

2007

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Recommended Citation

Joel B. Eisen, *Brownfields at 20, A Critical Reevaluation*, 34 *Fordham Urb. L.J.* 721 (2007).

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BROWNFIELDS AT 20: A CRITICAL REEVALUATION

Joel B. Eisen*

I. INTRODUCTION

The revitalization of brownfields,¹ once a theory, is now an industry. This industry, however, is not yet mature. It has been only twenty years since Congress attempted to give prospective purchasers of real estate a defense to liability under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”),² and a little more than a decade since the majority of states began to embrace voluntary cleanup programs for abandoned or under-used sites.³ The ink is barely dry on the 2002 CERCLA amendment that promises to reduce the risk of federal liability for brownfields developers.⁴

* Professor of Law, University of Richmond School of Law. The author wishes to thank Ron Rosenberg for his insights on brownfields law and policy, Bill Wolfe of the New Jersey chapter of Public Employees for Environmental Responsibility (“PEER”) for information about New Jersey’s brownfields programs, and Clay Burns for invaluable research assistance.

1. New Jersey’s definition of a brownfield is “[a]ny former or current commercial or industrial site that is currently vacant or underutilized and on which there has been, or there is suspected to have been, a discharge of a contaminant.” N.J. STAT. ANN. § 58:10B (West 2006).

2. See Comprehensive Environmental Response, Compensation, & Liability Act of 1980, 42 U.S.C. § 9607(b) (2000); see also *id.* §§ 9601–9675; Susan Opp & Sarah Hollis, *Contaminated Properties: History, Regulations, and Resources for Community Members*, Univ. of Louisville Ctr. for Env’tl. Pol’y & Mgmt., Practice Guide No. 9, at 6 (2005), http://cepm.louisville.edu/Pubs_WPapers/practiceguides/PG9.pdf (stating that “SARA [the Superfund Amendments and Reauthorization Act] added the innocent landowner defense, which sought to ease the liability on people who had inherited or purchased property without knowledge of potential contamination”).

3. See generally Joel B. Eisen, “*Brownfields of Dreams?*”: *Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883 [hereinafter Eisen, *Brownfields of Dreams*]; Joel B. Eisen, *Brownfields Policies for Sustainable Cities*, 9 DUKE ENVTL. L. & POL’Y F. 187 (1999).

4. See Small Business Liability Relief and Brownfields Revitalization Act of 2002, 42 U.S.C. §§ 9604-05, 9607, 9622, 9628 (2002); see also Seth Schofield, *In Search of the Institution in Institutional Controls: The Failure of the Small Business Liability Relief and Brownfields Revitalization Act of 2002 and the Need for Federal Legislation*, 12 N.Y.U. ENVTL. L.J. 946, 956 (2005) (claiming that the Act “may be helpful but . . . is ultimately insufficient”); Fenton D. Strickland, Note, *Brownfields Remediated? How the Bona Fide Prospective Purchaser Exemption from CERCLA Liability and the Windfall Lien Inhibit Brownfield Redevelopment*, 38 IND. L. REV. 789, 804 (2005) (criticizing the Act’s liability provision). For other criticisms of the Act, see William T.D. Freeland, *Environmental Justice and the Brownfields Revitalization Act of 2001*:

Even in these relatively early days, brownfields remediation and reuse is almost universally viewed as a done deal—a major environmental success story.⁵ Many point to state cleanup programs that have processed thousands of sites successfully, and there are numerous high-profile stories of successful conversions of neglected sites to profitable reuse.⁶ Still, relatively little empirical work has been done to assess whether state and federal brownfields policies have been an unqualified success.⁷ Getting a handle on their value requires, among other things, accounting for the wide variety in state program features, the numbers of cases handled, and the types and numbers of results. It also requires looking longitudinally at a statistically significant sample of sites to see whether environmental problems develop or persist after a period of years.

The optimism about brownfields policies has considerable staying power, in part because it rests on a foundation of specific expectations about brownfields, their cleanup and reuse, and assumptions about the typical site and typical developer. These expectations relate to “the nature of brownfield properties; the expectations and behavior of public and private parties involved in the development, environmental, and financial risks; the importance of subsidies; and the investment climate of host communities.”⁸ In this Article, I term this foundation the “brownfields

Brownfields of Dreams or a Nightmare in the Making?, 8 J. GENDER RACE & JUST. 183 (2004) (criticizing the Act on environmental justice grounds); Stanley A. Millan, *Contemporary CERCLA: Reversals of Fortune and Black Holes*, 16 FORDHAM ENVTL. L. REV. 183, 198 (2005) (noting that brownfields developers could face windfall liens).

5. See, e.g., Jennifer Felten, *Brownfield Redevelopment 1995-2005: An Environmental Justice Success Story?*, 40 REAL PROP. PROB. & TR. J. 679 (2006).

6. Kris Wernstedt et al., *The Brownfields Phenomenon: Much Ado About Something or the Timing of the Shrewd?* 4 (Resources for the Future, Discussion Paper 04-46, 2004), available at <http://www.rff.org/Documents/RFF-DP-04-46.pdf> [hereinafter Wernstedt et al., *Brownfields Phenomenon*] (noting that “[i]f one compares the state of affairs vis-à-vis the redevelopment of brownfields today to that of 10 years ago, it is clear that federal and state promotion of brownfields has yielded numerous success stories of idled and underutilized contaminated properties that now house a variety of economic activities”); see also *infra* note 54 and accompanying text (discussing success stories in Rust Belt cities).

7. See David A. Dana, *State Brownfields Programs as Laboratories of Democracy?*, 14 N.Y.U. ENVTL. L.J. 86, 86 (2005) (noting that “state brownfields programs represent a lost opportunity—the opportunity to empirically test different approaches to real property remediation”); Wernstedt et al., *Brownfields Phenomenon*, *supra* note 6, at 4 (noting that “[t]he empirical literature on brownfields—a topic that cuts across many disciplines and scales and is open to a wide range of methodological approaches—remains undeveloped relative to its potential”).

8. Wernstedt et al., *Brownfields Phenomenon*, *supra* note 6, at 4.

story,” and suggest that it is time for a more detailed analysis of this story after a decade of experience with brownfields remediation and reuse, and, as a consequence, a re-examination of whether brownfields programs meet their original goals, and whether those goals were the right ones.

Those involved in brownfields remediation pin many hopes on the process. They seek to discover and rehabilitate neglected sites, reverse the decay of urban cores, and, in some cases, link with smart growth strategies by slowing the march of development to suburban and exurban America. The parcel-by-parcel approach to brownfields remediation and reuse, however, cannot possibly guarantee all that. There are thousands of brownfields sites and each has a different experience.⁹ As a leading study pointed out, “[e]ach brownfield redevelopment decision can trigger a variety of concerns related to the long-term vision of a community, threats to public health and nature, economic livelihoods, social equity, and public participation.”¹⁰ The paradox of brownfields programs is that they may have considerable legitimacy when one looks at the successful remediation and reuse of individual parcels, but as a whole, the policies may or may not be contributing measurably to the long-term health of communities throughout the nation.

It is time to decide how nascent state programs could best promote a comprehensive approach to urban redevelopment. This in turn requires us to decide whether the assumptions about brownfields programs’ success are substantiated in practice. I am not at all suggesting that brownfields revitalization needs to end, yet, as I argue in this Article, the brownfields story is partly incorrect. Consider this recent summary: “Many of the premises [of brownfields policies] may have a factual base, while others may be rooted in unsubstantiated assertions of mixed quality or outright misunderstandings.”¹¹ As a result of this partial breakdown of the story, it is time for a reorientation of brownfields law and policy that moves it toward a development-centered approach to brownfields, not one that caters specifically to developers.

In this Article, I will look at brownfields policies in one state, New Jersey, and suggest how to make the approach of brownfields

9. For an early but still relevant and important discussion of a number of different experiences, see generally EDITH M. PEPPER, *NORTHEAST-MIDWEST INST., LESSONS FROM THE FIELD: UNLOCKING ECONOMIC POTENTIAL WITH AN ENVIRONMENTAL KEY* (1997), <http://www.nemw.org/lessons.htm>.

10. Wernstedt et al., *Brownfields Phenomenon*, *supra* note 6, at 4.

11. *Id.*

revitalization more development-centered and less developer-centered. New Jersey's program is worth examining for a number of reasons. First, it has processed a large number of sites. There are an estimated 10,000 brownfields sites in the state (though not all have commercial potential),¹² and a number of developers proceeded successfully to cleanups using the state Memorandum of Agreement ("MOA").¹³ In the state's Voluntary Cleanup Program ("VCP"),¹⁴ a party who wants to remediate a site enters into an MOA with the state's environmental agency, the Department of Environmental Protection ("NJDEP" or "DEP"). The MOA, as is typical for similar programs in other states, establishes the scope of assessment and remediation activities, including anything from preliminary assessment at the site to remedial actions and reuse of the site. New Jersey's program is a typical one that allows all sites (not just those designated as brownfields) to enter into the VCP, but also has elements tailored specifically to brownfields, including a statewide task force¹⁵ and an "Office of Brownfield Reuse."¹⁶ There are some analyses¹⁷ and some limited empirical evidence¹⁸

12. N.J. Dep't of Env'tl. Prot., Site Remediation and Waste Mgmt. Program Frequently Asked Questions, <http://www.state.nj.us/dep/srp/brownfields/faq/> (last visited Mar. 31, 2007); see also Michael Greenberg et al., *Brownfield Redevelopment and Affordable Housing: A Case Study of New Jersey*, 12 HOUSING POL'Y DEBATE 515, 517 (2001), available at http://www.fanniemaefoundation.org/programs/hpd/pdf/HPD_1203_greenberg.pdf [hereinafter Greenberg et al., *Affordable Housing*] (noting that "only 1,157 of these 10,000 sites have commercial potential").

13. N.J. Dep't of Env'tl. Prot., Voluntary Cleanup Program, <http://www.nj.gov/dep/srp/volclean/> (last visited Mar. 31, 2007) [hereinafter N.J. Dep't of Env'tl. Prot. Voluntary Cleanup]. New Jersey has two different MOAs: one for residential properties and one for non-residential properties. See *id.*

14. *Id.*

15. N.J. Office of Smart Growth, Brownfields Redevelopment Task Force, <http://www.nj.gov/dca/osg/commissions/brownfields/taskforce.shtml> (last visited Mar. 31, 2007). The Task Force was created in 1998 by the New Jersey Brownfield and Contaminated Site Remediation Act. See NAT'L GOVERNORS ASS'N, NEW MISSION FOR BROWNFIELDS: ATTACKING SPRAWL BY REVITALIZING OLDER COMMUNITIES 18-20 (2000), <http://www.nga.org/Files/pdf/REPORT200010BROWNFIELDS.pdf> (discussing the Task Force and its activities).

16. N.J. Dep't of Env'tl. Prot., Office of Brownfield Reuse, <http://www.nj.gov/dep/srp/brownfields/obr/> (last visited Mar. 31, 2007).

17. See, e.g., Lynn Singband, *Brownfield Redevelopment Legislation: Too Little, but Never Too Late*, 14 FORDHAM ENVTL. L. REV. 313, 314-15 (2003) (analyzing New Jersey's program "because New Jersey was one of the first states to pass brownfields legislation; it is the most densely populated state, which makes development pressure in the state enormous; and its legislation is a good example of a typical response to brownfields").

18. See generally MICHAEL GREENBERG ET AL., NAT'L CTR. FOR NEIGHBORHOOD AND BROWNFIELDS REDEVELOPMENT, THE IMPACT OF MOTHBALLED INDUSTRIAL SITES ON URBAN REDEVELOPMENT IN NEW JERSEY (2000), <http://policy.rutgers.edu/>

about the program, as it was one of the earliest brownfields programs and has been in place for over a decade. New Jersey is also attempting to use second-generation approaches¹⁹ to improve the relationship of brownfields cleanups and urban redevelopment, most notably the Brownfields Development Area (“BDA”).²⁰ In short, the brownfields program is maturing and growing, and well worth the analytical look.

