Transforming the Wasted Land: A Comparative Study of New York and New Jersey Brownfield Redevelopment Programs

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During the latter half of the twentieth century, a now familiar phenomenon took hold: manufacturing jobs in urban cores were replaced by service sector jobs in suburban areas, leading to myriad social, economic and environmental problems. The loss of stable avenues of employment for urban residents often led to increased crime, which led to the more affluent (and often white) residents fleeing the cities for new suburban neighborhoods.[1] At the same time, additional pressures on the environment and municipal infrastructures were created by the sprawling development of previously pristine lands,[2] as cities continued – and continue – to expand outwards from their urban cores. This pattern of flight and decay has been well documented, and is not within the scope of this paper. Instead, this work will focus on the environmental effects that have been left behind by businesses that shuttered or relocated, and specifically how governments have approached ways to encourage redevelopment of these contaminated sites, both as an economic stimulus for the local community and as part of a larger plan to prevent further sprawl by the development of "greenfields" – lands that have not yet been developed for urban or suburban use.

Generally speaking, when a site has been used over a period of years for commercial or industrial purposes, there is bound to be some level of soil contamination left behind when the business closes. Commentators and government agencies have recognized the reality of this phenomenon by coining the term "brownfields" which is commonly defined as "abandoned,

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[1] Glen M. Vogel, *An Examination of Two of New York State's Brownfields Remediation Initiatives: Title V of the 1996 Bond Act and the Voluntary Remediation Program*, 17 Pace Envtl. L. Rev. 83, 85 (1999).

[2] It is somewhat of a misnomer to refer to the lands being eaten by suburban sprawl as "pristine" or "greenfields" in the nomenclature of the environmental movement. In states like Oklahoma and Nebraska, for example, the natural environment was one of tall grass prairies; it was not until white settlers moved into the area, slaughtered the buffalo and displaced the natives, that the area was turned into (irrigated) farmland. Today, in many cases, it is the loss of this artificially created farmland – in the form of residential and commercial development – that causes great consternation. While it is certainly true that suburban development is more resource intensive than irrigation farming, there are compelling arguments to be made that the agricultural uses themselves were unsustainable over the long-term. *See* Marc Reisner, *Cadillac Desert: The American West and Its Disappearing Water* 104-119. The dust bowls of the 1930s, caused by the combination of drought and plowing, illustrated starkly the dangers. *Id.* at 148-52.

idled or underutilized industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination."[3] The redevelopment of these properties is encouraged through various statutory and regulatory schemes at the federal and state levels, which will be discussed in detail below.

Section I of this paper will provide a brief historical overview of brownfield programs at the federal level, in order to provide context for later material. Section II will cover in detail the various legal approaches to brownfield redevelopment taken by two states, New York and New Jersey. These two states have been chosen because they are both densely populated and have long industrial histories, meaning that there are bound to be significant numbers of brownfield sites in urban areas that require significant remediation in order to be developed anew. Section III will compare specific aspects of the regulatory approaches taken by New York and New Jersey in the following areas: liability standards, cleanup standards, environmental justice, area initiatives, and incorporation into a larger land use and growth plan. Section III also contains a brief conclusion of the ideas presented.

Section I: Federal Approaches to Brownfield Management

This section provides a brief overview of federal legislation concerning hazardous chemicals and land contamination. While later sections of this paper do not directly address federal legislation, it is important to understand the history and effects of federal environmental laws, as they have literally and figuratively shaped the landscape in which we find ourselves today. The first federal foray was in 1976, when Congress passed the Resource Conservation

[3] Vogel, *supra* note 1, at 84.

and Recovery Act (RCRA).[4] The scope of RCRA allowed "the Environmental Protection Agency (EPA) to monitor hazardous waste production from 'cradle to grave,' and to impose strict operation standards for generators, owners, operators and transporters of hazardous wastes."[5] While clearly an important piece of legislation, RCRA did not cover any existing sources of contamination, such as brownfields created by abandoned factories. This staggering loophole led in part to the infamous Love Canal crisis, where over 100 homes and a school were built on top of over 21,000 tons of waste; the waste began seeping into the homes in 1978, eventually leading to relocation for the home-owners and demolition of all buildings affected.[6]

In 1980, Congress responded again by enacting the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[7] "in an effort to identify, investigate, and remediate contaminated sites, and in order to provide a source of funding for cleanup of these sites."[8] The first notable effect of CERCLA was that it imposed strict, joint and several liability for cleanup of a contaminated property on nearly anyone who used or touched the property (known as a Potentially Responsible Party (PRP)).[9] A showing of causation or responsibility for the contamination is not necessary to find a party liable for cleanup costs and damages.[10] PRP liability covered not only property owners, but other users of the land, including institutions like lenders who finance construction; even if a business had complied with the laws in effect at the time they disposed of the waste, liability under CERCLA would not be foreclosed for on-site

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[4] Gabriel, A. Espinosa, *Building on Brownfields: A catalyst for Neighborhood Revitalization*, 11 Vill. Envtl. L. J. 1, 5 (2000).
[5] *Id*.; codified at 42 U.S.C. § 6901-92 (1994 & Supp. III 1997).
[6] *Id.* at n.18; *see also* Julia A. Solo, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change*, 43 Buff. L. Rev. 285, 290-91 n.23 (1995).
[7] Codified at 42 U.S.C. § 9601-9675 (1994).
[8] Lynn Singband, *Brownfield Redevelopment Legislation: Too Little, But Never Too Late*, 14 Fordham Envtl. L.J. 313, 321 (2003).
[9] *Id.* at 315-16.
[10] See New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) (cited in Espinosa, *supra* note 3, at 7 n.23).

contamination.[11] "Under [CERCLA's] liability system, even those parties which had no direct role in the contamination of the property – for example, current property owners or lenders – may be found liable for the entire cost of the cleanup."[12] The effects of these provisions are much debated: some commentators contend that the imposition of strict liability exacerbates the brownfield problem,[13] while others attempt to refute that assertion by pointing to the fact that the abandonment of contaminated properties out of fear of potential liability began well before 1980.[14] While a fascinating topic, further discussion of liability under (the original implementation of) CERCLA is beyond the scope of this paper.

The second major innovation of CERCLA was the creation of the "Superfund" program. Superfund was funded by a tax on industry, primarily oil and chemical companies, under the theory that companies that cause the pollution should pay to clean it up.[15] The fund provided money to clean up sites where no PRP (or none with deep pockets) could be found. At its peak, the program had a fund containing roughly $3.8 dollars, but the tax expired in 1995 and there has been no movement in the Republican controlled Senate and House to re-authorize it.[16] As a result, "the number of completed CERCLA cleanups each year has decreased by 50 percent since

[11] Paul Stanton Kibel, *The Urban Nexus: Open Space, Brownfields, and Justice*, 25 B.C. Envtl. Aff. L. Rev. 589, 599-600 (1998).

[12] Andrea Lee Rimer, Environmental *Liability and the Brownfields Phenomenon: An Analysis of Federal Options for Redevelopment*, 10 Tul. Envtl. L.J. 63, 66-7 (1996).

[13] Espinosa, *supra* note 3, at 316 ("The threat of CERCLA liability arguably caused, and continues to cause, the abandonment of many properties as potentially responsible parties choose to leave possibly contaminated property rather than face tremendous cleanup costs. Properties remain abandoned because developers' fear state and federal liability attaching upon any contact with the property, even if that contact is minimal.").

[14] *See* Joel B. Eisen, *Brownfields of Dreams?: Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. Ill. L. Rev. 883, 891-92 (1996)

[15] Randall Chase, *Biden Pushes Bill to Restore Superfund Tax* (June 21, 2002), at http://biden.senate.gov/newsroom/details.cfm?id=183978.

