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The Land Recycling and Environmental Remediation Standards Act: Pennsylvania Tells CERCLA Enough Is Enough

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THE LAND RECYCLING AND ENVIRONMENTAL REMEDIATION STANDARDS ACT: PENNSYLVANIA TELLS CERCLA ENOUGH IS ENOUGH

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I. INTRODUCTION

In the wake of several environmental disasters and subsequent outcries for action on the part of the government, environmentalists and the general public,[1] Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[2] Unfortunately, the result was a hurriedly passed and confusing piece of legislation.[3] CERCLA's liability scheme is severe and devoid of any meaningful safe harbors. It imposes strict[4] and joint and several,[5] liability on all potentially responsible parties (PRPs),[6] regardless of fault or causation.[7] Additionally, the limited defenses available under CERCLA are inadequate to protect those PRPs acquiring property subsequent to the release of hazardous substances.[8]

CERCLA's strict liability scheme has resulted in unintended and undesirable consequences.[9] Fearful of being compelled to remediate contaminated property, landowners simply abandon contaminated sites, or "brownfields," thus avoiding CERCLA liability.[10]

1. *See generally* United States v. Hooker Chem. & Plastics Corp., 680 F. Supp. 546 (W.D.N.Y. 1988) (explaining CERCLA enacted in response to severe environmental and public health effects caused by disposal of hazardous wastes).

2. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767, §§ 101-308 (1980) (codified as amended at 42 U.S.C. §§ 9601-75 (1994)).

3. For a discussion of CERCLA's legislative history, see *infra* notes 28-30 and accompanying text.

4. For a discussion of CERCLA's strict liability scheme, see *infra* notes 40-44 and accompanying text.

5. For a discussion of joint and several liability, see *infra* note 44 and accompanying text.

6. *See* CERCLA § 107, 42 U.S.C. § 9607. For text of CERCLA section 107, see *infra* note 34.

7. For a discussion of causation and fault under CERCLA's liability scheme, see *infra* notes 45-47.

8. For a discussion of the defenses available to PRPs under CERCLA, see *infra* notes 50-62 and accompanying text.

9. For a discussion of the brownfields phenomenon, see *infra* notes 79-97 and accompanying text.

10. Brownfields are defined as "abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination." U.S. ENVIRONMENTAL PROTECTION AGENCY, THE BROWNFIELDS ACTION AGENDA (1995).

As a result, these sites remain vacant, and the contamination is permitted to go unchecked and unremediated.[11]

In an attempt to alleviate the harsh effects of CERCLA's liability scheme, Congress amended CERCLA in 1986, passing the Superfund Amendment and Reauthorization Act (SARA).[12] The primary significance of SARA's enactment is the codification of the "innocent landowner" defense.[13] Regrettably, few landowners are able to satisfy its stringent requirements, thereby precluding invocation of the defense.[14]

After sixteen years of experience with CERCLA's insurmountable liability scheme, a movement has surfaced to mitigate the statute's harsh effects.[15] This movement comes as Congress debates Superfund Reauthorization bills.[16] Proponents of easing CERCLA's liability scheme suggest passage of legislation which would grant liability protection to owners, prospective purchasers and developers once they remediate a site to a predetermined standard.[17] As the law currently stands, however, owners, as well as prospective purchasers, of contaminated property subject themselves to CERCLA's strict liability component.[18]

Part II of this Comment begins with a general overview of CERCLA's strict liability component and courts' subsequent interpretation of this provision.[19] Subsequently, Part III provides a brief

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11. For a discussion of why prospective purchasers and developers are reluctant to develop brownfields, see *infra* notes 92-94.

12. Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. §§ 9601-75 (West Supp. 1987)).

13. For a discussion of the "innocent landowner" defense, see *infra* notes 57-62.

14. In order to qualify, a defendant must prove by a preponderance of the evidence that he did not have "knowledge" of the release or threatened release of hazardous material on the property prior to acquiring the property. *See* CERCLA § 122, 42 U.S.C. § 9622(g). For a discussion of the elements necessary to establish the defense, see *infra* notes 60-62 and accompanying text.

15. For a discussion of the effects of CERCLA's liability scheme, see *infra* notes 48-49 and accompanying text.

16. *See, e.g.*, H.R. REP. NO. 2500, 1st Sess., 101st Cong. (1995) (sponsored by Rep. Michael Oxley).

17. For a discussion of federal brownfield redevelopment proposals, see *infra* notes 89-97 and accompanying text.

18. Landowners remain fully liable for remediation of contaminated property regardless of fault or causation unless they can prove they fall within the provisions of the innocent landowner defense. For a discussion of the innocent landowner defense, see *infra* notes 61-62 and accompanying text.

19. For a discussion of CERCLA's strict liability component, see *infra* notes 40-44 and accompanying text.

overview of the brownfields phenomenon.[20] Lastly, Part IV focuses on the Land Recycling and Environmental Remediation Standards Act of 1995 (Act 2)[21] which the Pennsylvania State Legislature passed and Governor Thomas Ridge signed into law to address and remediate the brownfields problem in Pennsylvania.[22]

II. BACKGROUND

Congress passed CERCLA in response to growing concerns over the release of hazardous materials into the environment.[23] CERCLA's primary goal is to identify PRPs[24] and to force them to pay for the costs of remediation[25] resulting from the release of hazardous substances.[26] To this end, CERCLA imposes strict liability.[27]

20. For a discussion of the brownfields phenomenon, see *infra* notes 79-97 and accompanying text.

21. Land Recycling and Environmental Remediation Standards Act §§ 101-907, 35 P.S. §§ 6026.101-907 (1995).

22. For a discussion of the purpose of Act 2, see *infra* notes 104-07 and accompanying text.

23. United States v. Hooker Chem. & Plastics Corp., 680 F. Supp. 546, 548 (W.D.N.Y. 1988).

24. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 101(21), 42 U.S.C. § 9601(21) (1988 and Supp. IV 1992). The statute defines "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." *Id.*

25. CERCLA § 101(24) defines "remedial action" as:

> those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment . . . The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

CERCLA § 101(24), 42 U.S.C. § 9601(24).

26. One of the primary goals of CERCLA was to provide a means to expeditiously and effectively cleanup perilous contamination of hazardous waste. Stephen M. Feldman, *CERCLA Liability, Where it is and Where it Should Not be Going: The Possibility of Liability Release for Environmentally Beneficial Land Transfers*, 23 ENVTL. L. 295, 298 (1993). *See generally* Ronald G. Aronovsky & Lynn D. Fuller, *Liability of Parent Corporations For Hazardous Substance Releases Under CERCLA*, 24 U.S.F. L. REV. 421 (1989-90) (explaining Congress enacted CERCLA to address emerging problem associated with cost of cleaning up nation's hazardous waste disposal sites).

Additionally, Congress's second goal was to create a mechanism to ensure that those persons deemed responsible for any contamination did not escape the finan-

A. Legislative History

Because Congress enacted CERCLA in the closing days of the 96th Congress, its passage represented an eleventh hour compromise.[28] As a result, CERCLA is infamously known for its poor

cial obligation of rectifying the problem. Feldman, *supra* note 26, at 298. To achieve these goals, Congress created two mechanisms whereby the United States Environmental Protection Agency (EPA) could initiate cleanup of hazardous waste sites. *Id.* Section 103 of CERCLA authorizes EPA to unilaterally order a potentially responsible party to undertake personal abatement actions, thus requiring them to pay for and conduct cleanup operations while EPA oversees the operation to ensure compliance. *Id.* at 297. Section 106 reads in pertinent part: "The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment." CERCLA § 106(a), 42 U.S.C. § 9606(a).

The second response mechanism is contained in title 26 of the Internal Revenue Code, creating the Superfund program. *See* 26 U.S.C. § 9607(a) (1988). Congressional appropriations created a monetary trust fund to enable EPA to engage in cleanup activities of the nation's most hazardous waste sites and then seek indemnification from PRPs. Feldman, *supra* note 26, at 297. The underlying goal of CERCLA, however, is to "protect and promote the public interest." *Id.* at 298.

27. United States v. Alcan Aluminum Corp., 964 F.2d 252, 259 (3d Cir. 1992); United States v. Carolina Transformer Co., 978 F.2d 832, 836 (4th Cir. 1992); United States v. Hardage, 982 F.2d 1436, 1443 (10th Cir. 1992). CERCLA, however, does not specify the standard of liability to be imposed on a PRP. Rather, the statute incorporates the liability provision of section 311 of the Federal Water Pollution Control Act (Clean Water Act), which states "[t]he terms 'liable' or 'liability' under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of this title." CERCLA § 101(32), 42 U.S.C. § 9601(32). Section 1321 of the Clean Water Act states in pertinent part as follows:

> Any owner, operator, or person in charge of any vessel, onshore facility, or offshore facility—
>
> (i) from which oil or a hazardous substance is discharged in violation of paragraph (3), or
>
> (ii) who fails or refuses to comply with any regulation issued under subsection (j) of this section to which that owner, operator, or person in charge is subject,
>
> may be assessed a class I or class II civil penalty by the Secretary of the department in which the Coast Guard is operating or the Administrator.

CWA § 1321, 33 U.S.C. § 1321(b)(6)(A). *See also* United States v. Dixie Carriers, Inc., 627 F.2d 736, 739 (5th Cir. 1980) (stating that while express language of statute provides little guidance to indicate Congress's intent, statute operates under strict liability theory); True v. United States, 603 F. Supp. 1370, 1374 (D. Wyo. 1985) (stating statute imposes strict liability regardless of fault), *aff'd in part*, 894 F.2d 1197 (10th Cir. 1990). "Because strict liability involves the shifting of fault to the one most able to bear the cost and insure against the risk, it has been held that FWPCA is a means of transferring the risk from the public to the operator of the facility causing a harmful discharge." *Id.* at 1374. For a discussion of CERCLA's strict liability component, see *infra* notes 40-44 and accompanying text.

28. New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985). *See also* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982). Grad notes that although Congress worked on Superfund toxic and hazardous waste cleanup bills for over three years, the bill that finally became law had little

draftsmanship and ambiguous statutory construction.[29] When analyzing CERCLA's liability provision, therefore, courts consistently cite the legislative history and purpose when reading strict liability into the language of the statute.[30]

B. Statutory Construction

Courts have taken primarily two approaches when discerning the proper statutory construction of CERCLA. Following the first approach, a majority of courts begin their analysis by quoting the remedial purpose of the statute.[31] Under this rubric, courts liberally construe the statute's provisions in order to "avoid frustration of the [statute's] beneficial legislative purpose."[32] Under the sec-

legislative history. *Id.* at 1. While the bill was deficient in many respects, Grad notes that the legislation that did become law was the best that could be done. *Id.* at 2. The passage of CERCLA created a law conferring sufficient authorization to begin cleanup of old hazardous waste sites, prevent future spills and protect health and the environment. *Id.*

29. *See* Lansford-Coaldale Joint Water Auth. v. Tonnolli Corp., 4 F.3d 1209 (3d Cir. 1993). The Third Circuit noted that "congressional intent may be particularly difficult to discern with precision in CERCLA, a statute notorious for its lack of clarity and poor draftsmanship." *Id.* at 1221 (citing Artesian Water Co. v. Government of New Castle County, 851 F.2d 643, 651 (3d Cir. 1988)). *See also* Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1080 (1st Cir. 1986) (commenting CERCLA has acquired well-deserved notoriety for vaguely drafted provisions and indefinite, if not contradictory, legislative history) (quoting United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985))). *See generally* Grad, *supra* note 28, at 2 (noting time constraints imposed on passage of bill resulted in only fragmented legislative history, adding to already difficult task of discerning full meaning of law).

30. Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1242 (6th Cir. 1991). For a discussion of courts' interpretation of CERCLA's strict liability component, see *infra* notes 40-44 and accompanying text.

31. *See* United States v. Kayser-Roth Corp., 910 F.2d 24, 26 (1st Cir. 1990) (stating CERCLA is remedial statute "designed to protect and preserve public health and the environment"); Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1340 (9th Cir. 1992) (finding CERCLA's purpose to provide federal government with means to control spread of hazardous material); *Anspec*, 922 F.2d at 1241 (noting CERCLA intended to provide for cleanup of hazardous waste sites and spills); Walls v. Waste Resources Corp., 823 F.2d 977, 981 (6th Cir. 1987) (concluding CERCLA intended primarily to facilitate prompt cleanup by placing ultimate financial burden on those parties responsible for hazardous waste).

CERCLA authorizes the federal government to respond in several ways: (1) by allowing EPA to use Superfund resources to cleanup hazardous waste sites and spills pursuant to 42 U.S.C. § 9611; (2) by enabling EPA to sue for reimbursement of cleanup costs from any responsible party pursuant to 42 U.S.C. § 9607; or (3) by authorizing EPA to seek an injunction in federal district court to force a responsible party to cleanup any site or spill that represents an imminent and substantial danger to the public health or welfare or the environment pursuant to 42 U.S.C. § 9606(a). *Shore Realty Corp.*, 759 F.2d at 1041.

