

ENDING BROWNFIELDS PARALYSIS: COMMUNITY-BASED DECISIONS AND GOVERNMENT COOPERATION TO ACHIEVE FULL STAKEHOLDER INVOLVEMENT

by

Matthew A. Brody¹

I. Introduction

The following excerpts were taken from the Great Lakes Regional Online Brownfield Information Network, a web site devoted to sharing stories and knowledge regarding brownfield redevelopments and surrounding concerns. A couple of stories have been included here to help introduce the nature and origin of brownfields sites as they exist in the United States today:

Jim's Truck and Trailer operated for over 30 years in the Village of Milan, Illinois. It is an auto repair and filling station on a major highway entering the community. Increased competition reduced business and the owner decided to close the station, sell the property and retire in 1995. Although the station closed in 1995, the owner was unable to sell the property because prospective buyers were unwilling to take possession until the leaking underground storage tanks (LUSTs) were removed and the gasoline contamination cleaned up. The owner was faced with the choice of removing the LUSTs or abandoning the property.

As a conscientious proprietor, and one motivated to sell, the owner decided to remove the underground tanks. Knowing the Illinois Underground Storage Tank (UST) Fund would reimburse some of his cleanup costs, the owner registered the underground tanks with the Office of the State Fire Marshal. After the cleanup began and contractors discovered seven LUSTs, the owner was informed that the Illinois Underground Storage Tank Fund required a \$10,000 deductible on any reimbursement. The owner then decided to abandon the cleanup because he did not have sufficient funds to complete the project and pay the back taxes he owed. Sale of the property became all but impossible when the owner learned that the Illinois UST Fund would only reimburse the original owner or operator of a UST-property for remediation costs, not a prospective buyer.

Jim's Truck and Trailer buildings deteriorated and property tax payments lapsed. The Village of Milan's interest in remediating the site increased because it wanted to return the property to productive use. Realizing their common goal, the village, the owner and an interested buyer worked together to develop an innovative plan to finance the project. The owner would have to maintain some ownership stake in the property so that the costs of removing the LUSTs and remediating contamination could be recovered. The Village of Milan agreed to purchase the property and return a nominal portion of the proceeds to the owner to guarantee joint ownership of the property.... As part of the agreement, the original owner will give the Illinois Environmental Protection Agency (EPA) permission to send reimbursement checks from the Underground Storage Tank Fund to the escrow account in the owner's name.

Once remediation is complete, Eriksen Chevrolet will purchase the property and expand its auto dealership. Money from the sale of the property will be deposited into the escrow account and used to reimburse the Village for its initial purchase of the site. When the village recoups its investment and all expenses are paid, any money remaining funds will be returned to the former owner.²

...

The former Occidental Chemical Corporation's chemical manufacturing facility is located on 26 acres of a highly developed land in Clark County, Indiana. It is 1.5 miles north of the Ohio River and Louisville, Kentucky. Shea Chemicals constructed the facility in 1954 and sold it to Occidental Chemical (then Hooker Chemical) in 1958. OxyChem produced sodium phosphate, a potassium phosphate product as well as technical-grade and food-grade phosphoric acid. OxyChem was a major employer for Clarksville and Jeffersonville, Indiana, and Louisville, Kentucky.

Many cleanup obstacles plagued the site. An investigation of the 200,000 square foot complex uncovered numerous spill areas, significant physical plant deterioration, several areas of surface soil, subsurface soil, on-site ditch sediments containing arsenic, and "near" surface soil contaminated with elemental phosphorus. Investigation of the surface water and groundwater supply revealed arsenic levels that exceeded the federal maximum contaminant level. The groundwater flow at the site is very slow, 5-10 feet per year horizontally, so natural attenuation was expected to limit the potential for migration offsite.

In an effort to address the environmental and economic development issues associated with the site, OxyChem, the cities of Clarksville and Jeffersonville, the Indiana Department of Environmental

Management (IDEM), and the Indiana Department of Commerce formed a partnership to facilitate the redevelopment and reuse of this facility. OxyChem hired a private contractor to remediate the site, submitting a Voluntary Remediation Program (VRP) application to IDEM in November of 1993. At that time, the VRP program awarded no formal liability assurances to companies entering the program. But several agencies reviewed OxyChem's application and provided the company with an informal agreement not to hold the company responsible for past contamination.

Demolition of the facility began in May 1994 and remediation of the entire site started that August. Six months later, demolition and remediation of the entire site was complete. Remedial activities consisted of excavating and capping settling ponds, closing the tank storage and treatment system (in accordance with an approved Resource Conservation and Recovery Act closure plan), and demolishing and disposing of the remnants of several former production buildings. In the end, over 25,000 cubic yards of arsenic and phosphorus-contaminated soil and several tons of demolition debris were removed. Because of the small volume and limited flow of groundwater, IDEM concluded that the groundwater posed no threat to public health or the environment and required no remediation.

This brownfield voluntary remediation project cost \$1.5 million to complete. Because it entered the VRP, which now issues formal liability limitations, the former sodium and potassium phosphate plant received a Certificate of Completion from IDEM and a Covenant-Not-to-Sue from the Indiana Governor's office. These certifications stated that the remediation was completed in accordance with state regulations and that past, present or future owners would not be subjected to any future enforcement action. Furthermore, a Memorandum of Agreement with the U.S. EPA states that the EPA will abide by the decisions made through the state's voluntary program and that the site will not be subject to federal enforcement action for liabilities based on past contamination.

Known as Clarksville Commons, this once abandoned chemical facility is now a profitable retail center hosting major retailers and restaurant chains such as Pier One and T.G.I. Friday's. Revenues from this center are expected to increase as additional retail and commercial centers develop in the area. Clarksville Commons created approximately 300 new jobs, providing a much-needed boost to the Clarksville-Jeffersonville area economy.³

Jim's Truck and Trailer and Occidental Chemical Corporation represent two of the most common types of brownfields, the unused pieces of environmentally contaminated property that litter the landscape of countless inner-cities in the United States. These degraded sites result from the abandonment or lack of maintenance, and for the most part are largely forgotten as the remains of industrial areas that have been deserted for cheaper, cleaner, and more accessible suburban land. Jim's Truck and Trailer is an example of a smaller, relatively straightforward development, whereas Occidental Chemical is an example of a larger, corporate property with a greater amount of conflicting concerns. Both sites are exceptional examples of how cooperation can successfully restore brownfield sites to productive use, but success along these lines is not the norm. For most potential brownfields owners cooperation is not simple to find, as environmental regulations and stigma surrounding contaminated sites have given brownfields the reputation of legal black holes that can seize the assets of anyone who becomes involved. On January 11, 2002 the legal landscape changed, as President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act⁴ into law. The law's revision of the seemingly permanent liability standard provided under the Comprehensive Environmental Response, Compensation, and Liability Act⁵ (CERCLA or Superfund) altered the way government and developers perceived brownfields sites, and arguably gave new life to a movement that has made little substantive progress in recent years. The question now facing interested parties is whether the legal revision will promote new action.