[16] *EPA to Cut Superfund Cleanup Program* (July 1, 2002), at http://www.environmentaldefense.org/article.cfm?contentid=2165; *see also* David A. Dana, *State Brownfields Programs as Laboratories of Democracy?*, 14 N.Y.U. Envtl. L.J. 86, 88-89 (2005).

the late-1990s. Even the current federal EPA Administrator concedes that the agency has only $17 million to cover 200 cleanups a year."[17]

In 2001, President Bush responded to the widespread complaints about liability under CERCLA by signing into law amendments that became known as the Brownfields Revitalization and Environmental Restoration Act of 2001 (BRERA).[18] BRERA is composed of two separate parts; the first part addressed state brownfield remediation programs, "creat[ing] a bar on federal enforcement actions for sites participating in state programs"[19] by

> provid[ing] for three . . . categories of property owners who escape liability if a series of conditions are met. The first category is the owner of land in danger of contamination by a hazardous substance from a contiguous property, which is not owned by that person. . . . They also must have conducted an appropriate inquiry, and have had no reason to know the property was contaminated. The second category, the 'bona fide prospective purchaser,' . . . . [who] must have acquired the property after enactment of these amendments; all disposal of hazardous material on the site must have occurred before his acquisition; and the purchaser must not be affiliated with any potentially liable person. The final category is the innocent landowner . . . . who had no reason to know of the contamination, as demonstrated by having conducted an appropriate inquiry.[20]

The second half of BRERA, the Small Business Liability Protection Act, "provides two primary exemptions from Superfund liability: one for de minimus contributors to Superfund sites and one for parties contributing only municipal solid wastes to Superfund sites."[21] These sections closed up loopholes that would affect, for example, a dentist whose office is located in a house which has its trash removed to a municipal landfill that has been declared a Superfund priority site. Under the original implementation of Superfund, that dentist could theoretically be held liable for the entire cleanup cost of the landfill. BRERA brings sanity to the situation by

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[17] Dana, *supra* note 16, at 88.
[18] Pub. L. No. 107-118 (2002).
[19] Melissa H. Weresh, *Brownfields Redevelopment and Superfund Reform Under the Bush Administration: A Refreshing Bipartisan Accomplishment*, 25 W. New Eng. L. Rev 193, 202 (2003).
[20] Singband, *supra* note 8, at 322.
[21] Weresh, *supra* note 19, at 201-2.

eliminating potential liability for parties who contribute only small amounts of contamination to sites governed by the otherwise strict, joint and several liability scheme of CERCLA.

Overall, the federal government has a checkered history in brownfield redevelopment. In response to major problems, the federal government took the lead and implemented sweeping legislation to cover the most polluted sites, and even provided funding through an industry tax to ensure that the highest priority sites would be remediated. To be sure, the federal Superfund program has seem some astounding successes. In Boonton, New Jersey, for example, the Drew Chemical Company spent more than thirty years dumping hazardous waste in a 3.5 acre site located in a primarily residential neighborhood.[22] After the site was abandoned, it was covered with sod and made into a public park; soon after, however, residents and recreational users noticed noxious odors emanating from the site, and demanded that action be taken.[23] The site was added to the National Priority List in 1983, and considerable study was undertaken to determine the best way to remediate the site. Eventually, the waste was removed and by 1997 the site was christened as Pepe Field, home of a regulation little league baseball field, complete with an electronic scoreboard and concessions stand.[24] "The smell of rotten egg has been replaced by the aroma of roasting hotdogs, and the screech of heavy machinery has given way to the excited shouts of children on the playground."[25]

Unfortunately, the political will to continue taxing polluters to pay for their own messes has evaporated in the era of Republican rule.[26] Instead of continuing to collect money to ensure more successes like Pepe Field, the federal government has allowed the Superfund to languish,

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[22] *Pepe Field Success Story – Build It And They Will Come: The Story of Pepe Field, U.S. Environmental Protection Agency*, at http://www.epa.gov/superfund/accomp/success/pepefld.htm (last modified Mar. 1, 2006).
[23] *Id.*
[24] *Id*.
[25] *Id.*
[26] Even during the Clinton administration, the Republicans held both houses of Congress for most of his two terms, and ensured that no new polluter taxes would be instituted.

placing the onus on the states to pay for contaminated sites in their midst. This will, of course, have highly disproportionate effects on states with long industrial histories and dense populations, where land is at a premium and many prime sites are heavily polluted.

Section II: State Responses

Part A: New York

State implementations of environmental land use laws, including brownfield laws, have mirrored federal efforts. New York created its own Superfund program in 1979, which placed the burden of paying on responsible parties, and on public coffers when no responsible private party could be located.[27] The scope of the law was relatively narrow, "limited to a small subset of hazardous substances that pose the most risk to people and the environment" and to only the most heavily contaminated sites.[28] Nonetheless, "[s]ince 1980, the program has identified 1,714 potential sites. According to the [New York Department of Environmental Conservation] 401 sites have been successfully remediated."[29] Unlike its federal counterpart, the New York Superfund was not funded entirely by polluters. Instead, the State enacted the Environmental Quality Bond Act of 1986, which provided about $1.2 billion in debt financed funding for environmental remediation.[30] This Bond was paid for half out of the State's general treasury, and half by a tax on "generators of hazardous waste (waste end assessments), environmental

[27] Carrie Watkins, *Municipal Liability For Acquiring Title to Brownfields at the Federal and New York State Level*, 9 Alb. L. Envtl. Outlook 275, 292 (2004).
[28] *Id.*
[29] Richard L. Brodsky and John L. Parker, *Enhancing Environmental Remediation in New York by Strengthening the Superfund Program and Expanding the Brownfields Program*, 11 Fordham Envtl. L.J. 705, 721 (2000).
[30] *See* John P. Cahill, *New York State's Superfund Program*, 4 Alb. L. Envtl. Outlook 11, 12 (1999); *see also Governor Pataki Signs Landmark Superfund Legislation: Measure Will Restore State's Remedial Programs, Foster Redevelopment*, New York State Governor's Office of Regulatory Reform (Oct. 9. 2003), *at* http://www.gorr.state.ny.us/10_09_03_Superfund.htm).

regulatory fees, and the major petroleum storage facility license fee surcharge."[31] As a result of not providing perpetual financing, but a one-time bond authorization, the fund ran out of money in March 2001.[32]

Given that many contaminated sites were not being addressed by the State Superfund program, new ways of handling brownfields were needed. In 1994, the State Department of Environmental Conservation (DEC) created the Voluntary Cleanup Program (VCP), allowing "a 'volunteer' to enter into an agreement with the DEC to clean up a brownfield site."[33] The VCP is essentially an informal program, found neither in statute nor in promulgated rules.[34] As a result of the informal nature of the program, there was no funding provided, so "not only is the volunteer responsible for all clean-up costs himself, he also has the obligation of reimbursing the DEC for the costs of the Agency's oversight."[35] In return for these costs and burdens, the volunteer receives, after cleanup is complete, a qualified release stating that the DEC does not intend to seek action against that party for contamination at the given site.[36] A major drawback to this approach, in the sense that it completely undercuts the major incentive of the program, is that the release "leaves the volunteer open to enforcement or litigation from private parties, the EPA, or the state attorney general."[37] It is hard to see why one would volunteer for this program when only a small sliver of potential liability is foreclosed by such costly participation.[38]

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[31] Cahill, *supra* note 30, at 11.
[32] *Governor Pataki Signs Landmark Superfund Legislation: Measure Will Restore State's Remedial Programs, Foster Redevelopment, New York State Governor's Office of Regulatory Reform* (Oct. 9. 2003), at http://www.gorr.state.ny.us/10_09_03_Superfund.htm ("[T]he State Superfund funded by the 1986 Environmental Quality Bond Act was fully allocated as of March 31, 2001. DEC estimates that at least an additional 800 Superfund sites are still in need of investigation or remediation.").
[33] Vogel, *supra* note 1, at 105.
[34] *Id.*
[35] *Id.* at 107.
[36] *Id*.
[37] *Id.* at 107-08.
[38] It may have been partly for this reason that the VCP was discontinued when the Superfund/Brownfield Act was enacted in 2003. *Voluntary Cleanup Program Homepage, New York State Department of Environmental*

Never shy for new ways to extract additional revenue from its citizens, New York enacted the Clean Water/Clean Air Bond Act of 1996 (Bond Act).[39] Among its five major programs is a brownfield redevelopment program entitled "Environmental Restoration Projects."[40] The Bond Act, unlike the VCP, does provide funding for cleanups. $200 million was earmarked for the program, which would pay up to 75 percent of the costs of a given remediation project.[41] The Bond Act, however, only applies to property owned by a municipality; if a piece of contaminated properly is privately owned, it is not eligible for cleanup funding (unless and until the title is transferred to the municipality).[42] The exclusion of private property was actually based on constitutional principles: the Bond Act "could potentially run afoul of the New York State Constitution's bar against the government funding a private activity."[43] Regardless of the reason, this prohibition is clearly problematic, as a great deal of contaminated property - unless foreclosed upon for tax debts or seized by eminent domain - is not publicly owned, particularly in urban areas. For those cases where the Bond Act is applicable, however, the release from liability is considerably more comprehensive than that in the VCP. The Bond Act "provides municipalities with significant liability protection. The liability release applies to the participating non-responsible municipality, successors in title,

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Conservation, at http://www.dec.state.ny.us/website/der/vcp/ (Note: Web Addresses in this paper that do not list a date modified or last visited are *static* pages by their nature, and the content will not change over time.).

