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THE BROWNFIELDS ACTION AGENDA: A MODEL FOR FUTURE FEDERAL/STATE COOPERATION IN THE QUEST FOR ENVIRONMENTAL JUSTICE?

Stephen M. Johnson*

I. INTRODUCTION

Traditionally, the federal government has responded to environmental crises in a circuitous, or even haphazard, manner. The development of the Clean Water Act, Clean Air Act, and many of the major pollution control laws have followed pendulum-like journeys originating with a laissez-faire federal attitude and ending in comprehensive federal regulation.¹ Historically, once the federal government identified an environmental crisis, such as polluted lakes and streams, it began to address the problem by conducting research on the problem or providing funds to states or individuals to conduct research. Simultaneously, or shortly thereafter, the federal government affirmatively limited the activities that it took which contributed to the problem.

In the early stages of its response to most crises, though, the federal government was reluctant to impose similar limits on the private sector. Instead, the government often provided funding to states or individuals to address the problem at a local level. When the state and local measures failed, due to the interstate nature of pollution, among other reasons, the federal government responded with a massive regulatory program. Recently, however, the pendulum is reversing its motion, and the federal government is being pressured

* Associate Professor of Law, Mercer University School of Law. B.S., J.D. Villanova University. LL.M. George Washington University School of Law.

1. See ROBERT V. PERCIVAL, ENVIRONMENTAL REGULATION, LAW, SCIENCE AND POLICY 103-12 (1992). For a good discussion of the development of the Clean Air Act in this manner, see John P. Dwyer, *The Practice of Federalism under the Clean Air Act*, 54 MD. L. REV. 1183 (1995).

to return power to the states to address environmental problems.²

One of the most pervasive environmental crises that faces society today is environmental injustice. The crisis has been well-documented in the press and in academic circles.³ The inequities are legion. Studies indicate that hazardous waste landfills and treatment facilities, and industries that emit the greatest amounts of toxic chemicals, have been sited predominantly in minority or low-income communities.⁴ Studies also suggest that the federal government is bringing enforcement actions under environmental laws, and making cleanup decisions under Superfund, in a discriminatory manner.⁵

2. Recent Supreme Court decisions directly or indirectly restrict the federal government's regulatory powers. See, e.g., *United States v. Lopez*, 115 S. Ct. 1624 (1995); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *New York v. United States*, 505 U.S. 144 (1992). Congress is also taking steps to limit the federal government's regulatory powers. In early 1995, Congress enacted the Unfunded Mandates Reform Act of 1995, which requires the federal government to pay for any mandate that the government imposes on state, local or tribal governments that costs more than \$50 million per year. See 2 U.S.C. § 1501 (West Supp. 1994). Legislators have introduced dozens of other bills that would severely restrict federal environmental regulation. See Stephen M. Johnson, *United States v. Lopez: A Misstep, but Hardly Epochal for Federal Environmental Regulation*, 5 N.Y.U. ENVTL L.J. 33 (1996).

3. For a brief bibliography of recent law review articles, see Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 *ECOLOGY L.Q.* 1, 6 n.22 (1995). See also Robert W. Colin, *Review of Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice*, 9 *J. ENVTL. L. & LITIG.* 121 (1994). For a cross-disciplinary bibliography, see Michael Meuser & Dr. Andrew Szasz, *Environmental Inequality Bibliography* (visited Mar. 23, 1996) <<http://www.cruzio.com/~meuser/ejwww.html>>.

4. See Paul Mohai, *The Demographics of Dumping Revisited: Examining the Impact of Alternate Methodologies in Environmental Justice Research*, 14 *VA. ENVTL. L.J.* 615 (1995); BENJAMIN A. GOLDMAN & LAURA FITTON, *TOXIC WASTES AND RACE REVISITED: AN UPDATE OF THE 1987 REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 14-15* (1994); UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, *TOXIC WASTES AND RACE IN THE UNITED STATES* (1987); U.S. GEN. ACCOUNTING OFFICE, *SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES* (1983) (including a summary of 10 recent studies that focus on disparate siting of hazardous waste facilities in poor or minority communities). See also Dr. Andrew Szasz & Michael R. Meuser, *Environmental Inequality in Santa Clara County* (visited Feb. 27, 1996) <<http://www.cruzio.com/~meuser/EI/project.html>> (using data from the Toxics Release Inventory to examine the siting of industrial facilities in Santa Clara County).

5. See Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, *NAT'L. L.J.*, Sept. 21, 1992, at S1, S1-12; Rae

Air quality in minority and low-income communities is worse than in other communities.⁶ The federal government establishes regulations under a variety of environmental laws to protect persons from exposure to hazardous levels of toxic substances based on assumptions that may not protect various ethnic or racial communities.⁷ Furthermore, new market-based pollution trading schemes under the Clean Air Act and the Clean Water Act may create toxic hot spots that disparately impact low-income or minority communities.⁸

The federal government seems to be responding to environmental injustice in the same manner that it has traditionally responded to environmental crises. First, the government is imposing some limits on the actions that *it* takes that contribute to environmental injustice, but it is not placing any limits on *private* actors. President Clinton's Executive Order 12898 requires federal agencies to identify disproportionate impacts that federal programs or activities may have on minority and low-income communities, and requires agencies to develop strategies to address environmental injustice.⁹ Legislation that would limit the siting of landfills or require distributional factors to be considered in private decision-making, on the other hand, has died in Congress.¹⁰

Zimmerman, *Social Equity and Environmental Risk*, 13 RISK ANALYSIS 6, 20 (Dec. 1, 1993); UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR (Robert D. Bullard ed., 1994). In a recent report to EPA, the National Environmental Justice Advisory Committee recommended that "EPA should undertake a series of highly visible, focused enforcement initiatives that prominently place environmental justice concerns at the top of the agency's list of environmental priorities" in order to "demonstrate EPA's good faith and seriousness of purpose." *Increased Enforcement Recommended in Minority, Low-Income Communities*, 26 ENV'T REP. (BNA) 1554 (Dec. 22, 1995).

6. See Richard J. Lazarus, *Pursuing Environmental Justice: The Distributional Effects of Environmental Protection*, 87 Nw. U. L. REV. 787, 797 (1993); see also *Environmental Justice: Hearings Before the Subcomm. on Civil and Constitutional Rights*, 103d Cong. (1993) (statement of Paul Mohai); D.R. Wernette & L.A. Nieves, *Breathing Polluted Air*, E.P.A. J., Mar.-Apr. 1992, at 16.

7. See Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103 (1996); Lazarus, *supra* note 6, at 846.

8. See Daniel P. Selmi, *Experimentation and the New Environmental Law*, 27 LOY. L.A. L. REV. 1061, 1071 (1994).

9. See Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994) [hereinafter EO 12898].

10. See, e.g., S. 1161, 103d Cong. (1993); H.R. 2488, 103d Cong. (1993); H.R. 2105, 103d Cong. (1993); H.R. 1924, 103d Cong. (1993); H.R. 5326, 102d Cong. (1992); S. 2806, 102d Cong. (1992).

Consistent with the traditional response to environmental crises, the federal government is also providing funding, through grants and loans, to public and private institutions and communities to address environmental justice issues.¹¹ Furthermore, the federal government is conducting or funding research on environmental justice issues.¹²

However, given the current political climate, it is unlikely that the federal government will take the traditional approach to environmental crises and implement a massive regulatory program to eliminate environmental injustice. It is also unlikely that the federal government will leave the crisis to the states, although some state law remedies are providing greater opportunities to achieve environmental justice than federal remedies.¹³

Further steps must be taken in order to address the problem of environmental injustice. This article explores whether those steps should be taken by the federal government or state governments, or some combination of both.

11. See, e.g., Environmental Justice Community/University Partnership Grants Program, 60 Fed. Reg. 62,436 (1995); Environmental Justice Small Grants to Community-Based/Grassroots Organizations and Tribal Governments, 60 Fed. Reg. 62,432 (1995); Environmental Justice Through Pollution Prevention Grants, 61 Fed. Reg. 30,063 (1996).

12. Executive Order 12,298 requires federal agencies (to the extent permitted by law) to collect, maintain and analyze information assessing and comparing environmental and human health risks borne by populations identified by race, national origin or income. EO 12898, *supra* note 9, § 3-302(a). The Order stresses the importance of collecting, maintaining and analyzing such information regarding communities surrounding sites that become the subject of a substantial federal environmental, administrative or judicial action, *id.* § 3-302(b), or communities surrounding federal facilities. *Id.* § 3-302(c). In addition, the Order requires that "[e]nvironmental human health research, whenever practicable and appropriate, shall include diverse segments of the population in epidemiological and clinical studies, including segments at high risk from environmental hazards, such as minority populations, low-income populations and workers who may be exposed to substantial environmental hazards." *Id.* § 3-301.

13. See, e.g., Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 KAN. L. REV. 271 (1992). Reich points out that, due to differences between the U.S. Constitution and state constitutions, minority communities may be more likely to prevail in equal protection challenges to disparate siting of hazardous waste facilities based on state constitutions than they have been in challenges based on the U.S. Constitution. *Id.* at 313. In addition, Reich notes that state environmental protection acts might be used to increase public participation and require consideration of socioeconomic factors in environmental decisionmaking in ways that the National Environmental Policy Act, 42 U.S.C. § 4321-70 (1994), cannot be used.

