AMENDING CERCLA TO ENCOURAGE THE REDEVELOPMENT OF BROWNFIELDS: ISSUES, CONCERNS, AND RECOMMENDATIONS

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I. INTRODUCTION

Over the past four years, congressional leaders have introduced several complex bills in an effort to reauthorize the Comprehensive Environmental Response, Compensation, and Liability Act of 1980[1] (CERCLA).[2] These bills contain proposals that range in scope from those that would restructure CERCLA to those that only would address specific issues and concerns.[3] This Article examines some of the current proposals that would amend CERCLA to encourage the restoration and redevelopment of "brownfields." The United States Environmental Protection Agency (EPA) defines brownfields as "abandoned, idled or under used industrial and commercial sites where expansion or

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1. 42 U.S.C. §§ 9601-9675 (1994).

2. *See* Charles de Saillan, *Superfund Reauthorization: A More Modest Proposal*, 27 Envtl. L. Rep. (Envtl. L. Inst.) No. 5, at 10201 (May 1997) [hereinafter *Superfund Reauthorization*].

3. *See id.* at 10202.

redevelopment is complicated by real or perceived environmental contamination that can add cost, time, or uncertainty to a redevelopment project."[4]

Estimates of the number of brownfields vary, but one source has suggested that there are as many as 650,000 brownfield sites throughout the United States.[5] Investors incur a cost of $250,000 to remedy an average brownfield site.[6] Encouraging remediation of these sites would improve the environment and could save taxpayers a great deal of money. At least one estimate suggests that $100 billion in taxes could be generated and 100,000 new jobs could be created by the use of abandoned brownfield sites.[7]

In order to evaluate how current proposals to amend CERCLA might affect brownfield remediation and restoration, Part II of this Article reviews some key provisions of CERCLA. Part III then discusses specific problems in brownfield remediation and the major issues prompting proposed changes in CERCLA. The proposed changes discussed in Part III include amendments to CERCLA's liability scheme, increased administrative efforts to facilitate brownfield development, redefined cleanup standards, revamped state cleanup programs, and increased financial incentives to encourage brownfield redevelopment. Part IV of this Article concludes that brownfield remediation and restoration should be encouraged and that certain sections of CERCLA should be amended to facilitate such activities; however, the basic framework of CERCLA, including its liability scheme, should remain intact.

II. AN OVERVIEW OF CERCLA

A. Response Actions

During the 1970s and early 1980s, the American public became

4. REGION 5 OFFICE OF PUB. AFFAIRS, EPA, BASIC BROWNFIELDS FACT SHEET (1996); *see also* Brownfields Showcase Communities, 62 Fed. Reg. 44,274 (1997).

5. *See Multiple Factors Should Shape Choice of Technology for Brownfields*, 27 Env't Rep. (BNA) No. 48, at 2489 (April 11, 1997).

6. *See id.*

7. *See Administration of Brownfields Program Questioned at Hill Appropriations Hearing*, 27 Env't Rep. (BNA) No. 49, at 2511 (April 18, 1997).

increasingly alarmed by mounting reports of seriously contaminated, abandoned hazardous waste sites throughout the nation.[8] In 1980, following the discovery of a bubbling swamp of toxic chemicals at Love Canal, New York, Congress enacted CERCLA to remedy and deter such environmental pollution.[9] In enacting CERCLA, Congress established a multibillion dollar fund (the "Superfund") to help finance the cleanup of such sites.[10] CERCLA is generally administered by the EPA; however, CERCLA does allow the EPA to enter into cooperative agreements with states so that states may take the lead cleanup role in a particular case.[11]

CERCLA authorizes the EPA to use Superfund monies to implement two kinds of cleanup actions, or "response actions," at Superfund sites.[12] The first type of response action is a "removal action." Removal actions are short-term cleanup measures.[13] Examples of removal actions include the provision of temporary clean water supplies, the removal of leaking drums from a site, the temporary evacuation of a site's residents, and the provision of any other emergency assistance that may be necessary at a given site.[14] The

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8. *See id.* at n.4. The frequency and prevalence of news stories throughout the late 1970s and early 1980s helps to demonstrate the severity of mismanaged and uncontrolled hazardous waste sites. *See Superfund Reauthorization, supra* note 2, at n.4; *see also* Andrew Blake, *Dumpers: they Drove By Night*, BOSTON GLOBE, Mar. 22, 1981, at 22; Michael H. Brown, *Love Canal, U.S.A.*, N.Y. TIMES, Jan. 21, 1979, § 6 (Magazine), at 23; Donald Janson, *Jersey Hunts Dumpers of Toxics*, N.Y. TIMES, Jan. 30, 1978, at A1; Donald G. McNeil Jr., *Upstate Waste Site May Endanger Lives*, N.Y. TIMES, Aug. 2, 1978, at A1; Roger A. Rosenblatt, *Toxic Flow From Acid Pits Creates Water Basin Peril*, L.A. TIMES, Aug. 7, 1984, at 1; Peggy Strain, *Wells Could be Tainted, Homes West of Arsenal Told*, DENVER POST, Jan. 16, 1981, at 1.

9. *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767. CERCLA does not regulate the use of hazardous substances. Rather, it provides a system for identifying and cleaning up hazardous substances that have been released into the environment. In contrast, the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992 (1994), addresses recycling and disposal of hazardous substances. *See generally id.*

10. *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, § 221, 94 Stat. 2801.

11. *See* 42 U.S.C. § 9604(d)(1) (1994). Such agreements, however, are uncommon. *See Superfund Reauthorization, supra* note 2, at 10208.

12. *See* 42 U.S.C. § 9611. In implementing a response action, the EPA may either sue liable parties to recover its response costs or compel liable parties to implement a cleanup. *See id.*

13. *See Superfund Reauthorization, supra* note 2, at 10206.

14. *See* 42 U.S.C. § 9601(23). Generally, CERCLA limits removal actions to a maximum of twelve months and $2 million. *See id.* § 9604(c)(1); *see also Superfund Reauthorization, supra* note 2, at 10206.

second type of response action is a "remedial action." Remedial actions are long-term response measures.[15] These might include permanent groundwater remediation at a site and permanent relocation of a site's residents.[16] The EPA establishes procedures and methods for selecting and evaluating hazardous waste sites and for conducting cleanup actions under the National Contingency Plan (NCP).[17] Steps in the NCP process include performing a preliminary assessment and site inspection, conducting a remedial investigation and feasibility study, publishing a proposed remediation plan, and issuing the Agency's record of decision.[18]

The National Priorities List (NPL) is part of the National Contingency Plan. Using criteria based on "risks to public health, welfare, or the environment,"[19] the EPA evaluates and ranks sites according to their contamination levels and then lists those rankings on the NPL.[20] For remedial actions to be financed by the Superfund, the corresponding sites must be listed on the NPL. Listing on the NPL, however, is not required for the funding of removal actions.[21] Since the establishment of the first NPL in September 1983, the number of listed sites has grown from 406 sites to 1,238 sites.[22]

B. Cleanup Standards

Congress established statutory requirements for cleanup standards at Superfund sites in the Superfund Amendments and Reauthorization Act of 1986 (SARA).[23] Under section 121 of CERCLA,[24] remedial actions

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15. *See* 42 U.S.C. § 9601(24).

16. *See Superfund Reauthorization, supra* note 2, at 10206; *see also* 42 U.S.C. § 9601(24).

17. The NCP pre-dates CERCLA. The NCP was first drafted pursuant to the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251-1387 (1994), to address the problem of oil spills. *See* J. GORDON ARBUCKLE ET AL., ENVIRONMENTAL LAW HANDBOOK 274 (12th ed. 1993) [hereinafter ENVIRONMENTAL LAW HANDBOOK]. The NCP, as originally enacted, set forth criteria for disposing of oil and other hazardous substances under the FWPCA. *See id.*

18. *See Superfund Reauthorization, supra* note 2, at 10206.

19. *See* ENVIRONMENTAL LAW HANDBOOK, *supra* note 17, at 273.

20. *See id.*

21. *See id.* at 274.

22. *See Superfund Reauthorization, supra* note 2, at 10207.

23. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 9601-9675 (1994)). Congress also increased available cleanup funds when it passed SARA.

24. 42 U.S.C § 9621.

must meet the requirements of the NCP and be cost effective.[25] Section 121(b) gives preference to remedial actions involving treatment that "permanently and significantly reduces the volume, toxicity or mobility of hazardous substances."[26] The statute further specifies that off-site disposal of hazardous substances without such treatment is the "least favored alternative."[27]

A major goal of SARA was "to establish a statutory bias toward the implementation of permanent treatment technologies and permanent solutions whenever they are feasible and achievable."[28] In furtherance of this goal, section 121(d) of CERCLA now requires the EPA to select remedial actions that attain cleanup to a degree that "assures protection of human health and the environment."[29] CERCLA also requires the EPA to review completed remedial actions once every five years at sites where hazardous substances have been left in place.[30]

C. Natural Resource Damages

Most CERCLA actions involve costs for response actions at a particular cleanup site. However, CERCLA also contains an important provision permitting the government to recover an amount equal to the estimated value of an area's natural resources.[31] Under section 107(a)(4)(C), a responsible party may be liable for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss."[32] The government has increasingly used this provision in CERCLA cases to recover the

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25. *See* ENVIRONMENTAL LAW HANDBOOK, *supra* note 17, at 279.

26. 42 U.S.C. § 9621(b).

27. *Id.* § 9621(b)(1).

28. 132 CONG. REC. 23,438 (1986) (statement of Sen. Chafee). Senator Chafee believed that SARA was "the only way to assure the successful completion of the cleanup effort." *Id.* Under CERCLA, a remedy must achieve "all Applicable or Relevant and Appropriate Requirements (ARARs) [if] hazardous substances are left on-site." ENVIRONMENTAL LAW HANDBOOK, *supra* note 17, at 280. ARARs include all federal environmental laws and regulations, in addition to any state standards that are more stringent than federal regulations. *See id.* (citing 42 U.S.C. § 9621(d)(2)(A)).

29. 42 U.S.C. § 9621(d)(1).

30. *See id.* § 9621(c). The five-year requirement is a minimum standard. An EPA administrator may choose to inspect a site as often as he or she deems necessary. *See id.*

31. *See id.* § 9607(a)(4)(C).

32. *Id; see also* ENVIRONMENTAL LAW HANDBOOK, *supra* note 17, at 306.

lost value of natural resources.[33]

D. Liability under CERCLA

CERCLA imposes liability on four categories of "Potentially Responsible Parties" (PRPs): (1) parties that generated or arranged for the treatment or disposal of hazardous substances; (2) parties that transported hazardous substances for treatment or disposal; (3) present owners and operators of facilities at which substances have been disposed; and (4) past owners and operators of facilities at which hazardous substances have been disposed.[34]

PRPs are liable for response costs at a contaminated site. Response costs may include those costs associated with either removal actions or remedial actions.[35] Liability under CERCLA is strict, joint and several, and retroactive.[36] CERCLA's imposition of strict liability on a PRP means that a PRP may be liable under CERLCA regardless of whether it deliberately or negligently caused environmental damage.[37] Unless a

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33. *See* ENVIRONMENTAL LAW HANDBOOK, *supra* note 17, at 306. Retroactive liability is limited under this provision. No damages can be recovered for releases that occurred before December 11, 1980. *See* 42 U.S.C. § 9706(f).

34. *See* 42 U.S.C. § 9607(a); *see also Superfund Reauthorization*, *supra* note 2, at 10203.

35. *See* ENVIRONMENTAL LAW HANDBOOK, *supra* note 17, at 295. Examples of potential response costs include the costs of detecting, sampling, identifying, monitoring, and disposing of hazardous substances. Such costs may also include applicable attorney's fees and consulting fees. *See id.* at 295-96. The EPA often hires attorneys and environmental consultants to ensure that cleanup measures will comply with CERCLA. *See id.*

36. *See Superfund Reauthorization*, *supra* note 2, at 10203.

37. Strict liability for hazardous activities is not a new concept but is derived from an early English common law case, *Rylands v. Fletcher*, 3 H. & C. 774, 159 Eng. Rep. 737 (Ex. 1865), *rev'd*, 1 L.R.-Ex. 265 (1866), *aff'd*, 3 L.R.-E. & I. App. 330 (H.L. 1868). In *Rylands*, the Exchequer Chamber held that a "person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril." 1 L.R.-Ex. 279. This rule has been applied throughout the United States to activities such as the transportation of hazardous substances, the spraying of hazardous substances, the emission of noxious gases, and the keeping of explosives and flammables. *See Superfund Reauthorization*, *supra* note 2, at 10203 n.17 (citing S. REP. NO. 96-848, at 33 (1980)).

Courts have traditionally imposed strict liability when "the defendant's activity is unusual and abnormal in the community, and the danger which it threatens to others is unduly great. . . ." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 75, at 537 (5th ed. 1984). In addition, courts will impose strict liability based on the fact that a defendant has voluntarily and intentionally subjected others in his vicinity to a potentially dangerous risk. *See id.*; *see also NEPA to CERCLA: Completing The Circle*, 7 Envtl. F. (Envtl. L. Inst.) No. 6, at 11 (Nov./Dec. 1990). Philip T. Cummings, chief counsel of the Senate Committee on Environmental and Public Works during the drafting of CERCLA and minority

PRP can prove that the harm that it caused is divisible, it may be jointly and severally liable for all of the cleanup costs at a site.[38] Moreover, because courts have held that CERCLA liability is retroactive,[39] a court may impose liability on a PRP for activities that preceded CERCLA's enactment in 1980.[40]

E. Exemptions and Exclusions

There are few statutory defenses under CERCLA. Affirmative defenses to liability include proof that the release of a hazardous substance[41] was caused solely by an act of God, an act of war, or an act or omission of an independent third party other than an employee, agent, or party with whom there was a contractual relationship (the "third-party" defense).[42] In the 1986 SARA amendments, Congress narrowed its definition of "contractual relationship," thereby expanding the third-party defense under CERCLA.[43] For example, according to Congress's new definition, a contractual relationship does not exist between a purchaser and seller of contaminated property if after having made all appropriate inquiries about the property, the purchaser was

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counsel during the development of SARA, has written that "the core concepts of CERCLA are the liability provisions, which adopt the common law principle of strict liability for the conduct of abnormally dangerous activities." *Id.* According to the *Second Restatement* of *Torts*, in determining strict liability, "[t]he essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care." RESTATEMENT (SECOND) OF TORTS § 520(f) (1977).

38. *See Superfund Reauthorization*, *supra* note 2, at 10203. Section 113(f)(2) of CERCLA provides that a party can seek contribution from other liable or potentially liable parties who may have contributed to the contamination of a site. *See* 42 U.S.C. § 9613(f). It is the responsibility of a PRP, rather than the EPA, to collect contribution from other liable or potentially liable parties. *See Superfund Reauthorization*, *supra* note 2, at 10203.

39. *See Superfund Reauthorization*, *supra* note 2, at 10204 (citing, inter alia, Nova Chems. Inc. v. GAF Corp., 945 F. Supp. 1098 (E.D. Tenn. 1996) (upholding the constitutionality of retroactive application of CERCLA)).

40. *See Superfund Reauthorization*, *supra* note 2, at 10203-04.

41. *See* 42 U.S.C. § 9601(14)(defining the term "hazardous substance"). CERCLA specifically excludes from its definition of hazardous substances any petroleum substances, including various forms of natural gas. *See id.; see also* Michael M. Gibson & David P. Young, *Oil and Gas Exemptions Under RCRA and CERCLA: Are They Still "Safe Harbors" Eleven Years Later?*, 32 S. TEX. L. REV. 361 (1991).

42. *See* 42 U.S.C. § 9607(b).