Brownfields are defined generally by the Environmental Protection Agency (EPA) as "Real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."⁶ These properties, as illustrated by the examples above, are typically the remains of either heavy (e.g., Occidental) or light-use (e.g., Jim's Truck and Trailer) industrial properties that have been abandoned for a multitude of possible reasons. Experts in the field, "estimate that more than 500,000 sites exist in the United States that show evidence of at least some contamination that could trigger federal cleanup rules,"⁷ with a potential cleanup cost of \$650 billion.⁸ Although official government approximations are not quite that high, the U.S. General Accounting Office estimates that 130,000 to 450,000 contaminated commercial and industrial sites are located in this country, and a study by the U.S. Conference of Mayors revealed 43,000 acres of brownfields in 16,000 sites among only 39 cities surveyed.⁹ The sheer area encompassed by these sites makes obvious the enormity of the brownfields dilemma that currently confronts the nation. Urban, suburban, and even rural – there are an abundance of deserted, contaminated properties across the country.

The problems associated with troubled sites stem not only from the contamination that has been left behind, but also from the social ramifications. Most brownfields sites lie within inner-cities, and are predominantly in areas populated by minorities. Therefore, a disproportionate number of minorities are exposed to contamination, raising concerns that the relatively powerless communities are not able to fend for themselves. Further exacerbation of the problem is brought about via the primary parties in brownfields ownership and redevelopments, as outside developers, corporations, and private

interests dominate the economics crucial to the redevelopment process. Communities are treated as marginal participants in decisions that are made regarding their neighborhoods, and consequently their health and well-being. Even in situations where harmful brownfields are successfully remediated and brought to “productive use,” concerns of the stakeholders within communities are not considered a relevant part of the process.

In recent years, various levels of government as well as a number of groups with environmental, economic, and social concerns have begun to attempt to address the brownfields problem. In response to concerns regarding environmental injustices and minority communities, and due to private industry’s fear of strict liability, the government has been forced to take the lead. Programs have been implemented at the federal, state, and local level, but have been most evidently championed by the federal government. Led by the EPA and the creation or revision of related federal statutes and codes, the federal government has shaped or extended a variety of programs meant to encourage the remediation of brownfields and address the problems created by abandoned sites.

The Small Business Liability Relief and Brownfields Revitalization Act¹⁰ and the 1995 delisting of 25,000 sites from the Superfund National Priorities List are two of the most progressive federal moves to date, opening up certain sites to the opportunity of lessened liability potential for prospective developers, and therefore removing many of the economic barriers to redevelopment. Additionally, starting in 1997, the EPA has annually released the Federal Brownfields Partnership Action Agenda, “a compilation of commitments, new initiatives, events, and activities that the participating federal agencies will undertake in partnership to help communities deal with brownfields and associated problems.”¹¹ Unfortunately, exactly what the “associated problems” are is not outlined in the associated materials, and little action has been taken to substantiate the agency’s agenda. Thus, concerns surrounding issues of unfairness, environmental justice, and stakeholder’s rights stand unaddressed and largely ignored.

While the Federal Brownfields Partnership Action Agenda is a reasonable starting point for the type of broad participation that is needed to approach the brownfields dilemma, it stands in substance as little more than an unfulfilled plan. Although the EPA may be attempting to address the problems plaguing brownfields sites and communities, the trouble with brownfields redevelopment efforts is not the lack of viable plans for implementation, but the lack of focus and action on the key causes and consequences of the problem. The few programs that successfully address many of the relevant needs of those involved (i.e., the liability and economic concerns of developers) neglect to properly acknowledge and accommodate the needs of all stakeholders. The federal government and its “partners in action” have failed to address the root causes of the brownfields dilemma, and they have failed to suitably address the needs, concerns, and rights of all stakeholders involved. My argument is that a new approach is needed for the brownfields policy-making process. Collaborative communication involving all stakeholders – federal, state, and local governments, developers, the communities at risk, and any other person or group that is affected – needs to be devised and implemented to appropriately assess and alleviate the problems that confront all relevant stakeholders, not simply the most political or economically empowered few. It is only with the genuine involvement and participation of everyone involved that unique and tailored solutions can be created to accommodate the diverse needs of each community that experiences the depression and blight connected to the brownfields problem. It must be acknowledged that there is no panacea for the problem, but by addressing the most urgent needs and concerns of all relevant stakeholders, the brownfields dilemma can be engaged in a constructive and progressive manner that can solve the physical, economic, and social concerns of all involved without subjugating the needs of one group of stakeholders for the benefit of another.

Chapter II will proceed by defining brownfields and their origins within American society, looking at issues of deindustrialization and regulatory conflicts. Chapter III will look at the problems created by brownfields, including environmental contamination and concerns of environmental justice. Chapter IV will explain stakeholder theory and its application to brownfields properties, proposing the tenets of stakeholder theory as a means for addressing brownfields sites. Chapter V will discuss the current governmental brownfields programs at all levels of government. This description will also include evaluations of success and a summary of each program’s ability to properly address the needs of all stakeholders. Chapter VI will propose recommendations for change in the current brownfields programs, focusing on ways to increase advocacy to solve environmental justice harms and increasing stakeholder participation as a means of empowering communities. Finally, Chapter VII will conclude with a look to the future of brownfields policy and the possibility for change.

II. Background and History – Why So Many Brownfields Exist

There are a few major factors that have contributed to the proliferation of brownfields sites around the country. These causes originate from different laws, regulations, historical occurrences, and social tendencies, and it is clear that there is no one overwhelming reason why such a vast number of brownfields exist. This section will explain the origin and effect of a few of the main roots of the brownfields problem.

Socioeconomic Factors

The prevalent nature of brownfields throughout the United States can be attributed to many changes in the nature of the country, both social and economic, over the last fifty years. The key contributor to the exacerbation of the number of abandoned industrial sites has been the process of deindustrialization and the subsequent migration of business and affluence

to newer suburban sites, otherwise known as greenfields. After World War II the economy shifted from a predominantly manufacturing-driven economy to a service-based economy. This shift resulted in "a widespread, systematic disinvestment in the nation's basic industrial capacity."¹² Rather than invest, rebuild, and reuse inner-city sites, many industrial businesses owners chose to move their work (and often their families as well) to cheaper and cleaner suburbs where they could obtain untainted property sites. This change particularly impacted inner-cities:

Likewise, the impact of deindustrialization was felt disproportionately in urban areas (formerly the centers of the bulk of U.S. industrial activity). Compared to non-urban areas, deindustrialization has a much sharper economic impact on cities. After World War II, cities had a greater proportion of their population employed in manufacturing. In addition, the economic shift from low-skilled factory jobs left an employment void for uneducated workers. Especially in the North, cities experiencing the greatest job decline in industries employing unskilled workers had a significant increase in residents without the education for employment in any remaining growth industry.¹³

Deindustrialization resulted in two main consequences for the industrial cities. First, there were fewer jobs for residents of cities, resulting in higher rates of unemployment and increased instances of poverty. Second, sites where factories and industrial plants were formerly present were left to waste, leaving potential health hazards for members of the community. The combination of fewer jobs and wasting land caused many inner cities to slide into status as "urban wastelands," areas where the economic decline had prevented both the area and the people who inhabited it from pulling out of the social, economic, and environmental degradation that had inundated their environment.