Following a basic description of the New Jersey program, I will discuss two specific developments, the BDA initiative and the recent “Grace Period Rule,” that changed some aspects of the program. My aim is more modest than a full-scale re-evaluation of all brownfields programs (or indeed of the New Jersey program in its totality); instead I look at the experience within one program to assess whether there is movement toward the development-centered approach. I find that some developments in New Jersey are positive, notably the BDA’s approach to addressing multiple brownfield sites concurrently in the same location. On the other hand, the Grace Period Rule introduces the prospect for additional delay in cleanups that is unwarranted given the current program structure.

II. DRAWBACKS OF THE BROWNFIELDS STORY

The prevailing brownfields story has been repeated so often that it is essentially unchallenged. The story looks something like this: a developer, perhaps a hospital or university that has no prior experience with the environmental enforcement scheme, decides to look at a piece of abandoned or underused urban property, typically located in a declining Rust Belt city. While the abandoned property was most likely a site with a history of industrial uses (although, with its former owner out of the picture, it may be hard to tell), its primary attribute is that no one has touched it for the last decade or more. The site’s advantages are clear: it is large enough for development and located near railroads and other forms of transpor-

brownfields/mothballs2.pdf [hereinafter GREENBERG ET AL., BROWNFIELDS REDEVELOPMENT]; Greenberg et al., *Affordable Housing*, *supra* note 12.

19. See generally D. Evan van Hook et al., *The Challenge of Brownfield Clusters: Implementing a Multi-Site Approach for Brownfield Remediation and Reuse*, 12 N.Y.U. ENVTL. L.J. 111 (2003) (discussing New Jersey’s Brownfields Development Area (“BDA”) and terming it a second-generation approach).

20. N.J. Dep’t of Env’tl. Prot., Brownfields Development Area Initiative, <http://www.state.nj.us/dep/srp/brownfields/bda/> (last visited Mar. 31, 2007) [hereinafter N.J. Dep’t of Env’tl. Prot., Brownfields Development Area Initiative]; see also *infra* notes 171-75 and accompanying text (discussing the BDA initiative).

tation;²¹ it is also within striking distance of a large population that can provide jobs and shopping opportunities for the new shopping center or hospital or (to be trendy) biotechnology research park. Ultimately, the abandoned site that had been previously used for manufacturing will become an apartment complex or a ballpark, and yield a bushel of economic benefits to the municipality.

The prospective developer, inexperienced with environmental enforcement, does not know where to start. It is afraid to contact the state environmental protection department because it fears the unknown. As much literature has explained, the developer may face potential liability as an owner or operator under CERCLA (or one of its state counterparts) as a result of taking ownership, or even by undertaking to clean up and reuse the property.²²

In most cases, the story assumes that residual contamination is not all that serious—otherwise the site would have presumably attracted attention from state regulators who force site cleanups in state CERCLA-like programs.²³ So, the future of the developer when it tackles an urban brownfields site is hardly a complete imponderable. The site might be more difficult to develop than its greenfield counterpart²⁴ and presents the potential of environmental risk. The developer faces two possible outcomes, with one far more likely than the other. In the first scenario, the developer steps in with the aid of incentives that tip the scale in favor of taking on risk. It finds that the site is not all that contaminated and cleanup is therefore neither costly or difficult. It cleans up the site, utters the proverbial sigh of relief, gets a state's signoff through some form of liability release, and moves on to build a Wal-Mart or ballpark. In the second (less likely) scenario, the site is tossed back into the enforcement hopper because a serious environmental problem is discovered.

21. See Opp & Hollis, *supra* note 2, at 1.

22. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 898. This is somewhat internally inconsistent: it presumes that the developer has little knowledge of environmental matters but understands federal law well enough to know that if it becomes involved with the property then it faces liability.

23. See *id.* at 899–900.

24. See, e.g., H. Wade VanLandingham et al., *Public Strategies for Cost-Effective Community Brownfield Redevelopment*, Univ. of Louisville Ctr. for Envtl. Pol'y & Mgmt., Practice Guide No. 1, at 1-2 (2002), http://cepm.louisville.edu/Pubs_WPapers/practiceguides/PG1.pdf (noting that “[t]he process of developing a vacant or agricultural greenfield site is well understood. [and this] is not true of brownfield redevelopment”).

It is the uncertainty about whether a given site is a scenario one site or a scenario two site that hampers remediation and reuse.²⁵ The developer prepared a business case for its project which showed that if the environmental cost (a number plugged into the ubiquitous spreadsheet) becomes anything more than a de minimis amount—half a million dollars, a million, or even more—it will sink the profit of the development. Therefore, the developer, fearing the unknown, flees to the suburban greenfield location where things are much more predictable;²⁶ there is no environmental remediation cost²⁷ and the land cost is less, therefore the project cost is a known commodity. Moreover, the development is not subject to the vagaries of the urban political landscape. Starting at the pristine greenfield location, the developer can proceed with its development in a relatively short timeframe: one year, maybe two, but little more. The biotech research park is then open for operation, or the shopping mall with its trendy stores is turning out denim and dollars. The urban brownfield site remains undisturbed, awaiting a savvy, less risk-averse developer.

At the outset, then, the brownfields policymaker puts herself in the developer's shoes and asks, "Why would anyone run the risk associated with urban brownfields sites?"²⁸ The "why," of course, is increasingly addressed by programs that come to the aid of developers, attempting to make it possible for them to assess the environmental risks on properties, clean them up if necessary, and then proceed to reuse, all in a streamlined fashion.²⁹

25. *Id.* at 12–13.

26. *See, e.g., id.* at 3 (noting that "[g]reenfield sites (previously undeveloped properties) are usually in such higher demand areas, cost less per acre to develop, and do not involve as much risk and uncertainty for investors").

27. This assumes the suburban or exurban site is not a brownfield. As a study by the group Resources for the Future explains, this may not be the case. *See* Wernstedt et al., *Brownfields Phenomenon*, *supra* note 6, at 7 ("Numerous brownfield sites can be found in mining areas and more generally throughout rural America.").

28. In his comments at the signing of the 2002 CERCLA amendments, President George W. Bush stated:

Many communities and entrepreneurs have sought to redevelop brownfields. Often they could not, either because of excessive regulation or because of the fear of endless litigation. As a consequence, small businesses and other employers have located elsewhere—pushing development farther and farther outward, taking jobs with them, and leaving cities empty.

Remarks on Signing the Small Business Liability Relief and Brownfields Revitalization Act in Conshohocken, Pennsylvania, 38 WKLY. COMP. PRES. DOC. 52, 53 (Jan. 11, 2002), available at <http://www.gpoaccess.gov/wcomp/v38no2.html> (follow link under Bill Signing for Small Business Liability Relief & Brownfields Revitalization Act).

29. *See, e.g.,* VanLandingham et al., *supra* note 24, at 3 (noting that "[t]he situation changed in the 1990s as states passed laws and regulations including Voluntary

Thus, from the beginning, the foundation of brownfields law and policy has been developer-centered, not development-centered.³⁰ Grounding revolutionary changes on liability protection for potential accidental and unforeseen victims of environmental liability enshrined the prominence of facilitating the real estate transaction at a brownfields site.³¹ New Jersey describes its brownfields remediation process as “user friendly”³² and, compared to CERCLA, claims that it is the height of responsiveness, not enforcement “hide the ball.” The developer voluntarily signs a contract with the state that specifies precisely what obligations it will undertake and what cleanup it will perform.³³ Since the inception of brownfields remediation programs, there has been a sea of change in attitudes toward the remediation of contaminated sites. To the development community, the attitude change is a welcomed relief.

The result, not surprisingly, has been considerable interest in the brownfields revitalization process, and it is no wonder that there are many tools developed and sources available for pragmatic brownfields redevelopment. There is an array of sources for financing, even insurance (which, even though underused at present, has been developed in creative ways for brownfields redevelopment),³⁴ and there are numerous guides to federal brownfields initiatives and state voluntary cleanup programs.³⁵ Annual national

Cleanup Programs and more flexible cleanup standards for brownfields based on intended new uses of sites”).

30. See Singband, *supra* note 17, at 315 (noting that “current brownfield revitalization statutes will do little to increase brownfield redevelopment because they focus on limited liability rather than on cost issues and public and environmental health and safety”).

31. In the “go-go” real estate development market of the 1990s, this message resonated deeply. See, e.g., Opp & Hollis, *supra* note 2, at 8 (noting that “[t]he booming economy of the late 90s undoubtedly also contributed to the increase in development projects of all kinds”).

32. N.J. Dep’t of Env’tl. Prot., Voluntary Cleanup, *supra* note 13.

33. The New Jersey MOA documents for residential and non-residential properties can be found at N.J. Dep’t of Env’tl. Prot., Memorandum of Agreement for Residential Props., http://www.nj.gov/dep/srp/volclean/moa2_res.htm (last visited Mar. 31, 2007) & N.J. Dep’t of Env’tl. Prot., Memorandum of Agreement for Non-Residential Props., http://www.nj.gov/dep/srp/volclean/moa2_nr.htm (last visited Mar. 31, 2007).

34. The EPA discusses successful uses of insurance at U.S. Env’tl. Prot. Agency, *Environmental Insurance Helps Ensure Redevelopment*, EPA 500-F-03-232 (July 2003), available at <http://www.epa.gov/swerosps/bf/success/insurance.pdf>. See generally Peter B. Meyer et al., *Brownfield Redevelopers’ Perceptions of Environmental Insurance: An Appraisal and Review of Public Policy Options* (Lincoln Inst. of Land Pol’y, Working Paper WP02PM1, 2002), available at http://www.lincolninst.edu/pubs/dl/664_meyer02web.pdf.

35. See, e.g., CHARLES BARTSCH ET AL., COMING CLEAN FOR ECONOMIC DEVELOPMENT: A RESOURCE BOOK ON ENVIRONMENTAL CLEANUP AND ECONOMIC DE-

brownfields conferences attract thousands of participants.³⁶ New Jersey maintains a “site mart” that matches prospective developers and prospective sites, a kind of eBay for brownfield sites in New Jersey.³⁷ The prevailing sense is that states are open for business when it comes to brownfields. Indeed, brownfields incentives are now one part of the increasing trend of localities offering incentives to attract real estate development.³⁸

The primary brownfields incentives, of course, are those offered by the voluntary cleanup programs now available in all but one state that provide road maps for developers to approach state environmental agencies or brownfields revitalization agencies (if they exist) and deal directly with the states.³⁹ The new federal law pro-

VELOPMENT OPPORTUNITIES (1996), available at <http://www.nemw.org/cmclean.htm> [hereinafter BARTSCH ET AL., COMING CLEAN]; LINDA BREGGIN ET AL., A GUIDEBOOK FOR BROWNFIELD PROPERTY OWNERS (1999), available at http://www.elistore.org/reports_detail.asp?id=459; BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY (Todd S. Davis ed., 2d ed. 2002); BROWNFIELDS LAW & PRACTICE: THE CLEANUP & REDEVELOPMENT OF CONTAMINATED LAND (Michael B. Gerrard ed., 1998 & Supp. 2005); ELIZABETH GLASS GELTMAN, RECYCLING LAND: UNDERSTANDING THE LEGAL LANDSCAPE OF BROWNFIELD DEVELOPMENT (2000); IMPLEMENTING INSTITUTIONAL CONTROLS AT BROWNFIELDS AND OTHER CONTAMINATED SITES (Amy L. Edwards ed., 2003); RONALD ROSENBERG, BROWNFIELDS REDEVELOPMENT: CLEANING UP CONTAMINATED SITES FOR COMMUNITY RENEWAL (2000); RONALD ROSENBERG, COMMUNITY RESOURCE GUIDE FOR BROWNFIELDS REDEVELOPMENT (2002). For websites with useful information see Center for Brownfields Initiatives at the University of New Orleans, Homepage, <http://www.brownfields.com> (last visited Mar. 31, 2007); U.S. Env'tl. Prot. Agency, Brownfields Cleanup and Redevelopment Page, <http://www.epa.gov/brownfields> (last visited Dec. 2, 2006); Nat'l Ctr. for Neighborhood and Brownfields Redevelopment, Homepage, <http://www.policy.rutgers.edu/brownfields> (last visited Mar. 31, 2007); Northeast-Midwest Institute, Homepage, <http://www.nemw.org> (last visited Mar. 31, 2007).