32. *Kayser-Roth Corp.*, 910 F.2d at 26. *See also Shore Realty*, 759 F.2d at 1040 (stating CERCLA designed to bring order to array of partly redundant, partly inad-

ond approach, courts are more cautious, invoking their authority to construe CERCLA only when a particular provision is ambiguous.[33]

C. CERCLA Liability

Section 107 of CERCLA sets forth the criteria under which PRPs are liable for the production of hazardous waste contamination.[34] Imposition of liability under CERCLA requires a finding that: (1) the contaminated property or site is a "vessel" or "facility";[35] (2) a "release"[36] or threatened release of a "hazardous sub-

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equate federal hazardous substances cleanup and compensation laws) (quoting F. ANDERSON, ENVIRONMENTAL PROTECTION: LAW AND POLICY 569 (1984)).

33. *Anspec*, 922 F.2d at 1241-45. The Sixth Circuit noted that the authority to construe a statute lies at the very heart of judicial power and, thus, is not subject to scrutiny. *Id.* at 1245. The court discerned, however, that "the authority to construe is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." *Id.* (quoting Northwest Airlines, Inc. v. Transport Worker Union of Am., 451 U.S. 77, 97 (1981)). If a statute is clear and well-defined, a judicial decision that expands or contracts its reach or adds or deletes remedies creates federal common law. *Id.*

34. *See* CERCLA § 107, 42 U.S.C. § 9607. Parties falling within CERCLA's liability provisions include:

> (1) the owner and operator of a vessel or a facility,
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. . . .

Id.

35. The term "vessel" is defined as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." *Id.* § 102, 42 U.S.C. § 9602(28). CERCLA defines "facility" as:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

Id. § 101(9), 42 U.S.C. § 9601(9).

36. CERCLA defines "release" very broadly as:

> any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pol-

stance"[37] from the facility has occurred; (3) "response costs"[38] have been incurred as a result of the release or threatened release; and (4) the party to be held liable falls within one of the four classes of PRPs described in section 107 of CERCLA.[39]

D. Strict Liability

While section 107 delineates which persons will be liable for the costs of cleaning up a contaminated piece of property, the statute fails to articulate the standard of liability to be imposed on PRPs.[40] The legislative history, however, indicates the drafters in-

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lutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C.A. § 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer.

Id. § 107, 42 U.S.C. § 9601(22).

37. CERCLA defines "hazardous substance" as:

(A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

Id. § 101(14), 42 U.S.C. § 9601(14).

38. Although CERCLA does not expressly define the term "response costs," it does define the terms "response" or "respond" to mean: "remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." *Id.* § 101(25), 42 U.S.C. § 9601(25).

39. Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989). For the text of section 9607(a), setting forth the four classes of PRPs, see *supra* note 34.

40. *Id.*

tended to hold PRPs strictly liable.[41] Under CERCLA, liability is not dependent on fault, causation or contribution to contamination.[42] Instead, CERCLA endeavors to spread the risks and costs

41. *See, e.g.*, 126 CONG. REC. 30,932 (1980) (statement of Senator Randolph prior to passage of CERCLA). "Unless otherwise provided in this act, the standard of liability is intended to be the same as that provided in section 311 of the Federal Water Pollution Control Act. I understand this to be a standard of strict liability." *Id.* Additionally, Senator Randolph remarked, "it is intended that the issue of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law." *Id.*

CERCLA relies on the common law of ultrahazardous activities to justify the imposition of strict liability. Grad, *supra* note 28, at 9. The Restatement Second of Torts defines the general principle of "ultrahazardous activity" in pertinent part as follows: "[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm . . . ." RESTATEMENT (SECOND) OF TORTS § 519(1) (1977).

Although a provision on joint and several liability was taken out before final passage, the drafters intended joint and several liability to be imposed on those found liable under section 9607. *See* 126 CONG. REC. 30,932 (1980) (statement of Senator Randolph). Senator Randolph remarked that the removal of the reference to joint and several liability was made "in recognition of the difficulty in prescribing in statutory terms liability standards which will be applicable in individual cases. The changes do not reflect a rejection of the standards [of joint and several liability]." *Id.* Rather, the drafters intended that the issue of liability under CERCLA be resolved by the courts and traditional principles of common law. *Id. See also* United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988) (noting court should consider traditional and evolving principles of federal common law when deciding whether to impose joint and several liability); United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987) ("[I]mposing joint and several liability carries out the legislative intent by insuring that responsible parties will fulfill their obligations to [cleanup] the hazardous waste facility."); United States v. A & F Materials Co., 578 F. Supp. 1249, 1255 (S.D. Ill. 1984) (stating legislative history and statutory language support imposition of joint and several liability).

42. Robert S. Berger, *Recycling Industrial Sites in Erie County: Meeting the Challenge of Brownfield Redevelopment*, 3 BUFF. ENVTL. L. J. 69 (1995); *see, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) (noting interpreting section 9607(a)(1) as including causation requirement would make affirmative defense provided in section 9607(b) superfluous). The Second Circuit noted that each of the defenses listed in section 9607(b) carves out from liability an exception based on causation. *Id.* The court refused to construe CERCLA in a manner which would make some of its provisions surplusage without a clear congressional mandate. *Id.* Additionally, the Second Circuit noted Congress explicitly rejected incorporating a causation requirement into section 9607(a). *Id. See also Stringfellow*, 661 F. Supp. at 1060 (stating causation established if defendant falls into one of categories listed in section 107(a)). The *Stringfellow* court noted that the legislative history indicates Congress did not intend for traditional causation requirements to apply for purposes of determining liability under section 107(a). *Id.*

A secondary goal of imposing strict liability under CERCLA is to simplify the government's ability to compel cleanups at the least possible cost to the government. Berger, *supra* note 42, at 82; *see also* Feldman, *supra* note 26, at 308 (noting deterrence of environmentally damaging activities believed to be primary impetus behind CERCLA's enactment). Feldman notes that "the most influential aspect of the statute's liability scheme has been its prescriptive effect on minimizing hazardous waste contamination." *Id.*

between all parties associated with the hazardous waste industry.[43] Accordingly, courts have affirmed the imposition of strict liability, imposing liability on PRPs in almost every conceivable situation.[44]

E. Consequences of No-Fault Liability Under CERCLA

The no-fault liability scheme imposed under CERCLA has been the subject of much debate and the focal point of criticism.[45] As one commentator has noted, "[the] initial decade of CERCLA has been highlighted by liability with virtually no exemptions."[46] While the strict liability provision is equitable for those PRPs engaged in abnormally dangerous activities, it is clearly inequitable with respect to the majority of PRPs who innocently purchase contaminated property and yet are still subject to CERCLA's strict liability component.[47]

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43. *Id.*

44. *See* United States v. Mexico Feed and Seed Co., 980 F.2d 478, 484 (8th Cir. 1992) (stating CERCLA is remedial strict liability statute with focus on responsibility rather than culpability); *Shore Realty Corp.*, 759 F.2d at 1041 (stating Congress intended responsible parties be held strictly liable even though explicit provision for strict liability was not included in compromise); *Stringfellow*, 661 F. Supp. at 1062 (finding plain meaning of statute is unambiguous and reveals Congress's intent to impose strict liability on defendants subject only to the affirmative defenses listed in section 107(b)). *See generally* Feldman, *supra* note 26, at 306 (noting that facially CERCLA is response measure providing after-the-fact mechanism to ensure hazardous waste sites are cleaned at least to statutorily prescribed minimum levels).

Feldman comments that in an attempt to eradicate environmental disasters, the drafters of CERCLA's liability-driven provisions made a conscious choice to hold no-fault PRPs liable to the fullest extent of the law. *Id.* at 307. The decision to include even no-fault PRPs within the strict liability umbrella arose out of fear that any "fault-based" balancing system would deplete the limited federal resources before the public interest was served. *Id.* at 307. *See also* Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991) (concluding construing CERCLA to include successor liability is consistent with legislative purpose of act); United States v. Shell Oil Co., 605 F. Supp. 1064, 1073 (D. Colo. 1985) (concluding congressional intent supports finding PRPs retroactively liable for response costs and contamination occurring prior to CERCLA enactment); United States v. Fleet Factors Co., 901 F.2d 1550, 1557 (11th Cir. 1990) (stating secured creditor may be liable under section 107(a) even though not actual operator by participating in financial management of facility to degree indicating capacity to influence facility's treatment of hazardous waste).

45. Berger, *supra* note 42, at 78-79.

46. Feldman, *supra* note 26, at 300.

47. Berger, *supra* note 42, at 80. It is equitable to impose strict liability on PRPs engaged in abnormally dangerous activities because they are usually financially secure and furthermore, have profited from the production and handling of waste. *Id.* Thus, they should absorb the costs associated with their activities. *Id.* Additionally, because these PRPs have been forewarned as to the consequences of their actions, they can factor the costs of cleanup into their operating costs. *Id.* Conversely, developers and owners who have not played any role in contaminating a site should not be held responsible for the contamination caused by a prior

Because of CERCLA's harsh liability scheme, would-be developers and owners are discouraged from purchasing even minimally contaminated property for fear of being brought within section 107's liability provisions. As a result, contaminated property lies dormant.[48] Rather than using minimally contaminated old industrial and commercial sites for new purposes, developers locate new factories, offices and warehouses in the suburbs, creating intense development pressure and changing the nature of many communities.[49]

F. SARA: Amendments to Superfund

In 1986 Congress amended CERCLA, enacting the Superfund Amendments and Reauthorization Act of 1986 (SARA).[50] Congress enacted SARA in response to: (1) the effect of CERCLA's harsh liability provisions on innocent landowners;[51] and (2) an increased awareness of the problems which abandoned hazardous waste sites

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owner. *Id.* "While the liability scheme achieves its ends [in the form of] economic efficiency, fairness, deterrence and risk spreading, the collateral effect is to discourage redevelopment of commercial and industrial sites." *Id.*

48. *See* Berger, *supra* note 42, at 94. While environmental laws seek to clean up serious problems of hazardous waste contamination by imposing the cost of cleanup on those responsible for the contamination, they cause the unintended result of discouraging recycling and redevelopment of urban industrial properties. *Id.* Although these laws are not the sole cause for abandoning these sites, they clearly represent a major obstacle to redevelopment and, therefore, serve to perpetuate the problem. *Id.* The potential liability associated with industrial land creates a substantial risk of incurring enormous cleanup costs in order to return land to productive use. *Id.* Consequently, even if land is inexpensive, cleanup operations can be prohibitively expensive and unpredictable. *Id.* For example, the costs of an environmental audit for determining the amount of remediation necessary are significant. *Id.* While greenfield sites are more expensive up front, the projected costs of developing the property are fixed and predictable, unlike brownfields which cannot compare to the prudent financial investment of greenfields. *Id.* Thus, cleanup costs represent yet another obstacle to recycling brownfield sites. *Id.*

49. *Id.* at 96. The direct effect of abandoning old industrial and commercial sites in favor of new sites is to perpetuate the industrialization of new land, compelling new costs to build the infrastructure needed to accommodate these new developments. *Id.*

50. Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601-75 (1994)). *See* Feldman, *supra* note 26, at 295 (noting CERCLA amendments represented effort to expedite cleanup of hazardous waste sites and promote public interest). "Congress amended CERCLA to provide a concrete settlement policy to assist those potentially responsible parties who had little or no culpability, but still faced strict liability for massive clean-up costs." *Id.*

51. For a discussion of CERCLA's harsh liability provisions affecting innocent landowners as well as prospective purchasers, see *supra* notes 34-39 and accompanying text.

pose to the environment.[52] Prior to SARA's enactment, CERCLA granted PRPs a limited number of statutory defenses.[53] A PRP could escape liability only by proving the release, or threatened release resulted from: (1) an act of God;[54] (2) an act of war;[55] or (3) an act or omission of a third party.[56] With the passage of SARA, however, Congress created the "innocent landowner" defense.[57] Specifically, SARA amends CERCLA's definition of "contractual relationship" to exclude PRPs acquiring property subsequent to the release of hazardous materials and who would otherwise be liable

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52. For a discussion of the problems abandoned hazardous waste sites pose to the environment, see *infra* notes 79-97 and accompanying text.

53. *See generally* Mary E. Hitt, *Desperately Seeking SARA*, 18 REAL EST. L.J. 3, 13 (1989) (noting prior to enactment of SARA, only four statutory defenses existed to strict, joint and several, liability imposed on innocent landowners).

Section 9607(b) provides a limited number of statutory defenses to PRPs. Subsection (b) reads as follows:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
>
> (1) an act of God;
>
> (2) an act of war;
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
>
> (4) any combination of the foregoing paragraphs.

CERCLA § 107, 42 U.S.C. § 9607(b) (1988 & Supp. IV 1992).

54. *Id.* § 107(b)(1), 42 U.S.C. § 9607(b)(1). For purposes of CERCLA, the term "act of God" means "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." *Id.* § 101(1), 42 U.S.C. § 9601(1).

55. *Id.* § 107(b)(2), 42 U.S.C. § 9607(b)(2).

56. *Id.* § 107(b)(5), 42 U.S.C. § 9607(b)(5). For the textual language of CERCLA section 107, see *supra* note 53.