The result of deindustrialization and the shift to the service economy was also the beginning of what is known as "urban sprawl." Sprawl characterizes the dispersal of urban communities from concentrated industrial cores to expansive green spaces and decentralized cities encompassing a greater area of land. The blurred lines between the former city centers and the suburbs changed even more as industry continued to move to find cleaner, unspoiled land. Urban sprawl allowed industry to lay waste to an entire area as opposed to just the inner-city:

The insidiousness of urban sprawl is only now becoming well-understood. Urban sprawl means more transportation to get workers and supplies to outlying areas and finished goods to market-and therefore more pollution. It means leaving one trashed site behind in order to trash another one somewhere else-urban nomadism, to paraphrase Henry Henderson, commissioner of Chicago's Department of the Environment, who favors reclamation of brownfields.

Urban sprawl means the slow death of cities, starting from their core and eventually radiating right through the edge suburbs, the exurbs and the greenfields themselves. Exporting industry to greenfields destroys important resources, such as wetlands, prime farmland, scenic vistas and sleepy towns where fishing is too exciting to be done more than once a week. urban sprawl means a shift in wealth away from cities, worsening poverty and exacerbating all its attendant ills-minimum wage jobs, underperforming schools, sick kids, icky housing, drugs, gangs, body piercing and alarming haircuts.¹⁴

The mentality that created brownfields did not stop after parts of the inner-cities were contaminated, but rather, spread to the outlying areas and suburbs, creating poverty and shifting wealth further out. This process left a vast number of brownfields in its wake, and is largely responsible for the urban landscape in many American cities today.

CERCLA

The other causes for the brownfields phenomenon are more systemic than socioeconomic. These are the laws and statutes that act as disincentives to potential developers and remediators who could potentially cleanup brownfield sites. The primary force is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980¹⁵ (CERCLA or Superfund), with other laws such as the Resource Conservation and Recovery Act of 1976 (RCRA) also contributing to the liability fears of potential actors. CERCLA was enacted after the Love Canal disaster as a means to rectify holes in the existing law that did not properly cover the rights of citizens affected by environmental contamination. At Love Canal, a residential neighborhood was constructed over a former hazardous waste site, and despite discovery of the hazard and evidence of the firm that left it, residents were unable to sue because the law provided no legal remedy. CERCLA was enacted soon thereafter to fill in the apparent statutory gap. "CERCLA serves two "essential" yet independent purposes. First, the law gives the federal government the tools necessary for prompt and effective response to the problems created by abandoned hazardous wastes. Second, CERCLA holds those "responsible parties" accountable for the costs and responsibility of cleanup."¹⁶ Despite the seemingly fair and protective intentions of the law, the spirit in which the law has been enforced has been so expansive that developers and potential land purchasers have been discouraged from purchasing or even becoming financially involved in any way with land that could possibly contain any contaminant recognized under CERCLA.

Under CERCLA guidelines, the liability of any potentially responsible parties (PRPs) is retroactive, strict, and joint and several: retroactive meaning that parties may be held liable even if they obeyed the laws passed before Superfund; strict meaning parties may be held liable for their actions even if they were acting in the best interest of the property and using all means at their disposal to remedy the waste; and, joint and several meaning that parties may be held liable for the entirety of the liability or costs associated with the site even if they can prove they only contributed a fraction of the harm. "The

legislation imposes extremely broad liability, intended presumably to ensure that polluters pay. Under the scheme, however, any party who becomes associated with a piece of contaminated property can, essentially, be deemed fully liable for the cost of cleanup, regardless of that party's connection with the contamination. As a result, developers and investors are reluctant to acquire property which is likely to be contaminated.¹⁷ The legal consequence is that CERCLA allows legal action to be taken against individuals who may, in reality, have had nothing to do with the environmental harm caused at the site. This liability has been used broadly to attack many companies involved with brownfields who had little or nothing to do with the hazardous waste contained at a certain site.

The only defenses that CERCLA allows are an act of God, an act of war, and an act of an unrelated third party. These defenses have seldomly been successful due to exacting interpretations by the courts and the extreme burden of proof that environmental contamination and health hazard causes demand. The result of heightened liability has been the unwillingness of developers and investors to become involved with many properties due to their fear of liability under CERCLA. “Brownfields paralysis” normally occurs when the extent of contamination and cost of cleanup at urban and suburban industrial sites or gas stations is unknown. Uncertainty associated with the potential for CERCLA and other environmental liability especially impedes the sale or transfer of used industrial sites.¹⁸ Sites are simply left untouched because developers fear the stigma and complications involved in redevelopment. Concern that legal transfer of the property will trigger the initiation of liability leads owners to hold onto their environmentally-distressed sites for fear that potential discovery of contamination may cost them even after they no longer own the property. The consequence of this trepidation has resulted in thousands of properties across the nation lying idle or abandoned with owners too afraid to take action. Additionally, potential purchasers or developers stay clear of environmentally distressed property due to apprehension that they will be purchasing little more than the liability of a pile of hazardous waste. “Developers fear that potential exposure to liability under CERCLA prevents them from making reliable estimates of site cleanup costs. They perceive, in particular, that cleanup costs threaten to exceed the market values of these properties.”¹⁹ Even taking what would seem to be the most prudent and responsible precautions has not disconnected these potentially responsible parties from the sweeping liability of CERCLA. The result is that countless thousands of brownfields sites remain unoccupied and undeveloped.