43. *See* 42 U.S.C. § 9601(35).

unaware of the contamination at the time of purchase.[44]

Another CERCLA exemption that has been the focus of litigation involves the liability of secured creditors as "owners or operators." Section 101(20)(A) of CERCLA expressly excludes from the term "owner or operator" "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."[45] This security interest exemption is designed to protect lenders from liability if they merely retain a security interest in contaminated property. In the past, courts have construed this exemption narrowly; however, in 1997, Congress clarified the exemption in response to lenders' concerns.[46]

Another issue that Congress addressed in SARA was the concern that CERCLA liability could be imposed on parties that contributed only minor amounts of hazardous substances to a site.[47] Under the de minimis settlement provisions in SARA, the EPA may enter into an expedited settlement with a party that disposed of relatively small amounts of hazardous substances at a site.[48] The EPA then provides such parties with a covenant not to sue, which amounts to immunity from contribution suits.[49] The law as amended also allows the EPA to make "nonbinding preliminary allocations of responsibility" (NBARs) for sites that involve multiple PRPs.[50] CERCLA further allows the EPA to enter into "mixed funding" agreements by which the government assists liable parties in bearing the cost of a cleanup by granting the liable parties a portion of Superfund money.[51]

F. State Authority in CERCLA Cleanup Actions

Unlike other major federal environmental laws such as the Clean Air

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44. *See id.*

45. *Id.* § 9601(20)(A).

46. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 2502, 110 Stat. 3009, 462-67.

47. *See Superfund Reauthorization, supra* note 2, at 10205.

48. *See* 42 U.S.C. § 9622(g).

49. *See id.*

50. *See id.* § 9622(e)(3). In an NBAR, the EPA allocates among liable parties their respective percentages of the total response cost. *See id.*

51. *See Superfund Reauthorization, supra* note 2, at 10205; *see also* 42 U.S.C. § 9622(b)(1), (e)(3).

Act[52] and the Clean Water Act,[53] CERCLA does not establish a federal and state partnership for its implementation and enforcement. Although SARA gives states the authority to take the lead in response actions under cooperative agreements with the EPA, such agreements are rare.[54] Regardless of whether a state assumes control of a cleanup, it may still pay a significant percentage of the response costs that are funded by the Superfund.[55]

G. Concerns Underlying Proposals to "Fix" CERCLA

Many critics of CERCLA are convinced that CERCLA has been an utter failure. Critics focus on the expense of the program and argue that, after more than twelve years and $12 billion, only 220 of the currently identified 1200 sites have been cleaned.[56] Critics also argue that the threat of joint and several liability under CERCLA encourages litigation by, and between, PRPs, successor corporations, government agencies, and insurers.[57] They urge Congress to reform the law to permit parties to negotiate a "fair-share payment" of the costs of cleanup at a site, to streamline the cleanup process, and to provide more flexibility in setting

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52. Clean Air Act, 42 U.S.C. §§ 7401-7671q, 7410, 7412(e) (1994).

53. Clean Water Act, 33 U.S.C §§ 1251-1387, 1315, 1316(c), 1318(c), 1319(a), 1326(c), 1329, 1342, 1344 (1994).

54. *See Superfund Reauthorization*, *supra* note 2, at 10208. The EPA has published regulations governing cooperative agreements. *See* Cooperative Agreements and CERCLA State Contracts for CERCLA Response Actions, 40 C.F.R. §§ 35.6000-.6820 (1996).

55. States must pay or assure payment of 10% of remedial action costs, with the state share increasing to at least 50% for the cleanup of sites that were operated by a state or one of its political subdivisions, either directly or through contract. The EPA may increase the state contribution beyond 50% depending on the state's degree of responsibility for the release. *See* 42 U.S.C. § 9604(c)(3)(C).

56. *See Superfund Needs Reform to Speed Toxic Cleanup*, U.S.A. TODAY, Feb. 2, 1994, at 10A. According to one observer, the program is "absurdly expensive, hideously complex, and [] sometimes patently unfair. As a result, it invites litigation the way dung attracts flies; not by reeking, but just by being." *Id.*

57. *See* Robert W. McGee, *CERCLA: It's Time for Repeal After a Decade of Failure*, 12 UCLA J. ENVTL. L. & POL'Y 165 (1993). McGee argues that joint and several liability has caused a litigation explosion, exacerbates harm to the environment, allocates the cost of cleanup to the wrong parties, taxes producers rather than polluters, and harms the United States's ability to compete abroad. *See id.* at 173-80; *see also* Lynda J. Oswald, *New Directions in Joint and Several Liability Under CERCLA?*, 28 U.C. DAVIS L. REV. 299 (1995) (examining joint and several liability under CERCLA).

cleanup standards.[58]

Supporters of CERCLA, on the other hand, note that CERCLA has made considerable progress in cleaning up hazardous waste sites.[59] One supporter of CERCLA, New Mexico Assistant Attorney General Charles de Saillan, has noted that almost all NPL sites require some form of groundwater remediation.[60] De Saillan has pointed out that this kind of cleanup is an inherently lengthy process and necessarily takes many years to complete.[61] Despite the fact that such cleanup is a slow and difficult process, as of September 1996 groundwater remediation had been completed at 410 NPL sites.[62] Moreover, through September 1996, the EPA had conducted 4,023 removal actions: 1,226 at NPL sites and 2,797 at non-NPL sites.[63]

In addition, supporters of CERCLA believe that any unfairness in the CERCLA liability scheme is outweighed by CERCLA's benefits.[64] According to the EPA, liable parties now conduct seventy-two percent of all remedial actions.[65] In addition, potential liability provides a powerful incentive for "voluntary cleanups" under state cleanup programs.[66] The liability scheme also provides an incentive for industry to manage its waste responsibly and to choose reliable transporters and disposal facilities.[67] Supporters also disagree with CERCLA critics' characterization of CERCLA's transaction costs as excessive. They

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58. *See, e.g.*, John C. Buckley, *Reducing the Environmental Impact of CERCLA*, 41 S.C. L. REV. 765, 811 (1990) (presenting "a draft proposal for preventing ... needless consumption while retaining the full positive force of CERCLA liability"); John M. Hyson, *"Fairness" and Joint and Several Liability in Government Cost Recovery Actions under CERCLA*, 21 HARV. ENVTL. L. REV. 137 (1997) (examining joint and several liability under CERCLA, and noting that courts should not be permitted to apportion liability based on a court's determination of what constitutes a "fair" allocation of damages among PRPs).

59. *See, e.g.*, Charles de Saillan, *In Praise of* Superfund, ENVIRONMENT, Oct. 1993, at 42.

60. *See Superfund Reauthorization, supra* note 2, at 10210. Complete groundwater cleanup is an important step because only after such cleanup can operation and maintenance of a site begin. *See id.* at 10211.

61. *See id.* at 10210-11.

62. *See id.* at 10211.

63. *See id.*

64. *See id.*

65. *See id.* (citing *Superfund Reauthorization: Hearings Before the Subcomm. on Superfund, Recycling, and Solid Waste Management of the Senate Comm. on Env't and Pub. Works*, 103d Cong. 180 (1993) (statement of Carol M. Browner, EPA Administrator)).

66. *See id.*

67. *See id.*

point out that the numbers used by the critics are "front loaded" and appear inaccurate because a disproportionately large share of transaction costs are incurred early in the implementation of a CERCLA remedy.[68] Supporters contend that CERCLA's transaction costs will decrease as the number of remedial actions nearing completion increases.[69]

Against the backdrop of this debate, Congress began its most recent attempt to reauthorize CERCLA in 1993.[70] In 1994, the EPA sent a proposed consensus bill to Congress, representing the Clinton Administration's effort to develop a proposal that would be acceptable to industry, states, municipalities, and environmental groups.[71] Although CERCLA reauthorization was a top priority of the 104th Congress,[72] Congress was unable to pass comprehensive CERCLA reform legislation[73] or extend the federal government's tax authority, which would have been necessary to fund CERCLA reform.[74]

III. PROPOSALS TO AMEND CERCLA TO FACILITATE BROWNFIELD REMEDIATION

Proposals to amend CERCLA to facilitate brownfield remediation and redevelopment are important because these projects can have significant benefits for the environment, urban residents, property

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68. *See id.* Many critics of CERCLA rely on a 1992 RAND study which concluded that, from 1986 to 1989, large industrial firms "spent an average of 21 percent of their CERCLA-related expenditures on transaction costs." *Id.* (citing LLOYD S. DIXON ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, SUPERFUND PRIVATE-SECTOR EXPENDITURES AND TRANSACTION COSTS 45 (1994)). However, CERCLA supporters point out that "RAND placed an important caveat on its conclusions[:] the transaction cost share falls as a site moves through the remedial process." *Id.* (citing RAND INSTITUTE FOR CIVIL JUSTICE, *supra*, at 45).