II. THE NEED FOR STATE ENVIRONMENTAL JUSTICE INITIATIVES

A federal response to the crisis of environmental injustice unaccompanied by a corresponding state effort would be futile. State involvement is essential because states regulate or take many of the actions that disparately impact minority and low-income communities. In many cases, states are the primary actors, to the exclusion of the federal government.

For instance, much of the discourse on environmental injustice focuses on the disproportionate siting of hazardous waste facilities and hazardous industries.¹⁴ However, those siting decisions are intrinsically local land use decisions, and the federal government has traditionally been reluctant to regulate land use planning and other local government matters.¹⁵ In fact, the Supreme Court's recent decision in *United States v. Lopez*¹⁶ suggests that federal regulation of such local activities may be vulnerable to Commerce Clause challenges. Accordingly, state initiatives to prevent inequitable siting of hazardous facilities must be a central component of a national environmental justice strategy.

Similarly, differences in air quality in different parts of the country can often be traced to different controls that states place on persons and industries in different air quality control regions in the state. EPA gives states broad discretion to fashion plans to meet national ambient air quality standards, and the agency is reluctant to impose specific transportation controls or other controls on states that would limit land use.¹⁷ Once again, since the federal government exercises limited control over those decisions, states must take the lead in establishing programs to prevent inequitable distribution of air pollution.

States are also essential partners in the struggle to achieve environmental justice in the cleanup of hazardous waste sites. While studies have suggested that hazardous substances are cleaned up more slowly, and less permanent remedies are chosen more often in minority communities, those studies have focused on cleanups under the federal

14. See sources cited, *supra*, note 4.

15. See Johnson, *supra* note 2, at 29.

16. 115 S. Ct. 1624 (1995).

17. 42 U.S.C. § 7410 (1994).

Superfund law.¹⁸ Very few sites are cleaned up under the federal Superfund law, as compared to those that are cleaned up under state Superfund laws.¹⁹ Reform of the federal Superfund process will, therefore, only address potential environmental injustice at a small percentage of the hazardous sites that are cleaned up nationally each year. In addition, when the federal government cleans up hazardous sites under the Superfund law, it must incorporate state standards when it chooses the appropriate cleanup method for the site.²⁰ For both of these reasons, state laws that ensure adequate community participation in the selection and implementation of remedies for state Superfund sites, and that establish cleanup standards that protect all communities equally must be an important component of a national environmental justice strategy.

Finally, any effort to combat discriminatory or inequitable enforcement of environmental laws will be doomed to failure unless it focuses on enforcement by state government, as well as the federal government. The Clean Water Act, RCRA, and most of the federal environmental laws include provisions that authorize the EPA to delegate primary authority to state governments to administer and enforce major portions of those laws.²¹ State governments, rather than the federal government, administer and enforce most of the hazardous waste and clean water permitting programs in the country.²² Therefore, enforcement decisions under those programs are being made primarily by states, rather than the federal government.²³

In the future, states will play an ever larger role in protecting low-income and minority communities. The federal government is moving away from the "one-size fits all," "com-

18. See sources cited, *supra* note 5.

19. DAVID R. BERZ ET AL., ENVIRONMENTAL LAW IN REAL ESTATE AND BUSINESS TRANSACTIONS § 4.01 (1995).

20. 42 U.S.C. § 9621(d)(2) (1994).

21. U.S. GEN. ACCOUNTING OFFICE, E.P.A. AND THE STATES: ENVIRONMENTAL CHALLENGES REQUIRE A BETTER WORKING RELATIONSHIP 2 (1995) [hereinafter E.P.A. AND THE STATES]. See, e.g., 42 U.S.C. §§ 6926(b), 7661a(d) (1994); 33 U.S.C. § 1342(b) (1994).

22. E.P.A. AND THE STATES, *supra* note 21, at 2.

23. However, the federal government retains the right to bring enforcement actions in those states as long as the federal government notifies the state prior to bringing the enforcement actions. See 33 U.S.C. § 1319 (1987); 42 U.S.C. § 6928 (1994).

mand and control" regulatory approach that it has taken toward environmental crises in the past.²⁴ Instead, many of the new federal environmental initiatives, such as watershed planning and effluent trading in watersheds, rely on states as central partners to prepare, or aid the federal government in preparing, individual control strategies that address the specific needs and problems of discrete geographic regions.²⁵ If states do not consider distributional issues when they develop such individual control strategies, it is likely that effluent trading and other economic-based initiatives may perpetuate the inequitable distribution of pollution among low-income and minority communities.

Because state initiatives to ensure environmental justice are an essential part of a national environmental justice strategy, it is imperative that, to the extent that a state has developed an effective strategy for achieving environmental justice with regard to activities that are normally outside of the federal government's primary regulatory jurisdiction, the federal government should encourage states to develop such programs and not interfere with the state's administration of their programs.

III. THE NEED FOR FEDERAL ENVIRONMENTAL JUSTICE INITIATIVES

For several reasons, environmental justice reform is not an issue that can be left solely to the states. First, as noted above, many of the existing environmental injustices are caused, at least in part, by federal actions.²⁶ State programs and initiatives cannot remedy injustices that are caused by the federal government. In order to achieve environmental justice on a national level, reforms must begin with the federal government.

Additionally, environmental justice reform cannot be left to the states because it is unlikely that the states will uni-

24. See Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 298-307 (1996); Donald T. Hornstein, *Lessons from Federal Pesticide Regulation on the Paradigms and Politics of Environmental Law Reform*, 10 YALE J. ON REG. 369, 373-85 (1993).

25. See A Framework for Watershed-Based Trading, 61 Fed. Reg. 29,563 (1996); Effluent Trading in Watersheds Policy Statement, 61 Fed. Reg. 4994 (1996); Louise Wise, *The Clean Water Act: New Directions*, Remarks at ABA Satellite Seminar (Jan. 18, 1996).

26. See *supra* notes 5-8.

formly initiate programs to prevent inequitable distribution of pollution. Absent federal controls, states are likely to pursue the traditional "race to the regulatory bottom," and impose the minimal limitations on businesses that are politically acceptable in order to attract economic development.²⁷

Furthermore, in light of the fact that several states are attempting to eliminate affirmative action programs²⁸ and that several states have recently enacted laws that prohibit state governments from providing translated notices of important health and safety information,²⁹ it is unlikely that state governments will lead an aggressive campaign to ensure environmental justice for low-income or minority communities. If environmental justice reform is left to the states, it may be ignored.

Finally, environmental justice reform cannot be left to the states because many environmental injustices involve interstate or international disputes or pollution problems that can only be remedied through federal action.³⁰

27. The "race to the bottom" phenomenon has been described in ZYGMUNT J.B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY* 776 (1992); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the 'Race to the Bottom' Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1212 (1992); Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917 (1985).

28. See William Claiborne, *Affirmative Action Curbed in California; Governor Signs Order Eliminating Programs*, WASH. POST, June 2, 1995, at A1; *Georgia Colleges Ordered to Drop Racial Preferences*, WASH. POST, Apr. 10, 1996, at A20; Kathryn Wexler, *Womens Groups Take on California Initiative; Nationwide Support Bolsters Efforts to Preserve Affirmative Action*, WASH. POST, Mar. 3, 1996, at A3.

29. Twenty-three states have enacted laws that designate English as the official language for the state. Maria Puente, *Defining the One-Nation, One-Language Principle*, USA TODAY, Mar. 26, 1996, at 7A. Many of those laws prohibit the state from translating documents into other languages. *Id.*

30. The most notorious example of environmental injustice which cannot be resolved by states alone is the environmental crisis in the communities surrounding the maquiladoras along the Mexican border. See Jack Lewis, *The U.S. Colonias: A Target for Aid*, EPA J., Mar.-Apr. 1992, at 61. See also Ronald A. Taylor, *Pollution Fighter on U.S. Embassy Roster in Mexico*, WASH. TIMES, Jan. 8, 1991, at A5; Cecile Holmes White, *Hands Across the Border*, HOUS. CHRON., May 15, 1993, at 1.

On the domestic front, while pollution does not recognize interstate boundaries, the Commerce Clause of the U.S. Constitution limits the power of a state to regulate pollution that arises in a neighboring state, but which causes or contributes to environmental injustice in the state. Only the federal government can act to prevent such injustice.

IV. PRINCIPLES FOR COOPERATIVE FEDERAL/STATE ENVIRONMENTAL JUSTICE INITIATIVES

While the federal government must take the lead in crafting and implementing a national environmental justice strategy, it should model its initiatives on successful environmental justice programs that have been created in the states. At the same time, the federal government should continue to provide funding and technical expertise to states and local governments to encourage them to develop innovative programs to achieve environmental justice, which may be models for future federal initiatives.

The following principles should, therefore, guide the federal government in its response to the crisis of environmental injustice: (1) The federal government must take affirmative steps to remove any barriers that it has created to environmental justice; (2) To the extent that states or local governments have developed effective strategies to achieve environmental justice, the federal government should encourage them to pursue those strategies and take steps to enable them to pursue those strategies, as long as they don't conflict with overriding federal policies; (3) The federal government should adopt successful state environmental justice initiatives on the federal level, and make legislative and regulatory changes based on those successful initiatives; (4) The federal government should continue to support state and local environmental justice initiatives by providing funding, technical expertise and research assistance for those initiatives.