[39] Implementation of the Clean Water/Clean Air Bond Act of 1996, N.Y. ENVTL. CONSERV. LAW § 56-0101 et seq. (McKinney Supp. 1997); interestingly, there was a strong divide in the voting to approve the bond – "seventy-seven percent of those voting in New York City voted in favor of the 1996 Bond Act, while a majority of voters in the rest of the state opposed it." David L. Markell, *Some Overall Observations about the 1996 New York State Environmental Bond Act and a Closer Look at Title 5 and Its Approach to the 'Brownfields' Dilemna*, 60 Alb. L. Rev. 1217, 1221 (1997).

[40] Markell, *supra* note 39, at 1224.

[41] *Id*. at 1235.

[42] *Id.*

[43] *Id*. at 1230.

lessees, and lenders. These parties are released from liability to the state or to any person in a statutory cause of action related to the presence of contamination at the site."[44]

After several years of false starts and incomplete agreements, New York was able to successfully update its brownfields programs in 2003 with the passage of the Superfund/Brownfield Law. The new law tackled both the Superfund and brownfields sides of the environmental land use equation, as is implied by the act's creative title. "Up to $120 million . . . will be made available on an annual basis for the State Superfund Program and financed with bonds . . . with State debt service costs offset by industry fees."[45] So, while this latest implementation still uses debt financing, at least it provides funding on an on-going basis, preventing (hopefully) a situation like that which occurred from 2001 until late 2003, when the State Superfund was out of money. Another benefit of the revised program is that it has been expanded to allow more types of sites to be included.[46]

The brownfield remediation program received major changes in 2003 as well. Although the program was still limited to municipal-owned land, non-profit organizations holding title to contaminated lands who partner with municipal governments were allowed into the program to receive funding.[47] It also increased the reimbursement maximum from 75 percent to 90 percent, plus 100 percent of eligible off-site costs.[48] In addition, the liability component was revamped, providing broader immunity from suits than was allowed under the VCP.[49] The major changes

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[44] Cahill, *supra* note 30, at 15.

[45] *Governor Pataki Signs Landmark Superfund Legislation: Measure Will Restore State's Remedial Programs, Foster Redevelopment, New York State Governor's Office of Regulatory Reform* (Oct. 9. 2003), at http://www.gorr.state.ny.us/10_09_03_Superfund.htm.

[46] *Id*. ("The bill redefines Hazardous Waste to include Hazardous Substance sites allowing for the cleanup of hazardous substance sites, in addition to hazardous waste sites, which have been excluded from the State's Superfund program for 20 years.").

[47] Brodsky and Parker, *supra* note 29, at 731.

[48] *Supra*, note 45, at http://www.gorr.state.ny.us/10_09_03_Superfund.htm.

[49] N.Y. ENVTL. CONSERV. LAW § 27-1421(1) (McKinney 2006) ("[A]fter the department has issued a certificate of completion for a brownfield site, the applicant shall not be liable to the state upon any statutory or common law

in the brownfield program, however, concerned cleanup standards. Prior to 2003, according to "the clean-up standards set forth in the guidance documents for interpreting the [Environmental Conservation Law], any remedial program undertaken must restore the site to pre-disposal conditions, limited to the extent feasible and authorized by law."[50] The regulations further state that "the least preferable way of eliminating risks to human health is by restricting the future use of the property through engineering controls or deed restrictions."[51] The 2003 Superfund/Brownfield Law took a significantly different approach to cleanup standards. Today, there are four tracks with different cleanup standards, based on the expected future use of the property; the basic premise is that a site designated as a parking lot for a strip mall will not need to be cleaned to the same degree as one that will house a day-care center or apartments.[52] Track 1 allows the site to be used for any purpose; Track 2 allows restrictions on site use, plus the use of engineering/institutional controls; Track 3 allows unrestricted commercial or industrial use, with cleanup objectives determined by site specific data; and Track 4 allows restrictions on use, long-term use of engineering/institutional controls, and specific approval by DEC for higher than ordinarily allowable contaminant levels.[53]

Although private developers and landowners are not able to receive direct funding under the 2003 Brownfield Cleanup Program, there are economic incentives available to private parties. At the time the Department of Environmental Conservation issues a Certificate of

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cause of action, arising out of the presence of any contamination in, on or emanating from the brownfield site that was the subject of such certificate at any time before the effective date of a brownfield site cleanup agreement entered into pursuant to this title[.]).

[50] Vogel, *supra* note 1, at 95; though not discussed in Section I, these standards essentially comport with federal regulations. *Id*.

[51] *Id*.

[52] *See* N.Y. ENVTL. CONSERV. LAW § 27-1415(4) (McKinney 2004).

[53] *Id*. "'Engineering control' shall mean any physical barrier or method employed to actively or passively contain, stabilize, or monitor contamination, restrict the movement of contamination to ensure the long-term effectiveness of a remedial program, or eliminate potential exposure pathways to contamination." *Id*. at § 27-1405(11).

Completion for a particular site, the owner becomes eligible for a variety of tax credits.[54] The base credit varies from 10% to over 14% of the real property tax liability for the site's owner, depending on whether the owner is an individual or a business, and whether the site was cleaned to an unrestricted use level.[55] An additional 8% credit is available in areas defined by the state as "En-Zones."[56] Further credits are available based on the number of jobs created by the remediated site, as well as a credit for environmental remediation insurance that can be worth as much as $30,000.[57] Without having detailed information about property taxes and cleanup costs, it is difficult to determine whether these provisions provide much incentive to developers who are not otherwise eligible for remediation funding. This commentator believes that properties zoned for commercial or industrial uses and with high density allowances would receive the most benefit, since they are likely to have the highest property values, and consequently the highest tax liability. One may imagine that a site in midtown Manhattan that could be developed into a skyscraper would see a comparatively large tax break when compared with a low-rise site in Brooklyn or the Bronx (let alone upstate). In this sense, the credit seems to provide the most benefit to the people who need it the least, since sufficient economic incentives to redevelop these contaminated sites already exist. However, without solid evidence of patterns of use of these tax credits,[58] the above analysis is purely speculative and may prove to be wrong in practice.

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[54] *Brownfield Cleanup Program - Program Summary*, NYS DEC, at http://www.dec.state.ny.us/website/der/bcp/bcp.html#tc (the credits actually begin accruing upon signing an agreement with the state, but cannot be claimed until work is completed).

[55] *Id*.

[56] *Id.* ("En-Zones - A list of Environmental Zones will be created by the Commissioner of Economic Development no later than December 31, 2003. To be designated as an En- Zone, the area must have had, as of the 2000 census, a poverty rate of at least 20% and an unemployment rate of at least 1.25 times the statewide average.")

[57] *Id*.

[58] *See Id.* (credits were not available until the tax year beginning April 1, 2005).