69. *See id.*

70. *See Superfund Reauthorization: Hearings Before the Subcomm. on Superfund, Recycling, and Solid Waste Management of the Senate Comm. on Env't and Pub. Works*, 103d Cong. 180 (1993); *Superfund Program: Hearings Before the Subcomm. on Transp. and Hazardous Materials of the House Comm. on Commerce*, 103d Cong. (1993).

71. *See Superfund Reauthorization*, *supra* note 2, at 10214.

72. *See id.*

73. *See id.* at 10215. Many of the bills that aim to reauthorize CERCLA are extremely long and extremely complicated, and many of the issues are controversial. *See id.*

74. *See id.* Congress did pass legislation addressing the issue of lender liability under CERCLA, an issue on which there was general consensus. *See id.*; *see also* Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

developers, and taxpayers.[75] Encouraging the redevelopment of brownfield sites especially can create jobs and economic growth in inner cities, the areas that are most often burdened by brownfields.[76] Conversely, a failure to encourage redevelopment of brownfield sites may lead to uncertainty about the costs and liabilities associated with developing a given piece of property, which in turn might lead industrial developers to seek only those properties that they know are free of environmental problems. Such development decisions can lead to increased urban sprawl, increased transportation costs, escalation in the industrialization of "greenfield sites,"[77] and deterioration of the urban economic base.[78]

Two chief problems that discourage developers from purchasing and developing environmentally impaired property are fear of unforeseeable liability and lack of future profitability:[79]

> The problems with an environmentally impaired property are primarily ones of uncertainty and the possibility of a lack of profitability or ability to provide sufficient cash flow to service its owner's and creditor's requirements. These conditions result from both the operation of the physical facts of the environmental problem, especially uncontained impairment types where the physical parameters of the problem are difficult or impossible to establish with certainty or precision, and from the operation of law and the governing agencies that frequently take the approach of requiring the property owner to sign a blank check to cover an unknown cost of remediation.[80]

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75. *See The Brownfields Phenomenon: An Analysis of Environmental, Economic, and Community Concerns*, 25 Envtl. L. Rep. (Envtl. L. Inst.) No. 7, at 10337 (July 1995).

76. *See id.*

77. The term "greenfield sites" refers to undeveloped property. Greenfield sites are usually located in rural or suburban areas. *See General Policy: Agencywide Initiative Under Way to Address Urban Environmental Issues*, 28 Env't Rep. (BNA) No. 37, at 1797 (Jan. 23, 1998)

78. *See The Brownfields Phenomenon: An Analysis of Environmental, Economic, and Community Concerns*, *supra* note 75, at 10338.

79. *See id.* at 10337.

80. Albert R. Wilson, *Measuring Environmental Property Value Damages; A Discussion of Damage Measurement and Brownfields*, 4 J. ENVTL. L. & PRAC. 5, 13 (1997).

Although brownfield redevelopment increases the marketability and economic value of properties and improves the environment, brownfield redevelopment must not compromise the environmental health and the well-being of local residents. Environmental justice concerns are important because brownfields are most often found in inner-cities and economically depressed neighborhoods.[81] While the goals of redevelopment include the creation of employment in such areas, as well as the preservation of greenfields, such redevelopment programs may create dual standards of environmental protection by establishing environmental standards for cities that will remain lower than suburban standards.[82] As a result, some fear that inner-city brownfield redevelopment will cause these areas to "ultimately become a haven for the least desirable kinds of economic activities."[83]

A. Administrative Efforts to Facilitate the Redevelopment of Brownfields

The EPA first addressed the issue of brownfields in January 1995, with its Brownfields Action Agenda.[84] The Agenda addresses barriers in existing regulations and administrative practices and attempts to implement policy changes within the context of existing law.[85] Such changes include removing sites from the federal inventory of hazardous waste sites, clarifying liability and cleanup issues, establishing a pilot program, and establishing partnerships with brownfield stakeholders.[86] In addition, three other EPA initiatives directly address concerns of developers and lenders: the revised lender liability rule,[87] prospective

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81. *See* Georgette C. Poindexter, *Separate and Unequal: A Comment on the Urban Development Aspect of Brownfields Programs*, 24 FORDHAM URB. L.J. 1, 11 (1996).

82. *See id.* at 4.

83. *Id.*

84. *See* Andrea Lee Rimer, *Environmental Liability and the Brownfields Phenomenon: An Analysis of Federal Options for Redevelopment*, 10 TUL. ENVTL. L.J. 63, 71 (1996).

85. *See id.*

86. *See id.*

87. The EPA's revised lender liability rule was designed to clarify the ambiguities in CERCLA's secured-creditor exemption. *See id.* at 86. The rule was issued following court decisions that created confusion and uncertainty about a secured lender's potential liability as an "owner or operator" under CERCLA. Congress recently codified the rule in the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009. *See* Rimer, *supra* note 84, at 86. Presumably, the change was designed to "calm lender anxiety [and

purchaser agreements (PPAs),[88] and the EPA's issuance of "comfort letters."[89]

In June 1989, the EPA issued a guidance document establishing the Agency's policy on agreements not to sue prospective purchasers of contaminated property.[90] The guidance document specifically acknowledges that "it is the agency's policy not to become involved in private real estate transactions."[91] The document states, however, that "a covenant not to sue a prospective purchaser might appropriately be considered if an enforcement action is anticipated and if performance of or payment for cleanup would not otherwise be available except from the Superfund, and if the prospective purchaser participates in a cleanup."[92] Although the EPA rarely uses these agreements, the Clinton Administration's 1994 proposal to amend CERCLA included a proposal to identify bona fide prospective purchasers as a special class of owners that would be conditionally exempt from CERCLA liability.[93]

The EPA may also issue "comfort letters" to allay prospective brownfield purchasers' fears of potential liability for the cleanup of a brownfield.[94] EPA offices receive requests for comfort letters from parties seeking assurance that the EPA will not pursue them as PRPs if

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thus] make more funds available for brownfields redevelopment."

88. *See* Louis J. Schiffer & Jeremy D. Heep, *Forests, Wetlands and the CERCLA: Three Examples of Environmental Protection Promoting Jobs*, 22 J. CORP. L. 571, 595 (1997).

89. *See infra* notes 94-100 and accompanying text.

90. *See* Superfund Program: De Minimus Landowner Settlements, Prospective Purchaser Settlements, 54 Fed. Reg. 34,235 (1989); *see also Purchaser Agreements, Supplemental Guidance Will Ease Polluted Property Sale, Official Says*, 24 Env't Rep. (BNA) No. 33, at 1522 (Dec. 17, 1993) [hereinafter *Purchaser Agreements*] (citing *EPA Issues Claim Settlement Policy for "Innocent Landowners" Under CERCLA*, 20 Env't Rep. (BNA) No. 6, at 315 (June 9, 1989).

91. *EPA Issues Claim Settlement Policy for "Innocent Landowners" under CERCLA*, 20 Env't Rep. (BNA) No. 6, at 315 (June 9, 1989).

92. *Purchaser Agreements*, *supra* note 90, at 1522. The guidance document sets stringent parameters for the use of such agreements, and, in the past, EPA regions have been reluctant to enter into such agreements, signing only a few between 1989 and 1993. *See Prospective Purchaser Agreements*, 25 Envtl. L. Rep. (Envtl. L. Inst.) No. 1, at 10035 (Jan. 1995) (citing *Purchaser Agreements*, *supra* note 90, at 1522). The guidance document also includes "recommended provisions for inclusion in any agreement, including provisions granting the United States an irrevocable right to enter the property and the purchaser's release of any claims against the federal government." *Id.*

93. *See id.* at 10036.