57. Although SARA does not specifically call this defense the "innocent landowner" defense, it is codified in CERCLA through the combination of several sections. *See* L. Jager Smith, Jr., *CERCLA's Innocent Landowner Defense: Oasis or Mirage?*, 18 COLUM. J. ENVTL. L. 155, 157-58 (1992-93) (discussing SARA amendments' requirements for invoking innocent landowner defense). Smith notes that the SARA amendments creating the innocent landowner defense "were intended to 'clarify and confirm' the terms of the third party defense." *Id.* at 157 (quoting H.R. REP. No. 962, 99-186 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3279).

for the contamination.[58] Nevertheless, the defense is only available if the statutorily prescribed requirements of section 107 (*i.e.*, the third party defense) are satisfied.[59]

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58. Under the SARA amendments, "contractual relationship" is defined to include the following:

> land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:
>
> (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.
>
> (ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.
>
> (iii) The defendant acquired the facility by inheritance or bequest.

CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A).

The alteration to the definition of "contractual relationship" excludes an instrument which transfers title if the PRP acquired the land after disposal of hazardous materials and certain statutory requirements are satisfied. Smith, *supra* note 57, at 158-59.

59. CERCLA § 101(A)(i), 42 U.S.C. § 9601(35)(A)(i). Section 9601(35) continues as follows:

> In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of section 9607(b)(3)(A) and (B) of this title.
>
> (B) To establish that the defendant had no reason to know, as provided in clause (I) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

Id. § 101(35), 42 U.S.C. § 9601(35).

Additionally, because the "innocent landowner" defense is an affirmative defense, the defendant must prove these requirements by a preponderance of the evidence. Washington v. Time Oil, Inc., 687 F. Supp. 529, 531 (W.D. Wash. 1988).

The defense does not provide shelter for a PRP who becomes aware of the release of hazardous materials, or in some way contributed to the release of hazardous substances. Sections 9601(35)(C) and (D) read as follows:

> (C) Nothing in this paragraph or in section 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such

1. *Effect of "Innocent Landowner" Defense*

The "innocent landowner" defense provides relief for those PRPs acquiring land "without knowledge" of the release of hazardous substances.[60] As a practical matter, however, information regarding contamination at a particular site is almost always reasonably discernible at the time of sale, thus precluding invocation of the defense.[61] The innocent landowner defense, therefore, does not actually address the real problem faced by individuals who seek to sell or redevelop brownfields.[62]

2. De Minimis *Settlements*

In addition to clarifying CERCLA's third party defense and creating the "innocent landowner" defense, SARA added a provision permitting the United States Environmental Protection Agency

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knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3) of this title shall be available to such defendant.

(D) Nothing in this paragraph shall affect the liability under this chapter of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the action relating to the facility.

Id. § 101(35)(C),(D), 42 U.S.C. § 9601(35)(C),(D).

60. For a description of the requirements necessary for proving a PRP had knowledge of the release of hazardous substances, thus removing the availability of the defense, see *supra* note 59. The innocent landowner defense is essentially an "ignorance" defense which serves to protect parties who in no way contributed to the contamination, while distinguishing parties who found out contamination existed on the property from those who did not acquire knowledge of the contamination. Berger, *supra* note 42, at 84. *See also* United States v. Pacific Hide and Fur Depot, Inc., 716 F. Supp. 1341 (D. Idaho 1989) (concluding level of inquiry must only be appropriate and reasonable while rejecting government's contention that no inquiry could ever meet statutory standard). *But see* CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549 (W.D. Mich. 1991) (finding innocent landowner defense unavailable to contaminated site's present owner and related corporations which knew present owner at site used hazardous substance); Washington v. Time Oil Co., 687 F. Supp. 529, 532-33 (W.D. Wash. 1988) (stating defendant failing to present specific facts to indicate some other party having employment, subsidiary or contractual connection with defendant solely responsible for release of hazardous substances found on defendant's property).

61. Berger, *supra* note 42, at 85. Most states require owners to list the existence of any contamination on the deed. *Id.* As a result, a prospective purchaser will have specific knowledge of the existence of contamination prior to the sale of the property, making the purchase of urban industrial property, without knowledge of the presence of contamination, impossible. *Id.* Additionally, before lenders will agree to purchase a piece of property they require the completion of an environmental audit, further diminishing the likelihood a prospective purchaser will lack knowledge of the existence of any contamination on the property. *Id.*

62. *Id.* EPA rarely permits application of the innocent landowner defense. *Id.* Further, courts strictly construe the defense, further limiting its application. *Id.*

(EPA) to engage in legally binding settlements with PRPs.[63] SARA

63. CERCLA § 122(g), 42 U.S.C. § 9622(g). The section states as follows:
(1) Expediated Final Settlement
[w]henever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section 9606 or 9607 of this title if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the President, the conditions in either of the following subparagraph (A) or (B) are met:

(A) Both of the following are minimal in comparison to other hazardous substances at the facility:

(i) The amount of the hazardous substances contributed by that party to the facility.

(ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.

(B) The potentially responsible party—

(i) is the owner of the real property on or in which the facility is located;

(ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and

(iii) did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.

This subparagraph (B) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.
(2) Covenant not to sue
The President may provide a covenant not to sue with respect to the facility concerned to any party who has entered into a settlement under this subsection unless such a covenant would be inconsistent with the public interest as determined under subsection (f) of this section.
(3) Expedited agreement
The President shall reach any such settlement or grant any such covenant not to sue as soon as possible after the President has available the information necessary to reach such a settlement or grant such a covenant.
(4) Consent decree or administrative order
A settlement under this subsection shall be entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement. In the case of any facility where the total response costs exceed $500,000 (excluding interest), if the settlement is embodied as an administrative order, the order may be issued only with the prior written approval of the Attorney General. If the Attorney General or his designee has not approved or disapproved the order within 30 days of this referral, the order shall be deemed to be approved unless the Attorney General and the Administrator have agreed to extend the time. The district court for the district in which the release or threatened release occurs may enforce any such administrative order.
(5) Effect of agreement
A party who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.
(6) Settlements with other potentially responsible parties

authorizes EPA to reach a final settlement with PRPs if "[the] settlement involves only a minor portion of the response costs at the facility concerned."[64] Accordingly, although the de minimis settlement provision of CERCLA appears to provide an opportunity for innocent landowners to avoid exposure to CERCLA's liability scheme, in reality, EPA has been very reluctant to relieve PRPs from liability.[65]

In order to qualify under SARA's release provisions, the landowner must fall into one of two categories. Class "A" settling parties are defined as those individuals "for whom the amounts or toxic effects of their contributions to the hazard are minimal in comparison to other hazardous substances at the facility."[66] Class "B" settling parties are the actual owners of property who "did not conduct or permit the generation, transportation, storage, treatment or disposal of any hazardous substance at the facility," and "did not contribute to the release or threat of release of a hazardous substance at the facility."[67] Furthermore, like the innocent landowner defense, a class "B" settling party must have "purchased the property without actual or constructive knowledge of the hazardous substance" in order to qualify for a de minimis settlement.[68]

G. EPA Guidance: *De Minimis* Landowner Settlements and Prospective Purchaser Settlements

In order to clarify the *de minimis* settlement provisions of SARA, EPA issued an interpretive "guidance" in 1989.[69] The gui-

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> Nothing in this subsection shall be construed to affect the authority of the President to reach settlements with other potentially responsible parties under this chapter.

Id. § 122(g), 42 U.S.C. § 9622(g).

64. For the textual language of CERCLA section 122(g), see *supra* note 63.

65. *See* Smith, *supra* note 57, at 176. The *de minimis* settlement provision, however, is susceptible to overreaching by EPA against innocent landowners. *Id.* Because EPA has superior resources to litigate against the defense, they are in the position to require a party to essentially prove they meet the innocent landowner defense before they will be willing to enter into a non-cash settlement. *Id.* As a result, even a landowner believing he qualifies for the defense may chose to enter into a settlement agreement rather than face the uncertainty of litigating the defense in court. *Id.*

66. Smith, *supra* note 57, at 175. *See* CERCLA § 122, 42 U.S.C. § 9622(g). For the statutorily prescribed requirements for a class "A" settling parties, see *supra* note 63.

67. *See* CERCLA § 122, 42 U.S.C. § 9622(g)(1)(B)(iii).

68. Smith, *supra* note 57, at 175. The class "B" settling parties are those who most likely would attempt to assert the innocent landowner defense. *Id.* at 176.

69. Superfund Program; De Minimis Landowner Settlements, Prospective Purchaser Settlements, 54 Fed. Reg. 34235 (1989).

dance states that the goal of settlements is to entitle parties satisfying the *de minimis* settlement criteria to resolve potential liability issues as quickly as possible.[70] By settling with PRPs, EPA hopes to focus its resources on litigation with those parties primarily responsible for the contamination.[71] Due to the restrictive circumstances under which settlements are authorized, however, EPA has entered into very few settlement agreements.[72]

In 1995 EPA issued a second guidance, intending to expand the circumstances under which they would be willing to enter into settlement agreements.[73] Under the new guidance, EPA will enter into agreements resulting in reduced benefits to EPA if doing so would provide a substantial benefit to the community.[74] Thus, the second guidance encourages a more balanced evaluation of both direct and indirect benefits of prospective purchaser agreements.[75]

Despite SARA's amendments and EPA's interpretive guidances, the brownfields problem persists.[76] CERCLA's strict liability scheme continues to be the primary impediment to land recycling.[77] Unless prospective purchasers and developers are granted significant reprieves from liability, the legislatures' continuous, and yet ineffective, tinkering with CERCLA's provisions will do nothing to remove the current barriers to brownfield redevelopment.[78]

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70. *Id.*

71. *Id.*

72. For a discussion of EPA's desire to enter into settlement agreements under more circumstances, see *infra* notes 73-74.

73. U.S. ENVIRONMENTAL PROTECTION AGENCY, GUIDANCE ON SETTLEMENTS WITH PROSPECTIVE PURCHASERS OF CONTAMINATED PROPERTY (1995). "Experience has demonstrated that prospective purchaser agreements might be both appropriate and beneficial in more circumstances than contemplated by the 1989 guidance." *Id.*

74. *Id.* Under the guidance, EPA will enter into settlement agreements with prospective purchasers of contaminated properties if the direct benefits to the community include such things as: (1) creation or retention of jobs, (2) productive use of abandoned property, or (3) revitalization of blighted areas. *Id.*

75. *Id.* Indirect benefits include: (1) measures that serve to reduce substantially the risk posed by the site; (2) creation of conservation or recreation areas; and (3) provisions for community services such as improved public transportation and infrastructure. *Id.*

76. For a discussion of the brownfields problem, see *infra* notes 79-97 and accompanying text.

77. For a discussion of CERCLA's strict liability scheme, see *supra* notes 40-44 and accompanying text.

78. *See generally* News Conference with Carol Browner, EPA Administrator (Oct. 2, 1995).

III. THE BROWNFIELDS PHENOMENON

Due to CERCLA's liability scheme, private parties lack both legal and economic incentives to voluntarily investigate and remediate contamination at industrial sites.[79] Uncertainty concerning environmental liability has forced developers to look to greenfields, as opposed to brownfields, for new development projects, thus causing the proliferation of brownfields nationwide.[80] As the nation shifts from an industrial base to a more diversified economy, however, the same question remains: can the millions of acres of already contaminated property be made safe and productive for future economic development?[81]

A. Economic Disincentives to Brownfields Redevelopment

In addition to fears regarding liability, economic considerations also drive would-be developers toward greenfields.[82] The re-

79. R. Michael Sweeney, *Brownfields Restoration and Voluntary Cleanup Legislation*, 2 ENVTL. LAWYER 101, 105-06 (1995). Courts have not hesitated to hold PRPs strictly liable even though the PRPs may have voluntarily disclosed the presence of contamination. *Id.* at 106. As Representative Michael Oxley notes, "we supposedly live in a recycling society. We are urged to recycle cans, homes, cardboard, and newspapers. But, curiously, we are failing to recycle one of our most valuable resources—established industrial sites." *Will Brownfields Initiatives Really Work?*, THE ENVTL. F. May-June 1995, 28, at 32 [hereinafter *Brownfields Initiative*] (quoting Representative Michael Oxley). Regulations that were supposed to protect people and their communities have driven jobs away and have exposed residents to contamination for longer periods of time. *Id.* Potential developers all too often initiate development on greenfields, foregoing the multitude of regulations and potential liability associated with the redevelopment of old industrial sites, thus unnecessarily destroying prime farmland. *Urban Land Reclamation: Hearings before the Subcommittee on Technology, Environment and Aviation of the House Committee on Science, Space and Technology*, 103d Cong. 135 (1994) [hereinafter *Urban Reclamation Hearings*] (statement of Representative Tim Valentine). For a discussion of legal barriers to selling, developing or reusing industrial sites due to CERCLA liability structure, see *infra* notes 86-88 and accompanying text.

