Buffalo Law Review

Volume 43 | Number 1 Article 9

4-1-1995

Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change

Julia A. Solo
University at Buffalo School of Law (Student)

Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change

JULIA A. SOLO†

INTRODUCTION

Fear of liability under federal Superfund law may be discouraging use of former hazardous waste sites even after they have been cleaned up and thus encouraging industrial development to sprawl onto unpolluted land.[1]

No city or town benefits when entangled liabilities prevent cleanup and allow contamination to worsen. No business or worker advances when lender fears thwart facility modernization. No local, state or regional economy gains when sites remain dormant and adjoining neighborhoods suffer.[2]

The current version of the Superfund law should be recognized as detrimental to the economy of distressed urban areas as well as to our nation's environment. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[3] a massive and complex federal environmental law, was passed by the federal government in 1980 to respond to the problem of hazardous waste contamination in the United States.[4] The focus of CERCLA legislation, originally, was twofold: to clean up dangerous or potentially dangerous hazardous waste sites and to find parties who

---

† J.D. Candidate, May 1995, State University of New York at Buffalo School of Law; B.A., 1988, University of Michigan. I would like to extend special thanks to Professor Robert S. Berger for his endless assistance, advice, and encouragement on this Comment and for his role in creating a working group on this topic.

1. *Superfund Liability May Add to Urban Sprawl, Congress Told*, LIABILITY WK., Apr. 26, 1993.

2. Charles Bartsch & Richard Munson, *Restoring Contaminated Industrial Sites*, ISSUES SCI. & TECH., Spring 1994, at 74, 75.

3. 42 U.S.C. §§ 9601-75 (1992) (commonly referred to as Superfund).

4. 2 THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY & LITIGATION § 12 (Susan Cooke et al. eds., 1987); *see* Kathleen M. Martin, *Siting on Contaminated Property: Development and Cleanup through Public/Private Cooperation*, NAT. RESOURCES & ENV'T, Winter 1993, at 20, 20; Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 7 (1982); *see generally* S. 1480, 96th Cong., 1st Sess. (1979); 126 CONG. REC. S14,938-48 (daily ed. Nov. 24, 1980).

could be held accountable to pay for such cleanups.[5] In the process of seeking to accomplish these goals, however, it has become clear that Superfund has also had a number of unintended effects,[6] the most serious being to dissuade industry from redeveloping on former industrial land.[7]

The legislation imposes extremely broad liability, intended presumably to ensure that polluters pay.[8] Under the scheme, however, any party who becomes associated with a piece of contaminated property can, essentially, be deemed fully liable for the cost of cleanup, regardless of that party's connection with the contamination.[9] As a result, developers and investors are reluctant to acquire property which is likely to be contaminated.[10]

All former industrial property is perceived to have a high risk of contamination, and thus is avoided regularly by investors. The properties, which then sit idle and abandoned, usually in low-income urban neighborhoods, have come to be known as brownfields.[11] The loss of new business development has exacerbated economic hardship in these areas. Former industrial urban

---

5. H.R. REP. No. 253 (III), 99th Cong., 1st Sess. 15 (1985); Stephen M. Feldman, Comment, *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); Walter Mugden, Deputy Regional Council, Office of Regional Council, Region 2, EPA, Address at University of Buffalo School of Law (Oct. 1993); *see also* Elizabeth F. Mason, Comment, *Contribution, Contribution Protection, and Nonsettlor Liability Under CERCLA: Following Laskin's Lead*, 19 B.C. ENVTL. AFF. L. REV. 73, 74 (1991).

6. *See* Barry Kellman, *Symposium on the Seventh Circuit as a Commercial Court: The Seventh Circuit on Environmental Regulation of Business*, 65 CHI.-KENT L. REV. 757, 760 n.9 (arguing that the agencies authorized to promulgate environmental statutes must bear in mind that the decisions they make not only have short-term environmental effects, but "may also profoundly affect the future in foreseeable and unforeseeable ways.").

7. Bartsch & Munson, *supra* note 2 (arguing that "[p]erhaps the greatest barrier to industrial site reuse . . . is the 1980 Comprehensive Environmental Response, Compensation, and Liability Act-commonly known as Superfund").

8. 42 U.S.C. § 9607(a) (1988); Grad, *supra* note 4.

9. *See* 42 U.S.C. § 9607(a) (1988); Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVTL. AFF. L. REV. 579, 592 (1993); Grad, *supra* note 4.

10. Statement of Timothy Fields, Jr., Acting Deputy Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency, at the Plenary Session on "Recycling Inner City Properties" before The United States Conference of Mayors (June 13, 1994) [hereinafter Conference of Mayors]; Bartsch & Munson, *supra* note 2, at 74.

11. Conference of Mayors, *supra* note 10; Bartsch & Munson, *supra* note 2; Reed Rubinstein & Mary Field, *Clean Up Superfund or Write Off Urban Redevelopment*, CONN. L. TRIB., May 3, 1993, at 20; Viki Reath, *Think Tank Suggests Superfund Reforms*, ENV'T WK., Jan. 20, 1994, § 20 (citing study by the Center for the Study of American Business at Washington University in St. Louis); *Superfund Liability May Add to Urban Sprawl, Congress Told*, *supra* note 1, § 17.

centers are now characterized by falling tax bases, increased joblessness, and a large number of abandoned properties.[12]

Subsequent to Superfund's passage, developers have opted for the safer solution and built a majority of new industries and enterprises on pristine land located in the suburbs or in the countryside.[13] Rural and suburban sites, often referred to as greenfields, are less likely to have been previously used for industrial purposes and, therefore, have a lower probability of containing hazardous waste. Thus, developers are spared the danger of incurring liability for somebody else's waste.

The irony of Superfund is that it has created incentives to spread contamination. While the purpose behind the legislation was to clean up hazardous waste and protect the environment, it has resulted in contaminated properties sitting idle while more green land is developed. The contaminated properties pose a risk to urban residents and the new jobs are not accessible to those who need them the most.[14]

The basic barriers to urban economic redevelopment, which stem from Superfund legislation, include:

(a) the risk of liability for "innocent"[15] prospective purchasers of industrial property;[16]

(b) the enormous economic costs associated with site assess-

---

12. Conference of Mayors, *supra* note 10, at 5; *see* CUYAHOGA COUNTY PLANNING COMM'N, BROWNFIELDS REUSE STRATEGIES 25 (1993) [hereinafter CUYAHOGA COUNTY PLAN. COMM'N]; *Summaries of Clinton Administration Proposal for Superfund Reform, Released by E.P.A.* [Feb. 3, 1994] Toxics Law Rep. (BNA) at 1024 (Feb. 9, 1994) [hereinafter *Clinton Proposal*]; BRIAN HILL & JOANNE DENWORTH, REPORT ON REUSE OF INDUSTRIAL SITES ROUNDTABLE 5 (Pennsylvania Environmental Council 1993) [hereinafter INDUSTRIAL SITES ROUNDTABLE]; *Superfund Liability May Add to Urban Sprawl, Congress Told, supra* note 1; Rubinstein & Field, *supra* note 11.

With this decline also comes, inevitably, a greater need for services, poorer quality housing, poorly funded school systems, and higher crime rates. *See generally* James T. O'Reilly, *Environmental Racism, Site Cleanup and Inner City Jobs: Indiana's Urban In-Fill Incentives*, 11 YALE J. ON REG. 43, 45-46, 54 (1994).

13. John C. Buckley, *Reducing the Environmental Impact of CERCLA*, 41 S.C. L. REV. 766-67, 807-13 (1990); Bradford C. Mank, *Article: The Two-Headed Dragon of Siting and Cleaning Up Hazardous Waste Dumps, Can Economic Incentives or Mediation Slay the Monster?*, 19 B.C. ENVTL. AFF. L. REV. 239, 240 (1991); Rubinstein & Field, *supra* note 11.

14. O'Reilly, *supra* note 12, at 43, 47-48.

15. The term "innocent" conjures up an image that all previous owners and PRPs are "guilty." This is not, necessarily, an accurate image or label, due to the fact that Superfund liability is imposed on parties regardless of whether their waste handling procedures were legal and concerned with protection of public health.

The term "innocent" for purposes of this discussion merely means that the party or parties had no responsibility for, and no economic connection with, the handling, production, use, storage, or disposal of the hazardous contamination on the property.

16. Feldman, *supra* note 5, at 298; Martin, *supra* note 4, at 20.

ment and cleanup and thus with liability;[17]

(c) a lack of clearly defined cleanup standards;[18] and

(d) a lack of available public funding to assist with cleanup and assessment (particularly for small businesses).[19]

Legal solutions must be offered to overcome the impediments to redeveloping former industrial sites. Local governments would then be likely to follow with similar local redevelopment initiatives.[20]

---

17. *See* John J. Byrne & Thomas J. Greco, *Superfund Reform Needed to Keep Credit Flowing*, AM. BANKER, Mar. 22, 1994, at 17 (stating that environmental impact studies alone cost between $500 and $2500); Mank, *supra* note 13, at 256.

18. Douglas Wolf & Jacqueline M. Warren, *How Clean Is Clean?*, 30 ENV'T 3 (1988).

19. Robert S. Berger et. al., *Recycling Industrial Sites in Erie County: Meeting the Challenge of Brownfields Redevelopment*, BUFF. J. ENVTL. L. (forthcoming Spring 1995).

20. A number of state governments have already passed laws to help curb some of the harsh effects of the environmental laws and to help promote urban redevelopment. *See* Massachusetts Oil and Hazardous Material Release Prevention and Response Act, MASS. GEN. L. ch. 21E, § 3A (1993); Michigan Environmental Response Act, MICH. COMP. LAWS § 299.614 (1992); Minnesota Environmental Response and Liability Act, MINN. STAT. §§ 115B.01-.24 (1993); Minnesota Contamination Cleanup Grants, MINN. STAT. §§ 116J.551-.557 (1993); OHIO REV. CODE ANN. § 3746.01-.99 (Baldwin 1994).

Creative pending legislation exists on a wider scale. *See* Colorado Voluntary Cleanup and Redevelopment Act, H.R. 1299, Colo. 59th Gen. Assembly, 2d Regular Sess. (1994) (enacted); H.R. 4720, Mich. 87th Leg., Regular Sess. (1993) (provides economic redevelopment grants); H.R. 4058, Mich. 87th Leg., Regular Sess. (1993); S. 659, Mich. 87th Leg., Regular Sess. (1993) (targets existing infrastructure and promotes cleanups); S. 7787, N.Y. 215th Gen. Assembly, 2d Sess. (1994) (enacting voluntary remediation act); Pennsylvania Industrial Reuse Act, H.R. 1895, Pa. 176th Gen. Assembly, Regular Sess. (1993); Pennsylvania Industrial and Commercial Land Recycling Law, H.R. 2065, Pa. 176th Gen. Assembly, Regular Sess. (1993); S. 972, Pa. 178th Gen. Assembly, Regular Sess. (1993); Wisconsin Land Recycling Act, S. 462, Wis. 91st Leg., Regular Sess. (1993).

County and municipal leaders have had regional meetings and conferences on this specific topic, the crisis it is causing in their communities and how to best promote redevelopment of urban areas rather than industrialization of suburban areas. *See* CUYAHOGA COUNTY PLAN. COMM'N, *supra* note 12; Erie County Div. of Envtl. Compliance Servs., Erie County Dep't of Env't & Planning, Draft: Prioritizing Erie County Hazardous Waste Sites for Remediation Based on Future Use Potential, Dec. 1992 (on file with author); INDUSTRIAL SITES ROUNDTABLE, *supra* note 12.

At the local levels, municipalities have offered incentives to promote redevelopment and help instigate cleanup. Such incentives include tax incremental financing in Wichita, Kansas; tax increment financing and low-interest city loans in Minneapolis, Minnesota; fundraising drives for industrial rejuvenation and tax increment financing in Davenport, Iowa. CUYAHOGA COUNTY PLAN. COMM'N, *supra* note 12, at 54.

State and local laws, however, cannot override federal law, and sites that contain sufficient contamination, which have been targeted by the federal government will still be dealt with under CERCLA. The federal government, under the Clinton Administration, is now also acknowledging the stagnated redevelopment and cleanup of industrial and formerly industrial sites and has proposed amendments to address it in its 1994 proposal to Congress for Superfund reauthorization. *See* H.R. 3800, 103d Cong., 2d Sess. (1994); *Clinton Proposal*, *supra* note 12.

The issue of community participation raised time and time again in the area of environmental justice is relevant in the area of brownfield redevelopment.[21] While environmental justice advocates focus on the history of siting toxic industries in low-income, minority areas, and the need to empower neighborhoods to demand safer living conditions, the brownfield problem has also contributed significantly to urban blight. The short-sightedness of current Superfund legislation has contributed to the abandonment of urban toxic lands rather than creating an incentive to improve environmental conditions, particularly on former commercial and industrial urban property.[22]

If the government is to play a role in sparking redevelopment of brownfield sites, community participation will be a necessary component. The communities have paid the price for a governmental policy which has discouraged development in urban areas. Neighborhoods are often turned into ghost towns, and jobs are frequently taken away from these communities. These same communities should not be required to sit back while the government throws money at the problem simply to encourage redevelopment without any sense of its impact on individuals. Residents from within a community are best equipped to determine what type of developments are desirable and sustainable. These same communities will directly pay the price of any mistakes that are made. Any proposed incentive schemes should aim to make redevelopment accessible to all members of society and not exclusively to those with the most money. If redevelopment schemes are dependent upon community authorization and are accessible to those of all economic means, the success of redevelopment efforts will inevitably be greater.