94. *See EPA "Comfort/Status" Letters for Brownfield Properties*, 4 ENVTL. STRATEGIES FOR REAL EST. (Warren, Gorham & Lamont, New York, N.Y.), April 1997, at 1.

they purchase or develop on brownfield property.[95] In such letters, the EPA may provide varying degrees of comfort by explaining to a potential purchaser the Agency's position regarding a particular piece of property.[96] Comfort letters range from formal legal agreements containing a covenant that the EPA will not bring suit, to general policy statements explaining the EPA's discretion over the enforcement of CERCLA.[97]

EPA regional offices may issue comfort letters at their discretion upon request by an interested party. The EPA has developed sample comfort letters to help the Agency's regional offices respond to such requests.[98] The sample comfort letters are designed to apply to the following four situations: (1) when the site in question has never been listed on the federal inventory of hazardous waste sites; (2) when the EPA has either removed the site in question from the federal inventory of hazardous waste sites, or the site is located near, but not on, an inventoried waste site; (3) when the EPA intends to take action at a site or is currently taking action at a site; and (4) when a state environmental agency, rather than the EPA, is coordinating the response action at the site in question.[99] EPA regional offices can also address situations to which the four sample comfort letters do not apply by tailoring the sample letters when necessary.[100]

Despite the EPA's administrative attempts to encourage the remediation and redevelopment of brownfield sites, it is clear that prospective purchasers and developers would derive more comfort from statutory amendments that expressly protect them from potential liability. Thus, such express statutory protection would better promote the redevelopment of brownfield sites.

B. Legislative Proposals

There are a number of legislative proposals that might affect

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95. *See id.*
96. *See id.*
97. *See id.*
98. *See id.*
99. *See id.* at 2. For an example of a sample comfort letter, see *id.* at 4. Samples of the comfort letters can also be found at 60 Fed. Reg. 4624, 4626-29 (1997).
100. *See EPA "Comfort/Status" Letters for Brownfield Properties*, *supra* note 94, at 1.

brownfield remediation and redevelopment initiatives. Those proposals that are particularly relevant to this issue include: (1) limiting liability for purchasers and lenders; (2) providing finality and certainty to owners and developers who purchase brownfield properties for development; (3) considering future use of a property when determining appropriate cleanup standards; (4) using institutional controls to monitor and maintain environmental standards on such properties; and (5) providing federal certification of state programs that are designed to encourage voluntary cleanups at brownfield sites.

C. Changing CERCLA's Liability Scheme

Many of the recent legislative proposals to amend CERCLA contain provisions that would limit joint and several liability under CERCLA for purchasers and lenders. Although these proposals have not enjoyed bipartisan approval in Congress, both the Democratic- and Republican-sponsored bills introduced in the 103d and 104th Congresses contain extremely detailed procedures for allocating liability.[101] Some critics of these proposals warn, however, that such procedures run contrary to the overall goal of streamlining CERCLA cleanups and would substantially delay cleanups because of the need to allocate liability according to a complex formula before cleanups could begin.[102]

Recent CERCLA reauthorization bills also contain a number of proposed exemptions from liability. One of the more controversial proposed provisions would partially eliminate retroactive liability.[103] The Oxley proposal, for example, would have required payment from the Superfund to reimburse a liable party for half of any cleanup costs arising out of disposal activities that occurred prior to 1987.[104] Representative Edward J. Markey (D-Mass.) criticized this provision,

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101. *See Superfund Reauthorization*, *supra* note 2, at 10214 (citing S. 1834, 103d Cong. § 409 (1994); H.R. 3800, 103d Cong. § 409 (1994); S. 1285, 104th Cong. § 501 (1995); H.R. 2500, 104th Cong. § 207 (1995)). CERCLA reauthorization bills, or "reform" bills, are characterized by their complexity. During the 104th Congress, the Smith Bill, S. 1285, 104th Cong. (1995), introduced by Sen. Robert C. Smith (R-N.H.), was 249 pages long, and the Oxley Bill, H.R. 2500, 104th Cong. (1995), introduced by Rep. Michael G. Oxley (R-Ohio), as originally introduced was 264 pages long. *See Superfund Reauthorization*, *supra* note 2, at 10215-16.

102. *See, e.g.*, *Superfund Reauthorization*, *supra* note 2, at 10216.

103. *See id.*

104. *See id.* (citing H.R. 2500 § 201).

referring to it as "the Ed McMahon Polluter's Clearinghouse Sweepstakes."[105] Representative Markey admonished that paying liable parties for their cleanup costs would result in a windfall for many polluters.[106] Other proposed exemption provisions would exempt only particular types of sites, including "remining"[107] sites, landfills, battery recycling facilities, and oil recycling facilities.[108]

Many commentators believe that there are good reasons to retain CERCLA's current liability scheme. First, and perhaps most importantly, eliminating joint and several liability could undermine voluntary cleanup programs and current industry incentives to pro-actively prevent environmental contamination.[109] Second, creating new exemptions from liability for special interests, such as those listed above, would increase the cost to taxpayers for CERCLA cleanup projects.[110] In addition, reducing liability for some PRPs based on the type of activity conducted at a polluted site rejects the notion that "the polluter should pay."[111] Moreover, attempts to classify certain industries

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105. *Superfund Reauthorization*, *supra* note 2, at 10215 n.226 (quoting *Reform of Superfund Act of 1995: Hearings on H.R. 2500 Before the Subcomm. on Commerce, Trade, and Hazardous Materials of the House Comm. on Energy and Commerce*, 104th Cong. 158 (1995) [hereinafter *Hearings on H.R. 2500*] (statement of Rep. Edward J. Markey)). The EPA estimated that this provision in H.R. 2500 would cost the Superfund more than $1 billion annually. *See id.* (quoting *Hearings on H.R. 2500, supra*, at 158) (statement of Carol M. Browner, EPA Administrator)).

106. *See id.*

107. The term "remining" refers to operations that mine abandoned mine lands. In 1994, the Department of Interior estimated that there were approximately twelve thousand abandoned coal mine sites, a large percentage of which are located in Pennsylvania, West Virginia, and Kentucky. *See Proposal Would Restore Abandoned Mine Lands by Providing Industry Incentives for Remining*, 25 Env't Rep. (BNA) No. 6, at 281 (June 10, 1994). Generally, these sites were mined and abandoned prior to the enactment of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. No. 95-87, 91 Stat. 445 (codified as amended at 30 U.S.C. §§ 1201-1328 (1994)). *See id.* Remining activities at these sites are governed by the SMCRA. *See id.*

108. *See Superfund Reauthorization*, *supra* note 2, at 10215-16.

109. *See id.* at 10221.

110. *See id.*

111. On March 5, 1997, at a Senate Environment and Public Works subcommittee hearing, the head of the EPA, Carol M. Browner, made the following comments to a sponsor of a CERCLA reform bill that would exempt co-disposal landfill generators, arrangers, and transporters from retroactive liability for CERCLA cleanups: "[The reform bill would] impose a new system that would actually delay cleanups, shift costs from polluters to taxpayers, reduce community involvement, and prevent hundreds of dangerous sites from being addressed." *Superfund: Senator, EPA Chief in Heated Exchange Over Liability Provisions of GOP Measure*, Env't Rep. (BNA) No. 44, at 2237 (March 14, 1997). She said that the bill's "numerous liability exemptions and limits basically reject the notion that polluters themselves should pay the costs of cleanup." *Id.*

as exempt will most likely lead to more litigation as the criteria for exemption is challenged and clarified.

Proposals to eliminate retroactive liability under CERCLA are also imprudent. Such an amendment would effectively penalize those landowners who have already resolved their CERCLA liability.[112] Correspondingly, it would reward those who, through foot-dragging, have failed to resolve their liability.[113] As with the proposal to eliminate liability for certain classes of polluters, eliminating retroactive liability would likely lead to increased litigation as PRPs argue about when hazardous waste was disposed at a site or released into the environment.[114] Moreover, proposals to eliminate retroactive liability also seem contradictory to the underlying purpose of CERCLA, which is to address the problem of *abandoned* hazardous waste sites, many of which were contaminated long before Congress enacted CERCLA.