The federal government is following these principles in implementing EPA's Brownfields Action Agenda,³¹ which is being praised by the environmental community, businesses, and many civil rights leaders as a positive initiative in the fight for environmental justice.³² The remainder of this article illustrates the manner in which the federal government is applying those principles in the Brownfields Action Agenda. The partnership that the federal and state governments are

31. EPA announced its Brownfields Action Agenda, a series of actions that were designed to encourage brownfield redevelopment, on January 25, 1995. U.S. E.P.A., *Brownfields Action Agenda* (visited Jan. 25, 1995) <<http://www.epa.gov/swerosps/bf/ascii/action.txt>> [hereinafter BAA].

32. John Holusha, *EPA Helping Cities to Revive Industrial Sites*, N.Y. TIMES, Dec. 4, 1995, at A1; Gary Lee, *Breathing New Life into Brownfields; Incentives Lure Firms to Contaminated Sites*, WASH. POST, Mar. 11, 1996, at A4; John Chambers, *All Things Considered* (National Public Radio, June 17, 1996).

forging to encourage brownfield redevelopment could be a model for further federal/state environmental justice initiatives.

V. THE BROWNFIELD ACTION AGENDA AS A MODEL FOR
COOPERATIVE FEDERAL/STATE ENVIRONMENTAL
JUSTICE INITIATIVES

A. *What are Brownfields and Why is Brownfield
Redevelopment an Environmental Justice Issue?*

EPA defines brownfields as "abandoned, idled or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination."³³ The public probably recognizes brownfields as the abandoned factories or industrial complexes that exist in most cities and urban centers, although brownfields can also be found in the suburbs. The United States General Accounting Office estimates that there may be as many as 500,000 brownfields in the United States, and that it could cost \$650 billion to clean up those properties.³⁴ Brownfields vary greatly in the degree of hazard that they pose to society.³⁵ However, the term "brownfield" does not encompass sites that are so hazardous that they would be included on the National Priorities List under Superfund, or on similar state priority lists.³⁶

33. U.S. E.P.A., Office of Solid Waste and Emergency Response, *Brownfields Frequently Asked Questions* (visited May 23, 1996) <<http://www.epa.gov/swerosps/bf/answers.htm#1>>. The Office of Technology Assessment defines brownfields as "land and/or buildings that are abandoned or underutilized where expansion or redevelopment is complicated, in part, because of the threat of known or potential contamination." OFFICE OF TECHNOLOGY ASSESSMENT, THE STATE OF THE STATES ON BROWNFIELDS: PROGRAMS FOR CLEANUP AND REUSE OF CONTAMINATED SITES 1 (1995) [hereinafter OTA REPORT].

34. Anne Slaughter Andrew, *Brownfield Redevelopment: A State-Led Reform of Superfund Liability*, 10 NAT. RESOURCES & ENV'T. 27 (1996). The Office of Technology Assessment estimates that there may be up to 450,000 brownfield sites. OTA REPORT, *supra* note 33, at 2. There are over 2000 brownfield sites in the City of Chicago alone. *Id.* at 4.

35. "Information on the level of contamination of brownfields is limited, though sites are known to have anywhere from zero, low, or moderate contamination to extremely hazardous conditions, while many sites have not been evaluated." OTA REPORT, *supra* note 33, at 2.

36. *Id.* at 2; see also U.S. GEN. ACCOUNTING OFFICE, SUPERFUND: BARRIERS TO BROWNFIELD REDEVELOPMENT 2 (1996) [hereinafter GAO SUPERFUND REPORT].

For several reasons described below, land owners and developers are reluctant to redevelop these contaminated or potentially contaminated urban areas. Instead, developers often choose to build on suburban or rural farmland or open areas where there has been no prior commercial or industrial activity ("greenfields").³⁷ The threat of contamination is lower at greenfields than brownfields.³⁸ The trend toward development of greenfields, as opposed to redevelopment of brownfields, encourages suburban sprawl, increased traffic congestion, and habitat destruction.³⁹ It also stunts economic growth in urban areas.⁴⁰

Over the last few years, brownfield redevelopment has become an important environmental justice issue, as well as an important environmental issue. Many brownfields are located in poor or minority communities.⁴¹ Their presence often stagnates economic development.⁴² Redevelopment of the brownfield properties, on the other hand, creates jobs, improves the communities' tax base, and can spur additional economic development.⁴³

Brownfield redevelopment in poor and minority communities also provides environmental benefits to those communities. Contaminated properties that may have been creating health and safety concerns are cleaned up when brownfields are redeveloped.⁴⁴ The communities benefit from reduced exposure to environmental contaminants. In recognition of these economic and environmental benefits, the Director of the NAACP's Environmental Justice Program recently

37. U.S. E.P.A., Region 5, *Brownfields: Quickview of Key Issues: What are Brownfields?* (visited Apr. 9, 1996) <<http://www.epa.gov/Region5/brown/keyissues/quick.html#what>>. [hereinafter Region 5 Quickview].

38. Region 5 Quickview, *supra* note 37.

39. *Id.* See also OTA REPORT, *supra* note 33, at 4-5.

40. Region 5 Quickview, *supra* note 37.

41. *Id.* See also OTA REPORT, *supra* note 33, at 4.

42. OTA REPORT, *supra* note 33, at 4.

43. U.S. E.P.A., Office of Solid Waste and Emergency Response, *Brownfields Frequently Asked Questions - Question #2* (visited May 23, 1996) <<http://www.epa.gov/swerosps/bf/answers.htm#2>>. [hereinafter FAQ2]. Most brownfield properties are conveniently located near roads, water and sewer lines, and other necessary infrastructure features. Andrew, *supra* note 34, at 27. Revitalization of brownfields can spur redevelopment of other nearby properties that are served by the same infrastructure. *Id.*

44. E. Lynn Grayson, *Brownfields and Environmental Justice: Conflicting Initiatives?*, ABA SEC. NAT. RESOURCES, ENERGY & ENVTL L. NEWSLETTER, Jan.-Feb. 1996, at 6; see also FAQ2, *supra* note 43; Andrew, *supra* note 34, at 27.

praised brownfield redevelopment as "10 steps" toward environmental justice.⁴⁵

There is, however, a potential conflict between brownfield redevelopment and environmental justice. State governments often encourage landowners to redevelop brownfields by streamlining the environmental cleanup process for brownfields, or by establishing site-specific cleanup standards for the property based on the future use of the property.⁴⁶ Some critics argue that the community surrounding a redeveloped brownfield is being forced to accept a lower level of protection for health and safety in exchange for economic development.⁴⁷ EPA argues, on the other hand, that even if cleanup standards are set for brownfields on a site-specific basis, those cleanup standards must, at a minimum, protect human health.⁴⁸ Without a brownfields initiative, it is unlikely that the properties would be cleaned up at all. In addition, the agency notes that brownfields, by their nature, are marginally contaminated properties.⁴⁹

While environmental justice activists recognize the potential conflict between brownfield redevelopment and environmental justice, many believe that redevelopment can be accomplished in an environmentally just manner as long as: (1) the community surrounding a brownfield is informed about the proposed cleanup and redevelopment as early in the process as possible, and the community is allowed to participate fully in the decisionmaking process,⁵⁰ and (2) the site

45. John Rosenthal, Remarks in the ABA Satellite Seminar, *Brownfields Redevelopment: Cleaning Up the Urban Environment* (Mar. 7, 1996) [hereinafter Rosenthal Interview]. In *Toxic Waste and Race Revisited*, the United Church of Christ's Commission for Racial Justice identified community revitalization as an important part of any effective solution to the problem of environmental injustice. Grayson, *supra* note 44.

46. See *infra* notes 82-85 and accompanying text.

47. Grayson, *supra* note 44; see also Georgette C. Poindexter, *Addressing Morality in Urban Redevelopment: Using Stakeholder Theory to Craft Legal Process*, 15 VA. ENVTL. L.J. 37, 63 (1995).

48. *Id.*

49. *Id.*

50. John Rosenthal, *Change Cleanup Standards If and Only If*, THE ENVTL FORUM, May-June 1995, at 34. See also Poindexter, *supra* note 47. As the Director of the NAACP's Environmental Justice Program notes, "Environmental justice is a process and not an outcome. It is achieved by communities fostering meaningful and intelligent participation in environmental decisions that affect their children, their homes, their health, and their jobs." Rosenthal, *supra* note 50, at 33. In order for a community to be able to participate intelligently, it must understand the process for cleaning up a site, and must understand the

is cleaned up to a level that protects human health and the environment.⁵¹ Most of the state initiatives described below incorporate these protections.

B. *Why is a Cooperative Federal/State Program Necessary to Achieve "Environmentally Just" Brownfield Redevelopment?*

Before the federal government or state governments took steps to encourage brownfield redevelopment, very few brownfields were redeveloped. Uncertain liability and several other major impediments discouraged landowners from redeveloping brownfields.⁵² State governments have taken the lead in removing those impediments but a cooperative federal effort is essential. The following section of this article explores the impediments to brownfield redevelopment and state programs that attempt to address those issues. The section also discusses the limits of the states' powers, and identifies areas where the federal government must act to encourage "environmentally just" brownfield redevelopment.