---

21. The environmental justice movement has focused on the history of zoning hazardous waste facilities and highly polluting industries in predominantly poor and minority neighborhoods. Such siting decisions were made for numerous reasons, but predominantly because the low income neighborhoods tended to have less political power, and therefore, less say over their environmental conditions. Lives were sacrificed for economic reasons, and the lives were generally those of the poor, minorities, women, and children. For a comprehensive discussion of the issues surrounding the environmental justice movement, see Vicki Been, *What's Fairness Got to do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993).

The topic of this Comment, however, is meant to address additional unfairness to urban residents and neighborhoods. Legislation, though meant to create improved environmental conditions, has been shortsighted and has instead contributed to abandoned wastelands in these same urban areas. The cost of redevelopment on these sites is prohibitive, preventing development, either from within the community or from outside. In light of the development situation, jobs are becoming more and more scarce, as well as farther away from the cities. *See generally* O'Reilly, *supra* note 12.

22. For a lengthier discussion of abandonment of the urban core, see *infra* part II.

To illustrate the importance of a change in environmental laws both in order to preserve the environment and to promote urban industrial redevelopment, this Comment will focus on six major areas: (1) CERCLA's liability scheme; (2) CERCLA's effects on urban economic development; (3) the effects of economic development on the future of urban economies and urban populations; (4) CERCLA's environmental impact; (5) the need for change; and (6) proposed alternatives to the CERCLA liability scheme and the pros and cons of such alternatives.

I. CERCLA'S LIABILITY SCHEME

CERCLA was passed by Congress in 1980 primarily as a response to the environmental (and political) catastrophe at Love Canal.[23] Environmental bills relating to the issue of hazardous

---

23. Charles W. Powers, *Resources for Responsible Management, Property and Land Use as the Key to Cleaning Up Hazardous Waste Sites, in* CLEAN SITES 87 (Working Paper on Super Fund Reform, prepared for Clean Sites' Board of Directors, 1992); MARTIN LINSKY ET AL., HOW THE PRESS AFFECTS FEDERAL POLICYMAKING—SIX CASE STUDIES 27, 52 (1986); Grad, *supra* note 4, at 7-8.

The Love Canal crisis became well known in 1979. In the 1940s and 1950s, Niagara Falls, New York was home to a number of chemical manufacturing plants including Hooker Chemical. Hooker Chemical buried chemical waste on a large strip of land which had once been Love Canal. The waste burial was done by permit and according to the disposal methods known at the time. In the 1950s, the school board of Niagara Falls, New York acquired the property for one dollar. In the property deed, Hooker Chemical notified the school district of the chemical waste buried on the land and disclaimed any liability associated with damage, personal or property, caused as a result of the chemicals. Eventually, an elementary school was built over the canal site, and homes and neighborhoods sprung up all around. Hooker Chemical wrote a letter to the school board indicating its disapproval of the use of the property for a school.

In the early 1970s, residents became increasingly aware that some of the chemicals were leaking into their basements and bubbling up through the ground into the schoolyard and their backyards. The chemicals were very toxic, some of them containing dioxins. The press began to cover the story fairly regularly beginning in 1976. Also, state and local officials began to conduct investigations of the leaking substances. By 1978 it was commonly understood that the substances posed a danger and some families were advised by federal environmental officials to stay out of their basements. The homes had basically lost all value, as no one could find buyers given the presence and perceived danger of toxic waste. Soon, governmental officials began to take blood samples of the residents, in an attempt to determine more precisely what type of danger the chemicals posed to the residents. The community residents became terribly alarmed and wanted to move their families out of the neighborhood at once. The government failed to respond by offering assistance to the residents, and most residents were financially unable to relocate without finding purchasers for their now valueless properties.

Frustrated by government's unwillingness to assist them, and perceiving that the government was covering up many of its findings, the local residents used the media as their voice. Eventually, due to the organization and persistence of the residents and the political suicide associated with non-action, some of the residents' homes were purchased. The gov-

waste had been discussed in Congress for at least three years prior to its passage.[24] Superfund, however, was a hastily constructed bill.[25] It may have passed primarily as a public policy effort to show the country that the government was concerned with the protection of "public health [,] welfare [and] the environment" from hazardous wastes which are later found to have leaked.[26]

Superfund legislation has had significant effects on all property transactions in the United States.[27] The list of hazardous contaminants is extremely large, and includes a wide array of commonly used chemicals.[28] Sites can include "virtually any place at

---

ernment concluded that much of the problem stemmed from the lack of designated governmental funding for such a situation.

One of the major results of the Love Canal crisis was a public perception that the government was not willing to take action to deal with the health and property hazards associated with leaking hazardous wastes. The modest-income residents received a particularly sympathetic perception by the general public. Much of this was due to the large amount of publicity the residents were able to gain, the perception of serious health risks to the residents, and governmental inability or unwillingness to provide financial assistance to residents in order to help them relocate. Toward the end of this series of events, Superfund legislation was passed by Congress. ADELINE LEVINE, LOVE CANAL: SCIENCE, POLITICS, AND PEOPLE 7-26 (1982); Judith Miller, *Byline*, N.Y. TIMES, Apr. 29, 1979, at 36; *see* Comment, *An Enemy of the People: Prosecuting the Corporate Polluter as a Common Law Criminal*, 39 AM. U. L. REV. 311, 316 n.26 (1990); *see also* MICHAEL BROWN, LAYING WASTE: THE POISONING OF AMERICA BY TOXIC CHEMICALS 303-19 (1979).

24. *See* 2 THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY, & LITIGATION, *supra* note 4, §§ 12.02[1]-.04[1][b]; Grad, *supra* note 4.

25. *See* 2 THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY, & LITIGATION, *supra* note 4, § 12.04(1)(a); LINSKY ET AL., *supra* note 23, at 27, 52; Grad, *supra* note 4; Powers, *supra* note 23, at 87.

26. Exec. Order No. 12,580(4)(d)(1), 40 C.F.R. § 300.2 (1987), *reprinted in* 42 U.S.C. § 9606(a) (1992).

27. Thaddeus Bereday, *Contractual Transfers of Liability Under CERCLA Section 107(E)(1): For Enforcement of Private Risk Allocations in Real Property Transactions*, 43 CASE W. RES. L. REV. 161 (1992); Charles D. Crealese, *A Review of Environmental Site Assessment Guidance Desperately Seeking Standards*, LEGAL INTELLIGENCER, May 6, 1993, at 8.

28. CERCLA, 42 U.S.C. § 9602 (1994), designates hazardous substances as those designated by the EPA or those found in any of four other environmental laws. Section 9601(14) states:

> The term 'hazardous substance' means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated [hazardous waste] 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 . . . (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 . . . 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

which hazardous wastes have been dumped, or otherwise disposed of" including roadsides, dragstrips, and real estate subdivisions.[29] Potentially contaminated property, therefore, includes property with various and unexpected former uses, such as former manufacturing buildings, plants, mills, gas stations, and even dry cleaners.[30] The EPA's working definition of brownfield is "a previous industrial site which is left undeveloped due to the uncertainty of liability and cleanup costs."[31] For purposes of discussion in this Comment, that definition will be expanded to include both former industrial and commercial sites, since each can lead to a risk of contamination.

The liability scheme under Superfund is very broad[32] and has been a source of major controversy since the legislation's initial passage in 1980.[33] Numerous parties may be held liable for the full

---

this paragraph, and the term does not include natural gas . . . or synthetic gas usable for fuel, (or mixtures of natural gas and such synthetic gas).

Id. CERCLA's definition of hazardous waste includes over 700 substances, many of which are ordinary household substances. B.F. Goodrich v. Murtha, 958 F.2d 1192 (2d Cir. 1992).

29. CERCLA, 42 U.S.C. § 9601(9)(B) (1994); 42 U.S.C. § 9601(9)(A) (1994); *see* New York v. Shore Realty Corp., 759 F.2d 1032, 1043 n.15 (2d Cir. 1985); United States v. Nepacco, 810 F.2d 726, 743 (8th Cir. 1986); United States v. Ward, 618 F. Supp. 884, 895 (E.D.N.C. 1985); *see also* U.S. v. Conservation Chem. Co., 619 F. Supp. 162, 185 (W.D. Mo. 1985); New York v. General Electric Co., 592 F. Supp 291, 296 (N.D.N.Y. 1984); United States v. Metate Asbestos Corp., 584 F. Supp. 1143, 1148 (D. Ariz. 1984).

30. *See Clinton Proposal*, *supra* note 12, at 1024; INDUSTRIAL SITES ROUNDTABLE, supra note 12, at 2; CUYAHOGA COUNTY PLAN. COMM'N, *supra* note 12, at 2, 53; *see generally* MAKING ENVIRONMENTAL REGULATIONS WORK FOR NEW YORK'S ECONOMY AND ENVIRONMENT: HEARINGS BEFORE THE SENATE ENVIRONMENTAL CONSERVATION COMMITTEE LEGISLATIVE COMMISSION ON TOXIC SUBSTANCES AND HAZARDOUS WASTES, LEGISLATIVE COMMISSION ON SOLID WASTE MANAGEMENT ADMINISTRATIVE REGULATIONS REVIEW COMMISSION 37 (1994) [hereinafter NYS HEARING REPORT].

31. Conference of Mayors, *supra* note 10.

32. Superfund's liability scheme has been interpreted as strict, joint, several, retroactive, and perpetual. *See* Kelley v. EPA, 15 F.3d 1100, 1103 (D.C. Cir. 1994); Florida Power & Light Co. v. Allis Chalmers, 893 F.2d 1313, 1317 (11th Cir. 1990); United States v. Fleet Factors Corp., 901 F.2d 1550, 1553-54 (11th Cir. 1990). Liability applies to past owners as well as current owners of property, regardless of which party was responsible for the contamination. *See* 42 U.S.C. § 9607(a) (1992). Fault is not considered as a factor in determining liability. *See* Oswald, *supra* note 9, at 590.

33. *See* Cheryl Kessler Clark, *Due Process and the 'Environmental Lien: The Need for Legislative Reform*, 20 B.C. ENVTL. AFF. L. REV. 203, 203-04 (1993) (discussing broad power of the EPA to assign liability and place liens on property without allowing for judicial review and possible due process violations of such procedure); Mason, *supra* note 5, at 76 (advocating use of the "fair share" approach in determining liability of potentially responsible parties in CERCLA actions); Mank, *supra* note 13, at 293; Bereday, *supra* note 27, at 169 (arguing that "the 'polluters pay' rationale is not always justified because strict liability imposes costs on 'innocent' purchasers and other owners irrespective of who is in fact responsible."); ORIN KRAMER & RICHARD BRIFFAULT, CLEANING UP HAZARDOUS WASTE: Is

cost of cleaning any hazardous waste release associated with a piece of property. Potentially responsible parties (PRP's) include, among others, the party which owned the land at the time of its initial exposure to contamination and the current owner or operator of the property.[34] Inclusion of "present owners" in the scheme imposes liability on parties which may have no responsibility for the hazardous waste. The present owner of property may well have purchased it long after the waste was disposed or the contamination leaked onto the property. The liability scheme under CERCLA is joint, strict, and several.[35] The liability scheme, though not

---

THERE A BETTER WAY, at xvi-xvii (1993) (proposing abolition of retroactive liability).

Interestingly, even Senators present at the time of the bill's passage expressed concern about the retroactive nature of the liability structure and the negative effects which would result to industry, small businesses and the economy. Grad, *supra* note 4, at 14; S. REP. No. 848, 96th Cong., 2d Sess. 108-15 (1980).

34. The statute, 42 U.S.C. § 9607(a) (1992), reads:

> (a) Notwithstanding any other provision or rule of law and subject only to the defenses set forth in subsection (b) of this section (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 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, shall be liable for (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under section 9404(i) of this title.

Id.; *see also Fleet Factors Corp.*, 901 F.2d at 1553-54 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991); *Allis Chalmers Corp.*, 893 F.2d at 1317 (11th Cir. 1990).

35. Grad, *supra* note 4; *see, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985); United States v. Hooker Chem. & Plastics Corp., 680 F. Supp. 546 (W.D.N.Y. 1988).

The liability scheme under CERCLA is also retroactive. Liability is and has been imposed on parties who disposed of contamination years prior to the passage of Superfund. This is so regardless of whether they used disposal methods which were legal and authorized at the time. *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 174-75 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 732-34 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *Hooker Chem. & Plastics Corp.*, 680 F. Supp. at 556-57; United States v. Shell Oil Co., 605 F. Supp. 1064, 1069-73 (D. Colo. 1985).

There soon may be a change in the retroactive liability aspect of Superfund. On March

specifically set forth in the statute, has been interpreted by many courts over the past fifteen years.[36] The strict liability component allows liability to be assessed in the absence of fault.[37] Many prospective purchasers of property are extremely leery, lest they become entangled in the trapping web of a no-fault standard.[38]

Why strict liability? Strict liability has historically been imposed on industries engaged in ultra-hazardous activities.[39] Strict liability standards are implemented in an attempt to "promote fairness, economic efficiency, risk-spreading, and deterrence [to all parties engaged in the ultra-hazardous activity.]"[40] The strict liability component of CERCLA was intended to spread risks and costs between all parties associated with the hazardous waste industry and to simplify the government's ability to assess liability and receive money.[41] The liability scheme may be equitable with

---

21, 1994, Sen. Robert C. Smith (R-N.H.) and Rep. Bill Seliff (R-N.H.) "announced [that] they planned to introduce superfund legislation that would absolve potentially responsible parties of lability for activities conducted prior to 1980." *Elimination of Retroactive Liability Proposed by Republicans in Reform Bill*, MGMT. BRIEFING, Mar. 22, 1994.