A better proposal is for Congress to clarify the bases on which the EPA should grant liability exemptions to brownfield purchasers. Such exemptions should release bona fide prospective purchasers of brownfields from CERCLA liability under statutory or administrative criteria.[115] The Clinton Administration's 1994 Superfund Reform Bill[116] contained such provisions, expressly defining a "bona fide prospective purchaser" who would be exempt from liability under CERCLA as:

> a person who acquires ownership of a facility after enactment of this provision, and who can establish by a preponderance of the evidence [that, inter alia, she] is not affiliated with any other person liable for response costs at the facility, through any direct or indirect familial relationship, or any contractual, corporate, or financial relationship other than that created by the instruments by which title to the facility is conveyed or financed.[117]

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112. *See Superfund Reauthorization*, *supra* note 2, at 10221.

113. *See id.*

114. *See id.*

115. The EPA has the authority to enter into such agreements but has done so only in a few cases. *See Purchaser Agreements*, *supra* note 90, at 1522.

116. S. 1834, 103d Cong. (1994), *cited in* Rimer, *supra* note 84, at 79.

117. *Id.*, *quoted in* Rimer, *supra* note 84, at 79. The Administration's 1994 proposed Superfund Reform Bill also would have granted the United States the authority to place a lien on facilities

If Congress exempts purchasers and developers from CERCLA liability in certain circumstances in order to facilitate brownfield redevelopment, such exemptions will increase the market value of brownfield property. Some are concerned that this would result in a windfall to those owners whose activity on the property contributed to its contamination.[118] The counter-argument, however, is that permitting prior owners to recover value from the property by selling it to protected purchasers would provide the liable owners with funds that they could use to pay CERCLA judgments against the property.

D. How Clean is Clean?

Defining the scope of cleanup actions at a hazardous waste site and finalizing cleanup activities upon completion of remediation are issues that substantially affect a prospective purchaser's interest in a brownfield remediation project. An important issue in this debate is the extent to which the future use of the property should be used as a criterion in determining appropriate cleanup standards under CERCLA.

Today, the NCP requires the EPA to undertake a "site-specific baseline risk assessment" for each cleanup site.[119] The EPA uses the risk assessment to determine the maximum safe levels of contaminants at a site.[120] The EPA typically uses a conservative worst-case-scenario approach in establishing its baseline risk assessment and takes into consideration the possibility that a cleanup site may someday be used as residential property.[121] The EPA's remedy selection for a particular site rarely reflects the *actual* likely future use of the site.[122] In addition, CERCLA, as amended by SARA, expresses a strong preference for permanent remedies at a site.[123]

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owned by bona fide prospective purchasers for any unrecovered response costs that increased a property's value. *See Prospective Purchaser Agreements*, *supra* note 92, at 10039.

118. *See supra* notes 105-08 and accompanying text.

119. *See* Rimer, *supra* note 84, at 88-89 (citing 55 Fed. Reg. 8848 (1990)).

120. *See id.* (citing Douglas A. McWilliams, *Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization*, 21 ECOLOGY L.Q. 705, 739 (1994)).

121. *See id.* at 89.

122. *See id.* at 89-90.

123. *See* ENVIRONMENTAL LAW HANDBOOK, *supra* note 17, at 279. This preference for permanent remedies at a site "embodies the idea that PRPs and the EPA should be able to walk

Those who advocate that the EPA should consider future land use as a factor in response selection argue that some sites will pose greater environmental risks than others because of the use to which they are put.[124] Advocates for future land use consideration argue that when the EPA creates remediation goals, the Agency should set permissible contaminant levels for industrial-use property higher than permissible contaminant levels for residential-use property.[125] This would result in a potentially significant decrease in remediation costs without a significant increase in risk to human health.[126] Others argue that determining appropriate remediation for a site should also include consideration of the site's background contamination level.[127] Such consideration would help to ensure that remediation objectives do not require the attainment of contamination levels that are lower than an area's background contamination level.[128] This prevents the creation of a "hole in the donut"—land that is temporarily cleaner than the contaminated soil and groundwater that surround it.[129] If a site is cleaned while the surrounding land and groundwater are left contaminated, the cleaned site is likely to revert to a level of contamination "representing the average [contamination level] of the surrounding area."[130]

On the other hand, some question whether consideration of future land use will actually decrease the cost and predictability of remediation efforts.[131] Because future use of brownfields will often occur in areas surrounded by urban neighborhoods,[132] there is concern that lowering brownfield cleanup standards will ultimately affect the health and environment of those who reside in the vicinity of such sites.[133] There is

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away from the site after a cleanup without worrying about future danger to the public and the environment." Rimer, *supra* note 84, at 90.

124. *See, e.g.*, Wilson, *supra* note 80, at 11.

125. *See id.* This division of contaminant levels is part of Illinois's Environmental Protection Act, 415 ILL. COMP. STAT. §§ 5/1 to 5/58.12 (West 1996).

126. *See* Wilson, *supra* note 80, at 11.

127. *See id.*

128. *See id.*

129. *See id.*

130. *Id.*

131. *See* Rimer, *supra* note 84, at 93-94.

132. *See supra* note 76 and accompanying text.

133. *See* Rimer, *supra* note 84, at 94.

additional concern that industrial use of redeveloped property could lead to workers' occupational exposure to contaminants at a site.[134] There is a legitimate question as to the wisdom of a policy that could consign properties to permanent industrial use based on less demanding cleanup standards, especially in inner-city urban areas.[135] Despite these concerns, some recent legislative proposals would significantly lower CERCLA's cleanup standards.[136] Some of the proposed changes include: eliminating the current preference for permanent treatment remedies, placing containment remedies on an equal footing with treatment remedies, changing the level of exposure to hazardous substances that would constitute a human health risk, providing alternative methods of compensating for or eliminating groundwater contamination, and elevating the role that cost-effectiveness plays in remedy selection.[137]

Proposals to lower cleanup standards under CERCLA will likely prove controversial; however, most agree that Congress should amend CERCLA to expedite the remediation process and permit the EPA more flexibility in setting cleanup standards.[138] One proposal that has received general support would require the EPA to set national standards for soil and groundwater contamination for the approximately one hundred hazardous substances most commonly found at Superfund sites.[139] This proposal also recommends that Congress should provide the EPA with some measure of flexibility to waive the standards when appropriate.[140] Providing such flexibility would help expedite the risk

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134. *See id.*

135. Ironically, the Love Canal property was used for the disposal of some twenty-two thousand tons of chemical waste between 1942 and 1953, and yet eventually was occupied by a residential neighborhood and school. *See Superfund Reauthorization*, *supra* note 2, at 10224.

136. *See id.* at 10216-17. This is especially true for the Smith and Oxley Bills. *See id.*

137. *See id.* at 10217.

138. According to recent reports covering fiscal years 1992-1994, the EPA has streamlined cleanups. *See generally Superfund: Agency Increased Efforts to Streamline Cleanups, Aid Communities, Reports Say*, Env't Rep. (BNA) No. 18 (Aug. 29, 1997). The Superfund Accelerated Cleanup Model was introduced in fiscal year 1992 to streamline the cleanup process and has successfully eliminated the overlap between the types of cleanup actions in removal and remedial programs. In addition, the EPA has created a Superfund Revitalization Office and National Superfund Risk Management Workgroup to improve the efficiency of cleanups and to promote innovative treatment technologies. *See generally id.*

139. *See Superfund Reauthorization*, *supra* note 2, at 10223.

140. *See id.*

assessment and remedy selection processes at Superfund sites. Providing flexibility, however, is different than reducing the overall health and safety standards imposed by law. While the EPA should be permitted to consider future land use as a factor in selecting an appropriate remedy for a site, future land use should not be determinative of appropriate standards for remediation.[141]

E. Finality

Another cleanup issue that has been the focus of recent proposals is the attempt to increase the finality of the cleanup process.[142] Presumably, a brownfield purchaser and developer will want to enter into a binding agreement with appropriate federal and state environmental agencies assuring that they will not be subject to liability upon completion of a remediation project. Such agreements, if they contain provisions limiting future use of the remedied property, provide protection to the owner. However, by limiting future use, such agreements also limit the marketability of the property.[143] Policy makers in the CERCLA reauthorization debate must decide the extent to which cleanup standards should be relaxed to encourage the present redevelopment of brownfields, especially when such relaxation may limit the future use and marketability of property.