In addition to all of the financial incentives, the 2003 law sets forth epidemiological standards that must be followed for all site remediations. "In all cases, the target risk of residual contamination at a site shall not exceed an excess cancer risk of one in one million for carcinogenic end points and a hazard index of one for non-cancer end points."[59] This standard, which applies as a minimum level of protection, is equivalent to the most stringent levels in federal remediation programs.[60] While this sounds promising, it is difficult to determine what effect, if any, these standards will have in the real world. Statistics and statistical data are, in general, easily manipulated to suit the proponent's purpose at hand. And this seems especially to be the case when government agencies are involved. On March 30, 2006, for example, the federal government released a new report indicating the first net increase in wetlands in the United States in decades.[61] While this sounds like a terrific accomplishment on its face, the fact is, the result was obtained by a simple statistical lie – the government included (for the first time) run-off ponds and golf course water hazards as wetlands.[62] While it may be the case that there is better control of the science in the area of brownfields and cancer rates, this author is highly skeptical that the strict standards announced by New York will have any meaning whatsoever when put into practice.[63]

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[59] N.Y. ENVTL. CONSERV. LAW § 27-1421 (McKinney 2006).

[60] Christopher J. McKenzie and Matthew Forman, *New York Enacts Historic Brownfields Legislation* (Oct. 2003), at http://www.bdlaw.com/assets/attachments/51.pdf.

[61] *Status and Trends of Wetlands in the Conterminous United States 1998-2204*, US Fish and Wildlife Service, at http://wetlandsfws.er.usgs.gov/status_trends/national_reports/trends_2005_report.pdf ("Data collected for the 1998 to 2004 Status and Trends Report has led to the conclusion that for the first time net wetland gains, acquired through the contributions of restoration and creation activities, surpassed net wetland losses." *Id*. at 17.).

[62] Felicity Barringer, *Fewer marshes + More Man-Made Ponds = Increased Wetlands* (Mar. 31, 2006), at, http://www.nytimes.com/2006/03/31/washington/31wetlands.html (requires purchase) ("Traditional tidal, coastal and upland marshes count, but so do golf course water hazards and other man-made ponds whose surface is less than 20 acres.").

[63] Without getting into specifics, there are many questions presented about how the data will be used and interpreted: who determines the increase in cancer rates? What methodology is used? Can a developer appeal from an adverse decision?

The final innovation of the 2003 Superfund/Brownfield Law was the creation of the Brownfield Opportunity Area Program, which "provides municipalities and community based organizations with assistance, up to 90 percent of the eligible project costs, to complete revitalization plans and implementation strategies for areas or communities affected by the presence of brownfield sites, and site assessments for strategic brownfield sites."[64] This is the first attempt by New York to look at the brownfields program on a larger than plot-by-plot basis.[65] The stated goals of the program are to: "Assess the full range of community problems posed by multiple brownfield sites; Build a shared vision and consensus on the future uses of strategic brownfield sites; Coordinate and collaborate with local, state, and federal agencies, community groups and private-sector partners; Develop public-private sector partnerships necessary to leverage investment in development projects that can revitalize diverse local communities and neighborhoods."[66] Analysis of this program is deferred until Section III, Part D, *infra*.

Over the last 25 plus years, New York has taken an aggressive approach to dealing with the problem of contaminated sites. The effects of the various programs can be seen throughout the state. In Baldwinsville, located in Onondaga County (near Syracuse), a waterfront site had been used for more than one hundred years as a paper mill, boat works, and for various other manufacturing uses.[67] By the time it was abandoned in the 1980s, it was contaminated with mercury, lead, and various aromatic hydrocarbons; the land also contained old drums, electrical

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[64] *Brownfield Opportunity Areas Program Fact Sheet*, NY State DEC, at http://www.dec.state.ny.us/website/der/bfield/boafs.html.

[65] The ramifications of dealing with brownfields on an individual versus area basis will be discussed in Section III, *infra*.

[66] *Brownfield Opportunity Areas Program What is it?,* at http://www.nyswaterfronts.com/grantopps_BOA.asp.

[67] *Baldwinsville Brownfield Project Receives Award for Engineering Excellence*, NYS Division of Environmental Remediation, at http://www.dec.state.ny.us/website/der/projects/bf_bville.html .

equipment, and an underground storage tank.[68] The Village of Baldwinsville received two grants under the 1996 Bond Act, for investigation and site remediation.[69] The actual work done on-site "included a soil cap, a retaining wall to stabilize the shoreline and control erosion and institutional controls for cap inspection and maintenance."[70] Today, the site is a municipal waterfront park, complete with an amphitheater that houses concerts and other events from May through September, and includes boat access to the Seneca River.[71]

Part B: New Jersey

Like New York and a multitude of other states, New Jersey followed the lead of the federal government and enacted its first Superfund statute in 1983. The Environmental Cleanup Responsibility Act (ECRA)[72] "was the first state law to require governmental oversight and approval of environmental cleanups as a precondition to closure, sale, or transfer of industrial establishments."[73] These stringent requirements, though designed to encourage remediation, were believed to have hindered the process by creating overly burdensome regulations.[74] To encourage environmental cleanups further, New Jersey amended the statute in 1993, streamlining the steps necessary to sell an industrial property and renaming the law the Industrial Site Recovery Act (ISRA).[75] "ISRA mandates that industrial establishments be remediated – or at least that a remediation commitment be put into place – before lands can transfer."[76] This

[68] *Id*.
[69] *Id*.
[70] *Id.*
[71] *Id*.
[72] N.J. STAT. ANN. § 13:1K-6 et seq. (West Supp. 1995).
[73] Susan C. Borinsky, *The Use of Institutional Controls in Superfund and Similar State Laws*, 7 Fordham Envtl. L. J. 1, 24 (1995).
[74] *See Id*.
[75] N.J. STAT. ANN. § 13:1K-6 et seq. & 58:10B-1 et seq. (West Supp. 1995).
[76] Phyllis E. Bross, Susan B. Boyle, and Terri Smith, *The Greening of New Jersey's "Brownfields" – as viewed by the Department of Environmental Protection*, 9 Fordham Envtl. L. J. 541, 554 (1998).

legislation did contain one major innovation: the use of "a 'two-tiered approach,' that tied standards for soil cleanup with those for future land use."[77] Sites cleaned to the higher standard would have unlimited future uses, while those cleaned to the lower standard would be restricted to non-residential uses with appropriate engineering and institutional controls as needed.[78] ISRA even allowed for using both standards within a single site – where people can come in contact with soil, the higher standard is required; areas that would be located under structures or were otherwise inaccessible would only need to be cleaned to the lower standard.[79] Regarding liability, "[w]hile [it] attaches indefinitely to the responsible polluters, new purchasers, operators or remediators are not subject to such liability, even if the State subsequently enacts more rigorous standards."[80]

Though not issued specifically as a brownfield program, ISRA established the Hazardous Discharge Site Remediation Fund (The Fund), which provides grants and loans for parties wishing to conduct a site cleanup.[81] The Fund is open not only to municipalities, but to small businesses, innocent parties, and individual business and homeowners – though the specific programs and disbursements are restricted (e.g., municipalities can apply for up to $2 million in grants a year, while homeowners are only eligible for loans).[82] The Fund is not debt financed, but is provided funding by the New Jersey Legislature, as well as from the repayment of loans already issued.[83]

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[77] Borinsky, *supra* note 73, at 25; note that it predates NY's multi-tiered approach by 5 years.
[78] *Id*. at 26.
[79] *Id*.
[80] *Id*. at 29.
[81] *HDSRF General Description*, New Jersey Department of Environmental Protection (Dec. 10, 2004), *at* http://www.state.nj.us/dep/srp/finance/hdsrf/hdsrf_desc.htm.
[82] *Id.*
[83] *Id*.