36. See, e.g., Press Release, U.S. Env'tl. Prot. Agency, 4,000-plus Expected at 10th National Brownfields Conference Nov. 2nd-4th at Denver's Colorado Convention Center (Mar. 10, 2005), <http://yosemite.epa.gov/r8/r8media.nsf/Published%5C2005!OpenView> (follow “March” hyperlink).

37. See State of New Jersey, Brownfields Site Mart, <http://www.njsitemart.com> (last visited Mar. 31, 2007).

38. VanLandingham et al., *supra* note 24, at 8 (“This expansion of state brownfield programs is a logical outgrowth of broader state innovation and competition in efforts to encourage new investment and associated economic development.”). Another commentator sees brownfields programs as more “politically acceptable” than direct subsidies and other forms of aid to cities. See Michael R. Greenberg, Editorial, *Reversing Urban Decay: Brownfield Redevelopment and Environmental Health*, 111 ENVTL. HEALTH PERSP. A74 (Feb. 2003), available at <http://www.ehponline.org/docs/2003/111-2/EHP111pa74PDF.PDF> [hereinafter Greenberg, Editorial].

39. See Charles Bartsch, *Brownfields State of the States in 2004*, NE-MW ECON. REV., Fall 2004, at 14, 14, available at <http://www.nemw.org/ER%20brownfields.pdf> [hereinafter Bartsch, *State of States*] (noting that “[i]n 2004, South Dakota became the 49th state to adopt a formal brownfields program”).

vides some shelter for a developer that engages with the state, reducing the risk (claimed to exist well over a decade ago)⁴⁰ that the Environmental Protection Agency (“EPA”) will overfile⁴¹ and conclude that a cleanup completed successfully in a state program is not acceptable at the federal level. The EPA’s new “all appropriate inquiries” rule apparently ensures that if a developer follows procedures that are rapidly becoming widely accepted industry standards it should have little to fear from the EPA.⁴²

This brownfields story has led to certain basic trends in remediation and reuse. First and foremost, developers are treated as a monolithic group in most voluntary cleanup programs. Virtually anyone willing to tackle the remediation and reuse of a site can do so, with few exceptions. Because developers engage voluntarily with the state, they presumably lack culpability and, therefore, control the timing, sequencing, and even the comprehensiveness of remediation and reuse. The developer that takes the lead at a brownfield site dictates the terms of the cleanup and redevelopment strategy, otherwise it is assumed that it would not be worthwhile to proceed.⁴³ The result is a level of trust unheard of in other contexts. The MOA or a similar document empowers the developer to clean up the site, and the state’s role is limited to that of overseer. This means that the remediation outcome is only as good as the state’s ability to verify the results.⁴⁴ In states where remediation at a brownfield site can proceed without state involvement of any sort, the only verification is indirect through state-certified consultants who approve the cleanup results.⁴⁵

What does the state get in return for ceding control? When a developer comes to the state, it presumably has alternatives, including the option of no action. Without a developer ready to take on the risk of developing a brownfield site (which is presumptively

40. See generally Eisen, *Brownfields of Dreams*, *supra* note 3.

41. See Opp & Hollis, *supra* note 2, at 7 (noting that “[t]his act works to limit ‘overfiling’ by the EPA when a cleanup occurs through a state program”).

42. See Standards and Practices for All Appropriate Inquiries, 40 C.F.R. § 312 (2005). The EPA’s “All Appropriate Inquiries” page is located at <http://www.epa.gov/brownfields/regneg.htm>. Some commentators have observed that this rule may not offer sufficient protection to brownfields developers. See, e.g., Strickland, *supra* note 4, at 790. At the very least, there is residual uncertainty. See Opp & Hollis, *supra* note 2, at 7 (“Because the Act is still recent, its full effect on the status of brownfields is not yet clear. While it does ease CERCLA liability and promote redevelopment of sites, the provisions are lengthy and will undoubtedly be modified as the EPA provides further guidance and new judicial decisions arise.”).

43. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 965–70.

44. See *id.* at 1021.

45. See *id.* at 968–69.

deemed to be higher than that of a greenfield site even though it may not be), the brownfield site would remain fallow. In return for its streamlining of the environmental law scheme, the state receives a promise that the locality will see certain economic benefits once the property is back in use in its commercial, retail, residential, or other setting.⁴⁶

This story, though appealing, may well turn out to be inaccurate in whole or part in many cases. Brownfields policies were put into place on the basis of considerable faith in the power of fear and the resulting need to stop punishing developers, not the strength of available data. On the whole, there is not as much knowledge about the brownfields revitalization process as originally thought in the 1980s and 1990s.⁴⁷ There is a lack of satisfactory empirical evidence because, with roughly a decade of experience, studies of brownfields law and policy are just now starting to emerge.⁴⁸

There are essentially two types of studies underway: (1) those involving problem characterization (how many brownfields sites are in a given state or locality; how many of these have commercial potential; and so forth),⁴⁹ and (2) those developing a knowledge base of success stories that prospective developers can use to develop their own roadmaps for successful cleanups at their sites.⁵⁰ The latter includes case studies of individual brownfields sites in Trenton,⁵¹ Worcester,⁵² Baltimore,⁵³ and other ideal Rust Belt can-

46. Wernstedt et al., *Brownfields Phenomenon*, *supra* note 6, at 10 (discussing the importance of economic benefits to brownfields redevelopment projects).

47. *See id.* at 4 (noting that empirical literature on brownfields remains undeveloped).

48. An intriguing proposal to spur more studies is set forth in Dana, *supra* note 7, at 86-87 (calling for "an amendment to the federal CERCLA statute that would limit liability for participants in brownfields cleanups in states that employ a system of standardized data-collection regarding the development, implementation, and outcomes of at least a significant sample of their approved brownfields cleanups").

49. Wernstedt et al., *Brownfields Phenomenon*, *supra* note 6, at 5-6 (noting that "a small number of studies have relied on original surveys to systematically collect information on the scope of the brownfields problem"). The National Center for Neighborhood and Brownfields Redevelopment at Rutgers University has collected data on the number and attributes of mothballed brownfield sites. *See generally* GREENBERG ET AL., BROWNFIELDS REDEVELOPMENT, *supra* note 18.

50. Wernstedt et al., *Brownfields Phenomenon*, *supra* note 6, at 5 (noting that "much of what we know about brownfields and the barriers to their redevelopment has come from case studies of individual redevelopment projects").

51. Trenton is one of the EPA's "Brownfields Showcase Communities." *See* U.S. Evtl. Prot. Agency, *Trenton Brownfields Ride a Wave of Revitalization*, EPA 500-F-02-168 (2002), available at http://www.epa.gov/brownfields/pdf/ss_trent.pdf.

52. The Northeast-Midwest Institute's *Lessons from the Field* discusses the \$200 million "Medical City" project that "involved cleaning up and reusing 24 acres of blighted downtown property, and which is expected to create 3,000 new jobs and have

didates for brownfields policies (as well as a number of others),⁵⁴ where striking successes have been documented. Yet this anecdotal evidence of success, given the wide variety in approaches and results, is perhaps most useful as a process guide for other cities, not as a comprehensive justification of brownfields policies.⁵⁵

Brownfields programs have not been studied in an overall systematic way,⁵⁶ and it is possible that comprehensive studies would show that the vast majority of sites involve a win-win of successful remediation and benefits to the host community. Certainly those high-profile sites trumpeted by the EPA and the states are, in fact, places where benefits have materialized.⁵⁷ Yet, the supporting data is just now emerging.⁵⁸

Does this relative lack of certainty matter? If redevelopment potential is stymied by the fear of contamination at an urban site, a suburban site, or even an exurban site, that any remediation and reuse activity is better than the “no action” alternative. Yet just as the status quo may be preferable to environmentally damaging activities in other contexts,⁵⁹ it may be so here as well, where the benefits of “no action” may outweigh the costs of increased human activity at a brownfields site.⁶⁰

a total direct economic impact of \$875 million within its first ten years of operation.” PEPPER, *supra* note 9, at ch. 1.

53. See U.S. Env'tl. Prot. Agency, *Redevelopment Opportunities Taking Hold in Baltimore*, EPA 500-F-02-153 (2002), available at http://www.epa.gov/brownfields/pdf/ss_balti.pdf.

54. See U.S. Env'tl. Prot. Agency, *Brownfields Success Stories*, <http://www.epa.gov/brownfields/success.htm> (last visited Mar. 31, 2007).

55. Wernstedt et al., *Brownfields Phenomenon*, *supra* note 6, at 3-4 (noting that “most brownfield efforts have taken a property-by-property approach that aims at supporting the highest and best use of individual properties,” but “[w]hether these [brownfield success stories] have helped to revitalize distressed areas and contribute to a more sustainable community is a more difficult question, however.”).

56. *Id.* at 1 (noting that “[u]nfortunately . . . the enthusiasm for brownfields reuse generally has not been matched by systematic, careful documentation of actual practice at a wide range of sites”); see also Dana, *supra* note 7, at 101 (noting that as of 2005, the “paucity of our knowledge about the actual results of state brownfields programs”).

57. See *Brownfields Success Stories*, *supra* note 54.

58. See generally Wernstedt et al., *supra* note 6, at 4-6 (discussing empirical studies conducted as of 2004 and their limitations).

59. The example I have in mind is the requirement in the National Environmental Policy Act to study the alternative of “no action” because it may turn out to be preferable to a federal agency’s chosen course of action. See 42 U.S.C.A. § 4332 (West 2000).

60. See, e.g., Dana, *supra* note 7, at 93-94.

One might argue that, regardless of the quality of a brownfields cleanup, and even if the quality is significantly lower than would be required under CERCLA, some cleanup is better than no cleanup. All else being equal, perhaps

First, state programs are not limited to urban sites with potential for development. As a recent study explains, “[i]n theory, brownfields programs focus on sites in urban areas and VCPs focus on any site. The truth is that state programs often do not make such distinctions.”⁶¹ Urban sites’ perceived advantages, in terms of transportation, jobs, and so forth, turn out to be applicable to a much smaller number of brownfields sites than envisioned by the prevailing wisdom.⁶² More importantly, the promise of economic benefits through redevelopment is not a requirement for a developer’s entry into the voluntary cleanup process. Some states such as Michigan, New Jersey, and Pennsylvania⁶³ attempt to make some connection between brownfields cleanups and redevelopment efforts (but even those states typically tie a brownfield designation to eligibility for funding⁶⁴ or other state benefits,⁶⁵ not to

some cleanup is always better than no cleanup. But all else is not equal: before a brownfields cleanup, a site may well not be in use or may be only minimally in use, such that there are no or few contact points between site contamination and human beings. After a cleanup and redevelopment, a site may be the subject of intensive, daily use by a large number of people. In other words, while one effect of a brownfields cleanup may be to reduce the level of contamination, another effect may be to increase human exposure to the contamination on the site. To the extent that the second effect dominates the first, a brownfields cleanup may, putting other benefits from redevelopment aside, make matters worse. Some cleanup, in certain instances, may be worse than none.

Id.