Despite concerns about limiting future use, there is general agreement that some degree of finality is important to resolving purchasers' uncertainty about investing in brownfield property.[144] Some states, such as Illinois, have addressed the issue of finality by providing "No Further Remediation Letters" ("NFR Letters").[145] The state will issue an NFR Letter to a brownfield purchaser or other applicable PRP[146] after the agency approves a report certifying that all remedial

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141. *See id.* at 10224. CERCLA does not expressly provide for consideration of future use; however, the EPA has construed its authority to permit such consideration. *See id.* (citing NCP Preamble, 55 Fed. Reg. 8666, 8710 (1990)).

142. *See, e.g.*, Rimer, *supra* note 84, at 95-97.

143. *See* Wilson, *supra* note 80, at 11.

144. *See generally* Rimer, *supra* note 84, at 95-97 (discussing the pros and cons of finality).

145. 415 ILL. COMP. STAT. § 5/58.10(a) (West 1996).

146. *See id.* § 5/58.10(d).

action for a site is complete.[147] This letter, issued by the governing agency, is recorded as part of the title to the property and "[is] considered prima facie evidence that the site does not constitute a threat to human health and the environment and does not require further remediation under [the] Act, so long as the site is utilized in accordance with the terms of the [letter]."[148]

The NFR Letter, under the Illinois scheme, extends to "successor[s]-in-interest of the owner of the site."[149] As a result, successor owners are protected from further remediation requirements and have assurance that the site is safe for its listed intended use.[150] Unfortunately, many states lack voluntary cleanup programs authorizing agencies to grant such covenants not to sue or similar certificates of release. Furthermore, federal law provides no protection for successor owners should the EPA or a third party choose to file a CERCLA cost recovery action.[151] For this reason, federal PPAs and comfort letters remain an essential part of putting together a brownfield remediation and redevelopment project.

F. State Voluntary Cleanup Programs

CERCLA should be amended to authorize federal certification of state voluntary compliance programs to encourage the remediation of brownfield sites. As originally conceived, CERCLA lacks the element of cooperative federalism illustrated by partnerships between the federal government and state governments under other environmental laws such as the Clean Air Act and the Clean Water Act.[152] Perhaps Congress assumed that the EPA would develop cleanup expertise and

147. *See id.* § 5/58.10(b).

148. *Id.* § 5/58.10(a).

149. *Id.* § 5/58.10(d)(7).

150. *See* Wilson, *supra* note 80, at 11. If the governing agency wants to reopen the matter, it must prove that an NFR Letter was obtained as a result of incorrect or fraudulent information. *See id.* Violating the terms of an NFR Letter will render the letter voidable. *See* § 5/58.10(e).

151. *But cf. supra* notes 41-46 and accompanying text (discussing federal liability exemptions).

152. *See* Robert H. Abrams, *Superfund and the Evolution of Brownfields*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 265 (1997). For example, under the Clean Air Act, the EPA sets national ambient quality standards, and the states implement those standards through state implementation plans. *See* Clean Air Act, 42 U.S.C. §§ 7401-7671 (1994). Under the Clean Water Act, states have authority to administer the NPDES permit program if authorized by the EPA to do so. *See* Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994).

use such expertise in subsequent cleanup actions in a way that states could not duplicate.[153] Alternatively, Congress may have believed that the number of Superfund sites would be relatively few but sufficiently complex and severe so as to require the vast resources of the federal government.[154] In either event, there are good reasons for Congress now to authorize state programs to facilitate cleanup at hazardous waste sites that are not currently under CERCLA cleanup orders.

First, states are better able to evaluate their own needs and limitations because of their ability to take into account local social, political, geographical, and economic considerations.[155] Such considerations undoubtedly will differ from state to state.[156] States are also more aware of problems posed by potential sites within their jurisdiction. Giving states the authority to develop such programs would encourage innovation and experimentation in the redevelopment of such areas.

Some worry that states might be more willing than the federal government to emphasize economic considerations over environmental, health, and safety concerns.[157] The empirical evidence, however, has not shown this to be true in those states that have enacted programs similar to CERCLA.[158] Furthermore, most brownfields are not likely to be so contaminated as to fall within CERCLA's concerns, in part because many urban industries have avoided large-scale on-site dumping.[159] In addition, the most seriously contaminated hazardous waste sites already have been identified and placed on the NPL. Consequently, most sites not already listed on the NPL involve only small-scale spills and leaks.[160]

In November 1996, the EPA issued a guidance document encouraging regional officials to expand partnerships with state voluntary cleanup programs.[161] According to the guidance document,

153. *See* Abrams, *supra* note 152, at 267.
154. *See id.*
155. *See Rimer, supra* note 84, at 106.
156. *See id.*
157. *See, e.g., id.* at 107.
158. *See id.* at 106.
159. *See* Abrams, *supra* note 152, at 274-75. This aversion to on-site dumping was augmented by state nuisance laws, which also impeded large-scale contamination of urban sites. *See id.*
160. *See id.*
161. *See* Memorandum from the EPA to Superfund National Policy Managers, Interim

the EPA will use six baseline criteria to review a state program to determine whether it:

> (1) provides opportunities for meaningful community involvement, (2) ensures that voluntary response actions are protective of human health and the environment, (3) has adequate resources to ensure timeliness of voluntary response actions and availability of technical assistance, (4) provides mechanisms for the written approval of response action plans and documentation that the response actions are complete, (5) provides adequate oversight to ensure that the response actions protect human health and the environment, and (6) shows the capability of ensuring completion of response actions if the volunteering parties fail to complete the response actions.[162]

Based on these criteria, EPA regional offices negotiate "memoranda of agreement" (MOA) with interested states.[163] These MOA determine how cleanup responsibilities will be divided between a state and the EPA.[164] The EPA has made clear, however, that "[the EPA] does not intend that these MOAs constitute no-action assurances for any specific site."[165] In reauthorizing CERCLA, Congress should amend CERCLA to give qualified states maximum flexibility to implement cleanup programs. Delegation of authority should be based on criteria demonstrating a state's qualifications for overseeing cleanups and should include the authority to authorize, approve, and finalize brownfield remediation projects.

G. The Role of Local Governments

Local governments are often in a better position to encourage the

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Approaches for Regional Relations with State Voluntary Cleanup Programs (Nov. 14, 1996) [hereinafter Memorandum to Policy Managers]. Since issuing the Memorandum to Policy Managers, the EPA has issued a revised guidance document. *See* A Notice of Availability of Final Draft Guidance for Developing CERCLA Memoranda of Agreement (MOA) Language Concerning State Voluntary Cleanup Programs, 62 Fed. Reg. 47495 (1997).

162. *Voluntary Cleanup Guidance Supports Goals on Brownfields, EPA Says in Answer to Questions*, 27 Env't Rep. (BNA) No. 38, at 2005 (Jan. 31, 1997).

163. *See id.*

164. *See id.*

165. *Id.* (quoting Memorandum to Policy Managers, *supra* note 161).

redevelopment of brownfields than either the federal or state governments. First, a local government can identify best the sites within its community that may be appropriate for redevelopment. Regulating local land use is a primary function of local governments, and local planning and zoning departments presumably know the areas that are used for heavy industrial activities. Second, land use planning is a function of local government. Under their police power, local governments routinely issue building permits and certificates of occupancy, designate areas for tax abatement and redevelopment funds, and grant variances and conditional use permits for industrial and manufacturing activities.[166]

While it is clear that local governments must act consistently with state and federal mandates, state governments should give more authority to local governments to review and approve brownfield redevelopment proposals. Local communities should be involved directly in the challenge of reconciling potential conflicts between economic goals and health concerns within their communities. Local governments are also in the best position to coordinate federal, state, and county funding that may be available to assist brownfield restoration projects.[167]

H. Institutional Controls

Future owners of redeveloped brownfields must use the sites in a manner that is consistent with the EPA's designated uses of the property. One suggestion for ensuring compliance with future use requirements is to incorporate existing institutional controls into the list of cleanup project requirements.[168] Existing institutional controls include restrictive covenants, negative easements, and reversionary interests.