New Jersey established a Voluntary Cleanup Program (VCP) in 1992, which is not formally codified in statute.[84] Unlike New York's program, the VCP is not limited to innocent parties; even responsible parties may be allowed to enter into voluntary "Memoranda of Agreement" with the Department of Environmental Protection (DEP) under some circumstances.[85] The VCP "provides for a staged, cautious 'look-see-first' approach which can allow a person to assess a site and consider options prior to committing to a complete remediation in some cases."[86] Though the program was not focused on brownfields but on sites still in use, the effect of the program has been the remediation of thousands of brownfields – and potential brownfields, throughout New Jersey.[87]

In January 1998, with the Brownfield and Contaminated Site Remediation Act (BCSRA), New Jersey enacted its first official brownfields program.[88] BCSRA provides innocent developers, landowners, lenders, and other parties with additional liability protection. An innocent purchaser defense gives "protection to those who knowingly acquire contaminated sites, offering them protection from . . . claims by the state or third parties"[89] under certain conditions.[90] Once a remediation is complete, the DEP issues a No Further Action letter along with a Covenant Not To Sue.[91] The BCSRA does contain programs other than liability protection. Designed to complement The Fund, the Brownfield Site Reimbursement Fund (BSRF) provides reimbursement of up to 75% of costs incurred by developers, provided that

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[84] Bross, *supra* note 76, at 548 (it is an administrative creation).
[85] *Id.*
[86] *Id.*
[87] *See Id.*
[88] N.J. STAT. ANN. § 58:10B-1 et seq. (West Supp. 1998)
[89] David B. Farer, Jack Fersko, and Richard J. Ericsson, *The New Jersey Brownfield and Contaminated Site Remediation Act* (Mar. 3, 1998), at http://www.farerlaw.com/remed.html#Liability.
[90] Innocent purchaser defense valid "[s]o long as they have discovered the contamination through their due diligence, and have either: Relied on a DEP No Further Action letter for a cleanup completed prior to the acquisition; or Cleaned up the site, or received DEP cleanup plan approval." *Id*.
[91] Farer, *supra* note 89, *at* http://www.farerlaw.com/remed.html#Liability.

they enter into a redevelopment agreement with the state.[92] "The state and the developer can only enter into such agreement if the potential state tax revenues from the redevelopment project will be in excess of the amount needed to reimburse the developer."[93] In effect, the developer is giving the state an interest-free loan for undertaking the cleanup project according to the state's wishes.

BCSRA contains one other major program that is relevant for this study, the Environmental Opportunity Zone Act.[94] "The governing body of a municipality may, by ordinance, designate one or more qualified real properties in that municipality as an environmental opportunity zone."[95] Once an EOZ is created, the owners of land inside the zone are eligible for property tax abatements, lasting from ten to fifteen years, so long as the owners enter into an agreement with the State for a timely remediation.[96] The 1998 amendments allowed the inclusion of projects involving residential or other "productive" land, instead of just commercial and industrial properties, as was originally allowed.[97] "Remediation costs eligible for offset are broadly defined to include not only direct cleanup costs, but also direct and indirect legal, administrative, capital and engineering costs."[98]

A great example of the New Jersey approach comes from Camden, formerly an industrial hub along the Delaware River. On land that formerly housed a Campbell's Soup plant, a lumber mill, a soap manufacturer, and several other businesses, a heavily contaminated site was left

[92] Singband, *supra* note 8, at 329 ("The Commissioner of Commerce and Economic Development and the State Treasurer have sole discretion in entering into redevelopment agreements." *Id*. at 335).
[93] *Id.* at 329.
[94] N.J. STAT. ANN. § 54:4-3.150 (West Supp. 1998); actually, the program was created in 1995, but was amended in 1998.
[95] *Id*. at § 54:4-3.153.
[96] *Id*. at § 54:4-3.154.
[97] Farer, *supra* note 89, *at* http://www.farerlaw.com/remed.html#Environmental.
[98] *Id*.

behind by Camden's deindustrialization and urban decline.[99] Total costs for remediation of the 15 plus acres exceeded $7 million, and the site now includes an innovative cap measuring over 18 inches thick, and consisting of a combination of stone and fabric.[100] The area now houses a minor league baseball stadium, a soccer field for Rutgers University, and a green space.[101] The green space contains artificial grass, "composed of a combination polyethylene-polypropylene mix [that] is impregnated with approximately two inches of recycled black rubber. The rubber is made of 40,000 tires and sneakers."[102] These innovative spaces and methods have helped contribute to the revitalization of Camden, the waterfront of which now includes many remediated brownfields. Additional projects are continuing today, such as the renovation of former Victor Talking Machine Company factory, which will house luxury residential units.[103]

Part C: Summation

It should be clear from the above two parts that both New York and New Jersey have enacted multiple statutes covering varying aspects of the environmental land use problems faced by municipalities where abandoned or underutilized properties are present. The basic information given about the two states' programs show that both have carefully thought how to address the myriad problems in this area; the approaches are clearly similar, and have a lot of overlap, yet they are notably different in a number of ways.

What is not apparent from dry recitations of statutory provisions is how the programs have been implemented and supported. The next section of this paper will look at the whole

[99] *Historic Camden Waterfront Redevelopment Includes Entertainment, Recreation and Residential Projects Bringing New Jobs and Visitors*, NJ Dept. of Environmental Protection (Dec. 4, 2002), at http://www.state.nj.us/dep/srp/publications/brownfields/2001/07_camden.htm.
[100] *Id*.
[101] *Id.* (Some of the funding came via a grant from the NJDEP Green Acres Program.).
[102] *Id*.
[103] *Id*. (The building is known as the "Nipper" building, after the name of the dog featured in Victor advertisements sitting attentively in front of a conical horn speaker).

picture – instead of statutory guidance, it will focus on the real world effects of the programs. Specifically, topics of liability and cleanup standards will be compared and contrasted between New York and New Jersey, to determine whether the desired results are likely to be obtained, or whether unintended consequences and perverse incentives have destroyed a program's potential effectiveness. In addition, issues of environmental justice will be addressed – the goal here, after all, is to look at how these programs affect land use within urban areas – so it is critical to look at how the various programs have and are likely to actually reshape the urban landscape. Finally, the following section will address these programs in the larger context of their state governments, to see whether and how the presentation of the programs affects their efficacy.

Section III: Analysis

Having now covered, in some detail, the brownfield and related programs of New York and New Jersey, we can begin to analyze the ramifications of the way each state has set up their programs. This section of the paper discusses the approaches taken by the two states, and highlights the good and bad aspects of the programs introduced in Section II. The intent of this section is to distill the essential elements for a successful remediation program and to pinpoint specific provisions and processes that hinder that goal.

Part A: Liability Standards

Though both states' programs started off with limited exemptions from liability, as the programs have evolved the sphere of liability shields has continued to grow. These increases are important, because limitation of liability is the central feature of any brownfield or Superfund

program. It is hard to imagine how any voluntary program could be successful if volunteers are allowed to being sued – by anyone – for circumstances beyond their control.

New York's VCP provides an excellent example of a well-intended program that was doomed to failure[104] because of its implementation. In addition to the lack of funding for the program,[105] the weak liability shield provided a strong impetus to avoid volunteering for remediation.[106] The release provided by the DEC after a remediation was completed "is subject to certain reopeners. These reopeners include . . . unknown conditions at the time of the remediation are discovered and require further remedial work . . . and a discovery that the original response is not sufficient for the site's intended use."[107] These provisions must have struck terror in the hearts of potential participants in the VCP. Even after undertaking an expensive cleanup – entirely financed by the participant – the DEC could come back at any point in the future and insist on further action because of new discoveries.

These release provisions contrast significantly with the liability protection offered to municipalities under New York's Bond Act. Not only is a release provided for any statutory cause of action related to the site contamination, but the state "will also defend and indemnify these parties in any common law cause of action arising from the presence of contamination before the date"[108] of the agreement with the state. The 2003 Superfund/Brownfield Act provides that "the applicant shall not be liable to the state upon any statutory or common law cause of action, arising out of the presence of any contamination in, on or emanating from the brownfield site that was the subject of such certificate at any time before the effective date of a

[104] By failure, I mean that sites that would be cleaned under a well-designed program will remain contaminated due to the implementation of this particular program.
[105] *Supra*, notes 34-38, and accompanying text.
[106] Supra, note 37, and accompanying text (liability is only foreclosed in relation to the DEC, not to any other agency at the federal or state level).
[107] Vogel, *supra* note 1, at 107; *see also Voluntary Cleanup Program*, New York State Department of Environmental Conservation, at http://www.dec.state.ny.us/website/der/vcp/.
[108] Cahill, *supra* note 30, at 15.

brownfield site cleanup agreement entered into pursuant to this title[.]"[109] In terms of reopener provisions, the 2003 Act allows state, *inter alia*, to require additional remediation if the site is considered "no longer protective of public health or the environment."[110] Unfortunately, the law provides no guidance for what standard is to be used to determine whether something is considered to be "no longer protective." This point of ambiguity has the potential to lead to considerable litigation should the state attempt to use the reopener clause to force additional remediation at a site.