RCRA

The RCRA also acts as a hindrance to remediation and redevelopment. However, the core conflict of the RCRA lies in the inefficient way that it addresses different forms of waste. The negative effects of RCRA are felt as a regulatory problem as opposed to a liability problem. Former EPA Assistant Administrator Don Clay explains in Capital Hill hearing testimony:

The fundamental flaw in RCRA that hinders cleanup is that the law was primarily designed to regulate process wastes, not cleanup wastes. As a result, the law requires stringent treatment standards, usually based on combustion, for most wastestreams; establishes lengthy permit requirements; and otherwise presumes that process wastes are continuously generated and disposed of at an ongoing manufacturing facility. Consequently, the law emphasizes proper waste management and prevention of future contamination. However, most cleanups are one-time events, and generally address vast quantities of contaminated soil and debris - not chemical process wastes. As a result, RCRA's requirements are awkward, expensive, and in some cases hinder and prevent cleanup.²⁰

The mismatched effects of RCRA necessitate that certain sites that only need to be treated as one-time cleanup wastes and not manufacturing process wastes are exposed to additional guidelines and rules that add extraneous procedures and costs to the cleanup. The possibility of triggering the additional rules of RCRA, such as the land ban treatment standards, prevent potential remediators from getting involved at a site.

Additionally, as RCRA requires land owners to take corrective action for all releases of hazardous substances (sites posing an “imminent hazard”), regardless of the time of placement or the activity of the property, the law can be generally applied to most, if not all, brownfields sites. Another witness before the same Capital Hill hearing committee cited above stated, “Indeed, RCRA requirements today have a negative impact on brownfield redevelopment and voluntary cleanups. Several witnesses note that changes will aid in restoring brownfields and should be applied for both Federal and State cleanups.”²¹ RCRA, like Superfund, is a broad federal statute that does not allow the consideration of different types of cleanup needs at the thousands of sites across the country, and so generally imposes such strict standards on operators that it discourages the very actions that it was meant to induce. Owners and potential remediators of hazardous waste sites avoid properties completely for fear that they will have overly stringent standards forced on them once they become involved in or initiate a cleanup.

Government Fragmentation

The multitude of incentives at federal, state, and local levels fail to organize resources and set reasonable goals to promote brownfield site remediation. The problem is not that the different levels of government or private industry are not trying to address the brownfields problem, but rather that the solutions that are currently being implemented are fragmented, disorganized, and poorly coordinated. The closest mechanism to synchronization is the Brownfields Federal Partnership Action Agenda,²² which fails to set out much more than the names of a multitude of government agencies, the activities each

agency undertakes in its daily activities, and one line descriptions of “commitments” that each agency will make in the spirit of the new Action Agenda. An excerpt from the Action Agenda for the Department of Defense reads commitments such as, “Renewing the department’s commitment to long-term stewardship and developing tools for enforcing use restrictions on brownfields; and linking pertinent DoD websites to EPA’s brownfields website.” Although these actions are aligned with the *idea* of solving the brownfields problem, it is clear that they neither create new action nor implement progressive programs or ideas to solve the problem. The Action Agenda is worth little more than the paper it is written on.

Beyond the workings of the federal government, recent programs have raised issues concerning the rules of the federal government and the actions of state and local governments. While the federal government sponsors and even promotes many programs that are meant to address brownfields at all levels, the sheer size of such an undertaking forces the EPA to focus on its overarching statutes (CERCLA, RCRA, etc.) and addressing the most contaminated properties on the National Priorities List (NPL). Even the accomplishments included in the publicized reports of the EPA, such as the recent renewed financial commitment made by President Bush in Small Business Liability Relief and Brownfields Revitalization Act²³ offer little more than money and guidance for a handful of brownfields projects. States and localities, on the other hand, are left with most of the responsibility for the planning and authorization of actual site cleanups. Additionally, differing cleanup standards and issues regarding accountability complicate the process. For example, many cities wish to clean up certain brownfields sites in their communities that are particularly threatening in terms of environmental harm or particularly displeasing cosmetically. These cities may have little or no money that they can contribute to the remediation of these sites, and may therefore desire to enter into partnerships with local developers or private actors with the financing and expertise to clean up and redevelop the sites. Federal rules may complicate liability issues and prevent states from adequately alleviating risk placed on private investors, preventing cooperation from occurring. Unfortunately, incompatibility of federal and state action often arises in these types of situations, and the process hinders potential advances for brownfields.

The discrepancies between different levels of government in these situations arise in several ways. First, depending on the desired use of the land (i.e., industrial, commercial, residential), the city may be willing to allow less-stringent cleanup standards. A site that will be used for industrial purposes, for instance, does not need to meet the same level of cleanliness as a site that will be used for residential purposes. Therefore, a city may be willing to approve a certain level of cleanup that does not meet the standards of the federal statutes such as Superfund. This leaves all those involved, including potentially the city, open to liability. Investors wary of this risk refuse to participate in the cleanup programs. Second is the risk that the federal government will not sign off on the letters that states grant to investors referred to as “covenants not to sue,” which are a crucial component of investor involvement. These letters allow investors to become involved without the concern for legal liability. However, the concern exists that even if the states give liability waivers, the investors will still be subject to lawsuits from third parties under CERCLA. Although state EPAs have had more success in the past few years in gaining federal EPA cooperation in regards to liability waivers for brownfields investors, there is little that has been done to ensure, via a binding agreement, that an investor will be completely protected from liability under federal law. The retroactive, strict, and joint and several liability of Superfund permeates the agreements at all levels. Even after being guaranteed that the state will not pursue legal action, many potential remediators fear the liability and avoid brownfields, literally, at all costs. The next section of the paper will elaborate on the negative consequences of brownfield sites that have resulted from the causes discussed here.

III. The Harms of Brownfields – Contamination, Economics, and Justice

The negative effects of the brownfields problem come in a few different forms. Most obviously, there are the detrimental health concerns that environmental contamination can place on anyone who comes in contact with brownfield sites. There are also the economic effects of not only a vast amount of contamination but also a massive area of unused and relatively worthless space. Finally, there are concerns of stakeholder involvement and environmental justice that bring issues of morality and justice into consideration. This section will explain and elucidate the harms that brownfields sites cause to society.

Contamination

Although it would seem that the harms caused by the proliferation of brownfields should be fairly simple to assess and even quantify in terms of economics or pollution levels, the reach of the brownfields problem penetrates deeply into American society and culture. The most straightforward effect of brownfields sites is the environmental contamination that has accumulated in land and buildings. This contamination is extremely difficult to measure, as there are a vast number of sites with varying degrees of pollution. As the examples at the beginning of this paper show, there are a number of different types of brownfields. While some sites have only minimal contamination – perhaps the remnants of a dry cleaning business where only a trace of hazardous chemicals can be found – other sites, such as former industrial complexes or landfills, house thousands of potential hazardous substances and need cleanup procedures that could take years and cost many millions of dollars to complete. Therefore, the issue with most sites is not that there is some contamination, but how the contamination should be removed and who is affected by the contamination. “Since it is normally very difficult to prove or disprove whether contamination causes health problems, the better view is to conclude that any contamination within is a clear and present health danger or risk. Unfortunately, this risk is spread unevenly. Brownfield sites often exist in close proximity to

those who consume the least and are least able to deal with potential health and economic problems--the urban poor.”²⁴ Therefore, the important measurement is not the actual amount of contamination, but it’s affect on stakeholders.