61. Opp & Hollis, *supra* note 2, at 9.

62. Wernstedt et al., *Brownfields Phenomenon*, *supra* note 6, at 7. Nor are these sites necessarily the former industrial sites envisioned by the model. One recent study found that a minority of brownfield sites had “hosted light/heavy industry.” *Id.* (“Our environmental insurance survey of nearly 50 private developers of brownfield sites found that sites under redevelopment most commonly had hosted light/heavy industry (32%), mixed use (26%), commercial (22%), and residential (11%) activities.”).

63. VanLandingham et al., *supra* note 24, at 8 (“The states with the most active VCPs also tend to have special economic stimulus packages targeting brownfields, or to regions or locations that are likely to contain them. Michigan, for example, provides special incentives to its ‘Renaissance Zones;’ Pennsylvania has a ‘Special Industrial Areas’ cleanup standard and other states have targeted their federally designated Empowerment Zones or Enterprise Communities or their own state enterprise zones for brownfields incentives.”).

64. The New Jersey DEP works with the state’s Economic Development Authority to provide money from the Hazardous Discharge Site Remediation Fund for site remediation. Under state law, a developer that enters into a redevelopment agreement may potentially recoup up to seventy-five percent of her cleanup costs. *See* N.J. Dep’t of Env’tl. Prot., Hazardous Discharge Site Remediation Fund, <http://www.nj.gov/dep/srp/finance/hdsrf/> (last visited Mar. 31, 2007); *see also* Martha N. Donovan, *How to Deal with NJDEP Violations*, METROPOLITAN CORP. COUNS., Apr. 2006, at 29, <http://www.metrocorp.counsel.com/pdf/2006/April/29.pdf> (noting that “[t]he New Jersey Commerce and Economic Growth Commission and the Depart-

eligibility to enter a VCP).⁶⁶ VCPs, however, are not primarily concerned with the prospective developers' motives. A developer that plans to mothball a site is just as eligible as one who plans a massive urban redevelopment project.⁶⁷ Even where developers plan for urban growth, the promised economic benefits may fail to materialize. This is an area, of course, that has been studied extensively in urban policy literature and arose recently in *Kelo v. City of New London*,⁶⁸ where Justice O'Connor, in dissent, opposed a taking by the city of New London in part because it was grounded on a redevelopment plan with hazy promises of future economic benefits.⁶⁹

The fear of environmental contamination and the high cost associated with remediation have proven less important to prospective brownfields redevelopers than previously thought.⁷⁰ One study found that only eight percent of the cost of developing a brownfield site is attributable to the cost of environmental remediation.⁷¹ Another author observed that even after developers do some environmental assessments at brownfield sites, they still tend to overes-

ment of Treasury, in consultation with NJDEP, negotiate and approve redevelopment agreements if the project is appropriate and reasonable and there is a clear indication that, but for the availability of the funding, the developer is not going to do the project").

65. See, e.g., Opp & Hollis, *supra* note 2, at 9-10.

VCPs vary in their focus, with some emphasizing redevelopment of sites more heavily than others. The level of redevelopment incentives also depends upon which state organization oversees the state program. If it is an economic development department rather than an environmental department, the state brownfield program will be more likely to offer economic incentives to developers and to have variable cleanup standards, rather than adhering to more stringent cleanup standards.

Id.

66. Eligibility in New Jersey's VCP is extended to "[a]ny person not subject to the New Jersey Underground Storage of Hazardous Substances Act or the Industrial Site Recovery Act." N.J. ADMIN. CODE § 7:26C-3.2(a) (2005).

67. This phenomenon is discussed in GREENBERG ET AL., BROWNFIELDS REDEVELOPMENT, *supra* note 18, at i (noting that "[o]nly anecdotal information exists . . . about the prevalence of the problem").

68. 545 U.S. 469 (2005).

69. *Id.* at 495 (O'Connor, J., dissenting).

70. See Wernstedt et al., *Brownfields Phenomenon*, *supra* note 6, at 9 ("Recent work also has explored the economics of brownfields redevelopment, suggesting that contamination may not be as significant a constraint to property transactions as the prevailing sentiment of the 1980s and early 1990s suggested.").

71. See Greenberg et al., *Affordable Housing*, *supra* note 12, at 518 (citing a study by the Council for Urban Economic Development [now the International Economic Development Council, or IEDC]).

timate the remaining environmental risk.⁷² More importantly, studies based on surveys of real estate developers found many reasons other than environmental risk that led developers to shun urban sites, including “basic real estate fundamentals.”⁷³

There are two sets of potential problems relating to treating developers as a monolithic group. First, a developer, unlike the “newbie” volunteer of the brownfields story, may not be so innocent. Consider two different but related possibilities. The developer, far from being unfamiliar with the environmental enforcement system, may in fact be quite savvy and manipulate the system by enrolling a less meritorious site in the state’s voluntary cleanup program (perhaps even one that should be subject to state environmental enforcement).⁷⁴ While states are supposed to have checks in place to ensure this does not happen, there are instances where sites may fall through the cracks for one reason or another. There may not be the resources or political will for vigorous gatekeeping.

Second, the conduct of a cleanup can fall off the rails and come up far short of the one that we expect from an innocent developer. The cleanup program, of course, can encourage or discourage inadequate cleanups by its structure. A cleanup can take a long time under an MOA if a developer does not do what it promised to do, or if the cleanup takes longer than expected and the state does not devote enough oversight attention to it.⁷⁵

There is also a temporal element to this. A developer may attempt to conduct remediation in the right way, but it may later be discovered that it was not done correctly. This failure can be attributable to cleanup standards that are streamlined⁷⁶ in voluntary cleanup programs, which is one of the program’s major attrac-

72. See VanLandingham et al., *supra* note 24, at 12 (noting that prospective brownfields developers “tend to exaggerate the project uncertainty that remains [even] after completion of a site assessment that meets the [American Society for Testing and Materials] ASTM standards”).

73. See Wernstedt et al., *Brownfields Phenomenon*, *supra* note 6, at 9 (finding that “basic real estate fundamentals often pose more significant obstacles to redevelopment of any previously used urban land than does contamination”).

74. See Dana, *supra* note 7, at 87 (noting that “brownfields programs are likely to be used to address even very seriously contaminated sites that are not already subject to a CERCLA cleanup”).

75. There are other possibilities; for example, differing results due to variations in the skill and competence of consultants hired to do cleanups. See Shari Shapiro, *The Effectiveness of Pennsylvania’s Act 2: Are Good Mechanics Enough?*, 24 TEMP. ENVTL. L. & TECH. J. 441, 455 (2005).

76. Or perhaps a process of assessing the site that requires hasty judgments. See Greenberg, Editorial, *supra* note 38, at A74.

tions.⁷⁷ These streamlined cleanup standards often allow developers to use “institutional controls,” the popular means of fencing, zoning controls, deed, or covenant restrictions⁷⁸ that do not involve actual cleanups at the sites.⁷⁹ It is conceivable that this harnessing of contamination (rather than an actual cleanup⁸⁰) could fail years later.⁸¹ This may be yet another indication that the program adopts

Environmental scientists working in state and local government may find brownfields cases placed at the top of their action list, with a demand for action in a matter of a few weeks or a month, rather than months or years. Environmental health scientists in companies will be pressed to develop and use monitoring equipment that provides quick and decisive information to investors.

Id.

77. Eisen, *Brownfields of Dreams*, *supra* note 3, at 933; *see also* Wernstedt et al., *Brownfields Phenomenon*, *supra* note 6, at 13 (observing that “the relative effectiveness of nonfinancial interventions—a change in regulatory requirements such as reducing cleanup standards or liability relief that releases ‘innocent’ parties at contaminated sites from long-term damage claims—may be even more critical [to success of brownfields remediation and reuse]”).

78. *See* Wernstedt et al., *Brownfields Phenomenon*, *supra* note 6, at 10.

[C]leanup approaches at many brownfield properties often rely on legal mechanisms referred to as “institutional controls”—such as zoning, property easements and covenants, and well drilling bans—to restrict property uses at a site with residual contamination. In our environmental insurance study, for example, 38% of the developers noted the use of one or more institutional controls, most commonly government controls such as zoning and permitting requirements.

Id.

79. This is an accepted means of dealing with brownfield sites in New Jersey: There are several ways to comply with DEP’s cleanup standards and criteria. And, while permanent remedies are preferred, it is understood and recognized in New Jersey statutes that it does not always make sense to remove all contamination at a site. When a “cleanup” limits workers’ and residents’ exposure to contamination and is protective of human health and the environment, DEP can and has approved such remedial actions.

N.J. Dep’t of Env’tl. Prot., Site Reuse Opportunities and Cleanup Tools, http://www.nj.gov/dep/srp/brownfields/site_reuse.htm (last visited Mar. 31, 2007).

80. *See* Wernstedt et al., *Brownfields Phenomenon*, *supra* note 6, at 10 (“These institutional controls do not so much as enhance environmental quality through the elimination or treatment of contamination as they provide protection by limiting exposure to it.”). The title of a workshop at the Brownfields 2005 conference sums it up nicely: “Institutional Controls: The Achilles Heel of the Brownfields Program (& What Can be Done to Fix this Flaw).” Brownfields 2006, <http://www.brownfields2006.org/en/SessionsPast.Browser.aspx> (select “Brownfields 2005,” then search “Search Text” for “The Achilles Heel of the Brownfields Program”) (last visited Mar. 31, 2007). *See also* Schofield, *supra* note 4, at 956–57 (noting that in passing the 2002 CERCLA amendments “Congress appears to have improperly assumed that institutional controls as currently implemented can protect human health and the environment”).

81. Enforcement of these restrictions down the line against subsequent landowners, largely a creature of real property law, can also prove difficult. *See generally* Andrea Ruiz-Esquide, *The Uniform Environmental Covenants Act—An Environmental*

a developer-centered approach that is not sufficiently protective of the environment.⁸²

Experience with state voluntary cleanup programs may tell us that they need to be revised, and yet the early record has not frequently led to fine tuning of programs. New Jersey made some adjustments, so it is worth seeing whether the state critically examined the brownfields story and took additional steps to protect the environment.

III. NEW JERSEY'S VOLUNTARY CLEANUP PROGRAM: TESTING THE BROWNFIELDS STORY

New Jersey's VCP began in 1992, making it one of the oldest in the country.⁸³ The program is governed by oversight rules available on the DEP's website,⁸⁴ and it allows developers flexibility to conduct remediation at their own schedule, which is a critical element in any brownfields or voluntary cleanup program.⁸⁵ Additionally, the developer may terminate the MOA on its own if it so desires, and parties may select a partial investigation or cleanup without fear of penalties.⁸⁶ Like other VCPs, not all contaminated sites qualify.⁸⁷ Sites subject to the state superfund-like law, known as the "Spill Act,"⁸⁸ or the federal CERCLA program are not eligible to take part in the VCP.⁸⁹ Also, under the oversight rules, the

Justice Perspective, 31 *ECOLOGY L.Q.* 1007 (2004) (discussing the problem of enforcement and the Uniform Environmental Covenants Act).

82. See Greenberg, Editorial, *supra* note 38, at A74.

I have learned that some local governments do not differentiate between brownfield and uncontaminated sites. For example, the fact that a project has a major plume beneath it and that the plume is draining into a river that feeds into a potable water supply will not discourage some developers from expecting environmental scientists to agree with redevelopment schemes that pose measurable public health and ecologic risks. Deed restrictions that require occupants not to dig underground or not to use basements for a bedroom may not be followed or enforced.

Id.

83. N.J. Dep't of Env'tl. Prot., Voluntary Cleanup, *supra* note 13.

84. N.J. ADMIN. CODE §§ 7:26C-1.1 to -11.4 (2006).

85. N.J. Dep't of Env'tl. Prot., Voluntary Cleanup, *supra* note 13; see also *supra* note 43 and accompanying text.

86. N.J. Dep't of Env'tl. Prot., Voluntary Cleanup, *supra* note 13.

87. *Id.*

88. Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10 (West 2006).