New Jersey took a different approach to liability by having uniform standards between programs. Whether taking part in the VCP or the Brownfields program, a successful remediation effort is concluded with the issuance of a "No Further Action" (NFA) letter and a "Covenant Not to Sue."[111] The reopener provisions are detailed in the NFA, rather than listed by default in the statute.[112] "The covenant remains effective only for as long as the real property for which the covenant was issued continues to meet the conditions of the no further action letter."[113] If the state finds that the covenant is not being upheld by the landowner (or other party that is responsible for compliance), they will notify that party and potentially give them an opportunity to fix whatever is needed to be in compliance before initiating any other action.[114] Further, "the DEP will not force innocent covenant holders . . . to go back and perform additional remediation of contamination already addressed."[115] This approach has many advantages over the way New York has implemented liability shields. Instead of having different standards for each individual program, New Jersey offers one solution that is customized for the specifics of each site that is

[109] N.Y. ENVTL. CONSERV. LAW § 27-1421(1) (McKinney 2006).
[110] *Id*. at § 27-1421(2)(a)(iv).
[111] N.J. STAT. ANN. § 58:10B-13.1 (West. Supp. 1998).
[112] *Id*. at §48:10B-13.1(a).
[113] *Id.*
[114] *Id*.
[115] Bross, *supra* note 76, at 556.

remediated. And instead of providing an ambiguous reopener phrase that is sure to spur litigation, New Jersey makes the specific conditions explicit in each NFA. The possibility does remain, of course, that liability disputes and disagreements will arise between the New Jersey and responsible parties; they will likely be minor, however, when compared with those that may arise in New York.

Part B: Cleanup Standards

When New York and New Jersey initiated their remediation programs, neither used multiple cleanup standards; today, both states have implemented rules whereby the level of remediation required varies by the proposed future use of the site. Sites intended for residential use, or that will have exposed dirt, are subject to more onerous cleanup standards than brownfields intended to remain in commercial or industrial use. The biggest advantage of this approach is that it means that costs can be substantially reduced for remediation efforts. In the old days of requiring any cleanup to return the site to its pre-use state, "the cost of remediating a brownfield [was] generally higher than the cost of starting anew on a greenfield."[116] Often, the costs of cleanup could exceed the total value of the land altogether.[117]

The use of technology plays a vital role in the ability to have different cleanup standards. "As technology advances, and technologies once thought of as experimental become commonplace in clean-up programs, professional are not longer limited in how they can approach the remediation of many contaminated sites."[118] While an interesting subject in and of themselves, the specifics technologies used in site remediations, such as bioremediation, in-situ

[116] Vogel, *supra* note 1, at 110 (Such a cost differential obviously destroys any incentive to preserve greenfields.).
[117] *See* Singband, *supra* note 8, at 316.
[118] Vogel, supra note 1, at 110-11.

vapor extraction, and air sparging, are beyond the scope of this paper. Instead, what is important is to understand the effects that using multiple cleanup standards can have on communities and the opportunities to redevelop individual sites, as well as entire neighborhoods. The next Part in this section will discuss the environmental justice considerations present in the push to redevelop contaminated properties.

Part C: Environmental Justice (Cleanup Standards revisited)

The environmental justice movement "seeks to remedy the disproportionate environmental harm suffered by minorities and lower income communities."[119] The movement grew out of the broader civil rights movement, once it became clear that heavily minority communities face unique and disproportionate environmental problems.[120] The movement really galvanized with the 1987 release of the United Church of Christ's Commission on Racial Justice report, entitled Toxic Wastes and Race in the United States.[121] "For the first time in history, Toxic Waste and Race conclusively documented the disproportionate burden that African American, Latino, Native American, and Asian American communities bear as the 'dumping grounds' for our nation's waste and pollution."[122] Later studies by the US EPA and the National Law Journal found "race a significant factor in the distribution of environmental burdens."[123]

[119] Nicholas Capuano, *Silent Blight: New York's Brownfields & Environmental Justice*, 20 Pace Envtl. L. Rev. 811, 817 (2003).
[120] *See Id*.
[121] United Church of Christ Commission for Racial Justice, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites* (1987) (*cited in* Capuano, *supra* note 114, at 819-20).
[122] Bernice Powell Jackson, *Justice and Witness Ministries board members witness in opposition to a U.S. Army plan to incinerate tons of neutralized nerve gas near East St. Louis, Illinois*, at http://www.ucc.org/justice/environment.htm.
[123] Capuano, *supra* note 119, at 820.

One of the big current debates in the environmental justice movement concerns the proliferation of state programs allowing multiple cleanup standards. The shift to lower remediation standards for some sites is premised on the idea that the major barrier to redevelopment is economic – if it were only less expensive to clean up urban sites, more would be cleaned and redeveloped.[124] In fact, according to some commentators, the problem is really one of political machinations: the responsible parties and related interests (insurers, etc.) are the ones who have been lobbying for lowered standards, as a way to evade liability and push the financial burden onto the taxpayers.[125] The initiative really started with attempts to weaken Superfund laws; when that failed initially, the responsible parties "devised a 'back-door' approach that would produce cheaper and dirtier cleanups."[126] Part of that approach was the coining of the term brownfields, to create "a new category of sites that would be regulated in accordance with newly proposed and less stringent laws."[127] The inevitable, if cynical, conclusion is that lower cleanup standards will be used predominantly in minority areas, to the detriment of the residents: "[e]conomic development initiatives that begin with lower cleanup standards benefit wealthy developers and polluter at the expense of the residents in the respective communities."[128]

At this point, it is important to separate the two categories of controls used in remediations allowing less than complete cleanups. The reader should, by this time, recognize the use of both engineering (concrete caps, filtrations systems, etc.) and institutional (deed restrictions, on-site monitoring, etc.) controls on brownfield sites. The implications of the two

[124] *See* Samara F. Swanston, *Brownfields Cleanup Standards: Consistency With the Principles of Environmental Justice Can Result in Cleanups and Economic Development Too*, 11 Fordham Envtl. Law J. 857, 863 (2000).
[125] *Id*. at 862.
[126] *Id.* at 863-4.
[127] *Id*. at 864.
[128] *Id*. at 867.

forms of controls for environmental justice concerns vary significantly. First, because most of the technologies and methods used as engineering controls are relatively new, the necessary scientific and epidemiological evidence to prove their worth – or harm – cannot in most cases exist yet. We won't know for many years whether residual amounts of toxins in soils that have been capped by a layer of asphalt pose any long-term health effects, since the technique has only been used for about a decade in most places that allow it. This raises a very difficult question: how can new technologies be equitably tested? It is not as though the government can mandate that new technologies or processes be tested exclusively in affluent, white neighborhoods to determine whether they are safe. The areas that need the most remediation will be the ones that end up being the proverbial guinea pigs, and given the history of disproportionate contamination, that will tend to be minority and poor neighborhoods in urban areas.

One solution would be to adopt a precautionary principle, under which it is best to avoid new technologies with a potential for significant (unknown) harm, at least until their harms and benefits are more accurately known.[129] While adopting such a principle would likely prove beneficial in many ways, it would also disincentivize financially marginal remediations, which are the ones likely to be in situated in poorer communities. Many remediations under state programs are only feasible because of the use of engineering controls – if complete removal of affected soil was required, the costs of cleanup would exceed the value of the property.[130] This is clearly a difficult issue – how do you encourage economic growth without gambling on the environment and citizen health? Decision-makers will need to take all of the relevant factors into account when designing remediation programs using engineering controls, paying particular attention to the environmental justice concerns, so as to avoid making decisions that prove

[129] *See generally Precautionary Principle*, at http://en.wikipedia.org/wiki/Precautionary_principle (last visited Apr. 23, 2006).
[130] *Supra*, note 117, and accompanying text.

harmful in the long run. Another option could be to create obligations of continued monitoring for landowners who put engineering controls in the ground; states could help subsidize (either directly or through tax incentives) the costs of ensuring that these methods continue to sequester the contamination over time. With accurate and timely recordkeeping, states could quickly learn which techniques (if any) fail, stop authorizing their use in new cleanups, and require additional monitoring at other sites using similar control mechanisms.