36. *See, e.g.*, General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1418 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991); *Monsanto Co.*, 858 F.2d at 167 n.11; *Shore Realty Corp.*, 759 F.2d at 1042; *Hooker Chem. & Plastics Corp.*, 680 F. Supp. at 546; Violet v. Picillo, 648 F. Supp. 1283, 1290 (D.R.I. 1986); *see also* Oswald, *supra* note 9, at 580 ("In fleshing out CERCLA's sparse and inadequate language, the courts, quite understandably, have often been sidetracked by the deficiencies of the Act's specific provisions . . . [n]owhere is this problem more readily apparent than in cases addressing individual liability . . . .").

37. *See* Oswald, *supra* note 9, at 590.

38. The Innocent Landowner Defense, passed in 1986 as part of the Superfund Amendment and Reauthorization Act (SARA), was an attempt by the federal government to alleviate this trap for landowners who purchased property subsequent to contamination and in no way contributed to the condition of the site. Unfortunately, due to the very narrow construction of the defense, it has not served to alleviate uncertainty about liability and has not been effectively utilized by many who would, by most standards, be considered innocent. The Innocent Landowner Defense can be found at 42 U.S.C. § 9607(b) (1992). For a detailed discussion of the Innocent Landowner Defense to liability, see *supra* notes 46-53 and accompanying text.

39. "One 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) (emphasis added).

40. Oswald, *supra* note 9, at 592.

41. However, Superfund cleanups and lawsuits tend to move slowly, possibly because of the efficiency or lack thereof of large federal bureaucratic agencies, and partially because of the extent to which PRP's challenge their liability in court. These challenges often place great delays on cleanups. Transaction costs, including court fees between insurers, PRP's and the government, also greatly increase the cost of cleanup. *See* KATHERINE N. PROBST & PAUL R. PORTNEY, ASSIGNING LIABILITY FOR SUPERFUND CLEANUPS: AN ANALYSIS OF POLICY OPTIONS, RESOURCES FOR THE FUTURE 12 (1992).

The severity of the liability scheme does, arguably, create an incentive to financially

respect to PRP's engaged in an "abnormally dangerous activity."[42] The strict liability rationale[43] is wholly unfair, however, when it is used to impose liability on prospective purchasers or new owners who may never have participated in the "abnormally dangerous activity."[44] The all-inclusive aspect of Superfund's strict liability component actually serves to deter redevelopment of potentially contaminated sites by making these sites unmarketable.[45]

In an attempt to increase the fairness of the statute and reduce the instances where liability would be imposed on parties who had no connection whatsoever with hazardous waste, in 1986 Congress passed the Innocent Landowner Defense to Liability as part of the Superfund Amendment and Reauthorization Act, commonly referred to as SARA.[46] The Innocent Landowner Defense is a defense to CERCLA liability for landowners who purchased land subsequent to its contamination and who did not contribute in any way to its current state.[47] The Innocent Landowner Defense applies only to owners who "*unknowingly* acquired contaminated property . . . and who undertook *all appropriate inquiry* at the time of acquisition."[48] The "appropriate inquiry" is generally con-

---

secure responsible parties to cooperate with one another. *See* Olin Corp. v. Consolidated Aluminum Corp., 807 F. Supp. 1133, 1141 (S.D.N.Y. 1992) ("CERCLA provides an incentive for PRP's to voluntarily remediate hazards, but, prospectively it also provides a deterrent to the unsafe release of hazardous materials."); Andrew Ratzkin, *Superfund is up to Environmental Task*, CHRISTIAN SCI. MONITOR, June 22, 1993, at 19 (noting that "CERCLA has been a wild success in grabbing corporate America by the lapels and enlisting its considerable resources in the remediation of environmental hazards" and, that "CERCLA effects self-policing and private-party cleanup that doesn't cost the government a dime").

Additionally, because a persuasive argument could be made that each of the four potential classes of defendants profited from the production or handling of the waste, the scheme is, in some way, equitable.

42. RESTATEMENT (SECOND) OF TORTS § 519(1)-(2) (1977) (explaining rationale behind strict liability).

43. The rationale is based on fairness, equity, deterrence, and risk distribution. *See* RESTATEMENT (SECOND) OF TORTS § 519(1) (1977); Oswald, *supra* note 9, at 590.

44. Rubinstein & Field, *supra* note 11, at 20; *see generally Superfund Liability May Add To Urban Sprawl, Congress Told*, *supra* note 1; *see* Ellman v. Woo, No. 90-0718, 1991 U.S. Dist. LEXIS 18750, at *1 (E.D. Pa. Dec. 15, 1991).

45. *See* William Tucker, *Industry Goes Where the Grass is Greener: Superfund Sparks Flight to Suburban Locations*, WASH. TIMES, Nov. 30, 1993, at A9; Elliot P. Laws, Assistant Administrator, Office of Solid Waste Management and Emergency Response, U.S. Environmental Protection Agency, Address at the Conference of the National Council for Urban Economic Development on Environmental Redevelopment (Sept. 26, 1994); Conference of Mayors, *supra* note 10.

46. 42 U.S.C. § 9607(b) (1988).

47. *Id.*

48. 2 THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY & LITIGATION, *supra* note 4, § 12.05(2), at 12-17 (emphasis added).

sidered to be an environmental audit at the time of purchase.[49] Most lenders require that an environmental audit be conducted on the property prior to approval of financing.[50] If an environmental audit did, in fact, reveal some existing contamination, a purchaser is considered to be on notice and would not be protected under the Innocent Landowner Defense.[51] Purchasers who neglect to conduct an audit will not have met the statutory requirement of "appropriate inquiry" and will also remain unprotected by the Innocent Landowner Defense.[52]

Not surprisingly, the Innocent Landowner Defense has been strictly interpreted by the courts, and purchasers of property would be advised to seek clean sites rather than rely on their "innocence" as a defense to liability under CERCLA.[53] The word "innocent" as used in the Innocent Landowner Defense has a meaning more closely akin to ignorance, or unawareness than actual innocence. If a prospective purchaser or new owner of contaminated property had nothing to do with the state or condition of the property, no worthwhile policy objective is fulfilled by refusing to exempt that individual from liability. The concept of "innocence" should be enlarged to encompass those who are truly innocent of polluting. Only by exempting a larger class of innocent landowners will contaminated property have a chance of being cleaned and redeveloped. The current scheme, whereby polluters and non-polluters alike are included under Superfund's strict liability structure, is stagnating economic redevelopment and recovery in former industrial urban areas.

II. CERCLA'S EFFECTS ON ECONOMIC DEVELOPMENT

CERCLA has a great effect on economic development and planning. The consequences of CERCLA have to be considered in business decisions. To illustrate this point, consider the following

---

49. 42 U.S.C. § 9601(35)(B) (1992).

50. Gary Hector, *A New Reason You Can't Get a Loan*, FORTUNE, Sept. 21, 1992, at 107. The audit requirement by lenders stems from the desire to avoid PRP status and the subsequent reluctance to invest in contaminated properties. Though CERCLA itself appears to give liability exemptions to lenders, *see* 42 U.S.C. § 9601(20)(a) (1992), there have been many instances in which the courts have held lenders liable for contamination on property that they held as collateral or foreclosed upon. *See*, Kelley v. EPA, 15 F.3d 1100, 1103 (D.C. Cir. 1994); United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991).

51. *See* United States v. Monsanto Co., 858 F.2d 160, 168-69 (4th Cir. 1988); United States v. Chem-Dye Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983).; *see* 42 U.S.C. § 9607(b) (1992).

52. 42 U.S.C. § 9601(35)(B) (1992).

53. *See* Feldman, *supra* note 5.

example. A small business owner in Detroit, Michigan was interested in enlarging his electrical contracting business by expanding his existing building onto a neighboring parking lot.[54] The business owner was not, nor had he ever been, an owner of the parking lot.[55] His Detroit bank refused him the loan necessary for the expansion fearing liability stemming from traces of oil, antifreeze, and fuel that had dripped onto the lot over the years.[56] Instead of expanding in the city as intended, the owner moved his entire business to an area of undeveloped land sixty miles north of Detroit.[57] With this decision, he took ten jobs away from urban workers.[58]

A similar, yet more severe, situation occurred in Chicago, Illinois. A metal-stamping firm, attempting to expand in the city, could not find a large enough area within the city which was not plagued with environmental problems.[59] As a result, that industry also fled to a suburban area, and in the move, forty urban jobs were lost.[60]

Finally, a most notable anecdote comes from Cleveland. A newspaper owner, in his quest to construct a new production plant, looked at several downtown industrial properties. He ultimately chose an abandoned rail yard on the shores of Lake Erie. "The property had excellent transportation access and was perfect for [his] needs."[61] The Company spent $60,000 on its environmental assessment, only to find that the costs of cleanup would be prohibitive.[62] Instead, the newspaper chose a suburban location due to its "lack of . . . environmental liability."[63] "The new plant, with its 400 jobs [was] scheduled to open in 1994."[64]

These anecdotes merely skim the surface of instances in which urban workers have lost jobs due to legitimate fears by business owners of becoming liable for contamination on urban land. It is interesting to note that in each of these cases, the land that the business owners sought to acquire was not "seriously" contami-

---

54. This story is taken in its entirety from Keith Schneider, *Rules Easing for Urban Toxic Cleanups*, N.Y. TIMES, Sept. 20 1993, at A12.

55. *Id.*

56. *Id.*

57. *Id.*

58. Schneider, *supra* note 54.

59. This story is taken from Richard M. Daley, *Wastelands Transformed*, N.Y. TIMES, Jan. 4, 1994, at A15.

60. *Id.*

61. Tucker, *supra* note 45, at A9.

62. *Id.*

63. *Id.*

64. *Id.*

nated.[65] The properties were not previously used as hazardous waste disposal facilities, nor were they scheduled for cleanup under the Superfund program or a state cleanup program. Regardless of the level of contamination, however, the simple knowledge that *some* level of contamination existed on the properties and the prohibitive cost of dealing with such contamination were enough to force the business owners outside of urban areas, despite their desires to remain.

In the first two examples, the business owners actually *moved* their businesses, rather than simply expand at their existing locations.[66] There can be little doubt that the business owners incurred significant costs in connection with the moves. The drastic decisions to move an entire business out of town rather than acquire a lot to build an addition gives some insight into both the costs associated with even low-level contamination as well as the public perception about the severity of the Superfund liability laws.

Urban industrial property, including property with relatively small amounts of contamination, can often be acquired at a low price.[67] This may be true partially because there is virtually no market for it.[68] The risk of potential liability associated with becoming a "current owner" of contaminated property incurs a cost which far outweighs the initial savings.[69] The costs of cleaning up a contaminated piece of property can be prohibitive.[70] In many cases, the cost of liability is found to "far exceed the value of the property in an environmentally clean condition."[71] Such a proposi-

---

65. My reference to serious contamination is a site that has been identified on the National Priorities List (NPL). The NPL, taking "into consideration the limited resources which exist to combat the problem of hazardous waste sites [lists] . . . those sites which pose the greatest threat to human health or the environment." Ragna Henrichs, *Superfund's NPL: The Listing Process*, 63 ST. JOHN'S L. REV. 717, 717 (1989). Other known contaminated sites may be listed by state registries and scheduled for investigation under state superfund statutes. It was estimated that in 1989, the NPL listed slightly more than 1,200 sites of the over "30,000 known or suspected sites . . . nationwide." *Id.* at 717-18 (These figures do not include the numerous sites which are unknown to contain hazards).

66. Daley, *supra* note 59; Schneider, *supra* note 54.

67. Tucker, *supra* note 45 ("Normally, industrial property is worth $50,000 an acre, but because of the cleanup costs associated with this site [1.8 acres], we've been trying to unload it for $3,000 total." (quoting Del Dettmann, a real estate specialist in the city of Milwaukee, speaking about 1.8 acres of prime commercial real estate that the city acquired through tax delinquency when its industrial owner went bankrupt)).

68. *Id.*

69. *Id.*

70. *See* Reed Hayward & Bill Russell, *Cleaning Up the Dirt . . . Is Your Plant Next; Environmental Regulations*, PLANT ENG'G, Aug. 12, 1993, at 80; Tucker, *supra* note 45, at A9 (quoting Bill Barnard, public affairs director of the *Cleveland Plain Dealer*).

71. Bonnie H. Keen, *Tax Assessment of Contaminated Property: Tax Breaks for Polluters?*, 19 B.C. ENVTL. AFF. L. REV. 885, 885 (1992).

tion leads to the conclusion that developers would not accept the property even if it were given to them.