89. See N.J. ADMIN. CODE § 7:26C-2.2.

If the Department, in the exercise of its enforcement discretion, chooses to allow a person who is not subject to the Industrial Site Recovery Act or the New Jersey Underground Storage of Hazardous Substances Act to conduct remediation at a known or suspected contaminated site or area/areas of concern at a site, which the Department has not scheduled for publicly funded

DEP may terminate an MOA if it establishes that a property is “heavily contaminated and possesses an immediate environmental concern.”⁹⁰ In that case, the DEP conducts a cleanup using funds from the Spill Compensation Fund, New Jersey’s equivalent of the Superfund, and recovers the cost of the cleanup from the responsible party.⁹¹

The VCP is not limited to brownfields sites.⁹² Indeed, the state says “the VCP has also dovetailed nicely within the department’s brownfields initiatives for providing a tool for easier and faster re-use of formerly contaminated facilities.”⁹³ Subchapter Three of the DEP’s Oversight Rules provides the framework for conducting voluntary cleanups, known as the “Administrative Process for Voluntary Cleanups.”⁹⁴ This subchapter identifies the general requirements for an MOA, the process to request the DEP’s oversight of the brownfields cleanup, and the procedures for termination of an MOA.⁹⁵ It provides a one-step application for the entry into an MOA with the DEP and sets forth specific content requirements, including “the applicant shall conduct all remediation pursuant to the Technical Requirements for Site Remediation.”⁹⁶ Thus, the cleanup standards are the same as for other contaminated sites. Under these rules, MOAs can be processed in one step.⁹⁷ Once the department determines that an application is administratively complete, the MOA is in place.⁹⁸

The recent Grace Period Rule (“Rule”), promulgated on September 20, 2006, modifies the voluntary cleanup program oversight

remediation, then such participation shall be governed by a memorandum of agreement in accordance with N.J.A.C. 7:26C-3.

Id.

The VCP web page indicates that:

It should be noted that not all contaminated properties qualify for the program. Some properties subject to the Industrial Site Recovery Act and the Underground Storage Tank or Federal Superfund programs are not part of the VCP. Also, if an investigation reveals that a property is heavily contaminated and poses [sic] an immediate environmental concern (an acute, direct threat to human health or the environment), the department will conduct an immediate cleanup using funds from the Spill Compensation Fund.

N.J. Dep’t of Env’tl. Prot., Voluntary Cleanup, *supra* note 13.

90. N.J. Dep’t of Env’tl. Prot., Voluntary Cleanup, *supra* note 13.

91. *See id.*

92. *Id.*

93. *Id.*

94. N.J. ADMIN. CODE §§ 7:26C-3.1 to -3.4.

95. *Id.*

96. *Id.* § 7:26C-3.3(a)3.iii.

97. N.J. Dep’t of Env’tl. Prot., Voluntary Cleanup, *supra* note 13.

98. N.J. ADMIN. CODE § 7:26C-3.3(a).

rules.⁹⁹ The Rule was promulgated in response to a 1993 New Jersey statute, popularly known as the “Grace Period Law” (“GPL”), intended to allow those charged with “minor” violations of state environmental laws to fix them within a designated period of time (hence the name) without penalty.¹⁰⁰ The Rule revised the DEP’s imposition of penalties for violations of a number of New Jersey’s enforcement laws.¹⁰¹ Specific grace periods, ranging from thirty to sixty days or more, are made available for specified violations deemed minor.¹⁰² Part of the Rule amends Subchapter Three. Under current law, the DEP may terminate an MOA in three different sets of circumstances: if the person responsible for conducting remediation has (1) “not made scheduled submissions to the department pursuant to the schedule set forth in the MOA application; (2) has failed to pay the department’s oversight cost; or (3) has failed to submit documents required by an [MOA] in accordance with the technical requirements.”¹⁰³ The Rule adds that the termination of an MOA allows the DEP to “pursue an enforcement action against the responsible party for violations of any statute or implementing rule, conduct the remediation using public funds, and recover those costs from the responsible party or any other actions permitted under law.”¹⁰⁴ Thus, the remediation of a site where an applicant had its MOA terminated is governed

99. See 38 N.J. Reg. 3821(a) (Sept. 18, 2006) (codified in scattered sections of N.J. ADMIN. CODE tit. 7), available at http://www.nj.gov/dep/rules/adoptions/2006_0815grace.pdf.

100. N.J. STAT. ANN. § 13:1D (West 2003).

101. As the preamble explains:

The Department of Environmental Protection hereby adopts amendments to the Department Oversight of the Remediation of Contaminated Sites Rules, N.J.A.C. 7:26C (Oversight Rules) to set forth penalties for violations of the Underground Storage Tank Rules, N.J.A.C. 7:14B (UST Rules), the Industrial Site Recovery Act Rules, N.J.A.C. 7:26B (ISRA Rules), the Oversight Rules, N.J.A.C. 7:26C, and the Technical Requirements for Site Remediation Rules (Technical Rules.), N.J.A.C. 7:26E, and identify these violations as either minor or non-minor for the purpose of providing grace periods in accordance with P.L. 1995, c. 296 (N.J.S.A. 13:1D-125 et seq.), commonly known as the Grace Period Law. The amendments to these rules set forth how the Department will respond to any violation identified as minor.

38 N.J. Reg. 3821(a) (codified in scattered sections of N.J. ADMIN. CODE tit. 7), available at http://www.nj.gov/dep/rules/adoptions/2006_0815grace.pdf.

102. See *id.*

103. N.J. ADMIN. CODE § 7:26C-3.3(c).

104. *Id.* § 7:26C-3.3(c)5 (2006).

by an Administrative Consent Order, the familiar document mandating cleanup under the Spill Act.¹⁰⁵

In purported compliance with the requirement of the GPL, the DEP also extended the period of time allowed to correct the three deficiencies that would ordinarily allow the DEP to terminate an MOA.¹⁰⁶ The new rule reads as follows: “The department may provide the person responsible for conducting the remediation a period of time to correct the deficiency identified in (c)(1).i through iii, above, in order to achieve compliance with the memorandum of agreement and avoid termination of the memorandum of agreement pursuant to (c)(3) below.”¹⁰⁷

While the DEP deems this comparable to the specific grace periods extended to responsible parties conducting cleanups under enforcement-driven laws, it clearly is not. For enforcement-driven laws, the new Rule provides tables and charts establishing the range of “minor” violations with specific grace periods and time limits. By contrast, the language “a period of time” is not defined in the new language in Subchapter three. It appears that a brown-field developer operating under an MOA could argue for an indefinite extension of time to complete a cleanup. The DEP’s comments on the Rule imply that the DEP will do everything it can to accommodate developers.¹⁰⁸ Any action undertaken pursuant

105. See Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10 (West 2006); see also N.J. Dep’t of Env’tl. Protection, Voluntary Cleanup, *supra* note 13.

106. N.J. ADMIN. CODE § 7:26C-3.3(c)3.

107. *Id.*

108. See 38 N.J. Reg. 3821(a) (Sept. 18, 2006) (codified in scattered sections of N.J. ADMIN. CODE tit. 7), available at http://www.nj.gov/dep/rules/adoptions/2006_0815_grace.pdf.

[T]his adoption amends the provision at N.J.A.C. 7:26C-3.3(c)2 to allow a volunteer remediating a site pursuant to an MOA a period of time to correct a deficiency in complying with the MOA prior to termination. This will further encourage voluntary remediation including the remediation of brownfields by giving the volunteer *every possible opportunity* to succeed in the remediation process. If the volunteer is deficient in complying with the terms of the MOA (e.g., fails to submit a document in accordance with the schedule that the volunteer submitted to the Department), the Department will notify the volunteer of the deficiency, and allow the volunteer time to correct the deficiency. During that time period, the Department encourages dialogue between the volunteer and the Department’s case manager to resolve any differences, thus fostering a more collegial relationship. This positive relationship and experience can only lead to more developers seeking to develop brownfield sites, thus promoting smart growth and the economic well being of the State.

Id. (emphasis added).

to an MOA properly could be viewed as “minor” under the terms of the Rule and subject to an extension of time.

This prospect for delay could be deleterious to the success of the program in the case of a developer who is not innocent, as the brownfields story assumes. The DEP’s staff prepared a “Vulnerability Assessment” in 2002,¹⁰⁹ essentially a description of areas where the environmental programs administered by the state were not meeting legal requirements either because they were understaffed, underfunded, or simply overwhelmed. The DEP staff generated information about the VCP,¹¹⁰ which stated in part that seven percent of the sites with MOAs governing cleanups are “non-performers” because they are not meeting their legal obligations under their MOAs.¹¹¹ This figure is perhaps even more surprising when one considers that a number of sites with MOAs governing cleanups are residential real estate transactions where potential buyers are concerned with the condition of petroleum storage tanks. These tank cleanups are conducted with a “speedy turnaround,” the goal being to allow sellers “to present a ‘No Further Action Letter’ to buyers in time for settlement.”¹¹² Given the likelihood that most residential tank cleanups are done in short order, the seven percent non-performer figure is probably higher for developers remediating more typical brownfields sites.

There is reason for concern about the pace of cleanups undertaken under developers’ control. The DEP’s internal Vulnerability Assessment stated in part, “[t]here are 4921 active MOAs with an

109. See N.J. Dep’t of Env’tl. Prot., Site Remediation & Waste Mgmt. Program, Site Remediation Program Vulnerability Assessment (2002), available at http://www.peer.org/docs/nj/06_17_8_dep_vulnerable_srp.pdf [hereinafter N.J. Dep’t of Env’tl. Prot., Site Remediation & Waste Mgmt. Program]; see also News Release, Pub. Employees for Env’tl. Responsibility, Call for Inspector General to Head Mercury Day-Care Probe, Severe Toxic Problems Acknowledged in 2002 Internal “Vulnerability Assessment” (Aug. 17, 2006), http://www.peer.org/news/news_id.php?row_id=728 [hereinafter Inspector General] (referring to “a confidential internal DEP ‘Vulnerability Assessment’ review of the troubled site cleanup program conducted by former DEP Commissioner Bradley Campbell in February 2002”).

110. See N.J. Dep’t of Env’tl. Prot., Site Remediation & Waste Mgmt. Program, *supra* note 109. The final “Vulnerability Assessment” did not include the information about the VCP; the confidential internal assessment was later made available to the New Jersey chapter of PEER. See News Release, Inspector General, *supra* note 109; E-mail from Bill Wolfe, Director, N.J. PEER, to Joel B. Eisen, Professor of Law, University of Richmond School of Law (Sept. 22, 2006, 10:00:31 EST) (on file with author).

111. See N.J. Dep’t of Env’tl. Prot., Site Remediation & Waste Mgmt. Program, *supra* note 109.

112. N.J. Dept. of Env’tl. Prot., Voluntary Cleanup, *supra* note 13.

average age of 3.5 years.”¹¹³ The length of three and one half years is in and of itself fairly striking, being longer than the quick turn-around in the brownfields story. It is a sizeable fraction, roughly one-third to one-half, of the time period of the average CERCLA cleanup.¹¹⁴ Given that a number of sites handled by MOAs involve residential tank cleanups, it appears that other sites involve remediation periods beyond the three and one half year average.¹¹⁵ This is inconsistent with the brownfields story’s notion that the developer comes in, remediates quickly, and moves on. Without more empirical analysis, it is hard to discern the root cause of this problem. It may be that developers are addressing more seriously contaminated sites in the VCP when the sites should be handled elsewhere. It may also be that the state has every intention of handling a site quickly, but a developer delays the process.¹¹⁶

The standards governing cleanups are the same in either case,¹¹⁷ so the primary difference between enforcement sites and those in the VCP inheres in allowing developers proceeding under MOAs to control the cleanups. If the developer controls the cleanup, there are fewer guarantees that it will be handled properly, and it is difficult for a state to discern whether the developer has followed the MOA’s terms.¹¹⁸ The three and one half year figure suggests that some developers may in fact fail to follow their MOA obliga-

113. See N.J. Dept. of Env’tl. Prot., Site Remediation & Waste Mgmt. Program, *supra* note 109.

114. See Jonathan Cannon, *Adaptive Management in Superfund: Thinking Like a Contaminated Site*, 13 N.Y.U. ENVTL. L.J. 561, 592 (2005) (noting that “EPA has estimated the average time from proposal for listing on the NPL to completion of the remedial action at approximately eight years, but a recent study by Resources for the Future calculates the average instead at over eleven years”).