While the issues concerning the use of institutional controls are similar in many ways, they also raise unique and important concerns on their own. Allowing institutional controls in voluntary agreements gives landowners and developers an incentive to seek the least costly allowable future use, regardless of the character of the neighborhood.[131] Particularly in a state like New Jersey, which allows responsible parties in some circumstances to participate in the VCP, care needs to be taken to ensure that less economically desirable properties are treated fairly. It is not hard to imagine a brownfield in, for example, Long Island City, Queens.[132] LIC is a heavily minority, working class neighborhood with a considerable industrial presence (though much of the area is mixed-use with a strong residential base). The surrounding neighborhoods have been gentrifying over the past several years, but that growth has not made many gains into the heart of LIC. Now, we imagine an owner of a polluted, vacant site, who wants to eliminate his liabilities and make as much money as he can on the property. He enters a remediation program stating that the future use for this property will be some sort of light industry. This means that he will be subject only to a minimal cleanup; that particular cleanup

[131] This concern is admittedly shared with engineering controls, but sites lacking deed restrictions may be redeveloped in the future for any allowable zoned use, even if they have an asphalt cap or other engineering control in place.

[132] Long Island City is the westernmost neighborhood in Queens, adjacent to midtown and part of the upper east side of Manhattan. Directly north of LIC is Astoria, present home of the author. We'll pretend for the sake of this example that LIC (or a comparable area) is in New Jersey.

will cost considerably less than it would have had the future use been residential. When the remediation is completed, a deed restriction will be placed on the property explicitly prohibiting residential uses for all time. He then sells the remediated property to a developer who plans to erect some sort of light industry on the site, and the developer inherits the benefits of the liability limitations that the previous owner gained from the remediation.[133] While on the surface there does not seem to be anything wrong with this sequence, there are externalities created by the deed restriction that must be accounted for. By limiting the future development of this particular site, the value of the property will likely diminish to some degree. More importantly, though, it affects the whole neighborhood by preventing rezoning and revitalization of that neighborhood in the future.[134] As the Astoria gentrification heads south to LIC, neighborhoods that have deed restricted properties will be passed-by, potentially creating a ghetto of polluted and surrounding properties with diminished economic value, and reduced opportunities for redevelopment. In order to prevent this from happening, there would need to be an additional remediation of the contaminated sites at some point, in order to bring properties back up to the level of unrestricted – and fully productive – use.

The question then becomes, what can cities and states do to prevent this situation? It seems that the best solution is alertness: on the part of officials running the program and on the part of neighborhood and community groups in the affected areas. Stakeholders need to understand how a given proposal for redevelopment will affect not only that plot of land, but the surrounding neighborhood, taking into account demographic trends and potential future uses. Beyond that, there needs to be coordination between the different stakeholders to ensure that

[133] Alternatively, you could have a situation where an owner goes through a remediation and then does nothing with the site. The owner still gains because they have reduced their potential future liability, and increased the value of the site (though not as much as it would have been increased had a full remediation taken place).

[134] It can have the additional effect of continuing to attract similar harms (lower level cleanups) to the area by locking in lower uses in a given neighborhood.

neighborhoods don't receive a 21st century version of redlining, deed restrictions that inhibit productive growth and potentially leave empty, partially contaminated lots in the place of empty, heavily contaminated lots *sans* deed restrictions.[135] Building on this idea, the next two parts of this section will address the issues of community involvement and area planning in more detail.

Part D: Brownfield or Brownfields (plot, or area plans)?

One of the biggest things that separates the New York and New Jersey approaches to brownfield redevelopment is how the states treat areas containing multiple brownfields. Both states have implemented programs to the address this problem – New York has the "Brownfield Opportunity Areas Program" (BOAP) while New Jersey has the Brownfields Development Area Initiative" (BDAI) – but the similarities end with the names. New York's program, like the other components of the Superfund/Brownfields Law of 2003, offers up to 90% reimbursement of eligible remediation costs.[136] Funding can be provided for any or all of the three steps of the BOAP process: pre-nomination studies, nominations for the program, and an actual implementation strategy.[137] However, like other components of the 2003 law, funding is limited to municipalities and community based non-profit organization.[138]

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[135] To understand the concern here, think about what would happen fifty years from now when the light industry shop imagined in the example above had closed and left an abandoned site. Presuming that industry did not add any additional contamination to the site, there would still be the problem of the deed restriction on the land that would required an additional capital investment to remedy.

[136] *Brownfield Opportunity Areas Program Fact Sheet*, NY DEC, at http://www.dec.state.ny.us/website/der/bfield/boafs.pdf (Mar. 1, 2006)..

[137] *Id.* ("The Pre-Nomination Study provides a basic and preliminary analysis of the area affected by brownfield sites . . . . The Nomination provides an in-depth and thorough description and analysis, including an economic and market trends analysis, of existing conditions, opportunities, and reuse potential for properties located in the proposed Brownfield Opportunity Area . . . . The Implementation Strategy provides a description of the full range of techniques and actions, ranging from actions and projects that can be undertaken immediately to those which have a longer time-frame, that are necessary to implement the area-wide plan and to ensure that proposed uses and improvements materialize."). *Id*.

[138] *Id.*

New Jersey's BDAI, on the other hand, begins with the formation of a steering committee "representing the affected community and with the demonstrated commitment and leadership capacity to bring the BDA project through to completion."[139] Membership on the steering committee is not limited to municipalities or non-profits, but can include owners, users, and responsible parties.[140] The committee then holds an initial planning meeting with personnel from NJ DEP and other related offices.[141] Following that, another meeting is held at which the resources available for the remediation are identified. The steering committee then must develop a BDA Remediation and Reuse Plan, which "reflect[s] substantial private party and public input on a comprehensive vision for the BDA, including both brownfield and non-brownfield properties."[142] Afterwards, a site-specific timeline is developed and implemented, with oversight from the DEP that requires reauthorization of the plan on an annual basis to ensure adequate progress has been made.[143]

There are many potential benefits from handling brownfields on an area rather than individual basis: potential economies of scale, by eliminating redundancies that would be present by handling closely-situated sites separately;[144] improved management of contaminated soils, by "allow[ing] contaminated soil from one part of the BDA to be excavated . . . and, where properly protected, placed under buildings, parking lots, roadways, or elsewhere within the BDA"[145]; and myriad other efficiencies gained by having a single contact point within the

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[139] *Brief Synopsis of NJDEP's Brownfield Development Area Initiative*, NJ DEP, at http://www.nj.gov/dep/srp/brownfields/bda/bda_synopsis.htm (Feb. 17, 2006).
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id*.
[144] D. Evan van Hood, Judith Auer Shaw, Kenneth J. Kloo, *The Challenge of Brownfield Clusters: Implementing a Multi-site Approach for Brownfield Remediation and Reuse*, 12 N.Y.U. Envtl. L. J. 111, 134 (2003) (one can imagine the saving gained from having one set of heavy equipment (bulldozers, backhoes, dumpsters, etc.) handle the entire area, as opposed to having to bring in new equipment for each separate plot of land).
[145] *Id*. at 136.

administrative bureaucracy for all the properties within the BDA. In order to capture these benefits, however, the program must be well-designed and implemented. Given the information provided about the respective state programs, it is difficult to believe that New York will see anywhere near the success that New Jersey can find in redeveloping clustered brownfields in urban areas. A quick search of the New York Environmental Site Remediation Database illustrates the problem. Looking once again at Long Island City, Queens (this time for real), there is a cluster of brownfields around Center Boulevard and 48th Street.[146] The site identified as "Queens West (Hunter's Point) Parcel 9"[147] "is currently vacant, with areas of overgrown vegetation. Surrounding parcels include Parcel 8 of the Queens West development to the west (site #C241087), Stage II of the Queens West development to the north (Site # V00505), commercial uses to the east, and mixed uses to the south, including residential, commercial, a day care and a school."[148] Investigations of the site began in 1985, but have not yet yielded any major cleanup efforts.[149] The major problem is that there are three contaminated sites in close proximity, all as a result of having various manufacturing plants located on site for the better part of a century; however, the investigations and cleanups are all being handled individually, because there is no mechanism for aggregating the sites (Site #V00505 is owned by Pepsi Co., Inc.;[150] the others have no site owner listed). Had these particular sites been located in New Jersey, they would be eligible for the BDAI, and could be remediated and redeveloped as one larger parcel, with input from all relevant stakeholders and funding for the owner of the privately owned plot(s).