80. Sweeney, *supra* note 79, at 110. *See also Urban Reclamation Hearings*, *supra* note 79. It is estimated that there are as many as 500,000 sites nationwide that show some evidence of contamination which could trigger Superfund rules, thus inhibiting the ability of owners to sell or reuse the property. *Id.* (statement of Representative McHale). "Over the last 20 years, United States industry and commerce has increasingly tended to move away from the cities to the suburbs." E. Lynn Grayson & Stephen A.K. Palmer, *The Brownfields Phenomenon: An Analysis of Environmental, Economic, and Community Concerns*, 25 ENVTL. L. REP. 10,337 (July 1995). Owners seeking to sell, redevelop or expand existing operations face the stigma of site contamination. *Id. See also Urban Reclamation Hearings*, *supra* note 79 (statement of Representative Tim Valentine, Chairman, Subcommittee on Technology, Environment and Aviation).

81. *See Urban Reclamation Hearings*, *supra* note 79 (statement of Representative Valentine, Chairman, Subcommittee on Technology, Environment and Aviation).

82. *Id.* (statement of Dr. A. E. Mofitt, Jr., Vice President, Health and Environment at Bethlehem Steel Corp.). Developers must also overcome the lending com-

development of abandoned urban hazardous material sites, however, benefits developers, local communities and the environment. If remediated, reused or redeveloped for industrial, commercial or residential purposes, many idle properties possess valuable economic potential.[83] While the majority of industrial sites are located in "prime" downtown areas with preexistent infrastructures, the cleanup of these sites entails potentially higher risks and costs than those associated with the development of virgin land.[84] By taking advantage of existing infrastructures, however, rehabilitated brownfields are capable of housing emerging technologies and manufacturing processes, thus, reducing urban sprawl.[85]

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munities unwillingness to finance mortgages on brownfield sites. Grayson, *supra* note 80. Lenders are concerned about inheriting liability in the event of default or foreclosure. *Urban Reclamation Hearings*, *supra* note 79 (statement of Representative McHale). Additionally, lenders fear the loss of collateral value and the effect of cleanup costs on a project's viability. *Id.* Lenders, lessors and other financial sources cite several worries regarding financing the cleanup of contaminated properties including: (1) borrower's cleanup costs may compromise their ability to repay their debts; (2) contaminated properties are poor collateral and can leave a lender with no assets if the deal ultimately fails; and (3) the prospects of direct liability for remediation costs which may exceed the amount of money placed at risk in the first place. *Brownfields Initiative*, *supra* note 79, at 34 (statement of Hank Schilling, Vice President, Environmental Support, G.E. Capital).

The biggest impediment to recycling brownfields, however, is that potential response costs are often greater than the properties' value. *Id.* (statement of John Rosenthal). This has spawned the emergence of a concept called "landbanking," whereby current property owners, fearing discovery of contamination by state or federal agencies, do not offer property for sale. *Id.*

83. Sweeney, *supra* note 79, at 107. *See Urban Reclamation Hearings*, *supra* note 79. The existence of these idle properties poses tremendous problems for our nation's communities. *Id.* Some of the problems associated with brownfields include the folowing: (1) deterioration of environmental contamination; (2) suppression of economic development; and (3) reduction of jobs which would have been created from productive reuse of the site. *Id.*

84. *Urban Reclamation Hearings*, *supra* note 79, at 2 (statement of Representative Valentine). Site preparation costs of brownfield redevelopment projects are significantly lower than the costs associated with developing virgin land and resources. Sweeney, *supra* note 79, at 108. Developing greenfields requires expenditures for installing roadways, water lines, sewers and electricity. *Id.* In this era of budget constraints, the government can no longer afford to pay for public utilities and highways to accommodate site development out in the "sticks." Judith Evans, *Cleaning Up the Nation's Brownfields; Critics Want Some Assurances Industrial Sites Aren't Re-Polluted*, WASH. POST, Nov. 25, 1995, at E1.

85. Sweeney, *supra* note 79, at 107. Facilities left vacant deteriorate, thus inviting vandalism, arson and midnight dumping. *Urban Reclamation Hearings*, *supra* note 79 (statement of Representative McHale). Additionally, the longer the properties are left vacant, the greater the chance of spreading contamination. *Id.* This further diminishes property value and increases cleanup costs in addition to threatening the economic viability of adjacent properties. *Id.* The properties can be bought inexpensively and, subsequent redevelopment brings jobs to local communities and growth to the inner cities while concurrently leaving greenfields pristine. Grayson, *supra* note 80.

B. Identifying Barriers to Recycling Contaminated Properties

Supporters of brownfield redevelopment initiatives complain that the current law is confusing and overly stringent.[86] By imposing strict and unattainable standards, federal and state environmental laws further contribute to the abandonment of brownfields.[87] Consequently, in many instances, property owners are required to cleanup contaminated industrial sites to a heightened level which is incompatible with the projected use of the property.[88]

C. Proposed Amendments to Superfund: Encouraging Brownfields Redevelopment

The linchpin of proposed amendments to CERCLA is the exemption from liability for prospective purchasers of contaminated properties.[89] Legislative proposals should limit the liability of owners and re-developers by establishing cleanup standards based upon risks to health and the environment created by properties in their foreseeable future use.[90] A carefully monitored, restricted-use and risk-based cleanup plan, which is based upon the *actual* and foresee-

86. Bernard A. Weintraub & Sy Gruza, *The Redevelopment of Brownsites*, NR&E, Spring 1995, at 57.

87. *Brownfields Initiative*, *supra* note 79, at 30 (statement of Joanne R. Denworth, President, Pennsylvania Environmental Council). "The basic brownfields-greenfields concept is a good one: expedite the cleanup of contaminated, brownfield sites, and slow the loss of open, greenfields to development, by encouraging cleanup and reuse of old sites . . . ." *Id. See, e.g.*, Reform of Superfund Act of 1995, H.R. 2500, 104th Cong. §§ 101-05 (1995). The bill seeks to amend CERCLA to: (1) require EPA to offer final covenants not to sue to settling parties who meet certain requirements and pay a premium; (2) add provisions providing for delegation of authority to states to take action at National Priority List sites within the state; and (3) establish a more active role for the states. *See id.*

88. Evans, *supra* note 84, at E1. The issue of what the remediation standards will entail must be determined so that widely accepted cleanup standards and regulations can be created to recognize variations between residential, commercial and industrial uses. *Urban Reclamation Hearings*, *supra* note 79, at 23 (statement of Charles Bartsch, Senior Policy Analyst for Economic Development, Northeast Midwest Institute). Cleanup standards should take into account the ultimate use of the property because cleaning an abandoned manufacturing facility to a safe level is significantly less expensive than cleaning it for residential or even commercial purposes. *Id.* "Part of the push for brownfields legislation at the state and federal level[ ] stems from effort[s] to curtail [EPA's] oversight of the cleanup of properties whose contamination levels are less threatening than those for other large sites on the [National] Superfund [L]ist (NSL)." Evans, *supra* note 84, at E1.

89. *Urban Reclamation Hearings*, *supra* note 79, at 86 (statement of Timothy Fields, Jr., Acting Deputy Assistant Administrator, Office of Solid Waste and Emergency Response, EPA). As Charles Bartsch noted: "[t]he issue of liability needs to be clarified so that a new generation of legitimate 'innocent landowner' defenses can take hold. . . ." *Id.* at 29.

90. *Brownfields Initiative*, *supra* note 79, at 30 (statement of Joanne R. Denworth).

able reuse of property, is a workable solution to the current brownfield situation.[91]

Any legislative proposal, however, will be ineffective if it fails to address the need for certainty, an element conclusively lacking from Superfund.[92] The key to successful redevelopment of brownfields is the establishment of a clear, recognizable and expedient process to govern voluntary cleanups of contaminated sites.[93] Only by instilling confidence in the brownfields initiative on the part of potential purchasers or developers will brownfield sites become more competitive with the pristine greenfield sites, thus encouraging redevelopment of contaminated properties.[94]

Many of the brownfield amendment proposals include provisions to induce states to play an active role in recycling brownfields

91. *Id.* at 31. If cleanup standards are based on the prospective reuse of the property, it is sensible to release owners from liability, allowing market forces to take over once those cleanup standards are satisfied. *Id.* "[The] [p]roposed remedies would consider the reasonably foreseeable use of land, groundwater, and other resources." Daily Environment Report, July 18, 1995 (statement of Superfund reform principles and cover letter from Representative Michael Oxley, Chairman of Commerce, Trade, Hazardous Materials Panel). Reasonably foreseeable uses would be determined by considering a number of factors including: (1) current use of the property; (2) site analysis and surrounding land use patterns; (3) current zoning requirements and protected future land uses; and (4) input from community assistance groups, elected municipal and county officials and PRPs. *Id.*

92. *See generally* Grayson, *supra* note 80 (commenting that even if landowner is not liable under CERCLA, he may still be liable under state or local law). *See also* Brian Hill & Joanne Denworth, Report on Reuse of Industrial Sites Roundtables, Pennsylvania Environmental Council Roundtable Discussion (Oct. 14-22, 1993). The roundtable identified several constraints to the reuse of industrial and commercial sites: (1) uncertainty relating to cleanup standards under both state and federal law; (2) unending liability; (3) private investment favoring greenfields; (4) reluctance of private lenders to invest in former industrial sites; and (5) high remediation costs. *Id.* at 2.

93. *Urban Reclamation Hearings*, *supra* note 79, at 22 (statement of Charles Bartsch). Voluntary cleanups are essential to any brownfield redevelopment initiative if site reuse is to be viable on a national scale. *Id.*

94. *Id.* at 86 (statement of Timothy Fields). Under one proposal, purchasers would be exempt as owners under CERCLA if:

> (1) active disposal of hazardous substances occurred before purchase of the property,
> (2) the purchaser performs a thorough examination of the site's environmental condition,
> (3) the purchaser cooperates with efforts to remediate the property, and maintain the remedy,
> (4) the purchaser evinces due care to stop the on-going release of hazardous materials, in order to prevent future threatened release and to prevent or limit human or natural resource exposure to previously released hazardous materials, and
> (5) the prospective purchaser is not affiliated in any respect with a responsible party.

Id. at 87.

located within their boundaries.[95] These proposals seek to encourage the development of credible, EPA-certified, state voluntary cleanup programs by allowing individual states to define and make final approval decisions on remediations at low and medium priority sites.[96] Giving states the power to create explicit parameters for the voluntary cleanup process will remove significant roadblocks to redevelopment while at the same time providing an effective mechanism for promoting the cleanup of thousands of mildly-contaminated sites.[97]

IV. PENNSYLVANIA BROWNFIELDS LEGISLATION

In May 1995, the Pennsylvania Legislature passed three companion acts: (1) The Land Recycling and Environmental Remediation Standards Act (Act 2);[98] (2) The Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act (Act 3);[99] and (3) The Industrial Sites Environmental Assessment Act (Act 4).[100] The acts have been heralded as the most com-

95. *Id.* (statement of Representative McHale). The proposals list several requirements for any state program, including the following: (1) adequate public participation; (2) availability of technical assistance to parties conducting a voluntary cleanup; (3) oversight and enforcement authority; (4) provisions with covenants not to sue, contribution protection, certification of completion, "no further action" letters or other mechanisms to ensure finality of the cleanup process; and (5) linkage between the extent of cleanup required at the site and the intended use of the property. *Id.*

96. *Id.* (statement of Representative Peter J. Visclosky).

97. *See id.*

98. The Land Recycling and Environmental Remediation Standards Act (Act 2) §§ 101-908, 35 PA. STAT. ANN. tit. 35, §§ 6026.101-.908 (West Supp. 1996). Act 2 is the primary law creating a realistic framework for setting environmental cleanup standards. Department of Environmental Protection Homepage: *Land Recycling Highlights and Questions* (last modified Sept. 9, 1996) <http://www.pader.gov/dep/deputate/airwaste/wm/landrecy/default.htm>. The legislation provides the following: (1) incentives to encourage voluntary development and implementation of cleanup plans for abandoned sites without using taxpayer funds; (2) releases from liability when cleanup standards are met; (3) deadlines for Department actions; and (4) funding for environmental studies and cleanups through the Industrial Sites Cleanup Fund. *Id.*

99. The Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act (Act 3) §§ 1-14, PA. STAT. ANN. tit. 35, §§ 6027.1-.14 (West Supp. 1996). Act 3 limits environmental liability of those involved in redeveloping and financing recycled industrial sites. Department of Environmental Protection Homepage: *Land Recycling Highlights and Questions* (last modified Sept. 9, 1996) <http://www.pader.gov/dep/deputate/airwaste/wm/landrecy/default.htm>.

100. The Industrial Sites Environmental Assessment Act (Act 4) §§ 1-5, PA. STAT. ANN. tit. 35, §§ 6028.1-.5 (West Supp. 1996). The General Assembly passed Act 4 because abandoned property was not being used or reused because the costs associated with conducting an environmental assessment of the property were too high. Franklin L. Kury, Esq., Presentation at the Northeast PA Environmental Fo-

prehensive program in the nation to encourage the cleanup and reuse of industrial sites.[101] The legislature's goal was to develop a faster and easier way to encourage the voluntary cleanup and reuse of contaminated properties without risking the environment's integrity.[102] The three companion acts accomplish this goal, creating an innovative break from the past. In particular, Act 2 sets forth a new framework, creating three distinctive cleanup standards.[103]

A. The Land Recycling and Environmental Remediation Standards Act

Act 2 is the cornerstone of Pennsylvania's three bill legislative package.[104] "[I]t establishes over-arching legal principles to accomplish the dual objectives of encouraging the reuse of existing industrial sites and establishing environmental remediation standards to

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rum, (Sept. 27, 1995) *in The Liability Issue*, [hereinafter *The Liability Issue*] (prepared by the Environmental Law Group at Reed, Smith, Shaw & McKay).