The restrictive covenant is a deed restriction that prohibits specific

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166. *See, e.g.*, Ben Boer, *Institutionalizing Ecologically Sustainable Development: The Roles of National, State and Local Governments in Translating Grand Strategy into Action*, 31 WILLAMETTE L. REV. 307, 355-56 (1995).

167. *See Conference Explores Factors to Consider in Remediation, Redevelopment of Brownfields*, 27 Env't Rep. (BNA) No. 26, at 1423 (Nov. 1, 1996).

168. *See* Rimer, *supra* note 84, at 98-99.

uses of a particular piece of land.[169] To provide notice of the use restriction to future owners, the restriction is recorded with the title documents under state law recording schemes. Because restrictive covenants "run with the land,"[170] they would be an effective means of preventing the unwanted use of remedied brownfield property, notwithstanding repeated transfers of ownership in such property. A negative easement granted to the EPA as part of a consent decree would also provide the EPA with a method for enforcing use restrictions in the future. Such provisions would allow the EPA or a local granting agency to prohibit specific activities on the land that might otherwise be permissible.[171]

Creating a reversionary interest in deed is a third method by which governments could restrict the future use of a property. A reversionary interest is a term included in the property conveyance that sets forth certain mandatory conditions with which the purchaser must comply in using the property. Upon the violation of a condition, the property reverts to the grantor.[172] Because a reversionary interest must be included in a deed at the time of sale, this method of land use control would be appropriate only for cases in which the government conveys an interest in property.[173]

There are some problems with using existing institutional controls to limit the future use of a property. First, these mechanisms essentially are creatures of state law and are not always interpreted or applied consistently by the states.[174] Second, utilizing these institutional controls to ensure compliance would require continuous monitoring by the EPA or appropriate state agencies. The right to enforce a reversionary interest, for example, may be lost if the party holding the reversion does not act promptly when the condition is broken.[175] Furthermore, placing too many restrictions on use may create a disincentive for prospective

169. *See id.* at 98.

170. *Id.* According to Rimer, a covenant will "run with the land" if a number of conditions are met, "including that the owners have actual or constructive notice, and that vertical and horizontal privity of estate exist." *Id.*

171. *See id.* at 98-99.

172. *See id.* at 99.

173. *See id.*

174. *See id.* at 100.

175. *See* Frona Powell, *Defeasible Fees and the Nature of Real Property*, 40 U. KAN. L. REV. 411, 415-16 (1992).

purchasers to undertake development projects, thereby decreasing the future marketability of certain properties.

I. Incentives for Development

Previous discussion has focused on the need to address problems of potential liability and the enforcement of cleanup standards in order to provide more certainty for prospective purchasers of brownfields. In addition to these issues, a major disincentive to investment in brownfield property is the high cost of conducting the necessary site investigation and remediation.[176] Offering positive financial incentives to parties who undertake the redevelopment of contaminated brownfield sites is a frequently proposed method for encouraging developers to undertake such projects.[177]

Financial incentives take a variety of forms, including grants, loans, and tax credits. One source of such incentives, the EPA's Brownfields Economic Redevelopment Initiative, provides loans to states, local governments, and other local entities that have demonstrated the desire and capability to coordinate efforts to clean up and redevelop brownfields.[178] As of May 1997, the EPA had funded seventy-eight brownfield assessment demonstration pilots, each funded up to $200,000 over two years.[179]

Recent federal legislative proposals to encourage brownfield remediation and redevelopment also contain financial incentives for developers. The proposed Brownfields Redevelopment Act of 1997,[180]

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176. *See* Rimer, *supra* note 84, at 110. Such costs can often run into the millions of dollars. *See id.*

177. *See id.*

178. *See Proposed Guidelines Announced by EPA for Brownfields Revolving Loan Fund Pilots*, 28 Env't Rep. (BNA) No. 2, at 50-51 (May 9, 1997). The EPA's Revolving Loan Fund was awarded to state and local entities "to test brownfields cleanup revolving loan fund models that direct special efforts toward facilitating coordinated public and private efforts at the federal, state and local levels." *Id.* at 51. Eligible parties were required to "demonstrate an ability to manage a revolving loan fund and environmental cleanups; a need for cleanup funds; commitment to creative leveraging of EPA funds with public-private partnerships and in-kind services, and a clear plan for sustaining the environmental protection and related economic development activities initiated through [the] program." *Id.* The application deadline for participation in the program was June 9, 1997. *See id.* at 50.

179. *See id.*

180. H.R. 523, 105th Cong. (1997).

for example, would provide $2 billion in tax incentives for cleaning up abandoned and contaminated industrial sites.[181] The bill proposes a credit of up to fifty percent of the costs incurred by a party in cleaning up a brownfield site.[182] It further proposes making available tax-exempt bonds to help finance such cleanups.[183] A very similar bill was recently introduced in the Senate.[184] The Senate bill was co-sponsored by Senate Republicans and Democrats and has been endorsed by the Clinton Administration.[185]

IV. CONCLUSION

As of May 1997, ten bills to revitalize former industrial or commercial areas known as brownfields had been introduced in the 105th Congress.[186] While legislators appear divided largely along party lines over the question of whether to adopt stand-alone legislation addressing the cleanup of brownfields,[187] the fact that one proposal has garnered more than fifty co-sponsors indicates that there is widespread support for brownfield legislation in Congress.[188]

There is a general consensus that initiatives to revitalize abandoned, idle, or under-used industrial and commercial sites should be encouraged, and that a major obstacle to the redevelopment of these sites is environmental contamination. Prospective purchasers and developers of these sites are uncertain and fearful of potential liability under CERCLA, and banks are often reluctant to issue loans because of a general fear that the cleanup costs may exceed the value of the property.

In recent years, many states have developed voluntary cleanup

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181. *See Superfund: House Democrat's Brownfields Measure Would Provide Credit, Tax-Exempt Bonds*, 27 Env't Rep. (BNA) No. 40, at 2070 (Feb. 14, 1997).

182. *See id.*

183. *See id.*

184. *See id.* at 2071 (citing S. 235, 105th Cong. (1997)). Senate Bill 235 was introduced by Sen. Carol Mosely-Braun (D-Ill.) on Jan. 30, 1997. *See id.*

185. *See id.*

186. *See Division Remains on Brownfields Bill*, 28 Env't Rep. (BNA) No. 2, at 50 (May 9, 1997).

187. Democrats have called for legislation that exclusively addresses brownfields, but Republicans appear to be opposed to such legislation. According to one GOP staff member, other parts of CERCLA need to be changed as well. *See id.*

188. *See id.*

programs that entail agreements designed to provide liability protection to private parties. The EPA should be encouraged to enter into similar binding agreements with prospective brownfield purchasers under appropriate guidelines as a part of state voluntary cleanup programs. Congress should amend CERCLA to clarify the circumstances under which such agreements are appropriate.

Congress, however, should avoid the temptation to make major changes in CERCLA's current liability scheme.[189] Eliminating joint and several liability and retroactive liability for particular parties or industries under complicated legislative schemes would eliminate strong incentives to clean up contaminated property and to avoid contamination in the future. It would cost taxpayers a great deal of money and would likely result in increased litigation. Present provisions in CERCLA, such as the "de minimis" provisions in SARA, provide sufficient means to protect PRPs that have contributed minimal hazardous waste to a site.

Congress should give the EPA more flexibility to set cleanup standards that are appropriate for a specific site.[190] While this flexibility should allow the EPA to consider a site's future use, overall health and safety standards should remain high regardless of a site's future use. Institutional controls, such as land and water use restrictions and limitations on future land use, should be used when appropriate and on a site-specific basis.

Finally, qualified states should be authorized to implement the CERCLA cleanup program.[191] States should be given flexibility to undertake implementation on either a state-wide or site-selection basis. As a part of state participation in the program, local governments should have the authority to participate in and approve local brownfield redevelopment projects. In addition, federal and state financial incentives should continue to be used to encourage such projects. Taking these steps will improve CERCLA—a statute that, despite its flaws, has been successful in cleaning up hazardous waste sites throughout the nation—and will encourage the redevelopment and remediation of brownfield sites throughout the United States.

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189. *See Superfund Reauthorization, supra* note 2, at 10221-22.
190. *See id.* at 10223-25.
191. *See id.* at 10225.