1. *Impediments to Brownfield Redevelopment*

The major impediment to brownfield redevelopment is the uncertain, but potentially substantial, liability that developers may incur by redeveloping a site.⁵³ If there has been a release or potential release of hazardous substances at a brownfield, a developer could be held jointly and severally liable for the entire cost of cleaning up the site under the federal Superfund law⁵⁴ or similar state Superfund laws, if the developer purchases the property or redevelops the property.

issues involved in cleaning up a site. *Id.* Consequently, communities must have more access to information about risk assessment, reduced cleanup standards, and similar issues. *Id.*

51. Rosenthal, *supra* note 50, at 34.

52. See *infra* notes 53-71 and accompanying text.

53. OTA REPORT, *supra* note 33, at 1-2; Andrew, *supra* note 34, at 27. "Even abandoned properties with no contamination can suffer from the stigma of brownfields until a site assessment determines that it is clean." OTA REPORT, *supra* note 33, at 4.

54. Superfund imposes joint and several liability on current owners or operators of property from which there has been a release or threatened release of hazardous substances. 42 U.S.C. § 9607(a)(1) (1996). See, e.g., *O'Neill v. Picillo*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990). Current owners and operators can be held liable for the entire cost of cleaning up the property. 42 U.S.C. § 9607(a)(4)(A),(B) (1996).

While brownfields are usually not hazardous enough to be placed on the National Priorities List or similar State priorities lists, cleanups under federal or state Superfund laws⁵⁵ could still cost millions of dollars. If the developer does not already own the site, they may be reluctant to develop the site and expose themselves to such liability.⁵⁶ Similarly, current owners of brownfields where there has not been a release of hazardous substances may be reluctant to redevelop the property because they fear that redevelopment will cause a release which could trigger federal or state Superfund liability. In addition to the federal and state Superfund laws, RCRA and other federal and state environmental laws may impose liability on persons who purchase or redevelop contaminated properties.⁵⁷

Liability concerns deter not only potential purchasers of brownfields; they may also deter sellers.⁵⁸ Even if cleaned up in compliance with all applicable federal and state environmental laws, further contamination may be discovered at the site after the owner sells the property. Under federal and state Superfund laws the former owner may have continuing liability if the contamination can be traced to substances that were disposed of on the property during the time they owned it.⁵⁹

Former owners may also be liable in toxic tort suits brought by neighbors of the property or workers on the prop-

55. Approximately 45 states have enacted State Superfund laws, and many of those laws contain liability provisions that are similar to the Federal Superfund law. OTA REPORT, *supra* note 33, at 2, 10. States often focus their attention under State Superfund laws on sites that are not on the National Priorities List, and are not being cleaned up under the federal program. *Id.* State Superfund laws create the same liability concerns for potential brownfield redevelopers as the Federal Superfund law. *Id.* See also Andrew, *supra* note 34, at 27.

56. OTA REPORT, *supra* note 33, at 1-3. Although Federal Superfund law creates an affirmative defense to liability for an innocent landowner, see 42 U.S.C. §§ 9601(35), 9607(b)(3) (1996), the defense is not available to persons who know, or had reason to know when they bought the property, that hazardous substances were disposed of on the property. *Id.* § 9601(35)(A). As a result, the defense is not available to many persons who plan to redevelop brownfields.

57. OTA REPORT, *supra* note 33, at 6; see also Andrew, *supra* note 34, at 27.

58. Robert Frantz, Remarks at ABA Satellite Seminar, Brownfields Redevelopment: Cleaning Up the Urban Environment (Mar. 7, 1996) [hereinafter Frantz remarks]. See also GAO SUPERFUND REPORT, *supra* note 36, at 6.

59. Superfund imposes liability on persons who owned or operated property at the time hazardous substances were disposed on the property. 42 U.S.C. § 9607(a)(2) (1996).

erty, and could be a particularly attractive target if the current owner is financially troubled.⁶⁰ In addition, if the current owner of the property has established a business on the property, the former owner may find it difficult to clean up if the cleanup plans interfere with the operations of that business.⁶¹ Owners of brownfields may be unwilling to relinquish control over the properties while opening themselves up to such liability.

Uncertain cleanup standards are another major impediment to brownfield redevelopment. Prospective developers are often reluctant to purchase or redevelop brownfields because they can't predict the level of cleanup that will be required for the property under federal or state Superfund laws.⁶² If the developer can't predict the cleanup levels, they will not be able to predict how much the cleanup will cost, or how long it will take.⁶³ Accordingly, they can't determine whether the redevelopment will be economically viable.

Inadequate or nonexistent financing opportunities also frustrate brownfield redevelopment. One of the major reasons that private and public institutions have been reluctant to fund brownfield redevelopment is that they fear Superfund liability for the cleanup of the property if they finance the redevelopment. A 1990 decision by the United States Court of Appeals for the 11th Circuit, *United States v. Fleet Factors Corp.*,⁶⁴ has created uncertainty regarding the extent to which a secured creditor can be held liable under Superfund as the "owner" of the property it has financed.⁶⁵ EPA attempted to alleviate that uncertainty by promulgating regulations that created a "safe harbor" for secured lenders,⁶⁶ but

60. Frantz Remarks, *supra* note 58.

61. *Id.*

62. OTA REPORT, *supra* note 33, at 5.

63. *Id.* at 5, 6.

64. 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991).

65. Although Superfund defines "owner" to exclude anyone "who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility," 42 U.S.C. § 9601(20)(A)(iii) (1994), the *Fleet Factors* court held that a secured creditor can be held liable as an "owner" if its "involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose." *Fleet Factors Corp.*, 901 F.2d at 1558.

66. 57 Fed. Reg. 18,344 (1992) (to be codified at 40 C.F.R. pt 300).

the United States Court of Appeals for the District of Columbia Circuit struck down those regulations in 1994.⁶⁷

Even if the Superfund liability of secured creditors was clearly demarked, private and public institutions would still be reluctant to fund brownfield redevelopment in many cases because costs associated with cleaning up the property may be so high that it would be impossible to redevelop the site profitably.⁶⁸ In some cases, even the cost of assessing the extent of contamination on a brownfield may be higher than the profit that the developer could make by cleaning up and redeveloping the property.⁶⁹ Many creditors are unwilling to take the risk of investing in redevelopment of a brownfield, or even investing in the assessment of contamination at a brownfield, despite the fact that the assessment may disclose minimal contamination and the actual cleanup costs may be low.

If, despite all of those impediments, a landowner or developer proceeds with brownfield development, they may encounter one other major impediment. If the landowner or developer does not involve the community that will be affected by the redevelopment in the decisionmaking process regarding cleanup and redevelopment of the property, community opposition may be a major impediment to redevelopment.⁷⁰ Many brownfield redevelopers are beginning to realize that the project may not succeed unless the affected community is involved from the beginning of the decisionmaking process until the completion of the redevelopment.⁷¹ More importantly, full and informed community participation is necessary to ensure that the cleanup and redevelopment will be done in a manner that protects and empowers the affected community.

67. *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994). The *Kelley* Court held that EPA did not have the authority to issue substantive regulations to interpret a statute establishing liability. *Id.* at 1106.

68. OTA REPORT, *supra* note 33, at 8.

69. *Id.* at 18.

70. *Id.* at 9; *see also* GAO SUPERFUND REPORT, *supra* note 36, at 8.

71. Thomas W. Devine, Remarks at ABA Satellite Seminar, Brownfields Redevelopment: Cleaning Up the Urban Environment (Mar. 7, 1996) [hereinafter Devine remarks].

2. State Brownfields Initiatives

Because most brownfield sites do not present a sufficient threat to human health or the environment to warrant immediate attention under the federal Superfund program, states have taken the lead in cleaning up brownfield sites.⁷² In order to overcome the impediments to redevelopment outlined above, states have also taken the lead in developing initiatives that encourage brownfield redevelopment.⁷³ While states have attempted to encourage brownfield redevelopment through state Superfund laws and property transfer laws, the most successful vehicles for brownfield redevelopment have been state voluntary cleanup laws.⁷⁴

Cleanups under a state voluntary cleanup program are, as the name suggests, voluntary. The process begins when the owner or developer of a contaminated site approaches the state government and cooperatively develops a cleanup plan for the site with the government.⁷⁵ Minnesota developed the first voluntary cleanup program in 1988,⁷⁶ and many other states have implemented similar programs.⁷⁷

State voluntary cleanup programs attempt to encourage brownfield redevelopment by removing or reducing the impediments to redevelopment.⁷⁸ For instance, many state voluntary cleanup laws include provisions that authorize the

72. OTA REPORT, *supra* note 33, at 2.

73. *Id.*

74. *Id.* at 10. The voluntary cleanup programs offer technical assistance, financial assistance, and liability protection that states cannot generally offer through State Superfund laws. *Id.* at 3.

75. *Id.* at 13. Many state voluntary cleanup programs are not limited to brownfields, and allow persons to voluntarily remediate State Superfund sites as well as brownfields.

76. *Id.* at 19.

77. At the time that the Office of Technology Assessment prepared its *State of the States on Brownfields* report, there were 21 state voluntary cleanup programs. *Id.* at 3. The Midwestern States in EPA Region 5 (Minnesota, Illinois, Michigan, Indiana, Wisconsin, and Ohio) are at the forefront in cleaning up sites under voluntary cleanup programs. Andrew, *supra* note 34, at 28.