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[146] The database is located at http://www.dec.state.ny.us/cfmx/extapps/derfoil/index.cfm?pageid=3; results pages are not given unique addresses. The search was conducted by specifying the "County" field as Queens and leaving all other search terms blank.
[147] Site Code C241049
[148] From the "Site Description" field in this property's database record.
[149] *Id*., though three underground storage tanks were removed in 1995.
[150] Site Record for Stage II Queens West Waterfront Development, Site Code: V00505.

For an example of how New Jersey's approach has benefited communities, we can return to Camden. In an area less than two miles northeast of the Camden site discussed in Section II, one can find the Cramer Hill BDA. This consists of 8 properties, six adjacent to each other, on the waterfront of the Delaware River.[151] "The Cramer Hill neighborhood has beautiful vistas of the Delaware River of which the community would like to take full advantage by planning for open space along the river with passive recreational uses. In addition, the community would like to provide residential opportunities along the river to take advantage of the waterfront environment."[152] By integrating the 8 separate properties into one larger plan, the City and State are able to redevelop them at the same time as a vibrant, mixed-use area. This would not be nearly as easy if each parcel had to be remediated and redeveloped individually, given the economies of scale that would be lost by a piecemeal approach.

Part E: Brownfields alone, or a Comprehensive Redevelopment Plan?

Finally, we turn to how the brownfield programs are integrated overall into the state's urban land use programs. Once again, New Jersey is miles ahead of New York in this area. It is difficult to determine whether New York's programs are part of a larger program, or whether they are just piecemeal solutions developed in isolation to tackle specific problems. The NY DEC's Division of Environmental Remediation webpage states that the purpose of the BCP is to "enhance private-sector cleanup of brownfields and to reduce development pressure on 'greenfields.'"[153] However, it is difficult to see any implementation of a comprehensive strategy

[151] *Cramer Hill Brownfields Development Area*, NJ DEP Site Remediation Program (Dec. 17, 2003), at http://www.nj.gov/dep/srp/brownfields/bda/cramer_hill.htm
[152] *Id*.
[153] *Division of Environmental Remediation*, NY DEC, at http://www.dec.state.ny.us/website/der/.

to protect greenfields in New York. The primary indications of state policy come from the Environmental Conservation Law:

> It shall further be the policy of the state to foster, promote, create and maintain conditions under which man and nature can thrive in harmony with each other, and achieve social, economic and technological progress for present and future generations by: a. Assuring surroundings which are healthful and aesthetically pleasing; b. Guaranteeing that the widest range of beneficial uses of the environment is attained without risk to health or safety, unnecessary degradation or other undesirable or unintended consequences; c. Promoting patterns of development and technology which minimize adverse impact on the environment[.][154]

Beyond this generate statement of policy, New York has provided scant guidance for inter-agency cooperation, which is often necessary for remediations to be successful.[155] Without such cooperation, permits can be delayed for years, necessary assessments/inspections may not take place, and myriad other complications may arise from a lack of communication within the administrative bureaucracy. Overall, it appears as though New York has a ways to go before their brownfields program is fully integrated into a larger state program for either greenfield protection or urban revitalization.

New Jersey, on the other hand, has a comprehensive land use plan, and an office dedicated to carrying out the policy goals. The Office of Smart Growth is a branch of the NJ Department of Community Affairs, and takes an explicitly inter-agency approach to managing development in the State.[156] "Smart Growth is the term used to describe well-planned, well-managed growth that adds new homes and creates new jobs, while preserving open space,

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[154] N.Y. ENVTL. CONSERV. LAW § 1-0101 (McKinney 2006)

[155] *See* van Hood, *supra* note 144, at 146-7; the only guidance the State provides is the Brownfield Agency Directory, NY DEC, at http://www.dec.state.ny.us/website/der/bfield/bfdirectory.pdf (listing addresses and missions of state agencies that deal with brownfields in some capacity); SUNY College of Environmental Science and Forestry, SUNY Center for Brownfield Studies (May 26, 2004), at http://sunybrownfields.esf.edu/index.htm, provides little useful information beyond the courses offered in the program and outdated pages supporting the (then-proposed) Brownfield Act which became three full years ago. *Id*.

[156] NJ Department of Community Affairs: Office of Smart Growth, at http://www.nj.gov/dca/osg/.

farmland, and environmental resources. . . . Smart Growth principles include mixed-use development, walkable town centers and neighborhoods, mass transit accessibility, sustainable economic and social development and preserved green space."[157] Included in the plan is the InterAgency Smart Growth Team, whose purpose "is to create a united interagency front, which will serve to inform decision making at other levels including the State Planning Commission and it's [sic] committees and the Governor's Cabinet and their agencies represented on the team."[158] This is exactly the type of large scale planning that is missing from New York's programs.

By focusing its efforts on redevelopment of contaminated sites in urban areas and preservation of open space in less developed regions of the state, New Jersey is laying the foundation for a sustainable growth program. As the most densely populated state in the nation,[159] these issues are clearly of primary concern to lawmakers. There are thousands of brownfields throughout the state, and precious few greenfields remaining. By tackling these problems from the top down, by ensuring that all (many?) stakeholders have a say in the process, and by creating effective inter-agency partnerships, New Jersey has ensured that its programs in brownfield redevelopment have a great chance for success.

Part F: Conclusion

The problems inherent with brownfield redevelopment are most acute for heavily populated urban areas, where growth can best be accomplished by infill, rather than continued sprawl. This paper has identified some of the key issues surrounding brownfields and elucidated how two states have attempted to solve them. Neither state has a perfect solution, by any means.

[157] *Id*. at http://www.nj.gov/dca/osg/smart/index.shtml.
[158] *Id*. at http://www.nj.gov/dca/osg/commissions/isgt.shtml.
[159] *US States Ranked by Population Density: 1990*, at http://www.demographia.com/db-landstatepopdens.htm.

New York's programs fall short of the ideal for a number of reasons, including the inability of private parties to receive funding for remediation and a lack of a coherent state-wide policy. New Jersey's programs have addressed those two problems, but have their own weaknesses, including an onerous process for industrial land sales, and potential for unfairness by allowing properties in poor and minority areas to be cleaned to lower safety standards, with uses locked in by deed restrictions. Additionally, it is difficult to measure the practical differences in the program because the latest incarnations in both states are less than five years old. As anyone who follows the workings of government (at any level) is aware, a beautifully laid plan can be thwarted by partisan politics, bureaucratic incompetence, agency turf wars, and myriad other complications. The reader must be aware that the positive and negative components of the programs discussed herein may operate differently than planned once implemented in the real world. New Jersey, in particular, has quite a famed history of corruption, which can come into play any time a program provides large amounts of funding to people. Even current governor John Corzine alluded to the state's history of corruption during his campaign, promising (as all politicians do) to run his administration differently.[160]

It is, of course, impossible to create a perfect regulatory program – any government action will spawn unintended consequences of some sort – whether through intentional misdeeds or unforeseen reactions. It is exceedingly important, then, that state legislatures and administrative agencies move cautiously to avoid undermining their own goals. This is particularly the case when dealing with public safety issues and potential discrimination against minorities or those who are economically disadvantaged. Instead of adding program on top of program, as the federal government and the states continue to do, it may be a good idea for

[160] *A Prouder New Jersey*, Corzine for NJ, at http://www.corzineforgovernor.com/plans/prouder/ ("In addition to being a source of embarrassment for the state, the fact is that the residents of New Jersey pay for the misdeeds of government decision-makers by paying in effect, a 'corruption tax.').

legislators to stop and review the piecemeal implementations, and look to see how they can be streamlined and combined into fewer, but more effective programs with better coordination and oversight. The core tenets of a successful brownfield redevelopment program exist in both states; the legislatures and administrative agencies who carry out the mandates now need to work to ensure that their efforts are creating the most effective programs possible. Both states have a long way to go, but there is no rational reason why, with a little hard work, these well-intentioned efforts should fail to achieve positive results in redeveloping brownfields, revitalizing urban areas, and protecting the scarce pristine lands that remain undeveloped.