The difficulty of redeveloping urban industrial property also stems from the difficulty in obtaining loans and insurance.[72] Under CERCLA, all potential environmental problems, even minor problems, diminish the resale value of the land.[73] Banks are, understandably, reluctant to make loans upon which the collateral might prove worthless.[74] Additionally, "if the institution has to foreclose, it could face cleanup costs many times the value of the loan."[75] "A 1990 poll of the ABA's Community Bankers Council found that . . . . 62.5% of [their] . . . members declined potential borrowers based on the possibility of environmental liability."[76] Lenders have been held to be financially liable for cleanup costs, though lender liability is somewhat tenuous as designated by the statute.[77] The statutory language appears to offer a liability exemption to creditors; however, there has been a great deal of controversy over what factors determine a creditors liability for contaminated property.[78]

The controversy predominantly surrounds the issues of foreclosure and management. Courts have interpreted the statutory language to mean that, while creditors will not be held liable for waste contamination of their debtors, they "will be [held] liable if [their] involvement with the management of the facility is suffi-

---

72. Mank, *supra* note 13, at 247-48; *see generally Insurance Coverage for Cercla Claims Under Comprehensive General Liability Policies: Cleaning Up Waste In the Legal Environment*, 68 NOTRE DAME L. REV. 549 (1993).

73. According to Kathleen M. Martin, as contamination increases, value decreases, so that slightly contaminated land has a somewhat decreased value, and highly contaminated land may have a negative value if the cost of remediation exceeds the cost of the property in a clean condition. Martin, *supra* note 4. For land in which the degree of contamination and the cost of cleanup are uncertain, it is difficult to estimate the degree of discrepancy between present value and pre-contamination valuation.

74. Colleen Johnson, *Bankers Beware of Pollution Liability: Expert*, BUS. INS., Feb. 11, 1991, at 15; *see* Kelley v. EPA, 15 F.3d 1100, 1104 (D.C. Cir. 1994).

75. Byrne & Greco, *supra* note 17, at 17.

76. *Id.*

77. 42 U.S.C. § 9601(20)(A) (1992). Under CERCLA, the term "owner or operator . . . does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." *Id.*; *see Kelley*, 15 F.3d at 1100; United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578-80 (D. Md. 1986); United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991); United States v. Nepaco, 810 F.2d 726 (8th Cir. 1986).

78. A great deal of the controversy surrounds the distinction between a creditor with an "indicia of ownership" versus a creditor with "actual ownership" with respect to managing the affairs of a debtor after foreclosure. *See Kelley*, 15 F.3d at 1100; *Fleet Factors Corp.*, 901 F.2d 1550; *Maryland Bank & Trust Co.*, 632 F. Supp. at 578-80.

ciently broad to support the inference that [they] could affect hazardous waste disposal decisions if [they] so chose."[79] This expanded interpretation has caused considerable concern to lenders.[80] As a result, lenders have substantially altered their lending practices[81] and significantly less money is available to businesses wishing to develop on industrial land.[82]

Insurers, as well, often have been forced to pay for environmental cleanups if their policy holders are found to have been potentially responsible parties.[83] Major cleanups can cost millions of dollars and failure to comply with payment and cleanup schedules can result in fines of up to $25,000 per day.[84] "Superfund could pose [a threat] to insurer solvency" and "exposure could bankrupt every major liability insurer in the country."[85] Recently, many insurance companies have redrafted their policies to restrict the amount of coverage available for environmental cleanup.[86] Though special environmental policies are available specifically to protect against future discovery of property contamination, these policies tend to be prohibitively expensive.[87] "A $1 million, no frill [environmental remediation insurance] policy . . . would cost approximately $10,000."[88]

Such costs put great strain on new industries and would likely

---

79. *Kelley*, 15 F.3d at 1101 (quoting from United States v. Fleet Factors Corp., 901 F.2d 1550, 1558 (11th Cir. 1990)).

80. *Id.* at 1103; *see also* Byrne & Greco, *supra* note 17, at 17.

81. Johnson, *supra* note 74, at 15. Intervenor American Bankers Association has pointed to a survey

> indicating that lenders curtailed loans made to certain classes of borrowers or secured by some types of properties in order to avoid the virtually unlimited liability risk associated with collateral property that may be contaminated. Some lenders . . . even chose to abandon collateral properties rather than foreclosing on them for fear of post-foreclosure liability.

Kelley, 15 F.3d at 1104-05.

82. Byrne & Greco, *supra* note 17, at 17; *see generally* Charlotte A. Biblow, *Comment: Fiduciaries Are Waiting for Relief From Exposure on Environmental Issues*, AM. BANKER, Mar. 22, 1994, at 17.

83. *Insurance Coverage for CERCLA Claims Under Comprehensive General Liability Policies: Cleaning Up Hazardous Waste in the Legal Environment*, *supra* note 72, at 553-54; Colleen Johnson, *Insurer Seeks Superfund Reforms*, BUS. INS., Feb. 18, 1991, at 82.

84. Hayward & Russell, *supra* note 70, at 80.

85. Johnson, *supra* note 83, at 82 (referring to the 1991 Harold H. Hines Jr. Memorial Symposium in Chicago, co-sponsored by the Insurance School of Chicago and the Chicago and Northeastern Illinois Chapters of the Risk & Insurance Management Society Inc.).

86. Michael D. Zarin, *Who Pays to Clean Up the Property? Managing the Risks With Insurance*, N.Y.L.J., June 6, 1994, at S1.

87. *Id.* at S9.

88. *Id.*

drive investors to avoid formerly industrialized areas.[89] Industry gains more favorable finance and insurance rates by choosing clean and previously unused land.[90] Therefore, much urban property, which would normally have been considered prime real estate and which is connected to existing infrastructure, is passed over by developing businesses for lands in the countryside.[91]

III. URBAN ECONOMIC IMPACT

Urban centers across the country are facing barriers in attempts to increase their tax bases and create jobs by attracting industry and promoting internal business expansion.[92] Many formerly industrial cities have watched their once strong manufacturing bases drastically decline in the past decades.[93] Unemployment rates have increased, particularly in urban areas. Studies conclude that "the unemployed population significantly outweighs the number of job openings available at any point in time."[94]

Superfund's liability scheme has certainly not caused this decline, however, it has been targeted as one major obstacle to redevelopment.[95] Urban planners and municipalities lack the funds which would be required to clean industrial sites themselves in order to attract business.[96] Even if such funds were available, however, urban leaders could not guarantee exemption from future liability to either buyers or sellers, because Superfund liability is

---

89. *See* Biblow, *supra* note 82, at 17; Byrne & Greco, *supra* note 17, at 17; Daley, *supra* note 59, at A15; Hector, *supra* note 50, at 107; Schneider, *supra* note 54, at A12.

90. Pete Millard, *Land Ho: An Environmentally Friendly Bill Discovers New Economic Horizons*, CORP. REP. WIS., Sept. 1993, at 23.

91. Martin, *supra* note 4, at 20; Neil R. Pierce, *Time to Recycle Old Industrial America*, NATION'S CITIES WKLY., Aug. 23, 1993, at 10; Turner J. Smith, *Thoughts on Investing In Contaminated Property—Can Market Driven Remediation Help?*, 1989 A.B.A. REAL PROP. L. REP. 1 (1989).

92. *See* James Boyd et al., Resources for the Future, The Impact of Uncertain Environmental Liability on Industrial Real Estate Development: Developing a Framework for Analysis 8 (Jan. 1994) (unpublished manuscript on file with the *Buffalo Law Review*); NYS HEARING REPORT, *supra* note 30, at 37 (suggesting that New York Department of Environmental Conservation's remedial programs have been a barrier to economic development).

93. *See* Peter R. Pitegoff, *Buffalo Change and Community: A Symposium*, 39 BUFF. L. REV. 313, 314-15 (1991); DIVISION OF RESEARCH AND STATISTICS, NEW YORK STATE DEPARTMENT OF LABOR, BETHLEHEM STEEL IMPACT STUDY (1988).

94. Gordon Lafer, *The Politics of Job Training: Urban Poverty and the False Promise of JTPA*, 22 POL. & SOC'Y 349, 351 (1994).

95. *See* Daley, *supra* note 59, at A15; Schneider, *supra* note 54, at A12.

96. *See* Lafer, *supra* note 94, at 359 (explaining that the share of money from the federal government to local governments has decreased by approximately one-fourth during the 1980s).

imposed at a federal level.[97]

Often, owners who know toxins exist on their land but who have not been ordered to clean up under Superfund, will let their property sit, because "remediation costs substantially exceed property value."[98] These properties create not only an unaesthetic view, they also create health risks to adjacent communities. Surprisingly, sites which have been cleaned are often left fenced off and unused.[99] Current owners tend to be reluctant to sell cleaned sites for fear that use may aggravate previously unfound contamination and expose them to additional liability.[100]

Many former industrial sites are located in "low-income and minority communities."[101] As a result of the difficulty of redeveloping urban industrial sites, rejuvenation of economies in these areas through large scale job creation or community development strategies is severely inhibited.[102] The fear of health risks from living on or near property once labelled contaminated, and the lack of jobs or industry has caused property values of inner city residences to decline rapidly.[103] Without a positive return on a sale of property, prospects for moving to areas where new industrial jobs are available (mostly suburbs and areas outside of the suburbs) is too costly for many residents.

The future implications for cities is bleak as a result of the strange cycle created by Superfund liability.[104] Though urban industrial property may be less expensive than other development property, the full cost is actually prohibitive.[105] In determining ac-

---

97. Rubinstein & Field, *supra* note 11; INDUSTRIAL SITES ROUNDTABLE, *supra* note 12; CUYAHOGA COUNTY PLAN. COMM'N, *supra* note 12.

98. Boyd et al., *supra* note 92; Rubinstein & Field, *supra* note 11.

99. *Superfund Liability May Add to Urban Sprawl*, Congress Told, *supra* note 1.

100. *Id.*

101. *Urban Superfund Sites to be Targeted First*, SUPERFUND WK., Aug. 6, 1993, at 30 (quoting EPA Administrator, Carol Browner); *Striking A Deal*, NAT. L. J., Feb. 14, 1994, at 16 ("The Clinton Administration has aimed to strike a reasonable compromise in offering a plan for Superfund overhaul that would deal for the first time with the plight of minority and poor communities living near abandoned toxic waste sites.").

102. *Urban Superfund Sites to be Targeted First*, *supra* note 101.

103. John Mangels, *Cities Sowing Seeds of Help in Brownfields*, CLEVELAND PLAIN DEALER, July 19, 1993, at 8A.

104. CUYAHOGA COUNTY PLAN. COMM'N, *supra* note 12; Joel A. Mintz, *Economic Reform of Environmental Protection: A Brief Comment on a Recent Debate*, 15 HARV. ENVTL. L. REV. 149 (1991); O'Reilly, *supra* note 12, at 48.

105. Rubinstein & Field, *supra* note 11, at 20:

> Jobs and tax revenue will continue to drain from the cities because the potential environmental cleanup costs make urban industrial property outrageously expensive . . . . Who, after all, will build a factory on industrial property in Gary, Ind., or Bridgeport when the per-acre price, including remediation costs, is higher than an acre in midtown Manhattan?

tual cost to a purchaser, both cleanup costs and the cost of potential future liability must be added to the purchase price.

Previously cleaned property can become a liability for two primary reasons. First, subsequent to cleanup, the cleanup standards may become more strict, thereby changing the status of the clean property to that of contaminated property. Second, there is always a risk that the initial environmental audit did not uncover all of the contamination on the property, and if additional contamination is discovered, owners may incur liability. The uncertainty of the costs often makes these sites less desirable to developers and lenders.[106] As more urban industrial and commercial properties fall into this category, the number of jobs and industries in cities will continue to decrease.[107]

Current environmental laws are linked directly with economics. Superfund has had an impact on industry and economics, because it has affected decisions of business owners, developers, lenders, insurers, and urban populations. "[P]roducts produced under substandard environmental laws or weak enforcement regimes are traded freely on international markets at a competitive cost advantage over products from nations with strong environmental laws."[108] Reform policies should not weaken our environmental laws but, rather, recognize that a link exists between environmental laws and economics. Recognition will allow us to use that link advantageously through the development of proactive policy to countervail the negative economic impact of our environmental laws.

Id.

106. Not only are the properties unlikely to be accepted as collateral by creditors because they have *diminished values*, but often creditors will refuse to get involved because the properties can actually become *liabilities*. As noted *supra* notes 72-78, lenders may be held liable for the cost of cleanup of contaminated property if they "participate[d] in the facility's management prior to foreclosure." Kelley v. EPA, 15 F.3d 1100, 1104 (D.C. Cir. 1994). To best illustrate the unlikelihood of lenders willing to give credit for potentially contaminated property,

> Intervenor American Bankers Association points to survey data indicating that lenders curtailed loans made to certain classes of borrowers or secured by some types of properties in order to avoid the virtually unlimited liability risk associated with collateral property that may be contaminated. Some lenders . . . chose to abandon collateral properties rather than foreclosing on them for fear of post-foreclosure liability.

Id. at 1103.

107. O'Reilly, *supra* note 12, at 55.

108. Robert F. Housman & Durwood J. Zaelke, *Trade and the Environment: Making Trade and Environmental Policies Mutually Reinforcing: Forging Competitive Sustainability*, 23 ENVTL. L. 545, 552 (1992).

IV. ENVIRONMENTAL IMPACT

Superfund was enacted in order to address the problem of hazardous wastes in the environment and to enforce the cleanup of such waste.[109] The reality is that Superfund has not led to this result, because Superfund encourages businesses to avoid liability rather than take steps to clean up the waste. Many environmentalist supporters of Superfund believe that CERCLA and its associated liability scheme provides a good incentive for industries to get out of the hazardous waste or chemical production industry altogether.[110] While that argument may be true, it is irrelevant with respect to prospective purchasers or new owners of contaminated land who have never handled hazardous waste. It is essential, in evaluating the environmental effects of CERCLA legislation, to look beyond its effect on the hazardous waste industry, and to look at its environmental effects on the nation as a whole.