Economics

The economic stakes of the brownfields problem are difficult to enumerate, but there is no question that they are widespread in the way in which they affect the landscape and economics of American cities. Brownfields have economic consequences in a number of ways. First, as discussed above, these sites result from the deindustrialization of much of the country and the subsequent shift to the suburbs and “greenfield” sites. This change removed much of the economic power and jobs from inner-cities and began the sprawl to outlying areas, as well as the trend of leaving depleted properties behind rather than remediating and reusing them. Deindustrialization was also a part of the trend of the socioeconomic stratification in society that revolved around the separation of cities and suburbs. The resulting separation has led to many negative results for both the economy and the social balance in society. A second result of brownfields is that many inner-cities are wastelands of abandoned industrial and commercial sites. Not only does idle land take up valuable space, but it is a virtual black hole for the communities that it surrounds. The land is generally owned by someone outside the community, or laxly owned by the government as the result of delinquent taxes and subsequent abandonment. These properties are unproductive in every way: they collect no tax revenue, they provide no jobs, and they offer no other positive benefits to the communities where they are located.

Finally, brownfields create economic expenditures in the form of both remediation costs and liability penalties for the groups that aim to cleanup the sites. These groups include private investors, government entities, non-profit organizations, and joint-ventures that often include the communities themselves. The remediation costs for certain types of hazardous wastes can seem truly punitive in nature, with total costs at some sites *just to clean up* reaching high into the millions of dollars and much more than the entire final value of the property. As stated above, one estimate provided the number \$650 billion.²⁵ Finally, the costs of liability create negative potential market values for some investors, making the actual cost of investment highly prohibitive due to the risk of liability that may be forced on an a prospective purchaser. This risk effectively makes it less likely for potential investors to get involved, and further exacerbates a problem that needs increased financing to be resolved. Potentially, every American is affected in some way by the impact brownfields have had on land value and the income that they take away from potential taxes, governmental budgets, and other relevant interests.

Environmental Justice

The idea that brownfields site disproportionately affect the urban poor is an issue that is encompassed within the discussion of “environmental justice,” which is defined by the EPA as “fair treatment for people of all races, cultures, and incomes, regarding the development of environmental laws, regulations, and policies.”²⁶ The relatively- recent recognition that many environmental harms have a greater effect on the minority community has been extensively debated:

Questions regarding the inequitable distribution of the nation’s pollutants and their potential adverse health effects among certain segments of the population have been debated since the early 1970s. Since that time...the problem has been defined by three distinct interpretations: environmental equity, environmental racism, and environmental justice. “Environmental equity” refers to the idea that potential pollution sources...should not be disproportionately distributed among specific segments of the population, namely, the poor and minorities. “Environmental racism” is a broader label used for any policy, practice, or directive that differentially affects the environment of individuals, groups, or communities based on race. More recently, the expression “environmental justice” has been coined to encompass the concepts of environmental equity and environmental racism, with the assertion that environmental justice can be achieved only when all individuals, regardless of race or socioeconomic status, are equally protected from environmental harms and their related adverse health effects. Environmental justice advocates state that the overriding goal of the movement is the creation of a society wherein no racial or ethnic group or social class disproportionately bears the risk associated with pollution.²⁷

Therefore, due to the nature of the sites, environmental justice aspects come into play in many brownfields communities. As discussed above, most brownfields communities are in inner-cities and formerly-industrial areas. These neighborhoods have been abandoned both socially and economically in favor of newer suburban sites. Most of these communities are now inhabited by minorities and low income individuals who have little power to control the land they live near or on.

“Brownfield programs...often allow lower health standards in industrial or nonresidential areas. Because minorities are more likely to live in nonresidential or industrial areas, state brownfield statutes or regulations disproportionately increase health risks to minority groups.”²⁸ The power is held by either the government or the landowners, usually private investors who do not live in the area, but are looking to use the land for some type of economic benefit. The inhabitants of these communities are often left entirely out of the decision-making process, even though the ultimate use of such properties may determine where they live, work, and where their children play.

A large contributing factor to the environmental justice problem as it applies to brownfields is that there are few advocates for the afflicted communities, and many of the perpetrators are largely unaware or unsympathetic to the fact that they are contributing to any type of injustice. Most brownfield sites are not places where a company has recently chosen to

dump hazardous waste, but rather, they are old, abandoned sites where the owner may be legally removed from the original contributor by multiple titleholders. A situation is produced where a new liability has been created for the owner or operator of a particular site even though the contamination may have taken place in the past, and the new owner may be acting in good faith and with moral intentions. However, this situation of the relatively innocent purchaser is not the standard. It is no coincidence that many factories are operated in areas where there is cheap land and the companies are able to acquire the appropriate zoning. The presence of cheap labor from communities full of people who have few viable alternatives creates a strong impetus for industry to target and exploit these areas.

Under Title VI of the Civil Rights Act of 1964, citizens can file complaints alleging discriminatory effects resulting from the issuance of pollution control permits by state and local government agencies that receive governmental financing. The statute reads: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."²⁹ In 1998 the EPA released its "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits" in response to an increased call for government oversight because minority communities were bearing a disproportionate amount of environmental pollution. The point of this document was to explain the EPA process for reviewing Title VI complaints and encourage public comment. Subsequently, the EPA released the Brownfields Title VI Case Studies: Summary Report,³⁰ which was a thorough investigation of potential Title VI sites for the existence of Title VI violations. The conclusions of the report found decisively that there were no Title VI concerns. "The findings of these seven case studies demonstrate the claims that EPA's Interim Title VI Guidance would hinder brownfields redevelopment are largely unfounded. Although it cannot be stated that Title VI will never prove to be a deterrent to development of inner city brownfields areas, the experience of these seven Pilot cities...seems to indicate that Title VI has not been a major factor in redevelopment decisions taken for Brownfields Pilot areas."³¹

Although the EPA document may prove to at least some degree that brownfields are not subject to civil rights-based liability, and that stakeholder communities do not object to the situations that have evolved in the process of redevelopment, that does not preclude concerns about environmental justice. For example, many of the minority residents of brownfields communities do not understand the situation in which the potential redevelopments place them, or choose to ignore many of the potential harms. Rather than worry that their needs are being subjected to the desires of an indifferent government or developer, they are placated by the idea that new developments will create a better community and job opportunities. "An empowered community may act for a cleaner environment, but it is just as likely to accept pollution and health risk in an effort to address concerns perceived by some as more fundamental, such as job creation and tax base growth to improve schools and other community services."³² This often causes members of the community to endorse the redevelopments (at the behest of the developers) and accept lower standards for remediation than the federal government may require. Concerns over environmental justice are buried under the more urgent economic needs of the community, and the economically-interested parties cite public opinion as a justification for their actions.