78. In many cases, the cleanup process is also streamlined by reducing government oversight of the process. Andrew, *supra* note 34, at 28. In some cases, the state does not review the progress of a voluntary cleanup until the developer has completed the cleanup. *See, e.g.*, 1995 Pa. Laws 2, §§ 302, 303. In other cases, the State certifies an environmental professional to oversee the cleanup, and the State does not review the cleanup until it has been completed. *See, e.g.*, OHIO REV. CODE ANN. § 3746.10 (Anderson 1996). Some states, however, oversee all phases of the cleanup process. *See, e.g.*, MINN. STAT. ANN. § 115B.175 (West 1995).

state to enter into a covenant not to sue the developer or provisions that otherwise protect a developer from future liability for contamination at a voluntary cleanup site if the developer successfully conducts the voluntary cleanup that is chosen by the developer and the state government for the site.⁷⁹ Some state programs also waive the liability of prospective purchasers of contaminated property to encourage developers to buy and redevelop brownfields,⁸⁰ and several state programs include provisions to limit the liability of secured creditors.⁸¹

State voluntary cleanup programs also use flexible cleanup standards to lower the cost of cleanups and en-

79. Andrew, *supra* note 34, at 28. Minnesota's voluntary investigation and cleanup program protects developers who complete an approved voluntary cleanup of property as long as the developers did not contribute to the contamination initially. MINN. STAT. ANN. § 115B.175 (West 1995). Ohio provides a covenant not to sue developers under state environmental laws if developers retain consultants to oversee a voluntary cleanup and the consultants certify that the cleanup has been completed. OHIO REV. CODE § 3746.12 (Anderson 1996). However, only 1/3 of the State voluntary cleanup programs that OTA reviewed in *The State of the States on Brownfields* provided covenants not to sue, or similar immunity, to developers. OTA REPORT, *supra* note 33, at 17 n.39.

Pennsylvania offers developers more liability protection than most states offer through their voluntary cleanup programs. Under a recently enacted Pennsylvania law, if a person cleans up a contaminated site to a level that meets standards established under the law, the person cannot be held liable for further remediation of the site under any of Pennsylvania's environmental laws, and cannot be sued by third parties for contribution under those laws. 1995 Pa. Laws 2, § 501. Furthermore, unlike many other states, Pennsylvania's law does not allow the state government to require the developer to conduct any future cleanup at the site if further contamination is discovered, except in limited circumstances, such as fraud. *Id.* § 505.

80. OTA REPORT, *supra* note 33, at 17. In Minnesota, the state can enter into an agreement to take no action against a landowner under the State Superfund law when the contamination on the property originates from an adjacent property and the landowner is not otherwise responsible for the release. MINN. STAT. ANN. § 115B.177 (West 1995). The agreement can extend to prospective purchasers of the property if they are not otherwise responsible for the contamination. *Id.* Similarly, if a landowner completes an approved voluntary cleanup of property under Minnesota's voluntary investigation and cleanup program, subsequent purchasers of the property can receive the same protection from liability as the person who conducted the cleanup. MINN. STAT. ANN. § 115B.175 (West 1995). In the same way, if a contaminated property is cleaned up under the Pennsylvania or Ohio programs, subsequent purchasers can be protected from liability to the same extent as the person who conducted the voluntary cleanup. 1995 Pa. Laws 2, § 501; OHIO REV. CODE ANN. § 3746.14 (Anderson 1996).

81. See, e.g., 1995 Pa. Laws 3, § 5; MINN. STAT. ANN. § 115B.175 (West 1995).

courage brownfield redevelopment.⁸² In many programs, cleanup standards are established for a brownfield based on a site-specific risk assessment⁸³ that considers the future land use of the property.⁸⁴ Although the standards are often less stringent than cleanup standards under state Superfund laws, the standards are still set at levels that protect human health and the environment.⁸⁵

82. The voluntary cleanup standards may be based on one or more of (1) EPA guidelines for toxic chemicals; (2) maximum contaminant levels or maximum contaminant level goals under the Safe Drinking Water Act; (3) water quality criteria; (4) site specific risk assessment; or (5) background levels. OTA REPORT, *supra* note 33, at 15. States are often willing to adopt flexible cleanup standards for brownfields because they are less contaminated than Superfund sites. Devine Remarks, *supra* note 71.

83. Cleanup standards can be set based on site-specific risk assessments under the California and Ohio voluntary cleanup programs, among others. See CAL. HEALTH & SAFETY CODE § 25398.4 (West 1995); OHIO REV. CODE ANN. §§ 3746.04, 3746.07 (Anderson 1996). These site-specific standards are often an alternate to other uniform cleanup standards. For instance, in Pennsylvania, a person that conducts a voluntary cleanup can choose to clean the site up to one of three categories of cleanup standards: (1) background levels; (2) a statewide health-based standard; or (3) "a site-specific standard that achieves remediation levels based on a site-specific risk assessment so that any substantial present or probable future risk to human health and the environment is eliminated or reduced to protective levels based upon the present or currently planned future use of the property." 1995 Pa. Laws 2, § 301. Once again, though, Pennsylvania goes further than most states, in that the flexible cleanup standards described above apply to compelled remediation under any of Pennsylvania's environmental laws, and not merely to voluntary brownfield remediation. *Id.* § 106.

84. The future land use of a brownfield can be considered in setting cleanup standards in several states, including Minnesota, Ohio, and California. See CAL. HEALTH & SAFETY CODE § 25398.4 (West 1995); OHIO REV. CODE ANN. § 3746.04 (Anderson 1996); MINN. STAT. ANN. § 115B.17 (West 1995). For instance, if the groundwater underlying a brownfield will not be used as a drinking water source, the developer will probably not be required to clean up the groundwater to a level that meets drinking water standards. Similarly, if a brownfield will be used for industrial purposes with limited public access, cleanup standards for soil may be reduced. Devine Remarks, *supra* note 71.

In many cases, though, if a state considers future land use of a brownfield in setting cleanup standards, the state will impose deed restrictions or other land use controls on the property to ensure that the property will be used in the manner that the developer represented when the cleanup standards were established. California, Ohio and Minnesota impose such controls on property when cleanup standards are established based on the future use of the property. See CAL. HEALTH & SAFETY CODE § 25398.7 (West 1995); OHIO REV. CODE ANN. § 3746.05 (Anderson 1996); MINN. STAT. ANN. § 115B.175 (West 1995).

85. Most voluntary cleanup programs set cleanup standards for toxics at levels at which no adverse effects can be detected for noncancer risks and at which cancer risks are reduced to 1 in 1 million. OTA REPORT, *supra* note 33, at 15.

Some states provide additional financial incentives as part of voluntary cleanup programs to spur brownfield redevelopment.⁸⁶ Pennsylvania and Michigan, for example, provide grants to communities to conduct environmental assessments of contamination at brownfields.⁸⁷ Michigan, Minnesota and Pennsylvania offer grants and loans to developers and communities to conduct the actual cleanup of brownfields.⁸⁸ Minnesota and Ohio offer developers a reduction in property taxes or tax abatement for brownfield properties that are redeveloped under their voluntary cleanup programs.⁸⁹

While state voluntary cleanup programs include many incentives to developers to spur brownfield redevelopment, the programs also generally require developers to involve the community in the cleanup and redevelopment decisionmaking process. For instance, if a developer intends to clean up a site in Pennsylvania to a level that is based on a site-specific risk assessment, the developer must develop "a public involvement plan which involves the public in the cleanup and use of the property."⁹⁰ In addition, the developer must in-

86. Andrew, *supra* note 34, at 29; OTA REPORT, *supra* note 33, at 18.

87. Pennsylvania's "Industrial Sites Environmental Assessments Act" creates a two million dollar Industrial Sites Environmental Assessment Fund, administered by the State Department of Commerce, which provides grants for environmental assessments in distressed communities. 1995 Pa. Laws 4 §§ 3, 4. Similarly, Michigan provides up to ten million dollars for grants for environmental assessments in certain communities. MICH. COMP. LAWS § 13A.19508 (1996).

88. *See, e.g.*, 1995 Pa. Laws 2 § 702; MICH. COMP. LAWS § 13A.19508 (1996); MINN. STAT. ANN. § 116J.554 (1995).

89. Ohio offers a ten year tax abatement on the increased assessed value of real and personal property at a redeveloped brownfield. OHIO REV. CODE ANN. §§ 5709.57(c)(2), 5709.883 (Anderson 1996). Minnesota offers a reduction in property taxes to developers with an approved site assessment or cleanup plan. OTA REPORT, *supra* note 33, at 20.

90. 1995 Pa. Laws 2 § 304(o). Depending on the site involved, [the public involvement plan] may include techniques such as developing a proactive community information and consultation program that includes door step notice of activities related to remediation, public meetings and roundtable discussions, convenient locations where documents related to a remediation can be made available to the public and designating a single contact person to whom community residents can ask questions; the formation of a community-based group which is used to solicit suggestions and comments on the various reports required by this section; and, if needed, the retention of trained, independent third parties to facilitate meetings and discussions and perform mediation services. *Id.*

However, the law only requires a public involvement plan if the cleanup levels for the site will be based on a site-specific risk assessment *and* the munic-

clude, in risk assessments and cleanup plans, a plain language description of the information in the document "in order to enhance the opportunity for public involvement and understanding of the remediation process."⁹¹

Voluntary cleanup programs encourage landowners and developers to work cooperatively with state agencies to avoid some of the costs and delays that would otherwise prevent brownfield redevelopment. However, state voluntary cleanup programs cannot remove all of the impediments to brownfield redevelopment. Even in states that offer developers a covenant not to sue when the developers complete an approved voluntary cleanup, liability concerns remain a major impediment to brownfield redevelopment.