The strict liability component of Superfund is a barrier to small businesses and industries to recycle urban industrial land.[111] Because industries and small business owners often move to land without previous industrialization, concern is currently being voiced by environmental proponents and governmental officials about the negative environmental impact of "greenfield" development.[112] Disincentives under Superfund for reuse of industrial land encourage "sprawl onto unpolluted land," and "potential degradation of relatively pristine lands."[113] Furthermore, concern has been voiced by governmental officials about expanding existing infrastructures to support the enormous growth of development to outlying areas.[114] Infrastructures already exist in urban areas and are often not used to their full potential due to the migration of indus-

---

109. *See* 42 U.S.C. §§ 9601-75 (1992); H.R. REP. No. 253, 99th Cong., 1st Sess. 15 (1985).

110. *Administration of the Federal Superfund Program: Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation*, 102d Cong., 1st Sess. 44 (1991) (statement of Douglas W. Wolf, senior project attorney, National Resources Defense Council).

111. *Clinton Proposal*, *supra* note 12; CUYAHOGA COUNTY PLAN. COMM'N, *supra* note 12, at 6; Martin, *supra* note 4; Rubinstein & Field, *supra* note 11.

112. *See* CUYAHOGA COUNTY PLAN. COMM'N, *supra* note 12; INDUSTRIAL SITES ROUNDTABLE, *supra* note 12.

113. *Superfund Liability May Add to Urban Sprawl, Congress Told*, *supra* note 1; *see* Mank, *supra* note 13, at 240.

114. Prioritizing Erie County Hazardous Waste Sites for Remediation Based on Future Use Potential (Dec. 1992) (on file with Erie County Division of Environmental Compliance Services); Rubinstein & Field, *supra* note 11; CUYAHOGA COUNTY PLAN. COMM'N, *supra* note 12. Infrastructures include sewer systems, roads, water and electrical systems.

try and populations to greenfields.[115]

In addition to promoting reduction of pristine wilderness land and inefficient use of existing infrastructure, Superfund indirectly encourages greater levels of air and water pollution by requiring workers to travel greater distances to and from work.[116] Though deemed "environmental" for its originally intended purpose of cleaning up hazardous waste sites, we must ask whether Superfund legislation has, and will continue to have, a negative impact on the environment in the future. In assessing the impact of the legislation from a holistic perspective, the answer appears to be "yes."

V. The Call for Change

The current version of the Superfund law officially expired on September 30, 1994.[117] The taxes which are collected from the chemical industry to finance the "Superfund" were authorized only through December 31, 1995.[118] The lengthy amendment to CERCLA, introduced to the House of Representatives on February 3, 1994, failed to make it through Congress by October of the same year.[119] The current version of the law will continue to remain effective until such time as an acceptable amendment is proposed.[120]

Various commentators, scholars, environmentalists, and business leaders have criticized Superfund for its negative impact on urban development, despite its well-intended goal of keeping land safe and free from toxin exposure.[121] The widespread call that

---

115. O'Reilly, *supra* note 12, at 47:

> Highway access, well developed infrastructure, power and water lines, easy access to rail tracks and to other modes of transport are all desirable features of existing city sites. In past decades, these features encouraged the active recycling of older, abandoned business sites. The sites and the buildings remain, but the recycling has stopped. Manufacturing jobs have not stayed in the inner city.

Id.; *see also Superfund Liability May Add to Urban Sprawl, Congress Told*, *supra* note 1.

116. O'Reilly, *supra* note 12, at 47.

117. 26 U.S.C. §§ 59(A)(e)(1), 4611(e)(1), 4661(c), 4662(c)(1) (1988); *see also Urban Superfund Sites to be Targeted First*, *supra* note 101; Mank, *supra* note 13, at 245; *Clean Up Extended for Three Years, Tax Authority for Four Years in Budget Bill*, ENV'T REP. (BNA) No. 27, at 1243 (Nov. 2, 1990).

118. 26 U.S.C. §§ 59A(e)(1), 4611(e)(1), 4661(c), 4662(c)(1) (1988); *Urban Superfund Sites to be Targeted First*, *supra* note 101; *Clean Up Extended for Three Years, Tax Authority for Four Years in Budget Bill*, *supra* note 117.

119. H.R. 3800, 103rd Cong., 2d Sess. (1994).

120. Telephone interview with Elizabeth Collaton, Northeast-Midwest Institute, Washington, D.C. (Jan. 13, 1995).

121. *EPA's Administration of Superfund: Hearings to Review the Administration of Superfund by the EPA Before the Oversight Subcomm. of the Comm. on House Ways and Means*, 103d Cong., 1st Sess. (1993) (testimony of Robert M. Sussman, Deputy Administrator of the EPA, agreeing with Rep. Amory Houghton (R-N.Y.) that Superfund legislation

change in the current law is needed can be evidenced by the number of innovative bills introduced at the federal and state level.[122]

On July 26, 1993, in a hearing of the House Ways and Means Committee on the Administration of Superfund Sites by the EPA, Robert Sussman, the deputy administrator of the EPA, reported that one of the major "adverse impacts of the Superfund program is to inhibit the development and redevelopment of property that is part of the Superfund site or is contaminated."[123] The EPA Administrator, Carol Browner, also conceded that land use planning needs to be considered under reauthorization, and noted that

> [b]ecause urban hazardous waste sites take so long to clean up and are hard to sell, development is occurring primarily in clean areas. One reason that Superfund sites are undesirable for reuse is that under Superfund's liability scheme, future owners could be liable for any future discoveries of contamination.[124]

Superfund's liability scheme should be amended in order to create incentives for industry to clean and redevelop industrial land.[125] Redevelopment of industrial sites would: (1) increase jobs and the tax base in depressed urban areas; (2) decrease the level of contamination in cities by promoting cleanup of current contami-

---

ought to "create greater incentives for investors to make investments in [contaminated] sites.") [hereinafter Sussman]; *Superfund Program: Hearings Before the Subcomm. on Transportation of Hazardous Materials of the House Comm. on Energy and Commerce*, 103d Cong., 1st Sess. 7-103, 154-73 (1993) (testimony of Jan Paul Acton of the Congressional Budget Office claiming that the current incentive provided under Superfund legislation is to develop previously uncontaminated sites and that liability should be restricted for parties willing to redevelop previously contaminated sites) [hereinafter Acton]; CUYAHOGA COUNTY PLAN. COMM'N, *supra* note 12; INDUSTRIAL SITES ROUNDTABLE, *supra* note 12; Martin, *supra* note 4.

122. For a sampling of the innovative legislation which has been introduced to try to combat the problems of urban redevelopment of industrial sites, see H.R. 1005, 103d Cong., 1st Sess. (1993) (Urban Environmental Initiative Act); H.R. 2340, 103d Cong., 1st Sess. (1993) (Environmental Remediation Tax Credit); H.R. 3843, 103d Cong., 2d Sess. (1994) (Brownfield Cleanup and Redevelopment Act) (H.R. 3843, introduced by Peter Visclosky (D-I.N.) was incorporated in its entirety into the now defeated Superfund Amendment Proposal, H.R. 3800, 103d Cong., 2d Sess. (1994)); S. 972, Pa. 178th Gen. Assembly, Regular Sess. (1993) (Industrial Land Recycling Act); H. R. 1895, Pa. 176th Gen. Assembly, Regular Sess. (1993) (voluntary cleanup of abandoned industrial sites for innocent prospective purchasers); H.R. 1299, Colo. 59th Gen. Assembly, 2d Regular Sess. (1994) (enacted, Voluntary Cleanup and Redevelopment Act); S. 462, Wis. 91st Leg., Regular Sess. (1993) (Land Recycling Act); S. 659, Mich. 87th Leg., Regular Sess. (1993); S. 720, Mich. 87th Leg., Regular Sess. (1993); H.R. 4770, Mich. 87th Leg., Regular Sess. (1993); Minn. Stat. § 115B.175 (1993); S. 1036, N.J. 205th Leg., 2d Regular Sess. (1993) (enacted).

123. Sussman, *supra* note 121.

124. *Urban Superfund Sites to be Targeted First*, *supra* note 101.

125. CUYAHOGA COUNTY PLAN. COMM'N, *supra* note 12; *Clinton Proposal*, *supra* note 12; INDUSTRIAL SITES ROUNDTABLE, *supra* note 12.

nation; and (3) discourage industry from developing pristine lands.[126] There is no indication that CERCLA was intended to dissuade potential purchasers from environmentally sound development. A change in the law to redress its adverse economic impact by providing redevelopment incentives would not contradict the original intentions of the legislation.

VI. ALTERNATIVES

There are a number of reform measures which would help to combat urban industrial decay and create incentives for industry to rejuvenate economically depressed cities, create jobs in urban areas, and preserve pristine lands. Many such measures have been proposed at the federal level, others are being taken on by state legislatures, and some have been formulated by private organizations. This discussion in no way purports to address all of the existing discourse on brownfield redevelopment, but rather touches upon the major themes and trends of current policy proposals. Not all proposals provide sufficient environmental and health protections for urban communities and not all proposals will effectively promote positive community development. Many existing proposals should be comprehensively examined in order to determine both their positive and negative effects on redevelopment of depressed urban areas.

Proposed solutions and strategies for cleanup and redevelopment of brownfields must be evaluated with respect to the original purposes of Superfund legislation: to protect public health and environment[127] and to invoke strict, joint, and several liability on the parties "responsible" for contaminating our land and water.[128] A brownfield redevelopment strategy should aim to (1) provide jobs and an increased tax base for depressed urban areas; (2) ensure long-term environmental monitoring of formerly hazardous sites; and (3) remove some of the enormous financial risks associated with acquiring contaminated lands. No one strategy will alleviate the brownfields problem, and any effective solution must incorporate a number of the components discussed below.

---

126. *Urban Superfund Sites to be Targeted First*, *supra* note 101; Millard, *supra* note 90, at 23 (Linda Bochert of Wisconsin Legislative Council Committee); Sussman, *supra* note 121.

127. 42 U.S.C. § 9606(a) (1992); Exec. Order No. 12,580(4)(d)(1), 52 Fed. Reg. 2923 (1987).

128. H.R. REP. No. 253 (III), 99th Cong., 1st Sess. 15 (1985); Feldman, *supra* note 5, at 298.

A. *Lowering Cleanup Standards—An Oft-Cited Strategy to Further Redevelopment*

Proposals which call for lowering cleanup standards for industrial property have been repeatedly touted as a means to spark economic growth in poor urban areas.[129] Cleanups which meet strict environmental and safety standards are generally extremely expensive. The cleanup standards imposed by the federal government are criticized as requiring the land to be returned to an unreasonably pristine condition as well as being far too costly.[130] The federal government could reduce some of the cost of cleanup by lowering the standards for property which will be redeveloped for industrial use. The federal Superfund reauthorization bill does allow land use to be considered with respect to the cleanup remedy selected for the property.[131]

An example of such an incentive scheme has been implemented at the state level in Michigan. In 1990, Chrysler Corporation attempted to build a million dollar Jeep plant in a poor, abandoned section of Detroit.[132] Because of the traces of gasoline and metals found on the site, Chrysler learned that the cost of cleanup would almost equal the cost of building the new plant. Michigan worked out a compromise with Chrysler in which both the state and the corporation contributed money to *containment* rather than *removal* of the wastes. The new plant opened within two years, providing over 3,000 jobs to the city.[133] The state's decision to allow Chrysler to complete a less stringent cleanup than is ordinarily required, at a great cost savings, in a depressed urban industrial area was widely supported by Michigan businesses and gov-

---

129. Reath, *supra* note 11 (referring to a study conducted by the Center for the Study of American Business at Washington University, St. Louis, Mo. stating that "[n]ew cleanup standards [should be] flexible enough to account for tradeoffs between environmental goals and other socially desirable projects"); *Striking A Deal, supra* note 101, at 16 ("[T]he Clinton Administration proposal would allow less stringent cleanup standards at sites that will be devoted to industrial use."); *see Innovative Technologies, Voluntary Cleanups Pushed by HWAC*, PESTICIDE & TOXIC CHEM. NEWS, May 19, 1993 (emphasizing future land use planning as a factor which should be considered with respect to remedy selection of industrial sites); Rubinstein & Field, *supra* note 11 (advocating a number of alternatives to the Superfund liability scheme including releasing from liability those parties seeking to redevelop sites, *lowering cleanup standards for existing sites* and curbing lender liability); Tucker, *supra* note 45 ("People say you shouldn't talk about jobs vs. the environment, but it really comes down to that." (quoting Kathy Milberg, director of the Southwest Detroit Environmental Vision Project)).

130. *Superfund Liability May Add to Urban Sprawl, Congress Told, supra* note 1.

131. H.R. 3800, 103rd Cong., 2d Sess. (1994).

132. Schneider, *supra* note 54.

133. *Id.*

ernment officials.[134]

This scheme could prove extremely dangerous without strict protections in place. Before allowing cleanup standards to be determined by proposed land use, three specific points should be carefully considered. First, zoning laws may change in a particular area, so that an area currently zoned for commercial/industrial use may be rezoned for residential use in the future. In such instances, the property deed would have to reflect that cleanup was conducted only in accordance with the commercial or industrial zoning requirements. Further cleanup would then be required prior to most proposed changes in use. Cleanup of property often requires actual removal of the soil. The prospect of conducting full site remediation after foundations and buildings have been constructed on the property could be enormously costly. Prior to constructing the initial industrial or commercial building, it may be a better use of time and resources to conduct a full remediation, thereby freeing up the deed for any future sale or use of property.