115. E-mail from Bill Wolfe, *supra* note 10 (stating that “[a]nd that 3.5 years is an AVERAGE—it includes lots of residential tank pulls, which can be done in weeks or months, not years.”).

116. Without a harder look at state records, this would be extremely difficult to assess. Yet that discerning analysis is most urgently needed. This trend is unfortunately all too common in brownfields law and policy. There is a dismaying tendency across the nation to evaluate state brownfields programs by relying on formal statutes and regulations, not by digging down to “[l]ess formal agency documents, such as written policies and memos, as well as any actual anecdotes or aggregate data regarding brownfields projects.” See Dana, *supra* note 7, at 101.

117. See *In re Adoption of N.J.A.C. 7:26E-1.13*, 871 A.2d 711 (N.J. Super. Ct. App. Div. 2005).

118. See, e.g., Amy Pilat McMorrow, Note, *CERCLA Liability Redefined: An Analysis of the Small Business Liability Relief and Brownfields Revitalization Act and Its Impact on State Voluntary Cleanup Programs*, 20 GA. ST. U. L. REV. 1087, 1120 (2004) (noting that “[e]ven if the cleanup is sufficient, varying degrees of site cleanliness throughout a city or state may become a monitoring burden for the EPA or state environmental agencies”).

tions. In its response to comments on the draft Rule, the DEP acknowledged that “the department has found that all too often the volunteer chooses not to follow the terms of the MOA even though it is the volunteer that proposed them in the application.”¹¹⁹ New Jersey also appears to be moving toward having more licensed consultants supervise brownfield cleanups without additional state oversight.¹²⁰ As in other states where this is a model for remediation, this too adds to the prospect of a developer running amok.

A recent and notorious New Jersey case highlighted the potential disaster involved with allowing developers to control their own cleanups. It involved perhaps one of the worst possible nightmares for state regulators: residual toxic contamination at a day care center, which was brought to the entire state’s attention by sick children and front page articles in major newspapers.¹²¹ The “Kiddie Kollege” day care site was previously the location of a factory used for manufacturing thermometers and related instruments.¹²² Throughout the 1980s, the DEP monitored pollution at the site and oversaw hazards caused by mercury discharges. In 1994, the manufacturer ended its operations. Under New Jersey’s environmental transfer act (the Industrial Site Recovery Act, or “ISRA”¹²³), this should have triggered a cleanup of the mercury at the site. Instead the manufacturer, Accutherm, went bankrupt and failed to comply with ISRA’s requirements.¹²⁴

119. See 38 N.J. Reg. 3821(a) (Sept. 18, 2006) (codified in scattered sections of N.J. ADMIN CODE tit. 7), available at http://www.nj.gov/dep/rules/adoptions/2006_0815_grace.pdf.

120. New Jersey instituted a “Cleanup Star” program, under which the DEP “will pre-qualify environmental consultants meeting rigorous education, experience and professional requirements as ‘Cleanup Stars.’” N.J. Dep’t of Env’tl. Prot., Voluntary Cleanup, *supra* note 13. As the VCP web page indicates, “[t]hese ‘Cleanup Stars’ will be permitted to investigate and remediate certain low-priority sites and areas of concern with limited NJDEP oversight. NJDEP will strictly audit Cleanup Stars’ work to ensure regulatory compliance and protection of public health and the environment.” *Id.*

121. See Sam Wood et al., *Second Township Day-Care Operated on Toxic Ground*, PHILA. INQUIRER, Aug. 20, 2006, at A01, available at <http://www.philly.com/mld/inquirer/15317594.htm>; see also Tina Kelley, *New Jersey Vows to Overhaul Environmental Cleanup Work*, N.Y. TIMES, Oct. 24, 2006, at B2, available at <http://travel2.nytimes.com/2006/10/24/nyregion/24dep.html> (describing the aftermath of the Kiddie Kollege fiasco); News Release, Pub. Employees for Env’tl. Responsibility, MERCURY-LADEN DAY-CARE CENTER IN NEW JERSEY IS NO ANOMALY—Lax State Brownfield Laws Make Tragedy an “Accident Waiting to Happen” (Aug. 7, 2006), http://www.peer.org/news/news_id.php?row_id=722 [hereinafter Mercury-Laden Day-Care].

122. See News Release, Mercury-Laden Day Care, *supra* note 121.

123. Industrial Site Recovery Act, N.J. STAT. ANN. § 13:1K (West 2003).

124. See Sam Wood et al., *supra* note 121, at A01.

Various investigations were done at the site between 1994 and 1995.¹²⁵ In 1996, the DEP requested that the EPA regional office perform an assessment of the property,¹²⁶ which found “several small droplets of mercury were located on the floor of an area believed to be one of the production rooms.”¹²⁷ In 1996, however, the site was deemed ineligible for a removal action conducted under CERCLA.¹²⁸ The property was transferred to Navillus Group in 1997.¹²⁹ In 2002, Jim Sullivan, Inc. purchased the site from Navillus and two years later converted the property to a day care center.¹³⁰

In April, 2006, the DEP contacted the new property owner, Jim Sullivan of Jim Sullivan, Inc., to determine what measures, if any, had been undertaken to address site contamination.¹³¹ A discussion ensued and on June 21, 2006, DEP informed Sullivan that he should enter the VCP and submit an MOA application.¹³² One month later, the sampling found mercury in the building and “based on these findings and consultation with NJDEP and NJDH&SS [New Jersey Department of Health and Senior Services] technical staff, it was determined that the building was not fit for occupancy at this time.”¹³³ Thus, a site which should have been cleaned up as a mercury hazard wound up (at least for a period of time) being considered for the VCP.

The facts of the Kiddie Kollege scenario may be a bit unusual. The story does highlight, however, the possibility in states with voluntary cleanup programs whose eligibility is open to all sites, not just brownfields sites, to have contamination exceed the “light con-

125. *Mercury Timeline, Information*, <http://www.nbc10.com/news/9655585/detail.html> (last visited Mar. 31, 2007) (detailing a bank’s environmental investigation in 1994 and a NJDEP investigation of the exterior of the site in 1995).

126. *Id.*

127. *Id.*

128. *Id.* According to the timeline released by the DEP, the EPA concluded on January 16, 1996 “that based on air monitoring, soil sample analysis, wipe sample analysis and the condition and security of the building and surrounding property, the site does not present an immediate threat to human health or the environment.” *Id.* A “NJDEP Memorandum to the File” in June indicated that the EPA had “determined that the site was not eligible for a removal action; however, due to documented contamination present, the site require further investigation and remediation.” *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

tamination” levels expected under the brownfields story.¹³⁴ That a site such as Kiddie Kollege may fall through the cracks should serve as a warning to New Jersey and other states to revise the assumptions they make about brownfield sites and look for more of a demonstration from innocent developers up front. States should check the history of sites more thoroughly to see whether the site or any developer associated with the site is or should be involved in a pending enforcement action.

New Jersey and other states should also address what happens if remediation turns out to be inadequate. Some brownfields developers do not fit the story of the innocent developer who wishes to proceed quickly through a state voluntary cleanup program, receive liability protection, and move on with development.¹³⁵ In this sense, New Jersey’s Grace Period Rule is the wrong approach because it gives recalcitrant developers more time for delay. The Rule gives developers an indefinite period of time to correct any deficiencies the DEP may have discovered while overseeing the remediation process; this is susceptible to manipulation by unscrupulous developers.

The DEP has the option under the Rule to terminate an MOA.¹³⁶ The developer whose MOA is terminated may reapply and pay a \$1,000 reapplication fee.¹³⁷ In the context of a large site with considerable complexity, and perhaps extensive contamination, \$1,000 is clearly de minimis. In contrast, the commenters on drafts of the Rule, nearly all of whom represented developers or were themselves developers, perceived that any change to the VCP to impose additional requirements on developers was clearly unwarranted.¹³⁸ This is another unfortunate outcome of a developer-centered approach. It allows developers to believe that any hindrance to cleanup and reuse of a brownfield site, no matter how

134. See Kelley, *supra* note 121, at B2 (quoting public officials and representatives of public interest environmental groups who favor an overhaul of New Jersey’s cleanup programs in the aftermath of the Kiddie Kollege fiasco).

135. See 38 N.J. Reg. 3821(a) (Sept. 18, 2006) (codified in scattered sections of N.J. ADMIN CODE tit. 7), available at http://www.nj.gov/dep/rules/adoptions/2006_0815_grace.pdf (“Frivolous MOAs contribute to Departmental caseload management difficulties and require Department staff to direct their time towards cases in which there was never an intention by the person responsible for conducting the remediation to do any remedial work at the site.”).

136. See *id.*

137. *Id.*

138. *Id.*

small, is a “take back” that hampers the program.¹³⁹ No one would doubt the ability of developers and their representatives to plead their case. Yet, catering to them makes a \$1,000 reapplication fee a program “drawback,” even though the fee may have been imposed after a developer consistently flouted the Oversight Rules.

The DEP’s ability to terminate an MOA and move a site into the enforcement category appears, at first blush, a strong and credible threat. Yet the DEP itself stated that it does not intend to increase the number of MOAs it terminates.¹⁴⁰ As Professor David Dana has expressed cogently, there are numerous reasons why a state environmental agency might not want to bring enforcement action at a brownfield site, most notably that it would have to admit that its oversight failed.¹⁴¹ In New Jersey’s case, the state made its intent quite clear. In its responses to comments on the Rule it stated, “[t]he Grace Period amendments do not apply to the Voluntary Cleanup Program; hence there will be no enforcement of MOAs.”¹⁴² Some expressed concern that even if the state were willing to act more forcefully, it lacks the resources to follow

139. State regulators may even believe that gathering more comprehensive data on cleanups and their efficacy might hamper a program’s progress. See Dana, *supra* note 7, at 103 (noting that “[d]evelopers might not want outcomes at their sites measured for fear that the data would be used by regulators as a basis for re-opening the brownfields cleanups pursuant to re-opener clauses in the agreements between developers and the state government”).

140. See 38 N.J. Reg. 3821(a) (stating that “[t]he Department does not intend to increase the number of MOAs that it terminates”).

141. See Dana, *supra* note 7, at 95.

[P]eople and institutions prefer not to admit that they were wrong, particularly about a public health matter, either to themselves (which is psychologically upsetting) or to others (which is damaging to one’s reputation). Once a state agency has expressly approved, even subsidized in many cases, a brownfields cleanup, its staff may not relish acknowledging that the site poses some health or environmental risk and that more remediation is therefore necessary. After all, doing so would be perceived (rightly or wrongly) as an acknowledgement that the original cleanup plan approved by regulators was inadequate or inadequately supervised by those regulators.

Id.

142. See 38 N.J. Reg. 3821(a); see also E-mail from Bill Wolfe, Director, N.J. PEER, to Joel B. Eisen, Professor of Law, University of Richmond School of Law (Sept. 20, 2006, 21:10:39 EST) (on file with author).

The other big policy issue is the accommodation of the industry view on applicability—if a MOA was executed on a voluntary basis, the DEP has agreed to honor that voluntary expectation. So in addition to not terminating any more MOA’s, the DEP will not issue enforcement action for failing to accomplish the tasks and commitments set forth in the MOA regardless of how bad the MOA is performing[*sic*] or what the impact is on health or environment.