Act 4 allocates funds for grants to conduct assessments so that industrial sites will be used or reused to their fullest potential. *Id.* To provide these grants, Act 4 creates the Industrial Sites Environmental Assessment Fund. *See* title 35, § 6028.3. Annually, and upon the Governor's approval, up to two million dollars will be allocated to the fund for environmental assessments in distressed communities. Department of Environmental Protection Homepage: *Land Recycling Highlights and Questions* (last modified Sept. 9, 1996) <http://www.pader.gov/dep/deputate/airwaste/wm/landrecy/default.htm>.

101. *Pennsylvania Launches Land Recycling Program*, PR Newswire, July 19, 1995. By taking a practical and informed approach to liability and cleanup issues, the legislation removes obstacles to the cleanup and redevelopment of contaminated industrial sites while ensuring the health and safety of Pennsylvanians. Department of Environmental Protection Homepage: *Land Recycling Highlights and Questions* (last modified Sept. 9, 1996) <http://www.pader.gov/dep/deputate/airwaste/wm/landrecy/default.htm>. Governor Ridge commented that this new program will succeed where earlier measures failed because it adopts a more practical, realistic approach to industrial site cleanups. *Pennsylvania Launches Land Recycling Program*, PR Newswire, July 19, 1995. Confident that Pennsylvania's brownfields initiative will be a tremendous success, Governor Ridge stated "[w]e are setting a standard which I'm sure many other states will follow." *Id.*

102. Department of Environmental Protection Homepage: *Land Recycling Highlights and Questions* (last modified Sept. 9, 1996) <http://www.pader.gov/dep/deputate/airwaste/wm/landrecy/default.htm>. Under previous regulations, the DEP set unattainable standards and required landowners to jump through bureaucratic hoops without regard to the cost, ordering DEP approval at every step of the way. *Id.* The new system specifically rejects the previous administration's policy of mandating pristine cleanups as the only possible cleanup standard. *The Liability Issue, supra* note 100. The new system adopts Governor Ridge's pragmatic environmental remediation and liability protection policy. *Id.*

103. *Id.*

104. Marc E. Gold, Esq., Remarks prepared for the Brownfields Site Redevelopment and Pennsylvania's Land Recycling Act Seminar (Jan. 30, 1996) [hereinafter Land Recycling Act Seminar], at 3 (on file with author).

enable PRPs to obtain legal liability protection."[105] To this end, the program seeks to accomplish three basic goals: (1) restore industry for productive use, thereby providing jobs for Pennsylvanians; (2) clean up sites in order to make them safe for their communities and workers; and (3) protect farmland and other undeveloped property from unnecessary development.[106] By achieving these goals, legislators hope to encourage the productive redevelopment of brownfields, thus enabling Pennsylvania's job creators to develop new opportunities for the state's workforce.[107]

Act 2 represents a fundamental shift in state environmental policy on the cleanup and reuse of industrial sites.[108] The new framework includes three cleanup standards which are available to owners and prospective purchasers: (1) the background standard;[109] (2) the statewide health standard;[110] and (3) the site-spe-

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105. *Id.* at 3 (footnote omitted). "For the first time remediation procedures and standards appear in a state statute rather than in regulations developed under narrow regulatory programs or agency policies drafted and implemented without public input or review." *Id.*

106. *Pennsylvania Launches Land Recycling Program*, PR Newswire, July 19, 1995. The three companion acts seek to accomplish these goals by:

> (1) creating a realistic framework for setting cleanup standards based on health and environmental risks,
>
> (2) setting up clear processes to standardize state approval of cleanup plans with deadlines for action,
>
> (3) ending the never-ending cleanup liability for sites once they are made safe, and
>
> (4) providing opportunities for public review and input into setting cleanup standards.

Id.

107. *Pennsylvania Department of Environmental Resources Signs Industrial Cleanup Agreement for Philadelphia Property*, PR Newswire, June 12, 1995.

108. *As We See It*, HARRISBURG PATRIOT NEWS, Nov. 24, 1995, at Opinion and Editorial. In the past, the Pennsylvania Department of Environmental Resources (DEP) treated landowners like criminals even if the landowners volunteered to clean up a site where they did not contribute to the contamination. *Id.* Prior to the passage of Acts 2, 3 and 4, the state took a more stringent and inflexible approach to cleaning up contaminated sites. Under the old system, owners and prospective purchasers were required to remediate a site as much as possible, with costs mostly irrelevant in determining what amount of remediation was feasible. *Id.* "[Legislation was] inadequate because [it] lacked any specific cleanup standards, . . . impeding the use of realistic remediation strategies to achieve finality. . . ." *Id.* at 2. Additionally, unless the background standards achieved predated any human activity on the property, it was impossible to be released from liability. *Id.*

109. PA. STAT. ANN. tit. 35, § 6026.302 (West Supp. 1996). In order to qualify for liability protection under the background standard, a person must satisfy the following criteria:

> (a) Standard. Persons selecting the background standard shall meet background for each regulated substance in each environmental medium.

cific standard.[111] In order to qualify for liability protection, any

(b) Attainment. Final certification that a site or portion of a site meets the background standard shall be documented in the following manner:

(1) Attainment of the background standard shall be demonstrated by collection and analysis of representative samples from environmental media of concern, including soils and groundwater in aquifers in the area where the contamination occurs through the application of statistical tests set forth in regulation or, if no regulations have been adopted, in a demonstration of a mathematically valid application of statistical tests. The Department of Environmental Resources shall also recognize those methods of attainment demonstration generally recognized as appropriate for that particular remediation.

Id.

110. *See id.* § 6026.303. Under Section 303(a), the Environmental Quality Board (EQB) is directed to promulgate statewide health standards. *Id.* The section provides, in pertinent part, as follows:

(a) Standard.—The Environmental Quality Board shall promulgate Statewide health standards for regulated substances for each environmental medium. The standards shall include any existing numerical residential and nonresidential health-based standards adopted by the department and by the Federal Government by regulation or statute, and health advisory levels. For those health-based standards not already established by regulation or statute, the Environmental Quality Board shall by regulation propose residential and nonresidential standards as medium-specific concentrations within 12 months of the effective date of this act. The Environmental Quality Board shall also promulgate along with the standards the methods used to calculate the standards. Standards adopted under this section shall be no more stringent than those standards adopted by the Federal Government.

Id.

111. *See id.* § 6026.304. The section mandates the cleanup standards for various types of contaminants in different types of environmental mediums. *Id.* The cleanup standards provide, in pertinent part, as follows:

(b) Carcinogens.—For known or suspected carcinogens, soil and groundwater cleanup standards shall be established at exposures which represent an excess upper-bound lifetime risk of between 1 in 10,000 and 1 in 1,000,000. The cumulative excess risk to exposed populations, including sensitive subgroups, shall not be greater than 1 in 10,000.

(c) Systemic toxicants.—For systemic toxicants, soil and groundwater cleanup standards shall represent levels to which the human population could be exposed on a daily basis without appreciable risk of deleterious effect to the exposed population. Where several systemic toxicants affect the same target organ or act by the same method of toxicity, the hazard index shall not exceed one. The hazard index is the sum of the hazard quotients for multiple systemic toxicants acting through a single-medium exposure pathway or through multiple-media exposure pathways.

(d) Groundwater.—Cleanup standards for groundwater shall be established in accordance with subsections (b) and (c) using the following considerations:

(1) For groundwater in aquifers, site-specific standards shall be established using the following procedures:

(i) The current and probable future use of groundwater shall be identified and protected. Groundwater that has a background total dissolved solids content greater than 2,500 milligrams per liter or is not capable of transmitting water to a pumping well in usable

person[112] proposing to, or required to respond to the "release"[113] of a regulated substance must satisfy one of these three standards.[114]

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and sustainable quantities shall not be considered a current or potential source of drinking water.

(ii) Site-specific sources of contaminants and potential receptors shall be identified.

(iii) Natural environmental conditions affecting the fate and transport of contaminants, such as natural attenuation, shall be determined by appropriate scientific methods.

(2) Groundwater not in aquifers shall be evaluated using current or probable future exposure scenarios. Appropriate management actions shall be instituted at the point of exposure where a person is exposed to groundwater by ingestion or other avenues to protect human health and the environment. This shall not preclude taking appropriate source management actions by the responsible party to achieve the equivalent level of protection.

(e) Soil.—Concentrations of regulated substances in soil shall not exceed values calculated in accordance with subsections (b) and (c) based on human ingestion of soil where direct contact exposure to the soil may reasonably occur; values calculated to protect groundwater in aquifers at levels determined in accordance with subsections (b), (c) and (d); and values calculated to satisfy the requirements of subsection (g) with respect to discharges or releases to surface water or emissions to the outdoor air. Such determinations shall take into account the effects of institutional and engineering controls, if any, and shall be based on sound scientific principles, including fate and transport analysis of the migration of a regulated substance in relation to receptor exposures.

Id.

112. Act 2 defines person in the same broad manner as proscribed under CERCLA: "[a]n individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, authority, nonprofit corporation, interstate body or other legal entity which is recognized by law as the subject of rights and duties. The term includes the Federal Government, State government, political subdivisions and Commonwealth instrumentalities." *Id.* For a comparison of CERCLA's definition of "person," see *supra* note 24.

113. *See* title 35, § 6026.103. The statute defines release as:

[the] [s]pilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing of a regulated substance into the environment in a manner not authorized by the Department of Environmental Resources. The term includes the abandonment or discarding of barrels, containers, vessels and other receptacles containing a regulated substance.

Id.

114. *Id.* § 6026.301. The section provides as follows:

(a) Standards.—Any person who proposes or is required to respond to the release of a regulated substance at a site and who wants to be eligible for the cleanup liability protection under Chapter 5 shall select and attain compliance with one or more of the following environmental standards when conducting remediation activities:

(1) a background standard which achieves background as further specified in section 302;

(2) a Statewide health standard adopted by the Environmental Quality Board which achieves a uniform Statewide health-based level so that any substantial present or probable future risk to human health and the environment is eliminated as specified in section 303; or

1. Background Standard

Any "responsible person"[115] seeking to attain the background standard for a particular piece of property must first submit a "Notice of Intent to Remediate" (NIR) with the Pennsylvania Department of Environmental Protection (DEP).[116] In order to establish

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(3) a site-specific standard which 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 comprising the site as specified in section 304.

(b) Combination of standards.—A person may use a combination of the remediation standards to implement a site remediation plan and may propose to use the site-specific standard whether or not efforts have been made to attain the background or Statewide health standard.

(c) Determining attainment.—For the purposes of determining attainment of any one or a combination of remediation standards, the concentration of a regulated substance shall not be required to be less than the practical quantitation limit for a regulated substance as determined from time to time by the EPA. The department may, in consultation with the board, establish by regulation procedures for determining attainment of remediation standards when practical quantitation limits set by the EPA have a health risk that is greater than the risk levels set in sections 303(c) and 304(b) and (c). The department shall not establish procedures for determining attainment of remediation standards where maximum contaminant levels and health advisory levels have already been established for regulated substances.

Id.

115. Title 35, § 6026.103. The term "responsible person" shall have:

the same meaning as given to it in the act of October 18, 1988 (P.L. 756, No. 108), known as the Hazardous Sites Cleanup Act, and shall include a person subject to enforcement actions for substances covered by the act of June 22, 1937 (P.L. 1987, No. 394), known as the Clean Streams Law, the act of January 8, 1960 (1959 P.L. 2119, No. 787), known as the Air Pollution Control Act, the act of July 7, 1980 (P.L. 380, No. 97), known as the Solid Waste Management Act, the act of July 13, 1988 (P.L. 525, No. 93), referred to as the Infectious and Chemotherapeutic Waste Law, and the act of July 6, 1989 (P.L. 169, No. 32), known as the Storage Tank and Spill Prevention Act.

Id.

116. Subsequent to the passage of the three acts, the Department of Environmental Resources (DER) became the Department of Environmental Protection. While the act refers to the DER, any references in this Comment will refer to the agency by its current title (DEP).

The NIR is the initial notice requirement of Act 2. Pennsylvania Department of Environmental Protection Homepage: *Land Recycling Technical Reference Manual*, Chapter V, Public Participation, Notifications, and Fees (visited Nov. 16, 1996) <http://www.dep.state.pa.us/dep/deputate/airwaste/wm/landrecy/manual/manualex.htm>. The purpose of the NIR is to provide notice of proposed remediation of a site. *Id.* The notice of intent must include the following information: (1) a description of the site; (2) a listing of all contaminants located on the site; (3) a description of the intended future use of the property (including employment opportunities, housing, open space, recreation, etc.); and (4) the proposed remediation measures. *Id.*

compliance with the background standard, a responsible party must demonstrate that the level of contamination existing at the site does not exceed levels in the surrounding area for "regulated substances."[117] While "institutional controls"[118] may not be used to attain the background standard, they may be used subsequent to remediation efforts.[119]

2. Statewide Health Standard

In order to attain the statewide health standard, a person must submit a NIR with the DEP, as well as with the municipality in which the site is located.[120] The standards for satisfying the statewide health standard are those standards adopted, by regulation, by the Environmental Quality Board (EQB).[121] This standard is divided into two components: (1) any existing numerical residential and nonresidential health-based standards adopted by the DEP and the federal government by regulation or statute;[122] and (2) where there are no health-based standards established by regulation or statute, the EQB is directed to propose, by regulation, residential and nonresidential standards as "medium-specific concentrations,"[123] subject, however, to certain statutorily proscribed requirements.

117. COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, BILL ANALYSIS: SENATE BILL 1, 1, 4 (1995). Responsible persons may establish compliance with the background standard by taking samples of the various environmental mediums. *Id.*

118. Title 35, § 6026.103. "Institutional controls" are defined as: "[a] measure undertaken to limit or prohibit certain activities that may interfere with the integrity of a remedial action or result in exposure to regulated substances at a site. These include, but are not limited to, fencing or restrictions on the future use of the site." *Id.*

119. *Id.* § 6026.302(b)(4).

120. *Id.* § 6026.303(h)(1)-(4). Like the background standard, the statewide health standard includes the sixty day review period provision as well as the "deemed approved" provision. *Id.*

121. *See id.* § 6026.303(a). For the relevant textual language of section 303(a), see *supra* note 110.

122. *See id.* § 6026.303(a).

123. *Id.* A "medium-specific concentration" is "[t]he concentration associated with a specific environmental medium for potential risk exposures." *Id.* § 6026.103. The EQB shall prescribe the medium-specific standards subject to the following requirements:

> (b) Medium-specific concentrations.—The following requirements shall be used to establish a medium-specific concentration:
>
> (1) Any regulated discharge into surface water occurring during or after attainment of the Statewide health standard shall comply with applicable laws and regulations relating to surface water discharges.
>
> (2) Any regulated emissions to the outdoor air occurring during or after attainment of the Statewide health standard shall comply with applicable laws and regulations relating to emissions into the outdoor air.

A major concern with Act 2 is the absence of any protocols or procedures under the notice requirements to ensure compliance with the background and statewide health standards.[124] Under sections 302(e) and 303(h), responsible parties need only file the following: (1) a notice of intent to remediate;[125] (2) notice of submission of final report;[126] and (3) a final report.[127] Moreover, if the person submits a final report within ninety days demonstrating attainment of either the background or statewide health standard, a

> (3) The concentration of a regulated substance in groundwater in aquifers used or currently planned to be used for drinking water or for agricultural purposes shall comply with the maximum contaminant level or health advisory level established for drinking water. If the groundwater at the site has naturally occurring background total dissolved solids concentrations greater than 2,500 milligrams per liter, the remediation standard for a regulated substance dissolved in the groundwater may be adjusted by multiplying the medium-specific concentration for groundwater in aquifers by 100. The resulting value becomes the maximum contaminant level for groundwater.
> (4) For the residential standard, the concentration of a regulated substance in soil shall not exceed either the direct contact soil medium-specific concentration based on residential exposure factors within a depth of up to 15 feet from the existing ground surface or the soil-to-groundwater pathway numeric value throughout the soil column . . . .
> (5) For the nonresidential standard, the concentration of a regulated substance in soil shall not exceed either the direct contact soil medium-specific concentration based on nonresidential exposure factors within a depth of up to 15 feet from the existing ground surface using valid scientific methods reflecting worker exposure or the soil-to-groundwater pathway numeric value determined in accordance with paragraph (4).

Id.

124. Memorandum from Joanne R. Denworth, President, Pennsylvania Environmental Council (August 17, 1995) [hereinafter Denworth Memorandum] (on file with author).

125. Title 35, § 6026.302(e)(1)(i). This section provides in part that "[a] notice of intent to remediate shall be submitted to the department [of planned remediation activities] . . . ." *Id. See also id.* § 6026.303(h)(1)(i) (dictating same notice requirements).

126. *Id.* § 6026.302(e)(2). This section provides, in part, that "[n]otice of the submission of the final report demonstrating attainment of background standard shall be given to the municipality in which the remediation site is located. . . ." *Id. See also id.* § 6026.303(h)(2) (dictating same notice requirement for background standard).

127. *See id.* §§ 6026.302(b)(2), 6026.303(e)(2). The act does not require prior approval to initiate remediation. Land Recycling Act Seminar, *supra* note 105, at 5. The act, however, does require responsible parties to submit the notice of intent to the municipality in which the site is located as well as publication in a local newspaper. *See* title 35, §§ 6026.302 (e)(ii), 6026.303(h)(1)(ii). Additionally, when reporting remediation efforts to the DEP, the final version must contain a detailed description of the process taken to reach the background standard, as well as the reasons for choosing the various sources for testing. *Id.* §§ 6026.302(b)(2)(ii), 6026.303(e)(2). If the DEP does not respond within the sixty day time period, the final report is "deemed approved." *Id.* §§ 6026.302(e)(3), 6026.303(h)(3).

notice of intent to remediate under sections 302(e)(1) or 303(h)(1) is not required.[128] Additionally, under the background standard, if the adjacent site is contaminated, and the owner is responsible, the owner is still only required to remediate up to the property line in order to be relieved of any future liability.[129]

3. Site-Specific Standard

The goal of the site-specific standard is to evaluate a site in order to provide a "safe, productive cleanup standard unique to the site."[130] While the site-specific approach offers more flexibility to the responsible person, as compared to the background or statewide health standard, it imposes more statutorily prescribed requirements.[131] After providing a "notice of intent"[132] to use the site-specific standard, responsible parties must develop and submit: (1) a remedial investigation report;[133] (2) a risk assessment;[134]

128. *Id.* § 6026.302(e)(4). *See also* § 6026.303(h)(4) (providing same notice requirements).

129. *See The Brownfields Initiative, supra* note 79 (stating Pennsylvania's background standard and release of owners from liability for remediation). Critics contend these provisions will promote development of greenfields rather than the redevelopment of brownfields. Joanne R. Denworth, ELI draft article, (1995) [hereinafter ELI draft article] (unpublished draft, on file with author).

130. Pennsylvania Department of Environmental Protection Homepage: *Land Recycling Technical Reference Manual*, Chapter III, Remediation Standards (visited Nov. 16, 1996) <http://www.dep.state.pa.us/dep/deputate/airwaste/wm/landrecy/manual/manualex.htm>. The information in this report includes all pathways of exposure, and an evaluation of the present and future use of the site. *Id.*

131. *Id.* The site-specific standard requires the accumulation of additional information, requiring more time and effort and additional reviews to be filed with the DEP, municipalities and the public. *Id.*

132. *See* title 35, § 6026.304(n). The responsible person selecting the site-specific standard must submit a notice of intent to remediate to: (1) the DEP; (2) the municipality in which the site is located; and (3) a summary of the notice of intent to the general public. *Id.* Additionally, the notices required under section 6026.304(n) must "include a 30-day public and municipal comment period during which the municipality may request to be involved in the development" of the site's remediation plan. *Id.* § 6026.304(n)(ii).

133. *Id.* § 6026.304(l)(1). The remedial investigation report must include:

> (i) Documentation and descriptions of procedures and conclusions from the site investigation to characterize the nature, extent, direction, rate of movement, volume and composition of regulated substances.
>
> (ii) The concentration of regulated substances in environmental media of concern, including summaries of sampling methodology and analytical results, and information obtained from attempts to comply with the background or Statewide health standards, if any.
>
> (iii) A description of the existing or potential public benefits of the use or reuse of the property for employment opportunities, housing, open space, recreation or other uses.
>
> (iv) A fate and transport analysis may be included in the report to demonstrate that no present or future exposure pathways exist.

(3) cleanup plans;[135] and (4) a final report,[136] as outlined in the Act. In addition, a responsible person must submit a final remediation plan which includes remediation alternatives and a final remedy.[137]

(v) If no exposure pathways exist, a risk assessment report and cleanup plan are not required and no remedy is required to be proposed or completed.

Id.

134. *Id.* § 6026.304(l)(2). If required, the risk assessment report must: describe[ ] the potential adverse effects under both current and planned future conditions caused by the presence of a regulated substance in the absence of any further control, remediation or mitigation measures. A baseline risk assessment report is not required where it is determined that a specific remediation measure can be implemented to attain the site-specific standard.

Id.

135. *Id.* § 6026.304(l)(3). The statute requires a cleanup plan which: evaluates the relative abilities and effectiveness of potential remedies to achieve the requirements for remedies described in subsection (k) when considering the evaluation factors described in subsection (j). The plan shall select a remedy which achieves the requirements for remedies described in subsection (k). The department may require a further evaluation of the selected remedy or an evaluation of one or more additional remedies in response to comments received from the community surrounding the site as a result of the community involvement plan established in subsection (o) which are based on the factors described in subsection (j) or as a result of its own analysis which are based on the evaluation factors described in subsection (j).

Id.

136. *Id.* § 6026.304(l)(4). The final report must "demonstrat[e] that the approved remedy has been completed in accordance with the cleanup plan." *Id.*

137. *Id.* § 6026.304(j). The final remedy should consider each of the following factors:

(1) Long-term risks and effectiveness of the proposed remedy that includes an evaluation of:

(i) The magnitude of risks remaining after completion of the remedial action.

(ii) The type, degree and duration of postremediation care required, including, but not limited to, operation and maintenance, monitoring, inspections and reports and their frequencies or other activities which will be necessary to protect human health and the environment.

(iii) Potential for exposure of human and environmental receptors to regulated substances remaining at the site.

(iv) Long-term reliability of any engineering and voluntary institutional controls.

(v) Potential need for repair, maintenance or replacement of components of the remedy.

(vi) Time to achieve cleanup standards.

(2) Reduction of the toxicity, mobility or volume of regulated substances, including the amount of regulated substances that will be removed, contained, treated or destroyed, the degree of expected reduction in toxicity, mobility or volume and the type, quantity, toxicity and mobility of regulated substances remaining after implementation of the remedy.

A significant difference between the background and statewide health standards and the site-specific standard is the heightened notice requirements prescribed under the provisions of the site-specific standard.[138] Under the background and statewide health standards, no approval is necessary to initiate remediation activities because the DEP will only approve the final report after remediation at the site is complete.[139] In contrast, the site-specific standard requires notice and review each time a report is submitted to the DEP.[140] Furthermore, under the site-specific standard, a thirty day

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(3) Short-term risks and effectiveness of the remedy, including the short-term risks that may be posed to the community, workers or the environment during implementation of the remedy and the effectiveness and reliability of protective measures to address short-term risks.

(4) The ease or difficulty of implementing the proposed remedy, including commercially available remedial measures which are BADCT, degree of difficulty associated with constructing the remedy, expected operational reliability, available capacity and location of needed treatment, storage and disposal services for wastes, time to initiate remedial efforts and approvals necessary to implement the remedial efforts.

(5) The cost of the remediation measure, including capital costs, operation and maintenance costs, net present value of capital and operation and maintenance costs and the total costs and effectiveness of the system.

(6) The incremental health and economic benefits shall be evaluated by comparing those benefits to the incremental health and economic costs associated with implementation of remedial measures.

Id.

138. *Id.* § 6026.304(n). For the notice requirements of section 6026.304(n), see *supra* note 132.

139. *Compare* title 35, § 6026.302(e), 6026.303(h) *with* title 35, § 6026.304(n) (providing respective notice and review provisions for background and statewide health standards).

140. *See* title 35, § 6026.304(n)(2). This section reads as follows:

The following notice and review provisions apply each time a remedial investigation report, risk assessment report, cleanup plan and final report demonstrating compliance with the site-specific standard is submitted to the department:

(i) When the report or plan is submitted to the department, a notice of its submission shall be provided to the municipality in which the site is located, and a notice summarizing the findings and recommendations of the report or plan shall be published in a newspaper of general circulation serving the area in which the site is located. If the municipality requested to be involved in the development of the remediation and reuse plans, the reports and plans shall also include the comments submitted by the municipality, the public and the responses from the persons preparing the reports and plans.

(ii) The department shall review the report or plan within no more than 90 days of its receipt or notify the person submitting the report of deficiencies. If the department does not respond with deficiencies within 90 days, the report shall be deemed approved.

Id.

public and municipal comment period is triggered each time a report is submitted by a responsible person.[141]

Similar to the other two remediation standards, the site-specific standard has come under intense scrutiny. Specifically, concerns have been raised regarding the thirty day comment period.[142] As section 304(n)(1)(ii) is worded, citizens have no direct involvement.[143] Because the municipality is the only entity entitled to request a public participation plan, any interested citizen must convince the municipality to make such a request.[144] Therefore, if an industrial use is suggested for a site and no objection or request is made to the municipality, the person need only clean the site for an industrial use, even if no such use is planned.[145]

Critics contend that "while restricted use, risk-based standards are appropriate in some situations, they should be used sparingly."[146] Critics advocate a cleanup approach which permits remediation to a particular standard only if the projected use for

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141. *Id.* § 6026.304(n)(1)(ii). If the public or the municipality does, in fact, wish to become involved in the remediation process, the person must actively initiate a public involvement plan. *Id.* The municipality, however, is the only entity permitted to request the public involvement plan. *Id.* Additionally, use of the site-specific standards requires:

> develop[ment] [of] a public involvement plan which involves the public in the cleanup and use of the property if the municipality requests to be involved in the remediation and reuse plans for the site. The plan shall propose measures to involve the public in the development and review of the remedial investigation report, risk assessment report, cleanup plan and final report. Depending on the site involved, measures 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. § 6026.304(o).