States are perhaps the largest contributors to the environmental justice problem. States and localities work together to redevelop brownfields primarily for reasons that are largely the opposite of the EPA's impetus to clean up the most hazardous sites. While the EPA attempts to eradicate the most harmful sites, the states act to remediate the most economically-beneficial or aesthetically-pleasing sites. This is because once the EPA has cleaned the most hazardous sites, it is the remaining properties that present the more easily-manageable economic opportunities. States are looking to draw in private investors to bring new financing and fresh life to blighted communities. Therefore, many are willing to compromise stringent federal regulations in order to spur economic development in their communities. Not to say that states are attempting to poison citizens, or hold no regard for the well-being of their citizens. Rather, they look at the cleanup as little more than an instrument for allowing economic development, and thus they only desire that the cleanup be marginally sufficient for their needs. The EPA, on the other hand, looks at the cleanup as a necessary requirement to ensure the safety of all citizens. And, as the EPA does not have a direct concern for the economic well-being of the many citizens it protects, the prohibitive costs or objections to the high standards for remediation are irrelevant.

These conflicting motivations create divergence in environmental justice efforts. One potential legal issue that could arise relates to state EPA administration of state CERCLAs. "A challenge...would be founded on the argument that by using financial incentives to target poor, urban communities for brownfield redevelopment, which usually involve lower cleanup standards, less oversight, and limited liability, states are using methods of administering their CERCLAs that substantially impair the objectives of those acts (to protect health and environment) with respect to African Americans living near brownfields."³³ Even the strong justification that brownfields efforts provide jobs and economic mobility for blighted communities has been questioned. "In reality, these projects often provide only a few jobs for local residents, who may lack the necessary job skills or may be the victims of discrimination. The greatest benefits of new facilities in low-income and minority areas often go to skilled workers who live in surrounding areas or to middle-class property owners who do not live close to the facility."³⁴ Even the justifications for giving the communities benefits may be questioned, as jobs may not be given to residents. It is clear, then, that status quo brownfields programs as implemented at the state level bring issues of environmental justice into question.

The EPA, unlike the states, has undertaken many explicit attempts to address the environmental justice problem at all levels, including within the scope of brownfields redevelopments. In 1993 the National Environmental Justice Advisory

Council (NEJAC) was created to provide an independent voice for the EPA on issues of environmental justice. The NEJAC charter reads, “NEJAC shall provide independent advice and recommendations to the Administrator on areas relating to environmental justice that may include...advice on measuring and evaluating EPA’s progress, quality, and adequacy in planning, developing, and implementing environmental justice strategies, projects, and programs...”³⁵ In a report on urban revitalization and brownfields the NEJAC made a representative statement using the broad generalities that have become commonplace in addressing environmental justice concerns. The excerpt below concludes with the goal of the Advisory Council:

The vision of environmental justice is the development of a holistic, bottomup, community-based, multi-issue, cross-cutting, integrative, and unifying paradigm for achieving healthy and sustainable communities – both urban and rural. In the context of ecological peril, economic dysfunctionality, infrastructure decay, racial polarization, social turmoil, cultural disorientation, and spiritual malaise which grips urban America at the end of the 20th century, environmental justice is indeed a much needed breath of fresh air...There is no denying that great resilience exists in the economic, cultural, and spiritual life of America’s communities. There are many stellar accomplishments, entrepreneurial successes, and significant victories—both big and small. Hence, an abiding goal...was the constant search for abiding signs of hope.³⁶

Unfortunately, the confusing nature of this statement symbolizes much of the EPA effort to solve the environmental justice problem, with a great deal of hopeful rhetoric regarding the needs and concerns of the problem, but nothing more. The listing of nebulous goals and social problems does not elucidate at any level the plans that could and need to be implemented. The EPA effort has been dominated by press releases, studies, reports, statements, dialogues, working papers, announcements, discourses, conversations, and interviews—work that amounts to little more than the affirmation that a problem exists and something must be done. Furthermore, as illustrated by the incompatible policies of the federal and state CERCLAs above, a solution will be difficult to reach. Even with the EPA leading the effort to eliminate environmental justice concerns, conflicts in the goals and methods of all of the relevant stakeholders prevent any side from properly addressing the environmental justice issue. Something more than proclamations and uncooperative collaborations needs to be done to align the goals and abilities of all stakeholders and properly address environment justice as it pertains to brownfields redevelopments.

The impacts of environmental injustices are challenging to measure, and can be broken down into two broad categories: utilitarian consequences and deontological concerns (theories that have been simplified here for the purpose of this paper). Utilitarian consequences are the concrete impacts of the contamination and pollution that contribute to environmental justice problems. Generally, the concern is that unaddressed pollution at brownfield sites will lead to increased health risks that will cause people to get sick and eventually die or live shortened lives. The argument is amplified by the idea that if the government and the community are willing to accept lower environmental standards at some brownfields sites, these standards will become commonplace for all sites and in other similar situations, opening the door for widespread environmental disregard that could expand in a limitless manner. Many people could die due to the low value that environmental decision makers place on at-risk communities. Deontological concerns related to the moral argument that each organization and person are bound by an obligation to attempt to prevent injustices from occurring to others. The idea is that if individuals are subject to unjust environmental hazards in their community, any able person or entity must do what they can to prevent the violation, regardless of related factors such as economic concerns. Deontology assumes a moral obligation above all else, and places justice for all as the integral right. These two theories show that there are different ways that the environmental justice concern must be considered and approached. Not only are there lives at stake, but there are moral concerns that transcend the simple policy decisions made by the government. Although neither theory is an absolute, in addressing these issues both concerns must be integrated and implemented into any resolution. The next chapter will propose stakeholder theory as a means of evaluating brownfields concerns and will be followed by analysis of current brownfields programs and their ability to meet the needs of relevant stakeholders.

IV. Stakeholder Theory as A Means of Addressing Brownfields Problems

When evaluating the brownfields problem and attempting to forge some type of fair solution, it is important that the needs and concerns of all relevant stakeholders be addressed. Stakeholder theory as proposed by R. Edward Freeman is a means of evaluating decisions made by a business in terms of the duty that the organization owes to its stakeholders rather than the traditional focus on stockholders. Stakeholders are comprised of the groups that interact and provide essential roles for a business, whereas stockholders are simply the economic owners or beneficiaries of a business or corporation. Stakeholder theory is based generally on Immanuel Kant’s principle that human beings should not be treated as means to a certain end (i.e., shareholder wealth), but rather as persons with individual with equal (or perhaps more important) rights. This decision calculus forces firms to look more broadly at the groups affected by their actions and consider all possible outcomes—economic, moral, or otherwise—rather than just focusing on the idea of maximizing financial return and shareholder wealth. For purposes of this paper, the term “business” as generally understood under stakeholder theory will encompass the governmental or private players who are leading brownfields decisions, and the theory will be used as the principal means of evaluating a project’s “value.” The stakeholders that must be addressed in brownfields decisions include the government (federal, state, and local—and, indirectly, those whom the government represents), the investors/developers

who are investing in brownfields, the owners of the brownfield sites, and perhaps the most neglected group to date, the communities in which the brownfields are located.