Second, proponents of a brownfield redevelopment strategy that advocates use-based cleanup standards should bear in mind that additional remediation might never occur, regardless of a change in use. A change in use might not take place for years or even decades. Proper mechanisms for enforcement of deed restrictions cannot be guaranteed, due to human error, unpredictable changes in government, and the common inefficiencies of bureaucracy. A change in use from industrial to residential, or to a school or playground could have serious results if cleanup procedures are not extremely protective from the outset.[135]

Finally, urban centers are generally zoned with a mixture of commercial, industrial, and residential uses.[136] In urban neighborhoods, it is much more difficult to differentiate health standards, because residential areas are often in close proximity to industrial areas. Urban residents often live near local industry, and their children may take shortcuts through industrial property on their way to and from school. Potential for exposure to contamination is also increased if urban residents spend their days working in industrial

---

134. *Id.*

135. This scenario is not so different than the series of events which led to Love Canal. *See supra* note 23. The Love Canal situation resulted from a former toxic burial ground becoming the site of a school playground, surrounded by a neighborhood. The industrial property owners, when transferring the deed to the city, set forth strict instructions that the property was not to be used for any such purpose, due to the nature of the chemicals buried. As the years passed, the instructions and warnings were ignored, resulting in the ensuing and catastrophic series of events. *Id.*

136. *See Clinton Proposal, supra* note 12.

plants.[137] Though a proposal to lower cleanup for industrial property use may seem logical, all proposals must carefully consider the surrounding community and the actual exposure levels of the people who both work in and live near industry. Proposals which simply call for differentiated standards based on designated use may not provide adequate protection to current and potential residents of urban industrial areas. The federal Superfund reauthorization bill[138] anticipates some of the aforementioned problems and thereby requires that a number of relevant factors be taken into consideration prior to lowering cleanup standards based on land use.[139] Factors which must be considered include "the potential for economic redevelopment"[140] in the area, "the proximity of the contamination to residences[] [and] sensitive populations . . . [,]"[141] "land use history[,] . . . current land uses of . . . surrounding properties [and] recent development patterns for the area . . . ."[142] These safeguards provide a good foundation and indicate that the bill's drafters have considered the severe implications of lowering cleanup standards based on land use. At this stage, however, it is difficult to assess how seriously the government would consider such factors prior to authorizing diminished cleanup standards for urban industrial property.

The notion of lowering cleanup standards in order to promote industrial development, hence providing jobs for urban residents, raises a myriad of environmental justice issues.[143] Essentially, the proposals advocate lowering health and safety standards in favor of job security.[144] Incentives to promote economic redevelopment and environmental protection must not jeopardize the original purpose and goals of the Superfund legislation: "to protect public health[,]

---

137. *Id.*

138. H.R. 3800, 103d Cong., 2d Sess. (1994).

139. *Id.* § 510(2)(A)(I)-(VII).

140. *Id.* § 501(2)(A)(V).

141. *Id.* § 501(2)(A)(VI).

142. *Id.* § 501(2)(A)(II).

143. The environmental justice movement has predominantly challenged the policy of allowing disproportionate environmental hazards to be placed in low income and minority areas, thus increasing the risk of health hazards to those members of the community who have the least political and economic power. *See generally* Clarice Gaylord & Geraldine W. Twitty, *Protecting Endangered Communities*, 21 FORDHAM URB. L.J. 771, 771 (1994); Samara F. Swanston, *Race, Gender, Age, and Disproportionate Impact: What Can We Do About the Failure to Protect the Most Vulnerable?*, 21 FORDHAM URB. L.J. 577, 577 (1994); Gerald Torres, *Environmental Burdens and Democratic Justice*, 21 FORDHAM URB. L.J. 431, 435 (1994); Deehon Ferris, *A Challenge to EPA*, EPA J., Mar.-Apr., 1992, at 28.

144. Gaylord & Twitty, *supra* note 143, at 771 (discussing "the promise of economic prosperity and tax revenues forcing . . . communities [with] high unemployment, to choose between economic security and environmental degradation").

welfare [and] the environment."[145]

B. *Liability Release*

A common scheme at the state level to increase brownfield redevelopment is to release commercial and industrial developers from liability in exchange for a cleanup of contaminated industrial land.[146] Because the fear of liability is often cited as one of the primary reasons for the stagnation of brownfield redevelopment,[147] liability releases at the federal level will naturally be an important component of any brownfield redevelopment strategy.

1. *Who Should Benefit From Limitations or Releases From Liability?* The determination of who should be eligible for liability releases should be the result of careful analysis. If the releases are widely available to all individuals willing to remediate a brownfield, they could counteract the intended purpose of CERCLA's strict liability formula.[148] The idea behind a brownfield redevelopment strategy is *not* to offer liable industries an escape from paying for cleanup, but rather to help rejuvenate abandoned or stagnant industrial urban areas.[149] Developers and investors should be broken down into three categories: (1) those who have some causal link with contamination on a certain piece of property, (2) current owners of property who acquired it subsequent to contamination, and (3) prospective purchasers who have no previous connection whatsoever with the land they are interested in developing.

If full liability releases are offered to developers falling into the first category, the entire basis of the CERCLA liability scheme would be counteracted.[150] A liability scheme might be considered

---

145. 42 U.S.C. § 9606(a) (1992); Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987).

146. Liability releases are most commonly seen in state "voluntary cleanup programs" whereby a state will release a party from liability or limit the liability of a party if such party is willing to proceed with redevelopment of a contaminated piece of property. Voluntary cleanup statutes vary greatly from state to state. Most provide some level of *liability release, covenant not to sue* or *no further action letter* for parties undergoing cleanup. *See, e.g.*, IND. CODE ANN. § 13-7-8.9 (Burns 1993); Environmental Response Act, MICH. COMP. LAWS § 299.614a (1992); Minnesota Voluntary Response Action Plans, MINN. STAT. § 115B.175 (1992); OR. REV. STAT. § 465.285 (1991).

147. Bartsch & Munson, *supra* note 2, at 75; Conference of Mayors, *supra* note 10, at 3; Laws, *supra* note 45.

148. *See supra* notes 32-53 and accompanying text.

149. This notion is supported by the current Brownfield Redevelopment policy objectives of the EPA. *See* Conference of Mayors, *supra* note 10; Laws, *supra* note 45.

150. Recall that the basis of a strict liability formula is to spread the risks to all those engaged in an ultrahazardous activity. *See supra* notes 39, 42-43 and accompanying text.

whereby polluters[151] could be given a partial liability release or a cap on liability in exchange for not abandoning a contaminated site and engaging in remediation and redevelopment.[152] A brownfields redevelopment strategy offering a limited liability release to PRPs would be most workable if it were offered only on sites which are not on the National Priorities List or on a similar state registry. By the time sites reach that stage, they are generally considered to be substantially contaminated, and all viable parties which contributed to the pollution will be expected to fund the cleanup.[153]

It may be sensible, however, to provide liability releases to "polluters" in order to encourage cleanup of sites which are less contaminated than those on a registry. Without such encouragement, mildly contaminated sites would be more likely to sit for long periods of time, thereby creating a greater health risk to nearby communities. If releases of liability are dependent upon cleaning a site to a nationally recognized standard, and if the owner continued to pay for the cleanup, then liability releases offered to polluters of mildly contaminated properties would be an effective component of a brownfield redevelopment strategy and would pose no greater danger to surrounding communities than the existing system already poses.

The parties which fall into categories two and three are very similar because neither of them is responsible for the contaminated condition of the property. Proposals which offer liability releases in exchange for cleanup would certainly be most equitable if offered to both current, non-responsible owners, as well as potential purchasers of property. A liability release proposal targeting non-polluters exclusively may be a preferable strategy, primarily because it will be much less controversial, will do the least damage to the existing CERCLA liability structure, and will raise the fewest

151. Again, the term "polluter" is not meant to conjure up images of "guilt" in this context. Many of the parties who are responsible for property contamination were, at the time they handled the waste, following all required laws for such handling. CERCLA does not concern itself with *proper* versus *improper* handling, but simply whether there has been a release.

152. *See* Rubinstein & Field, *supra* note 11, at 20 (explaining that many owners of abandoned property would prefer to let their property sit than sell it because "remediation costs substantially exceed property value").

153. Under CERCLA's language, four categories of individuals will be held accountable for the cost of cleanup. 42 U.S.C. § 9607(a) (1992). Of the four, only the first, current owners and operators, may truly have no connection whatsoever with the contamination on the property. Though the statute does require even this class of individuals to pay for a cleanup, the rationale for including members of this category, who may not have contributed to the contamination, is inequitable and should be renounced. *See supra* notes 43-44 and accompanying text.

problems and questions about who will fund cleanups.

Programs would be simplest to administer if offered only to potential purchasers. If a liability release program was available to both potential purchasers and current owners, but only for contamination pre-existing purchase of the property, difficult proof problems would ensue. Current owners would have to prove that the property was already contaminated when they purchased it, and their use of the property since the time they have owned it has not exacerbated the contamination or the health risks to the community. Liability releases granted to parties which have no previous connection with the property eliminate any need to prove non-contribution and would ease the administrative burdens of a program.

Liability releases alone may not prove to be enough of an incentive to encourage prospective purchasers to redevelop on brownfields rather than greenfields. This is particularly true if prospective purchasers will be required to pay for the full cost of remediation. The federal government may still be able to recover remediation costs from any responsible parties associated with the site. If any money were recovered, a portion of it could be given to the prospective purchaser as a reimbursement for remediation. Alternatively, the right to recover may simply be granted directly to a prospective purchaser. Under this scheme, administrative recovery costs would be removed from the federal government, and the prospective purchaser would have the right to keep the full amount, if any, of a judgment.[154]

The question of who should be offered liability releases by the federal government may depend on a number of factors. Liability releases could be offered to parties responsible for pollution, as long as the property is not scheduled for cleanup, and as long as the party conducts a remediation on the property and pays for such a remediation. Liability releases should be offered to owners who have no connection to contamination as well as to potential purchasers of brownfields. Parties in these categories should not necessarily be required to pay for the full costs of remediation on the properties, particularly if viable responsible parties can be

154. Under H.R. 3800, if the federal government contributes money or services to a response action on land which has been acquired by a prospective purchaser, and the government has not recovered all of its response costs, it has the right to place a lien on the property in order to ensure recovery at the time the property is sold. Such lien is not to "exceed the increase in fair market value of the property attributable to the response action at the time of a subsequent sale or other disposition of the property." H.R. 3800 § 403(b), 103rd Cong., 2d Sess. (1994). Therefore it may become complicated to offer the right to recover to prospective purchasers, particularly if the federal government, or some other party, has contributed to the cost of cleanup.

found. Successful brownfield redevelopment strategies will need to offer flexible options such as those explored above to enable redevelopment to occur in an equitable and effective manner.

2. *Should Liability Releases be Contingent or Comprehensive?* The release of liability clause should not guarantee immunity for any contamination *caused* or exacerbated by the future owners.[155] Liability releases may be offered as an incentive for redevelopment of brownfields, but offering a release for future contamination gives permission to developers to pollute. Any brownfields redevelopment strategy which offers a liability release should be careful to maintain liability for any future pollution which is the result of action by a new owner.

Two great dangers to parties engaging in remediation of brownfields are that (1) cleanup standards will become more stringent subsequent to cleanup; and (2) previously undiscovered contamination will emerge after cleanup. The extent of liability releases must be determined with an awareness of these events. A liability release must be structured so as to exempt parties from the cost of additional remediation in the case of tightened standards or reemergence. If a party receiving a liability release were required to pay the full cost of cleanup on the property, as well as the full cost of additional remediation in the above two instances, the release from liability would basically be hollow.

Liability releases will only spark economic redevelopment if they exempt parties from the additional remediation costs associated with a more stringent cleanup standard or from an emergence of previously undiscovered contamination. These are some of the uncertain costs or potential costs that make redevelopment of brownfields so undesirable in the first place. If environmental as-

---

155. The Environmental Response Act in Michigan, MICH. COMP. LAWS § 299.614a (3) (1992), specifically addresses this issue. It reads:

> (3) A covenant not to sue issued under this section shall address only past releases or threats or release at a facility and shall expressly reserve the right of the state to assert all other claims against the person who proposes to redevelop or reuse the facility, including but not limited to, those claims arising from any of the following:
>
> (a) The release or threat of release of any hazardous substance resulting from the redevelopment or reuse of the facility.

Id.

> MINN. STAT. § 115B.175 (1993) provides guidelines for restricting liability:
> Subd. 7. Persons not protected from liability. The protection from liability provided by this section does not apply to:
> (1) A person who aggravates or contributes to a release or threatened release that was not remedied under an approved voluntary response action plan.

Id.

sessments are conducted in accordance with a state or federal standard and cleanup passes muster with a state environmental agency, parties should not be held liable for the cost of additional cleanup which may be required later.

In order to maintain an exemption from liability, parties may be required to refrain from interfering with state action to control a new health risk on the property.[156] State remedial action could involve substantial disruption of the regular course of business of an industry for a rather lengthy period of time. Parties benefiting from liability exemptions would have to be willing to take the risk that no further remediation will be required and will have to be convinced that if such additional remedial action is required, that the income potential of the property will more than equal the cost of any potential disruption. The cost of additional remediation, if not born by current property owners, would either have to be recovered from existing responsible parties[157] (other than those who have been released of liability) or from taxpayers.