E-mail from Bill Wolfe, *supra*.

through on enforcement (for example, to enter into more Administrative Consent Orders).¹⁴³

Assuming for the moment that the state could (or would) proceed with enforcement activities against a brownfields developer, the recent controversies surrounding the cleanup program cast doubt on the program's ability to get sites cleaned up correctly and promptly. The New Jersey General Assembly has held hearings over the past year about cleanups at major sites that appear to have been botched.¹⁴⁴ With respect to one aspect of toxic waste cleanup—proceeding to address the worst sites first—internal documents from the DEP made available to the organization Public Employees for Environmental Responsibility (“PEER”) show that the Spill Act program lags behind its statutory deadlines to provide and use a risk-based list ranking of the most dangerous sites.¹⁴⁵

143. Telephone Call from Bill Wolfe, Director, N.J. PEER, to Joel B. Eisen, Professor of Law, University of Richmond School of Law (Sept. 18, 2006) (transcript on file with author).

144. *See, e.g.*, Testimony from Invited Individuals, Including Representatives of the New Jersey Department of Environmental Protection, Concerning the Use and Disposal of Contaminated Concrete Materials at Redevelopment Sites in Mercer, Middlesex and Ocean Counties from the Ford Motor Company Site in Edison Township, Middlesex County Before the Joint Comm. Meeting of the Assemb. Judiciary Comm. and Assemb. Environment & Solid Waste Comm. (N.J. June 1, 2006), available at <http://www.njleg.state.nj.us/legislativepub/pubhear/ajuaen060106.pdf>; Transcript of the Comm. Meeting of the Assemb. Judiciary Comm. (N.J. June 15, 2006), available at <http://www.njleg.state.nj.us/legislativepub/pubhear/aju061506.pdf>; *see also* Testimony from Invited Individuals, Including Representatives of the New Jersey Department of Environmental Protection, Concerning the Use and Disposal of Contaminated Concrete Materials at Redevelopment Sites in Mercer, Middlesex and Ocean Counties from the Ford Motor Company Site in Edison Township, Middlesex County Before the Joint Comm. Meeting of the Assemb. Judiciary Comm. and Assemb. Environment & Solid Waste Comm. (N.J. June 1, 2006) (testimony of Bill Wolfe, Director, N.J. PEER), available at http://www.peer.org/docs/nj/06_1_6_peer_testimony.pdf.

For an in-depth report on the mishandling of one site, see Jan Barry et al., *Toxic Legacy*, RECORD, Oct. 2-6, 2005, <http://www.northjersey.com/toxiclegacy/series.html> (five-part series about former Ford plant in Mahwah). Bruce Springsteen may have told a tragic tale of the fate of an auto worker who lost his job that begins, “[t]hey closed down the auto plant in Mahwah late that month,” BRUCE SPRINGSTEEN, *Johnny 99*, on NEBRASKA (Columbia Records 1982), but what happened later at that site is perhaps even more tragic.

145. N.J. Dep’t of Env’tl. Prot., Site Remediation & Waste Management Prog., *Hot Issue* (Dec. 2004) (on file with author) (stating “[t]he Department never published a complete list of ranked sites and did not use the list to select sites for public funding”); *see also* N.J. Dep’t of Env’tl. Prot., Site Remediation & Waste Management Prog., *Remedial Priority System Options Paper* (Sept. 2004) (on file with author) (“The Department has not ranked sites since approximately 2000. The group that ranked sites was disbanded so there is no group of people assigned to do this work.”).

In any event, the state should exercise more oversight over brownfields sites, not less. It should not allow theoretically unlimited periods of time for brownfields developers to decide whether to comply with MOAs. The state could have complied with the GPL by considering some paperwork submissions to be minor, but deemed technical deficiencies such as a failure to meet the technical specifications of the Oversight Rules to be major and corrected immediately. The DEP appears to use its discretion to decide whether a developer made a serious error. This runs the risk of inadequate and unsupervised cleanups, particularly if the hammer available to the state—revoking the MOA and moving to enforcement action—is not a credible threat.

IV. BROWNFIELDS POLICIES AND “SMART GROWTH”

The very thing that made the brownfields policy so compelling when it was first developed in the early 1990s is also the thing that makes it so vulnerable to criticism. . . . That is, it tries to do several major things, like . . . bring back these sites and some kind of community benefit in the form of development. Every site is unique and rife with opportunities and incentives for political manipulation, corner-cutting and land-use mistakes . . .

. . .¹⁴⁶

Even if a brownfield site is remediated effectively, we should still ask whether the specific economic development at that site is appropriate. Every community will have a different perspective on this, so defining appropriate metrics for measuring success presents a difficult problem. In this Part, I test one claim that proponents of brownfields revitalization routinely make: that it is an essential component of “smart growth” strategies.¹⁴⁷ “Smart growth” management of land use has the potential to be a “revolution” in land use law.¹⁴⁸ As New Jersey defines it, “[s]mart growth is the term used to describe well-planned, well-managed growth that adds new homes and creates new jobs, while preserving open space, farm-

146. Alexander Lane, *From Hazard to Hope?: Redeveloping Old Industrial Sites Can Be a Boon or a Bust*, STAR-LEDGER, May 23, 2004, at 1 (quoting Prof. William Shutkin of the Massachusetts Institute of Technology).

147. On “smart growth,” see generally Colloquium, *A Look at Smart Growth and Urban Sprawl*, 21 ST. LOUIS U. PUB. L. REV. 253 (2002); Patricia E. Salkin, *Smart Growth and Sustainable Development: Threads of a National Land Use Policy*, 36 VAL. U. L. REV. 381 (2002); *Special Series: New Urbanism and Smart Growth*, 29 FORDHAM URB. L.J. 1419 (2002).

148. Richard Briffault, *Smart Growth and American Land Use Law*, 21 ST. LOUIS U. PUB. L. REV. 253, 253 (2002).

land, and environmental resources.”¹⁴⁹ Space does not permit a full description of the wide variety of locality-specific options¹⁵⁰ that a smart growth strategy would employ to check the increasing sprawl at suburban and exurban sites.¹⁵¹

While brownfields policies and smart growth gained enormous traction at roughly the same time in the 1990s, the link between the two is hardly coincidental.¹⁵² There are essentially two aspects of this. First, urban locations are ideal for the higher-density, pedestrian-friendly, resource-conserving infill developments sought by smart growth advocates.¹⁵³ Some major success stories attributed to brownfields policies are mega-developments bringing stores, apartments, and parks together in one urban place. This has led at least one observer to note that VCPs and a generally more favorable attitude toward infill developments have gone hand in hand.¹⁵⁴ The second part of the “brownfields redevelopment is

149. N.J. Dep’t of Cmty. Affairs, Office of Smart Growth, <http://www.nj.gov/dca/ogsmart/index.shtml> (last visited Mar. 31, 2007).

150. New Jersey’s smart growth “principles” are broad-ranging and include “mixed-use development, walkable town centers and neighborhoods, mass transit accessibility, sustainable economic and social development and preserved green space.” *Id.* These could be carried out in a specific context by a whole host of different techniques.

151. For fuller discussions of “smart growth,” see generally Briffault, *supra* note 148; Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247 (2000). For a counter perspective, see Dwight H. Merriam & Gurdon H. Buck, *Smart Growth, Dumb Takings*, 29 ENVTL. L. REP. 10,746 (1999).

152. A good example of a governmental program linking brownfields redevelopment and smart growth in specific communities is the EPA’s “Smart Growth in Brownfield Communities” initiative, which claims that, “[b]rownfield redevelopment is an essential component of smart growth, as both seek to return abandoned and underutilized sites to their fullest potential as community and economic assets.” U.S. Envtl. Prot. Agency., *Smart Growth in Brownfield Communities*, <http://www.epa.gov/piedpage/brownfields.htm> (last visited Mar. 31, 2007).

153. Edward T. Canuel, *Supporting Smart Growth Legislation and Audits: An Analysis of U.S. and Canadian Land Planning Theories and Tools*, 13 MICH. ST. J. INT’L L. 309, 314 (2005).

Principles of Smart Growth are epitomized by “[c]ompact, transit accessible, pedestrian-oriented, mixed-use development patterns and land reuse” in a system which “refocuses a larger share of regional growth within central cities, urbanized areas, inner suburbs and areas that are already served by infrastructure.” Such goals are achieved through measures including “[t]ax incentives, brownfield redevelopment, elimination of sprawl-enhancing subsidies, [the development of] urban growth boundaries, and transferable development rights.”

Id. (citations omitted).

154. Opp & Hollis, *supra* note 2, at 8 (“The popularity of VCPs and the increase in their use over the past 10 years could be attributed in part to a changing attitude towards infill projects, and the growing realization by city planners, development pro-

smart growth” linkage is that an infill development might preclude the need for new development at a suburban location. The brownfields story assumes that mega-developments would proceed at greenfields sites if not for incentives to clean up and reuse the urban sites. As a result, there is an almost one-for-one tradeoff between a brownfield site saved and a greenfield site protected. This does not necessarily make growth “smart”; it simply makes it inevitable.

Reuse of urban space in New Jersey and many other states is seen almost reflexively as smart growth. Indeed, several New Jersey programs are conducted within the state’s Office of Smart Growth (“OSG”).¹⁵⁵ Yet when we look at the brownfields programs and the experiences with them, it is not clear that all brownfields revitalization achieves smart growth. The number of brownfields sites with useful development potential is a relatively small subset of the overall number.¹⁵⁶ In addition, because a developer of a brownfields parcel with development potential dictates the terms of the redevelopment strategy on a parcel-by-parcel basis (in most jurisdictions, brownfields revitalization occurs one site at a time), there is no guarantee that the growth it promises to provide is “smart.”

The controversy surrounding the recent plan for the “Atlantic Yards” area of Brooklyn is perhaps typical.¹⁵⁷ The plan envisions a “large-scale, mixed-use real estate development”¹⁵⁸ on a brownfields site with “a long history of rail, industrial, storage,

professionals and citizens that reuse projects are both economically practical and important for a high quality of both urban and rural life.”).

155. As the OSG website states, “[t]he New Jersey Brownfields Redevelopment Task Force assists municipalities and counties in using brownfield redevelopment to help implement Smart Growth strategies in their plans and initiating an inventory of marketable brownfield sites for prospective developers with the support of the Brownfields Redevelopment Interagency Team.” N.J. Dep’t of Cmty. Affairs, Office of Smart Growth, Brownfields, <http://www.nj.gov/dca/osg/commissions/brownfields/index.shtml> (last visited Mar. 31, 2007).

156. See, e.g., Greenberg, Editorial, *supra* note 38, at A74.

For every brownfields site that is on 10 or more acres, is well located with respect to transportation and other infrastructure, and will host a redevelopment of = \$100 million, there will be 20 or more that will be on less than 3-acre sites located in an unfavorable location that has little obvious appeal to private investors.

Id.

157. See PlanNYC: New York City Planning Information Portal, <http://www.plan.nyc.org/projects> (last visited Mar. 31, 2007) [hereinafter PlanNYC] (describing the project and providing links to organizations both supporting and opposing the project).

158. *Id.*

manufacturing, and commercial uses,”¹⁵⁹ “that would consist of a 19,000-seat basketball arena; 4,500 units of housing; over 2.4 million square feet of office and retail space; and six acres of open space and parking for 3,000 cars.”¹⁶⁰ This development has been fiercely opposed by a number of community groups.¹⁶¹

The mega-development chosen for the urban brownfield site may pay some attention to smart growth principles, as in the case of Atlantic Yards. Others, however, might argue that development is not “smart” if it consists of expensive sports stadiums or high-priced condominiums that defeat neighborhood expectations of affordable housing.¹⁶² Local officials’ promises may not necessarily equate to beneficial outcomes, particularly if community residents have little say in planning for the remediation and reuse at the site. The brownfields process, like any urban land use development process, is subject to capture by well-heeled, politically savvy developers and a resulting distrust by local residents.¹⁶³ As one story on brownfields projects in New Jersey puts it, “with millions of dollars in government incentives at stake, and with the design and approval of cleanup remedies subjective and malleable from site to site, the brownfields process is seen as particularly open to political manipulation.”¹⁶⁴ The story cited “revelations that former Governor Jim Florio and some partners cut a deal for a bargain price on a publicly owned brownfield in Jersey City,” and the “recent decision to pull Kearny’s Standard Chlorine site—one of the state’s most polluted sites—from the federal Superfund list so a developer

159. EMPIRE STATE DEV. CORP., ATLANTIC YARDS ARENA AND REDEVELOPMENT PROJECT at 10-1 (July 2006), available at http://www.empire.state.ny.us/pdf/AtlanticYards/DEIS/10_Hazardous_Materials/10_HazMat.pdf.