The first and most essential consequence of the use of stakeholder theory over stockholder theory is the importance of the input and participation of each stakeholder in the formation and implementation of policy.

Stakeholders are those groups who have a stake in or claim on the firm. Specifically, we include suppliers, customers, employees, stockholders, and the local community, as well as management in its role as agent for these groups. We argue that the legal, economic, political, and moral challenges to the currently received theory of the firm, as a nexus of contracts among the owners of the factors of production and customers, require us to revise this concept along essentially Kantian lines. Thus, each of these stakeholder groups has a right not to be treated as a means to some end, and therefore must participate in determining the future direction of the firm in which they have a stake....³⁷

The current dominant theory of thought does not explicitly allow for the input of all relevant stakeholders in decision making. Although the government, by its participatory nature, may be more inclined towards stakeholder theory and more open to public input and recommendations than most corporations are, many brownfield sites do not benefit from governmental review.

There are two reasons for this absence of control: First, the vast majority of interested parties in the redevelopment of brownfields are private investors who are attempting to redevelop brownfield sites for the economic benefit of their company. Although the government is inextricably linked to these efforts through whichever program or statute may apply to that particular project, it is private industry that is contributing the funds for redevelopment. Second, using the current approach, there are simply too many brownfields sites for the government to fully address and oversee appropriately. Proper and fair oversight at every level of government takes extensive planning and efficiency that has not yet been incorporated into the system. With such a vast economic interest at stake, it is crucial that the government use its role to ensure that the opinions and needs of all stakeholders be addressed in the decision-making process. "The stakeholder theory does not give primacy to one stakeholder group over another, though there will surely be times when one group will benefit at the expense of others. In general, however, management must keep the relationships among stakeholders in balance. When these relationships become unbalanced, the survival of the firm is in jeopardy."³⁸

In using stakeholder theory as a means of determining proper action on brownfields issues, some basic guidelines must be established. R. Edward Freeman established the following six rules, which he calls the Doctrine of Fair Contracts in his article, *Some Future Directions*.³⁹

1. "The Principle of Entry and Exit" – Any contract...must have clearly defined entry, exit, and renegotiation conditions, or at least it must have methods or processes for so defining these conditions.
2. "The Principle of Governance" – The procedure for changing the rules of the game must be agreed upon by unanimous consent.
3. "The Principle of Externalities" – If a contract between A and B imposes a cost on C, then C has the option to become a party to the contract, and the terms are renegotiated.
4. "The Principle of Contracting Costs" – All parties to the contract must share in the cost of contracting.
5. "The Agency Principle" – Any agent must serve the interests of all stakeholders. It must adjudicate conflicts within the bounds of the other principals.
6. "The Principle of Limited Immortality" – The corporation shall be managed as if it can continue to serve the interests of stakeholders through time.

Think of these groundrules as a doctrine which would guide actual stakeholders in devising a corporate constitution or charter.

The Doctrine of Fair Contracts is a good starting point for the types of power and consideration that must be given to all stakeholders in a particular undertaking. Starting with a set of groundrules that enables all sides to achieve equity ensures fair contracts for everyone participating in the collective agreement and guarantees that regardless of any particular party's potential ignorance, all parties will be fairly represented by the "rules of the game." Ideally, each party would be willing to accept the outcomes, as they would have the same power and stake as everyone else.

The Doctrine of Fair Contracts and the idea that all stakeholders, as moral beings, should be given the power to participate and realize power and equality in decision making are the foundations of the stakeholder theory as it will be applied to brownfields decision making in this paper. The reason for the importance of this decision process is the common exclusion in the current process of perhaps the most important stakeholders: the people and communities affected by the contaminated site. Current government policies focus on business-interested developers at targeted sites to achieve goals that developers feel best serve the community, often while claiming that they are offering the best option for the people whose lives may be vitally changed. Integrating stakeholder theory into the process of brownfields decision-making is the only way to make a truly sound moral decision:

The moral decisions underlying the greenfield programs cannot be swept aside in the pursuit of stated policy objectives such as economic empowerment and preservation of green space. Nevertheless, these policy objectives cannot be presumptively subordinate to the goals of those seeking environmental equity across economic lines. The making of appropriate siting decisions in greenfields programs requires that the

moral question be addressed head-on: how much, if at all, are we willing to risk disproportionate environmental burdens across economic lines in order to provide economic opportunity and save open space from development?

No one group can presume to answer this question for another. Only by including all relevant answers to this query can any morally sound decision be reached. Stakeholder theory provides a sound basis for ensuring that all relevant parties have a say in the decision-making process. Such a process is crucial in resolving the greenfield question.⁴⁰

Stakeholder theory can be applied to brownfields decisions to provide the most accurate and moral decisions possible. Including all stakeholders in the process will truly improve brownfields decisions in the most vital ways, and for everyone involved. After an analysis and description of the current status of brownfields programs and their related complications, a further application of stakeholder theory will be used to apply solutions to the brownfields problem.

V. Current Brownfields Programs

Status quo efforts to address the brownfields problem come in a variety of shapes and sizes and from a number of different sponsors and actors. It is difficult to decipher any underlying theme, goal, or motivation behind the different efforts, as many programs have been crafted at separate times and for various purposes. The programs come in the form of laws, pilot programs, regular programs, demonstrations, assistance guides, voluntary guidance, and cooperative joint ventures. The purpose of this section is to investigate and understand these programs in order to evaluate their current success and their possibility for future usefulness in contributing to the solution of problems associated with brownfields. Specifically, the evaluation of each effort will be considered through the lens of stakeholder theory. Throughout the section, each program's background and success will be explained, followed a brief summary of the program's ability to address stakeholder concerns.