3. *Federal Proposals.* Jan Paul Acton of the Congressional Budget Office suggested to the House Energy Committee's Subcommittee on Transportation and Hazardous Materials that the legislature should limit liability of successor owners and operators

---

156. Both Michigan and Minnesota statutes, as part of their voluntary cleanup programs, require as a condition of liability release, that parties refrain from interfering with state action required to control additional releases of hazardous substances on their properties. MICH. COMP. LAWS § 299.614a (1992) states:

> (3) A covenant not to sue issued under this section shall address only past releases or threats of release at a facility and shall expressly reserve the right of the state to assert all other claims against the person who proposes to redevelop or reuse the facility, including but not limited to those claims arising from any of the following:
>
> (c) Interference with, or failure to cooperate with the department, its contractors, or other persons conducting response activities approved by the department.

Id.

> MINN. STAT. § 115B.175 (1993) states in part:
>
> Subd. 2. The commissioner may approve a voluntary response action plan . . . if the commissioner determines that . . .
>
> (3) The owner of the property agrees to cooperate with the commissioner or other persons acting at the direction of the commissioner in taking response actions necessary to address remaining releases or threatened releases, and to avoid any action that interferes with the response actions.

Id.

Additionally, the federal Superfund reauthorization bill also gives prospective purchaser status (exemption from liability) to a purchaser who "provides full cooperation, assistance, and facility access to persons authorized to conduct response actions at the facility . . . ." H.R. 3800 § 605(9).

157. As listed in 42 U.S.C. § 9607(a) (1992).

who "recycle" contaminated industrial sites.[158] Capping liability or eliminating liability altogether for an industry willing to develop an industrial site would provide incentives to get the urban sites redeveloped. By legislating liability limitations, Congress could decide what uses would be in the public's best interest and then provide limited liability only for such uses.[159] Public involvement and community consensus would be the most equitable method by which to determine whether a proposed use is in the public's best interest.[160] Local communities may consider factors such as the level of cleanup planned for the property, the potential environmental dangers imposed by the new use, and the number of quality jobs created for local residents.

The EPA now supports federal legislative proposals which limit the liability of a prospective purchaser who is willing to "cooperate[] with efforts to cleanup the site, does not contribute to the site's contamination, and exercises due care to ensure the existing contamination is not aggravated."[161] A prima facie determination of whether a new owner has met the above conditions might be participation in a voluntary cleanup program. Federal bill H.R. 3800 provides that the *bona fide* prospective purchasers of contaminated property will be exempt from federal liability under Superfund.[162] One way in which a prospective purchaser can become a *bona fide* prospective purchaser under the program is to participate in a qualified voluntary state remediation program.[163]

158. Acton, *supra* note 121; *Superfund Liability May Add to Urban Sprawl, Congress Told, supra* note 1.

159. *Superfund Liability May Add to Urban Sprawl, Congress Told, supra* note 1. The notion of providing incentives based on beneficial property use parallels the component in Rep. Mel Reynolds (D-Ill.) Environmental Remediation Tax Credit bill. *See infra* note 189.

160. Community participation and public involvement should play an extremely large role in any of the proposed policy changes recommended in this comment. The community role is crucial in order to determine whether the proposed use is truly beneficial to the surrounding neighborhood residents. The 1994 Superfund reauthorization bill incorporated a wide range of community involvement techniques, including the creation of Community Working Groups and Technical Assistance Grants. H.R. 3800 §§ 101-02, 103d Cong., 2d Sess. (1994). For a more detailed discussion on the important role of public participation in connection with environmental policy, see Ferris, *supra* note 143; Gaylord & Twitty, *supra* note 143; Torres, *supra* note 143.

161. Laws, *supra* note 45. Unfortunately, the EPA criteria include no limitations regarding the types of uses which would qualify a purchaser for a liability release.

162. H.R. 3800 § 403(6)(C).

163. *Id.* § 301(K)(2).

C. *State Voluntary Cleanup Programs*

Both the 1994 Superfund Reform Bill[164] and the EPA's Brownfield Redevelopment Project encourage states to develop their own voluntary cleanup programs.[165] According to the bill, state voluntary cleanup programs "significantly increase the pace of response activities at contaminated sites"[166] and "benefit the public health, welfare, and the environment by returning contaminated sites to economically productive or other beneficial uses."[167] Federal approval will be granted to programs which provide "opportunities for technical assistance,"[168] "adequate opportunities for public participation in selecting response actions,"[169] "streamlined procedures to ensure expeditious voluntary response actions,"[170] "adequate oversight . . . to ensure . . . protecti[on] of human health and the environment,"[171] "mechanisms for the approval of a response plan"[172] and "certification . . . from the state [indicating completion]."[173] Under the existing version of the bill, qualified state programs would receive funding as well as technical assistance from the federal government.[174] Prospective purchasers who successfully complete cleanups under approved state programs would receive release of liability at the federal level.[175] Offers of funding and liability release by the federal government would help to encourage states to conform their programs to meet, at a minimum, the federal requirements. The federal government's potential ability to shape state programs should be used to ensure that positive urban economic redevelopment begins to take place.[176]

---

164. H.R. 3800.

165. Conference of Mayors, *supra* note 10; Laws, *supra* note 45; H.R. 3800, offers financial and technical assistance to states to establish and expand voluntary response programs.

166. H.R. 3800 § 301(a)(1).

167. *Id.* § 301(a)(2).

168. *Id.* § 301(c)(1).

169. *Id.* § 301(c)(2).

170. *Id.* § 301(c)(3).

171. *Id.* § 301(c)(4).

172. *Id.* § 301(c)(5).

173. *Id.* § 301(c)(6).

174. *Id.* § 301.

175. *Id.* §§ 301 and 403.

176. There are numerous problems which could stem from poorly designed voluntary cleanup programs. States which allow for varying degrees of cleanup and little public participation could more easily use favoritism and politics to determine which plans are "beneficial" and what standards of cleanup are required. Economically depressed communities typically have less political power and find it more difficult to assert their interests in the way land is developed. The developers generally are not from economically depressed neighborhoods and may have influence over municipal leaders. These factors make it essential that programs are administered according to strict guidelines and with a significant amount of

The term "voluntary cleanup program" is used widely. Voluntary cleanup programs currently exist in many states,[177] and numerous others are in bill form[178] or have recently been enacted by state legislatures. Each of the programs, however, is very different and should be analyzed carefully. A model voluntary cleanup must ensure fairness, positive economic growth, and protection of public health, welfare, and the environment. In addition to providing state liability releases, voluntary cleanup programs will be most effective if they incorporate financial incentives to encourage redevelopment and cleanup of contaminated sites.[179] The most effective voluntary cleanup programs will provide a combination of strategies and offer packages on a continuum, depending on the status of the individual requesting participation in the program. Polluters, for instance, may be offered only a release of liability for remediating a site, whereby a prospective purchaser may get a federal grant, local tax abatement, and a release from liability.

Liability releases at the state level are a fundamental require-

---

meaningful community participation.

177. One example of a voluntary cleanup statute is the Minnesota Voluntary Response Action Plans, MINN. STAT. § 115B.175 (1992). The Minnesota bill has been on the books since 1992 and is a model plan in many respects. It provides liability releases, but only to parties who have no previous connection with the contamination on the property. It also allows for liability releases to lenders who finance the parties undertaking the cleanup. Additionally, releases run with the property and, therefore, go to any successor or assignee of the property. *Id.* Additionally, Minnesota provides Contamination Cleanup Grants. *Id.* § 116J.551-.557. These grants are provided to development authorities who submit a development plan to the state. Plans are approved based on numerous factors, including those with the highest potential for increasing the tax base of local jurisdictions, those with the highest social value to the community, those properties which pose the greatest threat to health and safety of the community, and the probability that the site will be cleaned in the reasonably near future. *Id.* § 116J.555 (1). The only obvious drawback to the Minnesota voluntary cleanup program is that it authorizes plans which do not remove or remedy all releases at the site. The remedy may be less than 100% if the proposed use will not jeopardize health and safety, will not aggravate or contribute to further releases, and the owner does not interfere with state response actions. *Id.* § 115B.17. This limitation may be good for industry, but it is likely to create an unnecessary risk for people living or working near the property.

178. *See, e.g.*, Voluntary Environmental Cleanup Program, H.R. 221, Ohio 120th Gen. Assembly, Regular Sess. (1994) (enacted); Voluntary Remediation Act of 1994, H.R. 7784, N.Y. 215th Gen. Assembly, 2d Sess. (1994); H.R. 972, Pa. 178th Gen. Assembly, Regular Sess. (1993) (providing for recycling of existing industrial and commercial sites, defines liability, sets standards of cleanup, establishing Voluntary Cleanup Loan Fund and Industrial Land Recycling Fund); H.R. 1895, Pa. 176th Gen. Assembly, Regular Sess. (1993) (specifically aimed toward cleanup of *abandoned* industrial sites by prospective purchasers); Voluntary Cleanup and Redevelopment Act, H.R. 1299, Colo. 59th Gen. Assembly, 2d Regular Sess. (1994) (enacted); Land Recycling Act, S. 462, Wis. 91st Leg., Regular Sess. (1993) (enacted).

179. *See* discussion of financial incentives *infra* notes 182-211 and accompanying text.

ment of any program in order to provide an incentive for purchasers to undertake cleanup.[180] Cash incentives, including grants or tax credits,[181] would help to ensure that not only wealthy developers, but all those interested in business development, could take advantage of the program. Local tax incentives, such as tax increment financing, could also take some of the initial burden from prospective purchasers. Remediation should be monitored by the state to assure that those benefiting from participation are meeting all environmental requirements.

Finally, community participation is an essential component in any voluntary cleanup program. The community participation element becomes more important as public funding is offered to developers. Community participation assures that public funds are not spent on socially undesirable projects. The proposed new land use should be part of any application for approval under a voluntary cleanup program. The community in which the site is located should have a significant voice in determining whether a proposed use would, in fact, be beneficial rather than detrimental to the locality. Unfortunately, state voluntary cleanup programs may qualify for federal approval under the bill, even absent provisions mandating significant community participation components and beneficial land use requirements for brownfields.

D. *Financial Incentives*

As noted in the previous section, liability releases alone may not prove inviting enough to entice prospective purchasers to engage in brownfield redevelopment. The cost of conducting remediation still may make the property more expensive than the cost of redeveloping on a greenfield. In order to best spark redevelopment, especially by prospective purchasers who currently run no liability risk, financial incentives should be offered to prospective purchasers in some instances. Brownfield redevelopment strategies need to include economic components aimed specifically at developers willing to provide long term economic benefits to particularly depressed urban communities. Future land use should absolutely be taken into account in order to prioritize the designation of funds to developers interested in rebuilding impoverished areas.[182] Land use

---

180. H.R. 3800, 103rd Cong., 2d Sess. (1994), provides the necessary step of guaranteeing a federal liability release to participants in qualified state voluntary programs. The federal release gives more backing to the state release, and clearly gives more protection to the participant.

181. *See* discussion of financial incentives *infra* notes 182-211 and accompanying text.

182. Minnesota provides grants to development agencies wishing to clean up contaminated sites. MINN. STAT. § 116J.555(1) (1992). Prioritization for designation of these funds is

should be considered to the extent that the proposed use of the land after cleanup provides economic growth potential for the area and does not exacerbate the previous contamination problem.[183] Economic incentives for redevelopment can come in many forms including tax credits, tax abatement, revolving loan funds at the federal, state and local levels, and direct cash grants. One of the most innovative financial incentive schemes aimed at brownfield redevelopment has been proposed in the area of federal tax credits.

1. *Federal Tax Credits.* The idea of using the Internal Revenue Code as an incentive for industry to conduct its business in an environmentally conscious manner is not new. The late Senator Heinz, in the original congressional hearings on the passage of CERCLA, introduced a measure to amend section 103 of the Internal Revenue Code.[184] The result of such a measure would have provided tax-exempt financing to industry for the installation of pollution control measures and facilities.[185] Though the measure was not passed in the 1980 Superfund debates, there is great potential for using tax credit incentives creatively in the field of environmental protection.

A tax credit program which creates incentives for private industry to invest in socially responsible ventures in economically needy areas exists in section 42 of the Internal Revenue Code: Low Income Housing Tax Credits.[186] Section 42 is a means for the government to encourage the private sector to invest in low-income housing. The tax credit incentive requires private investors to self regulate for fifteen years or else risk losing the credits.[187]

---

given to development plans based on "[the] highest potential for increasing the tax base of local jurisdictions relative to the fiscal needs of the jurisdictions as a result of developments that will occur because of completion of the response action," and "the social value to the community of the cleanup and redevelopment." *Id.* §§ 116J.555(2)-(3).

183. *Id.* § 116J.555.

184. 126 CONG. REC. S14,984-88 (daily ed. Nov. 24, 1980); *see also* Grad, *supra* note 4.