While the covenant not to sue protects the developer from enforcement actions by the state, it does not protect the developer from contribution suits by third parties under state environmental laws or toxic tort suits by third parties for contamination from the site.⁹² It also does not protect the developer from enforcement of federal environmental laws by federal authorities. Clearly, if there has been a release of hazardous substances or other environmental contaminants at a brownfield, the owner and purchasers of the site may be held liable under the federal Superfund law and other federal environmental laws, in addition to state environmental laws.⁹³ Although it is unlikely that the federal government will use Superfund to address most brownfields, many landowners, lenders and developers argue that *potential* federal Superfund liability is the greatest impediment to brownfield redevelopment.⁹⁴

The federal government is, therefore, an essential partner in any effort to encourage environmentally just brownfield redevelopment. The federal government plays two important roles. First, the federal government must provide

ipality, rather than any members of the community, requests to be involved in the remediation and reuse plans for the site. *Id.* If the site will be cleaned up to background levels or to uniform state-wide health-based levels, the developer must only notify the state government and the local municipality regarding the cleanup, and place a notice in the local paper. 1995 Pa. Laws 2 §§ 302(e), 303(h).

91. 1995 Pa. Laws 2 § 901.

92. OTA REPORT, *supra* note 33, at 16.

93. See *supra* notes 54-57 and accompanying text.

94. Andrew, *supra* note 34, at 28; GAO SUPERFUND REPORT, *supra* note 36, at 3.

relief from *federal liability* to persons that clean up brownfields to levels that protect human health and the environment, and it must provide clarification to lenders and prospective purchasers regarding the extent to which they can be held liable under federal law if they participate in redevelopment of a brownfield.⁹⁵ Second, the federal government must provide technical and financial support, and education, to industries, developers, states and local communities to encourage brownfield redevelopment, and to ensure that the public is involved in brownfield redevelopment decisionmaking in a meaningful manner.⁹⁶

C. *How has the Federal Government Worked with States to Achieve "Environmentally Just" Brownfield Redevelopment?*

The federal government is developing a successful partnership with states to spur brownfield redevelopment with the full, and informed, participation of affected communities. The partnership could serve as a model for future federal/state partnerships to achieve environmental justice, and the partnership is based on the four principles outlined in the Introduction to this article. The following discussion of EPA's Brownfields Action Agenda recounts those four principles, and describes how the actions that the federal government has taken under the Brownfields Action Agenda advance those principles.

1. *Principle Number One: The Federal Government Must Take Affirmative Steps to Remove Any Barriers That it has Created to Environmental Justice.*

The Environmental Protection Agency has taken several actions under the Brownfields Action Agenda that remove barriers that the federal government created to brownfield redevelopment. First, EPA removed 24,000 sites from CER-

95. Timothy Fields, Remarks in ABA Satellite Seminar, Brownfields Redevelopment: Cleaning Up the Urban Environment (Mar. 7, 1996) [hereinafter Fields Remarks].

96. *Id.*; see also OTA REPORT, *supra* note 33, at 26. EPA has assigned members of its staff through intergovernmental personnel assignments to work with the cities of Detroit, Chicago, Dallas and East Palo Alto in developing brownfield redevelopment programs. Fields Remarks, *supra* note 95.

CLIS (Comprehensive Environmental Response, Compensation and Liability System), the list of sites that the federal government reviews for possible inclusion on the Federal Superfund List, after the agency determined that it would not require the sites to be cleaned up under Superfund.⁹⁷ When EPA includes a site in CERCLIS, the listing often creates a stigma for the site and hinders development of the site.⁹⁸ When the agency removed the sites from CERCLIS, it removed a psychological barrier to development that it created by listing the sites initially.⁹⁹

The agency removed other federally-created barriers to brownfield redevelopment when it issued guidance to clarify the liability of lenders and municipalities under Superfund. After the *Fleet Factors* and *Kelley* decisions, it was unclear whether lenders that foreclosed on property, or attempted to protect their security interest in property by requiring mortgagees to take steps to avoid hazardous substance contamination on the property, could be held liable under Superfund as "owners" of the property. Similarly, it was unclear whether municipal governments that acquired property involuntarily could be held liable under Superfund as "owners" of the property. Accordingly, municipalities and lenders were reluctant to take any actions with regard to brownfields that might subject them to Superfund liability.¹⁰⁰

97. See Memorandum from Stephen D. Luftig, Acting Director, Office of Emergency and Remedial Response, U.S. ENVTL. PROTECTION AGENCY TO EPA REGIONAL HAZARDOUS WASTE PROGRAM DIRECTORS REGARDING REMOVAL OF NFRAP SITES FROM CERCLIS (1995) reprinted in ABA SEC. NAT. RESOURCES & ENVTL. LAW, BROWNFIELDS REDEVELOPMENT: CLEANING UP THE URBAN ENVIRONMENT 25 (1995) [hereinafter CERCLIS Memorandum]. The EPA plans to remove an additional 3,000 sites from the CERCLIS database. Fields Remarks, *supra* note 95.

The EPA removed the sites after it made a determination that the sites would not be listed on the National Priorities List and that no further remedial action was planned for the sites ("NFRAP determination") under Superfund at the time that the sites were evaluated. CERCLIS Memorandum, *supra* note 97, at 29. EPA cautions that "[A] NFRAP decision does not mean that there are no hazardous wastes associated with a given property; it means only that based upon available information at the time of evaluation, EPA decided not to take further action under CERCLA." *Id.*

98. BAA, *supra* note 31.

99. *Id.*; see also GAO SUPERFUND REPORT, *supra* note 36.

100. See, e.g., OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVTL. PROTECTION AGENCY, FACT SHEET: THE EFFECT OF SUPERFUND ON INVOLUNTARY ACQUISITIONS OF CONTAMINATED PROPERTY BY GOVERNMENT ENTITIES 1 (1995), reprinted in ABA SEC. NAT. RESOURCES & ENVTL. LAW,

EPA clarified the liability of lenders and municipalities in light of *Fleet Factors* and *Kelley* in a 1995 "Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily."¹⁰¹ In the policy, the agency announced that it will apply the provisions of the 1992 lender liability regulations that were invalidated in *Kelley* as an enforcement policy.¹⁰² The policy also provides that municipalities that acquire property involuntarily¹⁰³ through tax delinquency foreclosure, demolition lien foreclosure, escheat, abandonment, condemnation, or eminent domain will not be pursued as liable parties under Superfund by EPA.¹⁰⁴

EPA has taken other steps to clarify the Superfund liability of potential developers that the agency hopes will spur brownfield redevelopment. The agency recently amended its guidance on "prospective purchaser agreements" under Superfund to make the agreements more widely available.¹⁰⁵

BROWNFIELDS REDEVELOPMENT: CLEANING UP THE URBAN ENVIRONMENT 77 (1996) [hereinafter OECA FACT SHEET].

101. 60 Fed. Reg. 63,517 (1995). The agency also recently issued regulations that clarify when a lender may be exempt from liability regarding releases from underground storage tanks. *Underground Storage Tanks—Lender Liability*, 60 Fed. Reg. 46,691 (1995) (to be codified at 40 C.F.R. pts 280 and 281).

102. CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily, 60 Fed. Reg. 63,517, 63,518 (1995). The policy is, however, merely an enforcement policy, and does not release lenders from liability under Superfund or protect them from contribution lawsuits by third parties under Superfund. See OECA FACT SHEET, *supra* note 100, at 79. However, EPA believes that if a lender takes the actions that the policy requires lenders to take to qualify for protection from EPA enforcement, most courts will conclude that the lender is not an "owner" under Superfund. *Id.* Superfund reform legislation that was introduced in the 104th Congress would codify EPA's lender liability regulations. See H.R. 2500, 104th Cong., § 302 (1995).

103. EPA guidance suggests that "[a] government entity need not be completely 'passive' in order for the acquisition to be considered 'involuntary' for purposes of CERCLA." OECA Fact Sheet, *supra* note 100, at 79.

104. *Id.* EPA hopes that the policy will facilitate municipalities' plans to redevelop and broker brownfield sites to prospective purchasers. *Id.* Once again, the policy is merely an enforcement policy and does not release municipalities from liability or protect them from third party contribution lawsuits, but EPA feels that municipalities that comply with the provisions of the policy will not be held to be "owners" of property under Superfund. *Id.*

105. See *Agreements with Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement*, 60 Fed. Reg. 34,792 (1995) (guidance). While the amended guidance provides the agency greater flexibility to enter into prospective purchaser agreements, the agency insists that those agreements will not result in diminished environmental protection and will not aggravate the environmental injustice crisis. *Id.* In the guidance, EPA provides that:

Under the policy, EPA, in some cases, enters into an agreement to resolve a prospective purchaser's Superfund liability before the purchaser buys a contaminated property. Under the agreement, the purchaser agrees to conduct a specified cleanup of the property or pay the agency a specific amount of money in exchange for a covenant from EPA that it will not pursue any further action against the purchaser under Superfund for the release at the site, and will protect the purchaser from contribution suits by third parties.¹⁰⁶

[t]he agency intends to carefully weigh the public interest considerations of creating jobs in the inner city, where older contaminated industrial properties are often located, against the possibility of further environmental degradation of industrial property in mixed industrial/residential areas. EPA is committed to working with purchasers of such property, to the extent possible, to ensure proper cleanup and promote responsible land use.