142. Land Recycling Act Seminar, *supra* note 104, at 5. Critics contend that the thirty day period is much more than a comment period because after the time has lapsed, there is presumably no further opportunity for the municipality or the public to object or request to become part of the process of developing a cleanup plan for the site. *Id.*

143. *See* Denworth Memorandum, *supra* note 124. For the textual language of section 304(n)(1)(ii), see *supra* note 140.

144. Denworth Memorandum, *supra* note 124.

145. Land Recycling Act Seminar, *supra* note 104.

146. Denworth, ELI draft article, *supra* note 129, at 2.

the site is commensurate with that particular standard.[147] Only under this type of carefully monitored scheme, critics contend, is it appropriate to release owners from liability.[148] Otherwise, the burden of any future cleanup will fall on prospective owners, once again creating a disincentive to choose brownfields over greenfields.[149]

4. Special Industrial Areas

Under limited situations, persons may select the special industrial areas standard.[150] The objective of this standard is to stimulate interest in purchasing and redeveloping property in designated distressed areas by clearly defining and limiting the environmental obligations of a prospective purchaser.[151] Entering into an agreement with the DEP, an innocent prospective purchaser may obtain liability protection by taking actions necessary to address any "immediate, direct or imminent threats to public health or the environment . . . ."[152] Additionally, prospective sites can only include those used for industrial activities where: (1) no financially responsible person can be found;[153] or (2) the land is located in a designated enterprise zone.[154]

147. *Id.* Within this scheme, the community and the municipality are involved in the process of establishing a restricted use cleanup plan. *Id.*

148. *Id.* As the law currently stands, municipalities should consider rezoning industrial properties that they want upgraded to a higher use now (such as for residential purposes), to prevent owners from cleaning a site to an industrial standard, and relieving themselves of a further obligation of remediating the site in the future. *Id.* Otherwise, the state will release these owners from liability, once again leaving any future cleanup responsibilities squarely in the hands of future owners or municipalities. *Id.*

149. *Id.*

150. In order to qualify as a special industrial area, the property must be designated as a "special site." *See* PA. STAT. ANN. tit. 35, § 6026.305(a) (West Supp. 1996). This section applies to:

> property used for industrial activities where there is no financially viable responsible person to clean up contamination or for land located within enterprise zones designated pursuant to the requirements of the Department of Community Affairs, the review procedures of this section shall apply for persons conducting remediation activities who did not cause or contribute to contamination on the property. Any environmental remediation undertaken pursuant to this section shall comply with one or more of the standards established in this chapter.

Id.

151. Land Recycling Act Seminar, *supra* note 104, at 8-9.

152. *Id.*

153. *See* title 35, § 6026.305(a). For the relevant textual language of section 6026.305(a), see *supra* note 150.

154. *See* title 35, § 6026.305(a). In order to qualify for the Enterprise Zone Program, the applying municipality must be recognized by the Pennsylvania Department of Community Affairs (DCA) as a financially disadvantaged community.

To qualify for the special industrial areas standard, a person must first file a baseline remedial investigation report.[155] Once the baseline report is approved, the person must file an NIR with the DEP, the municipality in which the site is located and the public.[156] The provisions of section 305, like those for the site-specific standards, call for a thirty day public and municipal comment period.[157] If the DEP does not: (1) review the baseline environmental report; (2) consider the comments received; and (3) report any deficiencies within ninety days, the report is deemed approved.[158]

5. *Cleanup Liability Protection*

The liability protection provision of Chapter five is by far the most significant aspect of Act 2. Under section 6026.501(a), "[a]ny

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Pennsylvania Department of Environmental Protection Homepage: *Land Recycling Technical Reference Manual*, Chapter III, Remediation Standards (visited Nov. 16, 1996) <http://www.dep.state.pa.us/dep/deputate/airwaste/wm/landrecy/manual/manualex.htm>. Cleanups in special industrial areas must meet the following requirements:

> (1) cleanups may utilize treatment, storage, containment or control methods, or any combination of the above;
> (2) cleanups must address all containerized waste at the property in accordance with applicable regulations,
> (3) soil that is available for direct contact must meet human health protection goals,
> (4) removal of any uncontainerized waste posing an imminent, immediate or direct threat, based on the plans for reuse of property;
> (5) if groundwater is to be used, it must be remediated so that it is safe for its intended use.

Id.

155. *See* title 35, § 6026.305(b). This section states that a baseline remedial investigation:

> shall be conducted on the property based on a work plan approved by the department, and a baseline environmental report shall be submitted to the department to establish a reference point showing existing contamination on the site. The report shall describe the proposed remediation measures to be undertaken within the limits of cleanup liability found in section 502. The report shall also include a description of the existing or potential public benefits of the use or reuse of the property for employment opportunities, housing, open space, recreation or other use.

Id.

156. *Id.* § 6026.305(c).

157. *Id.* § 6026.305(c)(2).

158. *Id.* § 6026.305(d). The subsection reads as follows:

> [n]o later than 90 days after the completed environmental report is submitted for review, the department shall determine whether the report adequately identifies the environmental hazards and risks posed by the site. The comments obtained as a result of a public involvement plan developed under section 304(o) shall also be considered by the department.

Id.

person demonstrating compliance with the environmental remediation standards set forth in Chapter 3 shall be relieved of further liability for the remediation of the site . . . ."[159] The release from liability applies to: (1) current or future owners;[160] (2) developers;[161] (3) successors or assigns of any person with liability protection;[162] and (4) public utilities.[163] Additionally, a person will not be held responsible simply by virtue of conducting environmental activities, such as an environmental assessment, on the site.[164] Rather, in special industrial areas, liability protection extends to parties who engage in an environmental agreement with DEP pursuant to section 6026.305.[165]

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159. *Id.* § 6026.501(a). Section 6026.505, however, leaves open the possibility of future liability under certain circumstances. *See id.* § 6026.505. The "reopener" provision reestablishes liability if the DEP can establish that:

> (1) fraud was committed in demonstrating attainment of a standard at the site that resulted in avoiding the need for further cleanup of the site;
> (2) new information confirms the existence of an area of previously unknown contamination which contains regulated substances that have been shown to exceed the standards applied to previous remediation at the site;
> (3) the remediation method failed to meet one or a combination of the three cleanup standards;
> (4) the level of risk is increased beyond the acceptable risk range at a site due to substantial changes in exposure conditions, such as in a change in land use from nonresidential to a residential use, or new information is obtained about a regulated substance associated with the site which revises exposure assumptions beyond the acceptable range. Any person who changes the use of the property causing the level of risk to increase beyond the acceptable risk range shall be required by the department to undertake additional remediation measures under the provisions of this act; or
> (5) (i) the release occurred after the effective date of this act on a site not used for industrial activity prior to the effective date of this act;
> (ii) the remedy relied in whole or in part upon institutional or engineering controls instead of treatment or removal of contamination; and
> (iii) treatment, removal or destruction has become technically and economically feasible on that part.

Id.

160. *Id.* § 6026.501(a)(1).

161. *Id.* § 6026.501(a)(2).

162. *Id.* § 6026.501(a)(3).

163. *Id.* § 6026.501(a)(4).

164. *Id.* § 6026.501(b). Section 6026.501(b), however, does not provide any relief from liability to a person who declines "to exercise due diligence in performing an environmental assessment or transaction screen." *Id.* Section 6026.504, however, provides for the imposition of "new liability" for "contamination *later* caused by that person on a site which has demonstrated compliance with one or more of the environmental remediation standards established in Chapter 3." *Id.* (emphasis added).

165. *Id.* § 6026.502(a). Section 6026.502(a) provides in pertinent part as follows:

One concern raised regarding the liability protection provision of Act 2 is that it fails to achieve its primary purpose, encouraging the redevelopment of brownfields. Specifically, critics attack the fact that the point of compliance is fixed to one point in time and cannot be changed.[166] Consequently, the burden of any future remediation at a site again falls on the municipality or a prospective purchaser, exacerbating the brownfield problem.[167]

Furthermore, the liability protection afforded owners under the site-specific standard is especially troublesome.[168] Critics note that owners are released from liability for restricted use cleanups regardless of whether there is an actual proposal to reuse the prospective site for a restricted purpose.[169] The liability protection also extends beyond brownfields to greenfields.[170] This may result in producing the reverse effect of what the law intended to accomplish, condoning and even encouraging "the permanent conversion of greenfields into brownfields."[171]

> Any person included in such an agreement shall not be subject to a citizen suit, other contribution actions brought by responsible persons not participating in the remediation of the property or other actions brought by the department with respect to the property except those which may be necessary to enforce the terms of the agreement.

Id. The cleanup liabilities for persons engaged in the cleanup and reuse of special industrial properties include the following:

> (1) The person shall only be responsible for remediation of any immediate, direct or imminent threats to public health or the environment, such as drummed waste, which would prevent the property from being occupied for its intended purpose.
>
> (2) The person shall not be held responsible for the remediation of any contamination identified in the environmental report, other than the contamination noted in paragraph (1).
>
> (3) Nothing in this act shall relieve the person from any cleanup liability for contamination later caused by that person on the property.

Id. § 6026.502(b).

166. ELI draft article, *supra* note 129, at 7.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. ELI Draft Article, *supra* note 129, at 2. The "owner's choice" scenario sanctions the abandonment of existing sites by allowing property owners to opt for the least expensive method of obtaining the liability protection of Chapter 5. *Id.* at 4. Property owners may simply clean the property to the industrial site standard which can be achieved or maintained with minimal "institutional controls" such as: (1) fencing; (2) soil capping; or (3) deed restrictions limiting the future use of the site. *Id.* Because many of these brownfields are located in older cities where no prospects of industrial use exists, these numerous sites could leave municipalities with a plethora of locked-up and restricted land with "no one around to clean them up for higher commercial, residential or public use." *Id.*

6. Industrial Land Recycling Fund

In order to finance implementation of Acts 2 and 3, the Legislature enacted The Industrial Sites Environmental Assessment Act (Act 4).[172] Act 4 established the "Industrial Land Recycling Fund."[173] Monies are deposited into the fund in order to provide financial assistance to innocent parties undertaking voluntary cleanup at industrial sites.[174] The funding is accomplished through a provision providing financial assistance for the costs of implementing an environmental study and cleanup plan.[175] Under the provisions of the fund, innocent parties could potentially be reimbursed for up to seventy-five percent of the cost of these expenditures.[176] In addition, the Department of Commerce is authorized to grant low interest loans to eligible parties.[177]

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172. The Industrial Sites Environmental Assessment Act §§ 1-5, PA. STAT. ANN. tit. 35, §§ 6028.1-.5 (West Supp. 1996).

173. PA. STAT. ANN. tit. 35, § 6026.702 (West Supp. 1996).

174. *Id.* § 6026.702(b). The purpose of the fund is:

> to provide financial assistance to persons who did not cause or contribute to the contamination on property used for industrial activity on or before the effective date of this act and who propose to undertake a voluntary cleanup of the property. The financial assistance shall be in an amount of up to 75% of the costs incurred for completing an environmental study and implementing a cleanup plan by an eligible applicant. Financial assistance may be in the form of grants as provided in this section or low-interest loans, to be lent at a rate not to exceed 2%.

Id.

In addition to the monies appropriated by the General Assembly, the act authorizes the transfer of fifteen million dollars from the Hazardous Sites Cleanup Fund. *Id.* § 6025.702(g).

175. *See id.* Under section 6026.702(c), grants may be made to political subdivisions or local economic agencies for the purposes of conducting a cleanup. *Id.* § 6026.702(c).

176. *The Liability Issue, supra* note 102, at D-22.

177. *See* title 35, § 6026.702(d). Under section 6026.702(e), priority for financial assistance is available to those applicants satisfying certain statutorily defined criteria. *Id.* § 702(e). When determining whether applicants will receive financial assistance, the DEP will take the following factors into consideration:

> (1) The benefit of the remedy to public health, safety and the environment;
>
> (2) The permanence of the remedy;
>
> (3) The cost effectiveness of the remedy in comparison with other alternatives;
>
> (4) The financial condition of the applicant;
>
> (5) The financial or economic distress of the area in which the cleanup is being conducted;
>
> (6) The potential for economic development;
>
> The Department of Commerce shall consult with the department when determining priorities for funding under this section.

Id. (footnotes omitted).

B. The Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act

Concurrent with the passage of Act 2, the Pennsylvania Legislature passed the Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act (Act 3).[178] In recognition of certain groups' fears of incurring liability, the act limits the environmental liability of: (1) economic development agencies;[179] (2) lenders;[180] and (3) fiduciaries.[181] Indeed, the stated

178. Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act (Act 3) §§ 1-5, PA. STAT. ANN. tit. 35, §§ 6027.1-.5 (West Supp. 1996).