185. Grad, *supra* note 4.

186. I.R.C. § 42 (1994).

187. I.R.C. § 42(i)(1). Private industries invest a certain amount of money in low income housing development. Generally, private, non-profit agencies oversee the housing development and management. The investors receive a certain amount of federal tax credits for every dollar they invest in the project. The credits yield an annual rate of return and are granted over the next fifteen years. The credits are conditioned on the housing maintaining a certain percentage of low-income occupants over the course of the next fifteen years. In this way, the private industry cannot reap the reward of governmental incentives without providing a lasting program of economic benefit to a community. The private industry will assure that monitoring and oversight of the project is conducted properly and that the project continues to survive as required, because they will not want to lose their investment. The credits can be lost retroactively if the program goes out of compliance. *Id.* The fact that

A similar incentive scheme as that provided under section 42 of the Internal Revenue Code could be implemented for economic development of brownfields in depressed urban areas. In the summer of 1993, Mayor Richard M. Daley of Chicago testified before Congress on proposed legislation to clean up abandoned industrial sites.[188] The proposed legislation, introduced by Representative Mel Reynolds (D-Ill.), incorporates federal tax credits with other local governmental incentives to entice industry to acquire and develop "abandoned, contaminated industrial sites."[189]

Under Reynolds' bill, the environmental remediation tax credit would equal twenty-five percent of the cost incurred by the taxpayer for environmental remediation. The requirements for eligibility are that the property be considered a "qualified contaminated site" and that the "remediation plan . . . was approved by the [EPA]."[190] No credits are granted until the EPA determines that the cleanup has been completed.[191] The credit would not be available to any party who was the owner or operator of a business on the site prior to the enactment of the legislation, to anyone who arranged for the disposal, treatment, or transportation of hazardous waste on the site, or to anyone related to the aforementioned parties.[192]

In order to be qualified, a site would have to be located within a designated city. Under the bill, cities will be designated by the Secretary of Housing and Urban Development (HUD). Cities will apply for qualification under the program and contribute non-federal funding to the remediation of sites in their jurisdiction.[193] Non-federal funding can include "grants, loans, property or income tax abatement, contributions by private parties or non-federal governmental sources, or any other direct or indirect financial assistance."[194]

Cities will be chosen to participate in the program based upon, among other factors, the "degree of economic deterioration . . . as measured by the city's manufacturing job losses between 1970 and 1990."[195] Criteria required for site selection include the unlikeli-

---

oversight of the projects is done by the private rather than the public sector, may save the government substantial money over public housing ventures.

188. Daley, *supra* note 59.

189. H.R. 2340, 103d Cong., 1st Sess. (1993) (The Environmental Remediation Tax Credit bill introduced June 8, 1993 by Mel Reynolds (D-Ill.)).

190. *Id.*

191. *Id.* § 54(B).

192. *Id.* § 54(D).

193. *Id.* § 54A(a)(2).

194. *Id.* § 54A(a)(2)(B)(III).

195. *Id.* § 54A(a)(3)(A).

hood that the site will be redeveloped without the credit and the strong likelihood that redevelopment will result in job creation and an increased tax base.[196] Only sites which have been out of productive use for at least one year will be eligible for participation in the program.[197] This final criterion will help to assure that private developers will not receive money for projects which they would have undertaken with or without the credit.

Representative Reynolds effectively incorporated socially responsible land use into the bill by authorizing credits only to those uses which will bring economic benefits to the community. The bill should be taken seriously and should be commended for incorporating environmental protection and urban revitalization into one incentive scheme.

In general, eligibility for environmental remediation tax credits could be based upon a number of factors including full environmental remediation, location in a depressed economic area, and the creation of a certain number of jobs to local residents. The initial credits could be granted after the site passed agreed upon environmental tests. Further credits could be authorized annually based upon full compliance. Conditions for compliance should include state of the art waste disposal and emission controls, maintaining full operation of the plant, industry, or business for a certain number of years, and guaranteeing the continued employment of a minimum number of individuals from the local community.

One of the major benefits of this type of scheme would be the long range compliance requirements. With respect to both urban redevelopment and environmental safety, long range commitments are essential for any effective change. The other benefit would be that the federal government would not be required to pay for the cleanup initially. The cleanup would be funded by developers in exchange for receiving tax credits as reimbursement in later years. Reimbursement to the federal government for the amount spent on the credits could be obtained by suing the parties responsible for contaminating the land.

The tax credit scheme would have to be authorized under the Internal Revenue Code, rather than under CERCLA. The only change required under CERCLA would be to release from liability those purchasers willing to undergo the cleanup and development of the property. Including a tax credit scheme, such as the one laid out by Reynolds, in any brownfields redevelopment strategy would help to create needed incentives for prospective purchasers as well

196. *Id.* §§ 54A(a)(4)(A), (C).
197. *Id.* § 54A(a)(4)(B).

as ensure a socially beneficial component to the strategy.

2. *EPA Redevelopment Grants.* The EPA is currently embarking on a Brownfield Economic Redevelopment Pilot Program.[198] The program aims to provide cash assistance to eight depressed urban areas in an attempt to entice new industry to these distressed regions.[199] The EPA's pilot program is one of a number of recent indicators that the EPA and the federal government are finally recognizing Superfund's detrimental effects on economic development. Current EPA policy supports brownfield redevelopment strategies aimed at prospective purchasers willing to reuse and redevelop contaminated urban land. The EPA does not support strategies which would provide a benefit to polluters or PRPs.[200]

3. *Community Development Block Grants.* One of the most obvious sources of cash which could *potentially* be used for brownfield redevelopment comes from an already existing federal program aimed at rejuvenating depressed communities. HUD's Community Development Block Grant (CDBG) program is authorized primarily to assist in housing and small business development.[201] The primary objective of the Community Development Block Grant Program, authorized by the Housing and Community Development Act of 1974, is "the development of viable urban communities, by providing decent housing and a suitable living environment *and expanding economic opportunities, principally for persons of low and moderate income.*"[202]

Government funding created for community development purposes should be made available to both non-profit agencies and members of the community who would otherwise be unable to start businesses. Criteria for brownfield redevelopment funds under

198. Laws, *supra* note 45.

199. *Id.* The first of the eight cities chosen was Cleveland, Ohio. The purpose of the cash ($200,000) paid by EPA to the city of Cleveland was to help locate the sites with the most redevelopment potential. The cleanups will be conducted under Ohio's recently enacted Voluntary Cleanup Program. OHIO REV. CODE ANN. §§ 166.01, 166.07, 317.08, 2744.02, 2744.03, 3734.18, 3734.30, 3746.01-.07, 3746.071, 3746.08-.17, 3746.171, 3746.18-.31, 3746.35, 3746.99, 5709.82, 5709.83, 5709.87, 5709.88, 5709.881, 5709.882, 5709.883, 6111.036, 6123.01, 6123.032, 6123.041, 6123.14 (1994). Additionally, the EPA has given grants of $250,000 to Richmond, Virginia, and Bridgeport, Connecticut in order to stimulate brownfields redevelopment and try to undo some of the harm created by Superfund. The money is not intended to compensate any party which contributed to the pollution caused on the site and is aimed toward *bona fide* potential purchasers of property. Conference of Mayors, *supra* note 10.

200. Conference of Mayors, *supra* note 10.

201. 24 C.F.R. § 570 *et seq.* (1994).

202. *Id.* § 570.2. (emphasis added).

CDBG should be that all uses are economically beneficial to the community, maintain strong economic recovery goals, and incorporate a meaningful community participation component. Without community participation, the determination of a project's true economic benefit to a community cannot accurately be measured.

A beneficial aspect to linking environmental assistance grants to a needs-based agency such as HUD is that the funding can be linked to a larger redevelopment scheme for the entire community. CDBG funding is aimed toward assisting the neediest communities in their development efforts.[203] If the brownfields problem is a major impediment to redevelopment, CDBG financing for site cleanup in economically depressed areas should be an acceptable means toward the goal of recovery.

E. *Private Sector Redevelopment Strategies*

A business angle on the issue of brownfield redevelopment has been posed by a subsidiary of Southern Pacific Transportation Corporation, an industrial group. According to Southern Pacific, the EPA should reimburse non-liable parties on a quarterly basis for taking the initiative to remediate sites in depressed economic areas.[204] The reimbursement would serve as a redevelopment incentive to entrepreneurs and assure that redevelopment is focused in the neediest communities.[205]

The proposal offers no assurances that the new use of the site would in fact benefit the community. If tax dollars are to be given to private individuals, some determination must be made about which private parties will use them most efficiently. The proposal also fails to include any liability release for either new or previous owners of brownfields property. Without a community participation component and without some sort of assurance that long term benefit would come from the remediation, the plan remains too simple to be workable.

Richard Stroup, from the Political Economy Research Center in Bozeman, Montana, has suggested that the government auction off abandoned waste sites to bidders willing to clean up the property and put it back in use.[206] Under this creative solution, *the gov-*

---

203. *Id.*

204. *Environment: Emissions Fee on Polluters Proposed as Alternative Superfund Liability Scheme*, DAILY REP. FOR EXECUTIVES, REG. ECON. & L. (BNA) No. 195, at d19 (Oct. 12, 1993) (quoting John Spisak, President of Industrial Compliance, a Subsidiary of Southern Pacific Transportation Corp.).

205. *Id.*

206. Richard L. Stroup, *Privatizing "Orphan" Hazardous Waste Sites: A Way to Improve Superfund*, PERC VIEWPOINTS, Nov. 1992, at 4.

ernment would pay the bidders to take the property. Bidders would have to divulge their ultimate intended use of the property as well as the type of remediation required to ready the site for such use. The winning bidder would be the one requiring the smallest payment. According to the research center, such an incentive scheme would encourage companies to invest in research on cost effective and reliable remediation methods.[207]

The beauty of this proposal, according to its author, is that it gets the abandoned property back into the hands of private parties as quickly as possible.[208] The proposal suggests that the new owner could post a bond with the government to use as collateral in case the site was never cleaned.[209] Stroup does not propose that a liability release be granted, because he believes that the threat of liability would help assure that the private party undertook a serious cleanup effort.[210] Stroup's proposal is novel, and it covers many aspects of the brownfields problem. Its main deficiency is its lack of a community participation component which should be a necessary part of any redevelopment scheme in which the federal government offers cash to private parties for the purposes of promoting redevelopment. The general public may prefer to have property sit idle (and even contaminated) than to have their tax dollars used to profit private individuals who have no obligation to benefit the community.[211]

The above proposals all have incorporated some useful tools for safely increasing economic development and environmental cleanup in depressed industrial areas. Properly drafted alternative policies should (1) provide financial incentives to non-responsible parties only, (2) preserve strict liability causes of action by the EPA against responsible parties in order to recoup some of the cleanup costs, (3) ensure that liability releases to potential purchasers protect against subsequently discovered contamination as well as a change in the cleanup standards, (4) maintain cleanup standards on commercial property which will consider the health risks posed to adjacent neighborhoods and local residents, (5) assure that a thorough cleanup is conducted prior to the granting of liability releases, and (6) link local job development and long term monitoring to any access to public funding. "Protection of public

---

207. *Id.*; *see also Auctioning of Superfund Sites Suggested*, SUPERFUND WK., Dec. 25, 1992, at 6.

208. Stroup, *supra* note 206, at 4.

209. *Id.*

210. *Id.*

211. *See generally* Ferris, *supra* note 143; Gaylord & Twitty, *supra* note 143; Swanston, *supra* note 143; Torres, *supra* note 143.

interest remains at the heart of deciding whether a . . . settlement under CERCLA should be upheld."[212] If protecting previously uncontaminated lands from future toxin exposure and rejuvenating the economies of urban industrial areas are considered to be in the "public interest," then incorporation of carefully considered brownfield redevelopment strategies should be well within the bounds of the EPA administered Superfund policy.

CONCLUSION: LEGISLATING FOR THE TWENTY-FIRST CENTURY

The need to amend Superfund in order to induce economic development of depressed urban areas has steadily transformed from a somewhat extravagant idea to a common effort at the local, state and federal level. The efforts and policy objectives of the current administration are commendable and, with any luck, will help to undo some of the economic and environmental hardship in our cities.

The effects of redevelopment incentives will be both economically and environmentally beneficial. Safely redeveloping previously contaminated sites is essentially "recycling" of industrial land. Superfund would not only have served its purpose in removing hazardous wastes from a community,[213] but additionally would encourage the land to be put back to productive use and allow the community to continue to grow and thrive in a cleaner and safer manner. A successful brownfields redevelopment strategy will focus on extremely distressed areas and will heed the input of community residents.

There *is* a direct link between environmental legislation and economics. To legislate solely with regard to the environmental aspect is tantamount to pretending that environmental legislation exists in a vacuum. Environmental laws can be used to effectively "steer trade [industry] in a desirable direction" and to "encourage economic activities that provide increasing levels of economic and ecological well being."[214] Unfortunately, environmental laws can also be used ineffectively, without regard for future economic and ecological well being. While it is beneficial that a clearer understanding of the link between environmental legislation and economic development has emerged, it is unfortunate that it has taken fifteen years since the initial passage of CERCLA for such

---

212. United States v. Seymour Recycling Corp., 554 F. Supp. 1334, 1337 (S.D. Ind., 1982); *see* Feldman, *supra* note 5, at 315 n.104, 330 n.170; *see also* 42 U.S.C. § 9622(a) (1992).

213. *See supra* notes 23-26 and accompanying text.

214. Housman & Zaelke, *supra* note 108, at 547, 551.

widespread acceptance to arrive.

The history of this experience should serve as a lesson in our future legislative policy. Legislation is generally passed to address a current problem or grievance of the public. In this sense, legislation has historically been reactive. The problem with reactive legislation, as illustrated by the examples of Superfund's effect on economic decision making, is that it attempts to solve one problem while creating a host of others. A move toward proactive legislation is essential if we hope to avoid the unintended effects of hastily passed legislation in the future. Forward reaching legislation will be developed slowly and deliberately and will require extensive public input, not only by politicians and special interest groups, but by regular citizens, the ones most likely to be affected in the long run.