Id. at 34,794.

In addition, since prospective purchaser agreements aren't covered by Section 122 of CERCLA, there is no legal requirement for public notice and comment on the agreement. However, "in light of EPA's new policy of accepting indirect public benefit as partial consideration, and the fact that the prospective purchaser agreements will provide contribution protection to the purchaser," EPA's policy provides that

the surrounding community and other members of the public should be afforded the opportunity to comment on the settlement, whenever feasible. . . . Particularly in urban communities and at facilities where environmental justice is an issue, Regions should provide sufficient opportunities for public information dissemination and facilitate public input. Seeking cooperation with state and local government may also facilitate public awareness and involvement. Additionally, Regions should make a case-by-case determination of the need and level of additional measures to ensure meaningful community involvement with respect to the agreement.

Id. at 34,795.

106. Under the guidance, EPA may enter into an agreement with a prospective purchaser of contaminated property and provide the purchaser with a *covenant not to sue* if the following criteria are met: (a) An EPA action at the facility has been taken, is ongoing, or is anticipated to be undertaken by the agency; (b) The agency should receive a substantial benefit either in the form of a direct benefit for cleanup, or as an indirect public benefit in combination with a reduced direct benefit to EPA; (c) The continued operation of the facility or new site development, with the exercise of due care, will not aggravate or contribute to the existing contamination or interfere with EPA's response action; (d) The continued operation or new development of the property will not pose health risks to the community and those persons likely to be present at the site; (e) The prospective purchaser is financially viable. Agreements with Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. at 34,792-794 (1995).

Because the guidance provides that EPA must receive a substantial benefit as part of a prospective purchaser agreement, the prospective purchaser must still generally pay for part of the cleanup costs as a condition of the agreement.

Many developers will not buy brownfields because they do not want to be held jointly and severally liable under Superfund for uncertain, but potentially substantial, cleanup costs. A developer that enters into a prospective purchaser agreement, though, knows the extent of its potential liability before it ever buys the property. Although prospective purchaser agreements may increase the alienability of some properties, it is unlikely that they will play a significant role in encouraging brownfield redevelopment, because EPA generally will only enter into agreements regarding seriously contaminated sites, rather than traditional brownfields.¹⁰⁷

While the initiatives described above are useful first steps to encourage brownfield redevelopment, there are limits

Id. at 34,794. However, EPA will consider the "indirect benefits" of the redevelopment when it determines how much of the cleanup costs it will require the purchaser to fund under the agreement. *Id.* Indirect benefits include

measures that serve to reduce substantially the risk posed by the site, creation or retention of jobs, development of abandoned or blighted property, creation of conservation or recreation areas, or provision of community services (such as improved public transportation and infrastructure). Examples of reduced but measurable benefits to EPA include partial cleanup or compensation.

Id.

In addition to the covenant not to sue, EPA provides the purchaser with contribution protection under Section 113(f)(2) of CERCLA. *Id.* at 34,798.

107. Pursuant to the guidance, EPA will only enter into prospective purchaser agreements covering a particular piece of property when an EPA action has been taken, is ongoing, or is anticipated to be undertaken, on the property. *Agreements with Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement*, 60 Fed. Reg. at 34,792, 34,794. Most brownfields would not, therefore, be candidates for prospective purchaser agreements.

There are several other reasons why prospective purchaser agreements, under the current guidance, would not effectively encourage brownfield redevelopment. First, the negotiation and approval process for prospective purchaser agreements is time-consuming, averaging from nine months to a year and a half, and expensive. Michele B. Corash, Remarks in ABA Satellite Seminar, *Brownfields Redevelopment: Cleaning Up the Urban Environment* (Mar. 7, 1996). Second, the agreements only address Superfund liability, and do not protect prospective purchasers from liability under RCRA, other federal environmental laws, or state environmental laws. *Id.* EPA has only entered into a few dozen agreements since the agency initially adopted the prospective purchaser guidance.

Congress and the states are addressing some of those limitations. Many states are beginning to enter into prospective purchaser agreements that protect purchasers from liability under state environmental laws. *Id.* Members of the United States House of Representatives are considering amending Superfund to exempt prospective purchasers from Superfund liability if they follow certain procedures before buying property. See H.R. 2500, 104th Cong., § 305 (1995).

to what the federal government can accomplish merely by removing barriers created by federal law or the federal government. Since the federal and state governments have created barriers to brownfield redevelopment, the federal government must encourage states to pursue strategies that remove those barriers, and must model future federal initiatives on successful state programs.

2. *Principle Number Two: To the Extent that States or Local Governments Have Developed Effective Strategies to Achieve Environmental Justice, the Federal Government Should Encourage Them to Pursue Those Strategies, as Long as They Don't Conflict With Overriding Federal Policies*

As part of the Brownfield Action Agenda, EPA is taking steps to encourage states to develop effective strategies, such as state voluntary cleanup programs, to spur brownfield redevelopment. State voluntary cleanup programs have been an effective tool to encourage brownfield redevelopment. However, states cannot protect landowners or developers that voluntarily cleanup sites under those programs from liability under Superfund or other federal environmental laws.

EPA is making those state programs more attractive to developers and landowners by entering into agreements with states, whereby EPA agrees that it will not pursue Superfund enforcement actions at sites that are cleaned up under the state voluntary cleanup program, unless the site poses an imminent threat to human health or the environment.¹⁰⁸ EPA

108. EPA and states enter into Superfund Memoranda of Agreement ("SMOA") that define the roles that each play in administering the Federal Superfund law in the State. Andrew Warren, U.S. Environmental Protection Agency, Remarks in ABA Satellite Seminar, *Brownfields Redevelopment: Cleaning Up the Urban Environment* (Mar. 7, 1996) [hereinafter Warren Interview]. Recently, EPA's regional office in Chicago (EPA Region V) began incorporating "comfort language" into the SMOAs with several states to assure the state that EPA would not pursue Superfund enforcement actions at sites where landowners or developers are undertaking or have successfully completed an approved voluntary cleanup under the states' voluntary cleanup program. *Id.*

The language added to the SMOAs varies from state to state, depending on the structure of the state's voluntary cleanup program. *Id.* In some cases, EPA commits that it will not pursue Superfund enforcement at a site after a site begins a voluntary cleanup under the state's voluntary cleanup program. *Id.* In other cases, EPA commits that it will not pursue Superfund enforcement at a site after the state certifies that the site has been cleaned up under the state's voluntary cleanup program. *Id.* The language in the SMOA between EPA and

will not enter into an agreement with a state unless the state voluntary cleanup program protects human health and the environment and ensures that affected communities are involved in the cleanup decisionmaking process. This partnership between EPA and the states clearly illustrates the benefits of cooperative federalism in the struggle to achieve environmental justice.¹⁰⁹

3. *Principle Number Three: The Federal Government Should Adopt Successful State Environmental Justice Initiatives on the Federal Level, and Make Legislative and Regulatory Changes Based on Those Successful Initiatives*

While states have taken the lead in developing programs to encourage brownfield redevelopment, the federal government has recently begun to model federal initiatives on successful state initiatives. For instance, President Clinton recently announced his support for tax reform to encourage brownfield redevelopment,¹¹⁰ and several brownfield tax in-

Indiana, for example, provides that "[a]t sites successfully completing a remediation under the VRP, Region V does not plan or anticipate any federal action under the Superfund law (CERCLA) unless, in exceptional circumstances, the site poses an imminent threat to human health and the environment." U.S. ENVTL. PROTECTION AGENCY, REGION V & INDIANA DEPT. OF ENVIRONMENTAL MANAGEMENT SUPERFUND MEMORANDUM OF AGREEMENT ADDENDUM 2 (1995), reprinted in ABA SEC. NAT. RESOURCES & ENVTL LAW, BROWNFIELDS REDEVELOPMENT: CLEANING UP THE URBAN ENVIRONMENT 123, 124 (1996).

Prior to incorporating "comfort language" into SMOAs, EPA would send "comfort letters" to individual developers, in which the agency indicated that it did not plan any Superfund enforcement action at the time. Warren Interview, *supra*. EPA still follows that approach in states where the agency has not incorporated "comfort language" into the SMOA.

