list that includes (among other data) the number, type, and name of developers receiving No Further Action letters,167 and one maintained by the OSG on sites that fit state and local development criteria.168 More work needs to be done to see whether sites in these two databases are closely correlated. As Professor Dana has suggested, in-depth analysis of this sort might yield results that would run contrary to the story of brownfields as an engine of economic redevelopment, and state regulators may be consequently reluctant to perform this searching analysis.169

165. Id.
166. Id. (quoting Kearny Mayor Alberto Santos).
167. N.J. Dep’t of Envtl. Prot., NJDEP Known Contaminated Site List for New Jersey, 2005, http://www.nj.gov/dep/gis/digidownload/metadata/statewide/kcsl.htm (“The Known Contaminated Sites List for New Jersey 2005 are those sites and properties within the state where contamination of soil or ground water has been identified or where there has been, or there is suspected to have been, a discharge of contamination. This list of Known Contaminated Sites may include sites where remediation is either currently under way, required but not yet initiated or has been completed.”).
168. The OSG maintains an extensive collection of digital Geographic Information System (“GIS”) data, including a number of files which show how sites fit within state smart growth plans. See N.J. Dep’t of Cmy. Affairs, Office Smart Growth, Maps and GIS Data, http://www.state.nj.us/dca/osg/resources/maps.shtml (last visited Mar. 31, 2007).
169. Dana, supra note 7, at 95.
In some states, there is recognition that brownfields remediation should take place in conjunction with redevelopment. In the BDA initiative, which began in 2002, New Jersey has made a significant attempt to bring together developers and municipalities in a systematic way to yield effective remediation and economic benefits. In the BDA program, the DEP “works with selected communities affected by multiple brownfields to design and implement remediation and reuse plans for these properties simultaneously.” The mechanism for this involves community-based “steering committees” that “propose ‘clusters’ of closely spaced brownfield sites to DEP for coordinated oversight of the remedial process.” The BDA application requires a steering committee to submit “a description and explanation of the BDA, a discussion of the proposed BDA boundaries, current activities and uses within the BDA, and a clear identification of the brownfields within the BDA that the Steering Committee intends to address.” Current BDA communities include Camden, Elizabeth, Hillside, Irvington, Newark, Palmyra, and Trenton, and more are in the works.

The contrast with the normal brownfields development process is striking, as described in a recent article by Evan van Hook, a former DEP Assistant Commissioner and a driving force behind the BDA initiative.

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170. See Bartsch, State of States, supra note 39, at 14 (“More states are channeling resources to sites with some end use or economic development activity in mind—with the thinking shifting from cleanup only to a cleanup-and-reuse strategy.”).


172. Id.


175. N.J. Dep’t of Envtl. Prot., Brief Synopsis, supra note 173.


177. See van Hook et al., supra note 19, at 118.

In his 2000 article, van Hook developed a theoretical framework for an area-wide brownfield redevelopment program. The framework follows four basic principles: (1) establish a process to “define and delineate areas affected by multiple brownfields;” (2) aggregate financial and technical resources and incentives; (3) develop area-wide remediation and redevelopment plans; and (4) “provide ongoing, [coordinated, cross-property,] focused support, incentives and assistance for remediation and redevelopment of the brownfields.
typically require brownfields developers to demonstrate that their proposed reuse of the property is consistent with an overall vision for the community. In the BDA initiative, this perspective changes, as Van Hook observes that “involvement in shaping the new uses to which the brownfields will be put . . . is particularly enhanced.”178 The steering committee’s vision of the proposed reuse is not necessarily the one that will inevitably be adopted: “While BDA steering committees do not have the ability to dictate reuse on all properties, however, the BDA Initiative does give the reuse preferences of the steering committee substantial persuasive force.”179

Van Hook notes that “the BDA Initiative appears to result in increased efficiency and effectiveness in the remediation process.”180 One obvious advantage of a multi-site, clustered approach is its ability to address cross-contamination among brownfields sites at the same location. Ordinarily, the developer of a site addresses contamination within the legal boundaries of its own site,181 but in a BDA, by “addressing closely spaced contaminated properties in a concerted effort, the BDA approach helps ensure that this cross-contamination will not occur, regardless of the chemical or physical process involved.”182 Van Hook even observes that the “potential for cross-property contamination” should become a factor in selecting BDAs, to capitalize on the benefits of remediating multiple sites at once in the same area.183

Finally, there is the potential for significant community involvement. Negotiations regarding redevelopment of brownfields sites ordinarily take place between the developer and local officials, which can give developers the upper hand.184 Of course, a savvy area in accordance with the area-wide plans.” These principles are reflected in the design of the New Jersey BDA Initiative.

Id. 178. Id. at 140.
179. Id.
180. Id. at 128.
182. Van Hook et al., supra note 19, at 131.
183. Id.
184. See, e.g., Greenberg, Editorial, supra note 38, at A74 (“For example, to make enough money to pay the cleanup costs, a housing developer can be expected to ask
developer may choose to reach out to the affected community, but is not normally required to do so. By contrast, the BDA initiative, with its use of the broad-based local steering committee, explicitly guarantees local involvement. As one recent analysis of several state area-wide brownfields programs puts it, “[i]n contrast to site-specific remediation, the area-wide approach of the [New Jersey] BDA provides a framework that addresses the larger physical, political and social contexts of an affected community.”

V. CONCLUSION

Brownfields revitalization is here to stay. It is so popular with a broad coalition of advocates that states vie for bragging rights about their programs’ successes. At the same time, the brownfields story’s limitations are also beginning to show. There are more contaminated sites being addressed in state VCPs, and perhaps less rapid progress at the average site than the story might have suggested would take place. In this respect, the New Jersey Grace Period Rule represents incremental backsliding, offering the potential for longer cleanups and the ability for developers to evade program rules and responsibilities.

Allowing developers to control their own cleanups also does not comport with a vision of community-wide real estate development, such that after a decade of experience, a “consensus is building among environmental and real estate professionals that the remediation and reuse of brownfields that were not addressed through ‘first generation’ brownfield programs will require new strategies.” A second generation of brownfields policies, such as New Jersey’s BDA initiative, is needed. Second generation brownfields policies should allow for more area-wide, community-focused processes, like the BDA initiative, to capitalize more effectively upon the economic promise of the brownfields story. An approach such as the BDA has the potential for considerable

for more units per acre, for permission to put parking on top of areas with residual contamination, and for deed restrictions on the use of property.”).

185. See generally BARTSCH ET AL., COMING CLEAN, supra note 35.
186. See generally Eisen, Brownfields of Dreams, supra note 3.
188. Greenberg, Editorial, supra note 38, at A74.
190. Van Hook et al., supra note 19, at 152.
advantages over parcel-by-parcel brownfields development, and brings brownfields revitalization closer to the ideal of “smart growth” than leaving development solely in the hands of individual developers.191

191. Id. at 114.