179. "Economic Development Agencies" are defined as:

(1) Any redevelopment authority created under the act of May 24, 1945 (PL. 991, No. 385), known as the Urban Redevelopment Law.
(2) Any industrial development agency as that term is defined in the act of May 17, 1956 (1955 PL. 1609, No. 537), known as the Pennsylvania Industrial Development Authority Act.
(3) Any industrial and commercial development authority created under the act of August 23, 1967 (PL. 251, No. 102), known as the Economic Development Financing Law.
(4) Any area loan organization as that term is defined in the act of July 2, 1984 (PL. 545, No. 109), known as the Capital Loan Fund Act.
(5) Any other Commonwealth or municipal authority which acquires title or an interest in property.
(6) Municipalities or municipal industrial development or community development departments organized by ordinance under a home rule charter which buy and sell land for community development purposes.
(7) Tourist promotion agencies or their local community-based nonprofit sponsor which engage in the acquisition of former industrial sites as part of an "Industrial Heritage" or similar program.
(8) Conservancies engaged in the renewal or reclamation of an industrial site.

Id. § 6027.3.

180. Act 3 defines "lender" as:

[a]ny person regulated or supervised by any Federal or State regulatory agency and any of its affiliates or subsidiaries, successors or assigns, including its officers, directors, employees, representatives or agents, and any Federal or State banking or lending agency or its successors, including, but not limited to, Resolution Trust Corporation, Federal Deposit Insurance Corporation, Federal Reserve Bank, Board of Governors of the Federal Reserve System, Federal Home Loan Bank, National Credit Union Administrator Board, Office of the Comptroller of the Currency, Office of Thrift Supervision, Farm Credit Administration and Small Business Administration or a similarly chartered Federal instrumentality. The term also includes the initial lender and any subsequent holder of a security interest or note, guarantor, lease financier or any successor or a receiver or other person who acts on behalf or for the benefit of a holder of a security interest. The term includes an economic development agency.

Id.

181. The act defines "fiduciary" as:

[a]ny person which is considered a fiduciary under section 3(21) of the Employee Retirement Income Security Act of 1974 (PL. No. 93-406, 29

policy of Act 3 expressly acknowledges economic development agencies' reluctance to acquire title to, or other interests in, property.[182]

1. Economic Development Agency Environmental Liability

The first category of parties relieved from liability are "economic development agencies."[183] The release from liability applies where the agency "holds an 'indicia of ownership'[184] in property as a 'security interest'[185] for the purpose of developing or redevelop-

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U.S.C. § 1002(21)) or who acts as trustee, executor, administrator, custodian, guardian of estates, conservator, committee of estates of persons who are disabled, personal representative, receiver, agent, nominee, registrar of stocks and bonds, assignee or in any other capacity for the benefit of another person.

Id. § 6027.3.

182. *Id.* § 6027.2(5).

183. *Id.* § 6027.4.

184. "Indicia of ownership" is defined as:

[a]ny legal or equitable interest in property acquired directly or indirectly:

(1) for securing payment of a loan or indebtedness, a right of reimbursement or subrogation under a guaranty or the performance of another obligation;

(2) evidencing ownership under a lease financing transaction where the lessor does not initially select or ordinarily control the daily operation or maintenance of the property; or

(3) in the course of creating, protecting or enforcing a security interest or right of reimbursement of subrogation under a guaranty.

The term includes evidence of interest in mortgages, deeds of trust, liens, surety bonds, guaranties, and lease financing transactions where the lessor does not initially select nor ordinarily control the daily operation or maintenance of the property, or other forms of encumbrances against property recognized under applicable law as vesting the holder of the security interest with some indicia of title.

Id. § 6027.3.

185. Act 3 defines "security interest" as:

[a]n interest in property created or established for the purpose of securing a loan, right of reimbursement or subrogation under a guaranty or other obligation or constituting a lease financing transaction. The term includes security interests created under 13 Pa.C.S. (relating to commercial code), mortgages, deeds of trust, liens, lease financing transactions in which the lessor does not initially select or ordinarily control the daily operation or maintenance of the property, trust receipt transactions and their equivalents. Security interest may also arise from transactions such as sales and leasebacks, conditional sales, installment sales, certain assignments, factoring agreements, accounts receivable, financing arrangements and consignments if the transaction creates or establishes an interest in property for the purpose of securing a loan, right of reimbursement or subrogation under a guaranty or other obligation. The term also includes a confession of judgment or money judgment whereby a lender commences an execution on such judgments with a writ of execution and thereby causes property to be levied and attached.

Id.

ing the property or to finance an economic development or redevelopment activity . . . ."[186] The liability release occurs in four circumstances: (1) the agency must not have directly caused an immediate release or directly exacerbated a release of a contaminated substance;[187] (2) an agency forecloses on or assumes possession of a property;[188] (3) an agency conducts a remedial action pursuant to a written agreement with the DEP;[189] or (4) the agency acts in cooperation with governmental agencies in performing a remedial action.[190] Act 3's limitation on liability, similar to Act 2's, does not include federal entities.[191]

2. Lender Environmental Liability

The second group of persons relieved from liability are lenders.[192] Lenders who engage in activities involved in the "routine practices of commercial lending"[193] are relieved from liability to the DEP and any other persons.[194] A lender is not relieved from liability, however, if the lender: (1) directly caused an immediate release or directly exacerbated a release of a contaminated substance; or (2) knowingly and willfully compelled the borrower to

186. *Id.* § 6027.4.

187. *Id.* § 6027.4(1).

188. *Id.* § 6027.4(2).

189. *Id.* § 6027.4(3).

190. *Id.* § 6027.4(4). For a liability release to apply in the situation where an agency has cooperated with a governmental agency in performing a remedial action, the following three factors must be met:

> (i) An economic development agency and any of its successors and assigns may take no action that would disturb or be inconsistent with remedial response that is proposed, approved or implemented by the Federal Environmental Protection Agency.
>
> (ii) An economic development agency and any of its successors and assigns shall permit access to Federal and Commonwealth agencies and other parties acting under the direction of those agencies to evaluate, perform or maintain a remedial action.
>
> (iii) An economic development agency or any of its successors and assigns shall perform, operate and maintain remedial actions pursuant to State laws as directed by the department.

Id. § 6027.4(4)(i)-(iii).

191. *See The Liability Issue*, *supra* note 102, at F7.

192. For the definition of "lender," see *supra* note 180.

193. *See* title 35, § 6027.5(a). Routine practices include, but are not limited to: (1) the providing of financial services; (2) holding of security interests; (3) workout practices; (4) foreclosure; or (5) the recovery of funds from the sale of property. *See id.*

194. If the lender is involved in the "routine practices of commercial lending," the lender "shall not be liable under the environmental acts or common law equivalents to the Department of Environmental Resources or to any other person by virtue of the fact that the lender engages in such commercial lending practice . . . ." *Id.*

cause the release of a regulated substance or to violate an environmental act.[195] It is also important to note that a lender's liability is limited to the cost of any response actions resulting from the lender's activities.[196] Nevertheless, a lender may still be liable as an owner or operator under federal statutes.[197]

3. Fiduciary Environmental Liability

The third and final group of persons granted liability protection under Act 3 are "fiduciaries."[198] Any person acting as a fiduciary is not liable either in their personal or individual capacity merely by virtue of providing such services.[199] Liability may be imposed, however, under the following circumstances: (1) a release occurred during the time the fiduciaries services were actively provided; (2) the fiduciary has the "express power" and "authority" to control the property where the release occurred; or (3) the release occurred as a result of the gross negligence or willful misconduct of the fiduciary.[200] Similar to lender liability, a fiduciary's liability is limited to the cost of a response action directly attributable to the fiduciary's activities.[201]

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195. *Id.*

196. *Id.* § 6027.5(b). Act 3 provides that:

> [l]iability shall arise only if the lender's actions were the proximate and efficient cause of the release or violation. Ownership or control of the property after foreclosure shall not by itself trigger liability. No lender shall be liable for any response action if such response action arises solely from a release of regulated substances which occurred prior to or commences before and continues after foreclosure, provided, however, that the lender shall be responsible for that portion of the response action which is directly attributed to the lender's exacerbation of a release.

Id.

197. *The Liability Issue, supra* note 102, at F10.

198. See *supra* note 181 for definition of "fiduciary."

199. *See* title 35, § 6027.6(a).

200. *Id.*

201. *Id.* § 6027.6(b). Section 6027.6(b) provides in pertinent part as follows:

> No fiduciary shall be liable for any response action if such response action arises from a release of regulated substances which occurred prior to or commences before and continues after the fiduciary takes action as specified in subsection (a). Notwithstanding the foregoing, a fiduciary shall be responsible for that portion of a response action which is directly attributable to exacerbating a release. A release of regulated substances discovered in the course of conducting an environmental due diligence shall be presumed to be a prior and continuing release on the property.

Id.

C. Relationship of Pennsylvania Legislation to Federal Superfund Law

When analyzing the liability protection provision of Act 2, it is important to remember its relationship to federal Superfund law.[202] Even after the passage of Act 2, developers and investors still have concerns about reusing abandoned industrial sites, fearing they may be liable for cleanup costs under federal environmental standards.[203] They are concerned EPA does not possess "the authority or flexibility to offer liability releases that will provide real and effective incentives to join [state] programs. . . ."[204] Without this authority, critics fear that the effectiveness of any state brownfields program is severely limited.[205]

While CERCLA's liability provisions preempt any conflicting state brownfields initiatives (where they conflict), room exists to accommodate these initiatives. The majority of sites in the country are not listed on Superfund's National Priorities List (NPL);[206] therefore, state law is equally as important as federal law in addressing the cleanup of industrial sites.[207]

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202. As section 904(a) of Act 2 states: "The provisions of this act shall not prevent the Commonwealth from enforcing specific numerical cleanup standards, monitoring or compliance requirements specifically required to be enforced by the Federal Government as a condition to receive program authorization, delegation, primacy or Federal funds." *Id.* § 6026.904(a).

203. *Bill Removes Brownfields' Final Hurdles*, ALLENTOWN MORNING CALL, February 9, 1996, at A12.

204. Stephen C. Jones, *Unless Congress Authorizes the EPA to Grant Developers Releases From Liability, New Inner-City Cleanup Programs May Be of Limited Value*, NAT'L L.J., May 15, 1995, at B6. "The primary problem facing state brownfields programs is that they cannot protect redevelopers from federal liability under CERCLA or other federal laws." *Id.* Carol Browner, EPA Administrator, notes that EPA is limited in its ability to make reforms under CERCLA without the passage of a new law. News Conference with Carol Browner, EPA Administrator, (Oct. 2, 1995). Browner notes that the administrative changes EPA makes are more effectively achieved by changing the law. *Id.* "[Q]uite frankly, it is time for Congress to change the law." *Id.*

205. Jones, *supra* note 204, at B6.

206. *See Waste and Hazardous Substances Brownfields: EPA Funds More Pilots, Delists Superfund Sites*, American Political Network Greenwire, Jan. 26, 1996. Last year alone EPA removed 24,000 sites from the Superfund List to enhance their chances for redevelopment. *Id.*

207. ELI Draft Article, *supra* note 129, at 8. Even under federal law, the applicable, relevant and appropriate requirements (ARARS) look to state law for cleanup standards other than maximum contamination levels. *Id.* The cleanup standards under Act 2 are specifically identified as applicable, relevant and appropriate under state law for purposes of Superfund. Land Recycling Act Seminar, *supra* note 104, at 4. It is important to note, however, that these standards do not preempt the more stringent federal cleanup standards required to be imposed under Superfund or the national contingency plan. *Id.*

V. CONCLUSION

While the threat of liability under Superfund constantly lurks behind every state brownfields initiative,[208] a viable solution to the brownfields problem plaguing the states remains.[209] Until Congress enacts new legislation to address CERCLA's unrealistic and archaic liability structure, states must attack the problem on their own.[210] The basic concept of Pennsylvania's brownfields program is sensible: expedite the cleanup of contaminated sites while simultaneously slowing the loss of open lands by "encouraging cleanup and reuse of old sites" through the limiting of liability of brownfield owners and developers.[211] Abatement of the proliferation of brownfields is possible only through the establishment of realistic cleanup standards based upon the actual risk to health and the environment posed by these contaminated properties.[212] By passing brownfield legislation, Pennsylvania has come a long way in addressing the problems plaguing current Superfund laws.[213] One only hopes Congress will take the lead from Pennsylvania and attack the problem at the federal level, thus finally removing barriers to economic development at the state level and restoring a proper federal-state balance.

Thomas G. Kessler

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208. For a discussion of the relationship of federal Superfund laws to state laws, see *supra* notes 202-07 and accompanying text.

209. For a discussion of the beneficial effects of Pennsylvania's brownfields program, see *supra* notes 98-103 and accompanying text.

210. For a discussion of CERCLA's harsh liability scheme, see *supra* notes 45-59 and accompanying text.

211. ELI Draft Article, *supra* note 129, at 2.

212. *Id.*

213. For a discussion of what changes need to be made to the current Superfund law, see *supra* notes 89-97 and accompanying text.