109. There are, however, limits to the effectiveness of this approach. First, EPA does not offer landowners or developers a covenant not to sue, contribution protection or other protection from Superfund liability under this approach. Warren Interview, *supra* note 108. The agency merely makes a commitment to the state, rather than the landowner or developer, that it will not pursue a Superfund enforcement action for releases from the site. *Id.* Furthermore, EPA retains its authority to enforce RCRA and other federal environmental laws at the site. *Id.* Recently, though, EPA has suggested that it might add provisions to the memoranda of agreement that it negotiates with states regarding RCRA enforcement that would encourage brownfield redevelopment and provide for reduced EPA oversight of some brownfields. *Id.*

110. The brownfield tax proposal was one of the few environmental initiatives that the President discussed in his 1996 State of the Union Address. President Clinton, 1996 State of the Union Address (visited Jan. 23, 1996) <<http://www1.whitehouse.gov/WH/New/other/challenge.html#environment>>. The President announced a \$2 billion, seven year brownfield tax incentive program

centive bills have been introduced in Congress.¹¹¹ Congress is also considering legislation that would provide grants and loans to state and local governments to conduct site assessments or cleanups at brownfields.¹¹²

In addition, many of the administrative reforms that EPA is making to Superfund mirror successful state initiatives. EPA recently issued a directive that encourages greater consideration of future land use in selection of a cleanup method for Superfund sites.¹¹³ The directive stresses the need for early and active community participation in the cleanup selection process,¹¹⁴ and the potential need for deed restrictions and similar land use controls when cleanup

as part of the proposed 1997 budget. See *Clinton Unveils Tax Incentive Plan to Restore 30,000 Brownfield Sites*, 26 ENV'T REP. (BNA) 2140-41 (Mar. 15, 1996). Under the plan, a person could fully deduct all of the cleanup costs that they spent at a brownfield in the year that they incurred the costs. *Id.* The deduction would only be available, though, for EPA's brownfield pilot projects, *described infra*, and for sites that are located in communities where the poverty rate is greater than 20 percent. *Id.* White House officials claim that the plan will spur \$10 billion in private investment and address 30,000 brownfields. *Id.*

111. See, e.g., H.R. 3747, 104th Cong. (1996); H.R. 3241, 104th Cong. (1996); H.R. 2846, 104th Cong. (1996); S. 1911, 104th Cong. (1996).

112. See, H.R. 3214, 104th Cong. (1996); H.R. 3093, 104th Cong. (1996); H.R. 2742, 104th Cong. (1995); H.R. 2178, 104th Cong. (1995); S. 1285, 104th Cong. (1995).

113. See U.S. ENVTL. PROTECTION AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, DIRECTIVE REGARDING LAND USE IN THE CERCLA REMEDY SELECTION PROCESS (1995), reprinted in ABA SEC. NAT. RESOURCES & ENVTL. LAW, BROWNFIELDS REDEVELOPMENT: CLEANING UP THE URBAN ENVIRONMENT 65 (1996) [hereinafter OSWER DIRECTIVE]. The directive provides that

[r]easonably anticipated future use of the land at *National Priorities List* sites is an important consideration in determining the appropriate extent of remediation. Future use of the land will affect the types of exposure and the frequency of exposures that may occur to any residual contamination remaining on the site, which in turn affects the nature of the remedy chosen.

Id. at 67 (emphasis added).

The directive does not address the extent to which the future use of groundwater should be considered in CERCLA remedy selection. *Id.* at 68.

114. In the directive, EPA notes that "early community involvement, with a particular focus on the community's desired future uses of property associated with the CERCLA site, should result in a more democratic decisionmaking process; greater community support for remedies selected as a result of this process; and more expedited, cost-effective cleanups." *Id.* at 65. The directive also provides that "[i]f the site [being cleaned up] is likely to have environmental justice concerns, extra efforts should be made to reach out and consult with segments of the community that are not necessarily reached by conventional communication vehicles or through local officials and planning commissions." *Id.* at 65.

methods are selected based on future land use.¹¹⁵ The agency is also developing streamlined risk assessment procedures for specific types of brownfield properties, such as steel mills, to facilitate the selection of cleanup methods based on site-specific risk assessments.¹¹⁶ Finally, the agency is developing a joint policy with states on voluntary cleanup programs, which should provide valuable guidance to states regarding how to administer an environmentally protective and environmentally just voluntary cleanup program.¹¹⁷

4. *Principle Number Four: The Federal Government Should Continue to Support State and Local Environmental Justice Initiatives by Providing Funding, Technical Expertise and Research Assistance for Those Initiatives*

The last major component of EPA's Brownfield Action Agenda is a federal grant program to encourage brownfield redevelopment. The agency is providing grants of up to \$200,000 to 76 communities across the United States to fund Brownfield Pilot Projects.¹¹⁸ The grants can be used for site assessment, cleanup and redevelopment planning, and actual cleanup of brownfields.¹¹⁹ EPA believes that the grants will encourage communities, investors, lenders, developers, and

115. The directive provides

If any remedial alternative developed during the [feasibility study] will require a restricted land use in order to be protective, it is essential that the alternative include components that will ensure that it remain protective. . . . A variety of institutional controls may be used such as deed restrictions and deed notices, and adoption of land use controls by a local government. . . . Where waste is left on-site at levels that would require limited use and restricted exposure, EPA will conduct reviews at least every five years to monitor the site for any changes. . . . Should land use change, it will be necessary to evaluate the implications of that change for the selected remedy, and whether the remedy remains protective. . . . EPA . . . retains its authority to take further response action where necessary to ensure protectiveness.

Id. at 73-74.

116. Fields Remarks, *supra* note 95.

117. See *Voluntary Guidance on Brownfields Expected*, 26 ENV'T REP. (BNA) 2106 (1996).

118. U.S. E.P.A., *Brownfields Pilots* (visited Nov. 18, 1996) <<http://www.epa.gov/swerosps/bf/pilot.htm>>. See also Fields Remarks, *supra* note 95.

119. See U.S. ENVTL. PROTECTION AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, *BROWNFIELDS NATIONAL PILOTS: QUICK REFERENCE FACT SHEET*, reprinted in ABA Sec. Nat. Resources & Env'tl. Law, *Brownfields Redevelopment: Cleaning Up the Urban Environment* 297 (1996).

state and local governments to work together to develop creative ways to redevelop brownfields.¹²⁰ Many of the projects explore ways to remove regulatory barriers to redevelopment without sacrificing environmental protection.¹²¹ Those programs can then be used as models for brownfield redevelopment in other sites across the nation. The agency also believes that communities will be able to use the grants to leverage significant amounts of private redevelopment capital, which can be used to spur redevelopment of the property, creating new jobs and increasing the communities' tax base.¹²²

VI. CONCLUSION

Although it may be too early to definitively measure the success of federal and state brownfield redevelopment programs, initial reactions to the programs have been positive. The federal government and state governments seem to be working cooperatively to address the impediments to brownfield redevelopment that are within their respective realms, and fostering the efforts of their governmental counterparts in a manner that highlights the benefits of true cooperative federalism.

120. *Id.* The criteria that the agency uses to select the national pilot projects include

(1) effect of brownfields on the community or communities; (2) value added by federal support; (3) existing local government structure; (4) community involvement plan; (5) environmental justice plan; (6) appropriate authority and government support; (7) proposed cleanup funding mechanisms; (8) flow of ownership plan; (9) environmental site assessment plan; (10) national replicability; (11) measure of success.

Id.

121. *Id.*

122. EPA awarded the grant for the first pilot project to Cuyahoga County, Ohio in 1993. Fields Remarks, *supra* note 95. The county used the \$200,000 grant to leverage \$3.5 million in private capital, which was used to clean up and redevelop an abandoned industrial complex. *Id.* The redevelopment increased the county's tax base by \$1 million and created 171 new jobs. *Id.* While the national pilot projects seem to be achieving the ambitious goals described above, some environmental justice advocates have argued that the process that EPA uses to select the communities that will serve as pilot projects favors big cities over small communities. In a recent interview, the director of NAACP's environmental justice program argued that the application process disadvantages small communities, since major cities have the resources to prepare eye-catching applications, while small communities often have barely enough resources to complete the application. Rosenthal Interview, *supra* note 45.

The Brownfield Action Agenda incorporates the principles for federal/state cooperation in environmental justice initiatives that were described in the introduction to this article and can serve as the model for further federal/state environmental justice initiatives. For instance, the federal government can take steps to facilitate and encourage the development and use of SEPAs¹²³ in the quest for environmental justice, and model legislative and administrative changes to NEPA¹²⁴ on those successful state initiatives.¹²⁵

Similarly, the federal government could facilitate the continued refinement of state pollution prevention and toxics use reduction programs, and model changes to the Federal Pollution Prevention Act of 1990¹²⁶ on those state programs.¹²⁷ State laws that limit the siting of hazardous facilities and facilitate meaningful public participation could provide the template for changes to RCRA¹²⁸ that would reduce environmental injustice. Finally, although it is extremely unlikely that it would do so, Congress could even model future federal environmental justice legislation on state laws that guarantee each person the right to a clean environment.¹²⁹ Regardless of what steps the federal government and state governments take next to advance environmental justice, their cooperative approach to brownfield redevelopment can be a model for future successful initiatives.

123. SEPA is the generic name that many commentators use to refer to state environmental review laws that are modeled on the National Environmental Policy Act. See, e.g., DANIEL P. SELMI & KENNETH A. MANASTER, *STATE ENVIRONMENTAL LAW* § 10.01 (Supp. 1995); Reich, *supra* note 13, at 306.

124. The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331-70 (1994).

125. The author addresses these issues in a forthcoming article.

126. 42 U.S.C. §§ 13101-09 (1994).

127. For a critique of the Pollution Prevention Act of 1990 in light of state initiatives, see Stephen M. Johnson, *From Reaction to Proaction: The 1990 Pollution Prevention Act*, 17 COLUM. J. ENV'T'L. L. 153 (1992).

128. 42 U.S.C. § 6901-92 (1994).

129. See, e.g. PA. CONST., art. 1 § 27.