160. PlanNYC, *supra* note 157.

161. *See id.* (providing links to these groups, including “Brooklyn Against Destructive Development” and “Field of Schemes”).

162. Lane, *supra* note 146, at 1 (quoting Joe Morris of Jersey City’s Interfaith Community Organization, who observes that, “[i]f you ask 100 people in Jersey City what should be done with vacant land, 99 of them tell you affordable housing . . . [b]ut that never gets factored in when a brownfields developer pops in from out of town”); *see also* Jennifer Steinhauer, *A Cleanup That’s Easier Legislated than Done*, N.Y. TIMES, Dec. 4, 2005, at 47 (noting the frustration by environmental and neighborhood advocates about the slow pace of New York’s brownfields program in getting sites for affordable housing into the program).

163. *See, e.g.*, Greenberg, Editorial, *supra* note 38, at A74 (noting that “[i]n our public surveys, it is clear that the public does not necessarily trust its local elected officials’ and developers’ characterizations of environmental risk, nor their assertions that the local infrastructure and schools can meet added demands caused by redevelopment”).

164. Lane, *supra* note 146, at 1.

can build warehouses there.”¹⁶⁵ This latter development highlights another point made earlier, that “the brownfields model works well on modestly contaminated sites, but to use it to address a massively contaminated site is asking the market to do more than it can.”¹⁶⁶

Controversy of this sort does not in and of itself mean that brownfields development should not proceed. Instead, it simply tells us that even though the brownfields story assumes development is preferable to inertia, the merits of the proposed real estate project must be tested in each individual case. There is a means available to New Jersey to examine whether its policies are having the desired effect. It has data available that would allow for a more thorough analysis of whether brownfields developers in New Jersey are consistently providing promised economic benefits in return for involvement with and remediation of their sites. The state maintains two extensive databases; a “Known Contaminated Sites” list that includes (among other data) the number, type, and name of developers receiving No Further Action letters,¹⁶⁷ and one maintained by the OSG on sites that fit state and local development criteria.¹⁶⁸ More work needs to be done to see whether sites in these two databases are closely correlated. As Professor Dana has suggested, in-depth analysis of this sort might yield results that would run contrary to the story of brownfields as an engine of economic redevelopment, and state regulators may be consequently reluctant to perform this searching analysis.¹⁶⁹

165. *Id.*

166. *Id.* (quoting Kearny Mayor Alberto Santos).

167. N.J. Dep’t of Env’tl. Prot., NJDEP Known Contaminated Site List for New Jersey, 2005, <http://www.nj.gov/dep/gis/digidownload/metadata/statewide/kcsl.htm> (“The Known Contaminated Sites List for New Jersey 2005 are those sites and properties within the state where contamination of soil or ground water has been identified or where there has been, or there is suspected to have been, a discharge of contamination. This list of Known Contaminated Sites may include sites where remediation is either currently under way, required but not yet initiated or has been completed.”).

168. The OSG maintains an extensive collection of digital Geographic Information System (“GIS”) data, including a number of files which show how sites fit within state smart growth plans. See N.J. Dep’t of Cmty. Affairs, Office Smart Growth, Maps and GIS Data, <http://www.state.nj.us/dca/osg/resources/maps.shtml> (last visited Mar. 31, 2007).

169. Dana, *supra* note 7, at 95.

In some states, there is recognition that brownfields remediation should take place in conjunction with redevelopment.¹⁷⁰ In the BDA initiative, which began in 2002, New Jersey has made a significant attempt to bring together developers and municipalities in a systematic way to yield effective remediation and economic benefits.¹⁷¹ In the BDA program, the DEP “works with selected communities affected by multiple brownfields to design and implement remediation and reuse plans for these properties simultaneously.”¹⁷² The mechanism for this involves community-based “steering committees”¹⁷³ that “propose ‘clusters’ of closely spaced brownfield sites to DEP for coordinated oversight of the remedial process.”¹⁷⁴ The BDA application requires a steering committee to submit “a description and explanation of the BDA, a discussion of the proposed BDA boundaries, current activities and uses within the BDA, and a clear identification of the brownfields within the BDA that the Steering Committee intends to address.”¹⁷⁵ Current BDA communities include Camden, Elizabeth, Hillside, Irvington, Newark, Palmyra, and Trenton,¹⁷⁶ and more are in the works.

The contrast with the normal brownfields development process is striking, as described in a recent article by Evan van Hook, a former DEP Assistant Commissioner and a driving force behind the BDA initiative.¹⁷⁷ Ordinarily, as noted above, states do not

170. See Bartsch, *State of States*, *supra* note 39, at 14 (“More states are channeling resources to sites with some end use or economic development activity in mind—the thinking shifting from cleanup only to a cleanup-and-reuse strategy.”).

171. N.J. Dep’t of Env’tl. Prot., *Brownfields Development Area Initiative*, *supra* note 20.

172. *Id.*

173. N.J. Dep’t of Env’tl. Prot., *Brief Synopsis of NJDEP’s Brownfields Development Area Initiative*, http://www.state.nj.us/dep/srp/brownfields/bda/bda_synopsis.htm (last visited Mar. 31, 2007) [hereinafter N.J. Dep’t of Env’tl. Prot., *Brief Synopsis*].

174. See News Release, N.J. DEP’T OF ENVTL. PROT., DEP ISSUES ENFORCEMENT DIRECTIVES AGAINST THREE COMPANIES TO COMPEL CLEANUP: ACTION SUPPORTS STATE BROWNFIELD REDEVELOPMENT AREA INITIATIVE (Nov. 18, 2003), [HTTP://WWW.NJ.GOV/DEP/NEWSREL/RELEASES/03_0165.HTM](http://www.nj.gov/dep/newsrel/releases/03_0165.htm).

175. N.J. Dep’t of Env’tl. Prot., *Brief Synopsis*, *supra* note 173.

176. See N.J. Dep’t of Env’tl. Prot., *Brownfields Development Area Initiative*, *supra* note 20.

177. See van Hook et al., *supra* note 19, at 118.

In his 2000 article, van Hook developed a theoretical framework for an area-wide brownfield redevelopment program. The framework follows four basic principles: (1) establish a process to “define and delineate areas affected by multiple brownfields;” (2) aggregate financial and technical resources and incentives; (3) develop area-wide remediation and redevelopment plans; and (4) “provide ongoing, [coordinated, cross-property,] focused support, incentives and assistance for remediation and redevelopment of the brownfields

typically require brownfields developers to demonstrate that their proposed reuse of the property is consistent with an overall vision for the community. In the BDA initiative, this perspective changes, as Van Hook observes that “involvement in shaping the new uses to which the brownfields will be put . . . is particularly enhanced.”¹⁷⁸ The steering committee’s vision of the proposed reuse is not necessarily the one that will inevitably be adopted: “While BDA steering committees do not have the ability to dictate reuse on all properties, however, the BDA Initiative does give the reuse preferences of the steering committee substantial persuasive force.”¹⁷⁹

Van Hook notes that “the BDA Initiative appears to result in increased efficiency and effectiveness in the remediation process.”¹⁸⁰ One obvious advantage of a multi-site, clustered approach is its ability to address cross-contamination among brownfields sites at the same location. Ordinarily, the developer of a site addresses contamination within the legal boundaries of its own site,¹⁸¹ but in a BDA, by “addressing closely spaced contaminated properties in a concerted effort, the BDA approach helps ensure that this cross-contamination will not occur, regardless of the chemical or physical process involved.”¹⁸² Van Hook even observes that the “potential for cross-property contamination” should become a factor in selecting BDAs, to capitalize on the benefits of remediating multiple sites at once in the same area.¹⁸³

Finally, there is the potential for significant community involvement. Negotiations regarding redevelopment of brownfields sites ordinarily take place between the developer and local officials, which can give developers the upper hand.¹⁸⁴ Of course, a savvy

area in accordance with the area-wide plans.” These principles are reflected in the design of the New Jersey BDA Initiative.

Id.

178. *Id.* at 140.

179. *Id.*

180. *Id.* at 128.

181. Albert I. Telsey & Sally A. Jones, *Brownfields Development Area Initiative Is an Idea in the Making*, N.J.L.J., Oct. 20, 2003, at S-10, available at http://www.westonsolutions.com/pdf_docs/SJonesLNJLawJournal.pdf (noting that “[t]he owner of a brownfields property usually did not look over the fence to see how he might be able to tie-in his cleanup with remedial action being undertaken by his neighbors”).

182. Van Hook et al., *supra* note 19, at 131.

183. *Id.*

184. *See, e.g.*, Greenberg, Editorial, *supra* note 38, at A74 (“For example, to make enough money to pay the cleanup costs, a housing developer can be expected to ask

developer may choose to reach out to the affected community,¹⁸⁵ but is not normally required to do so.¹⁸⁶ By contrast, the BDA initiative, with its use of the broad-based local steering committee, explicitly guarantees local involvement. As one recent analysis of several state area-wide brownfields programs puts it, “[i]n contrast to site-specific remediation, the area-wide approach of the [New Jersey] BDA provides a framework that addresses the larger physical, political and social contexts of an affected community.”¹⁸⁷

V. CONCLUSION

Brownfields revitalization is here to stay. It is so popular with a broad coalition of advocates that states vie for bragging rights about their programs’ successes.¹⁸⁸ At the same time, the brownfields story’s limitations are also beginning to show. There are more contaminated sites being addressed in state VCPs, and perhaps less rapid progress at the average site than the story might have suggested would take place.¹⁸⁹ In this respect, the New Jersey Grace Period Rule represents incremental backsliding, offering the potential for longer cleanups and the ability for developers to evade program rules and responsibilities.

Allowing developers to control their own cleanups also does not comport with a vision of community-wide real estate development, such that after a decade of experience, a “consensus is building among environmental and real estate professionals that the remediation and reuse of brownfields that were not addressed through ‘first generation’ brownfield programs will require new strategies.”¹⁹⁰ A second generation of brownfields policies, such as New Jersey’s BDA initiative, is needed. Second generation brownfields policies should allow for more area-wide, community-focused processes, like the BDA initiative, to capitalize more effectively upon the economic promise of the brownfields story. An approach such as the BDA has the potential for considerable

for more units per acre, for permission to put parking on top of areas with residual contamination, and for deed restrictions on the use of property.”).

185. See generally BARTSCH ET AL., *COMING CLEAN*, *supra* note 35.

186. See generally Eisen, *Brownfields of Dreams*, *supra* note 3.

187. Kris Wernstedt & Jennifer Hanson, *Areawide Brownfield Regeneration Through Business-Based Land Trusts and Progressive Finance* 7 (Lincoln Inst. of Land Pol’y, Working Paper WP06KW1, 2006), available at http://www.lincolninst.edu/pubs/dl/1096_Wernstedt_complete_web.pdf.

188. Greenberg, Editorial, *supra* note 38, at A74.

189. See News Release, Inspector General, *supra* note 109.

190. Van Hook et al., *supra* note 19, at 152.

advantages over parcel-by-parcel brownfields development, and brings brownfields revitalization closer to the ideal of “smart growth” than leaving development solely in the hands of individual developers.¹⁹¹

191. *Id.* at 114.