A. The Brownfields Tax Incentive

The Brownfields Tax incentive, as it is commonly known, is part of the Taxpayer Relief Act of 1997 (Public Law 105-34). The incentive was created as a joint effort between the EPA and the Department of the Treasury to spur the cleanup and remediation of brownfields sites across the country. The main purpose of the tax incentive was to create equal ground between taxpayers who contributed contamination at a specific property site and those who had not contributed contamination, but desired to remediate a polluted site. As of 1994, the IRS permitted costs utilized to cleanup environmentally contaminated property sites to be deducted from income as expenses completely in the year the costs were incurred, rather than being capitalized over time. This allowance worked as an incentive for land owners to cleanup their land in order to reap the potential tax benefit of the one-time deduction. The IRS ruling, however, was shortsighted in that it only addressed taxpayers who had committed the actual contamination of the property, and not those who had purchased property contaminated by someone else. Thus, many typical potential brownfield remediators who did not already own their sites were comparatively disadvantaged and received no tax benefit. The new law extended the incentive to potential brownfield developers and added a potential new financial enticement for developers and investors to purchase and remediate brownfields sites. The EPA estimates that "While the tax incentive costs approximately \$300 million in annual tax revenue, the tax incentive is expected to leverage \$3.4 billion in private investment and return 8,000 brownfields to productive use."⁴¹

Although the Brownfields Tax Incentive is a step in the right direction in terms of government concessions, the structure of the law severely limits the ability of many potential remediators to take advantage. The incentive covers only expenditures at property sites that meet relatively stringent contamination, land use, and geographic requirements. Thus, the law is not a comprehensive incentive for all potential developers. It was positioned primarily to affect EPA pilot projects, the most economically-depressed inner cities, and the heaviest industrial areas. The law was championed by Chicago Mayor Richard Daley, and considered by most city leaders as an opportunity for big cities to level the playing field between the inner-city property sites and the suburban sites that had largely been the cause for urban blight. The original idea was slowly recognized as unnecessarily prohibitive, and to further develop use of the incentive, the geographic limitations were eliminated in an amendment to the law (Public Law 106-554) in 2000. The new limitations state the qualifications as: "In general – The term 'qualified contaminated site' means any area- (A) which is held by the taxpayer for use in a trade or business or for the production of income...in the hands of the taxpayer, and (B) at or on which there has been a release (or threat of release) or disposal of any hazardous substance."⁴² As can be expected, the requirements are more complicated than what is stated above, and many rules and exceptions exist within the structure of the incentive. Perhaps most notably, the law is set to expire at the end of 2003, and no obvious indication has been made regarding its future.

At the EPA website a bevy of materials answering questions and giving further explanation regarding the Brownfields Tax Incentive has been published. The following excerpt explains, in the EPA's words, the benefit of the incentive:

Q: Why is the Brownfields Tax Incentive beneficial?

A: The Incentive permits a taxpayer to treat any "qualified environmental remediation expense" as a deductible expense in the year incurred, rather than charging the expense to a capital account. Deductible expenses reduce a taxpayer's taxable income and thus generally reduce his or her income tax liability.

Without the Brownfields Tax Incentive, new property owners had to capitalize, i.e., add to basis, the cost of their land remediation expenditures. These taxpayers could not recover these costs for tax purposes until they sold the land.⁴³

Thus, the tax incentive benefits potential remediators by allowing them to deduct the expenses incurred to clean up the site in the year the costs were incurred (or, under federal tax laws, carry back two years or forward twenty years) rather than capitalizing the expenses and not reaping any potential benefit until the time when the land was sold. The old system created the counterintuitive situation of asking someone to invest a great deal of money in a cleanup project with only the potential for financial loss until the time when the property was sold, creating no real incentive to invest in a property and in the community in the interim. Basically, the cleanup was a loss. The new incentive fuels the important ideal of drawing investors who may normally choose a contamination-free greenfield into purchasing and overhauling a brownfield.

Unfortunately, the incentive has remained little more than a symbolic effort. The law has gone through various changes and been championed by multiple leaders across the political spectrum, from large city mayors, to President Clinton, and now to President Bush. Although the idea of the incentive remains untainted, the logistics of creating a truly beneficial alteration in the tax code have been difficult to organize. One group of researchers notes the minimal progress achieved to date:

Section 198 has rarely been utilized by taxpayers. EPA estimated that as of the end of 1999 only twenty to thirty sites had been designated nationwide...Senator Robert Torricelli, D-N.J., noted this in the floor debate on the "Small Business Liability Relief and Brownfields Revitalization Act."... A GAO study reported in December of 2000 that in New Jersey there had been only three development projects which had even applied for this tax benefit. Developers told me they are discouraged from using the provision because of the provision's indefinite future and the exclusion of brownfield sites containing petroleum. There is simply no incentive for real estate developers to complete projects and market them quickly if the tax benefit they have derived is going to be taxed as ordinary income at 39.6 percent rather than capital gains at 20 percent. The financial impact of that reality is very significant.⁴⁴

Despite the efforts of multiple administrations, the Brownfields Tax Incentive apparently fails to induce potential developers into contributing money towards the remediation of brownfields sites.

Additional reasons for the lack of extensive use of the tax incentive center around the failure of the law to properly give economic benefits to the claimant. An illustration of this point lies in the characteristics of the incentive as a tax deferral and not a proper incentive:

Section 1245 states that a gain on the sale of certain property is taxed as ordinary income for the amount of all depreciation or amortization deductions previously taken on the property. Section 198 states that any cost expensed under section 198 will be treated as a depreciation deduction attributable to section 1245 property. Thus, the deduction taken in the year of the expenditure is recaptured and taxed as ordinary income in the year of the sale, making section 198 function only as a tax deferral, instead of a deduction. The investor will be better off investing in the greenfield...In sum, a brownfield investment will actually be more expensive for the investor than an investment in a greenfield.⁴⁵

Thus there is no economic incentive provided under Section 198 for a developer to target and remediate a brownfield site over a greenfield site. At best, the incentive only changes the times at which certain taxes will have to be paid, and although the timing may be substantive, the lack of empirical use of the tax incentive shows that it is not substantial enough to encourage the goal of inducing a greater amount of brownfield redevelopments.

The Brownfields Tax Incentive and Stakeholder Concerns

The Brownfields Tax Incentive attempts to address the concerns of the various stakeholder groups. The law is an economic incentive for developers who already have financing and, as such, it is targeted primarily at private investors who stand to benefit from choosing a brownfield and reaping the reward of the incentive rather than choosing a greenfield with no supplementary economic enticement. The initial planning of the incentive targeted the geographic areas where poverty rates were higher and incomes were lower, supposedly addressing the areas that needed the most help. However, this targeting was forged by the mayors of large cities as a means of attempting to compensate for the movement of industry and economic productivity from the inner-cities. Outside of the myopic idea that creating jobs and rebuilding communities is the only way to improve the lives of those who inhabit the cities, the tax incentive largely ignored the people who stood to be impacted most, the inhabitants of the communities. Few documented consultations were completed, and project choices were made on the basis of producing the most money. Furthermore, cities, which may provide at least some degree of accountability for involving the community in decisions, were left out of the plan, as the tax code does not address issues of compensating municipalities that have foreclosed on land with delinquent taxes. These entities, which are home to a substantial portion of brownfield sites in blighted areas, are not impacted by the rules. It is clear that the federal Brownfields Tax Incentive does not adequately address all stakeholders, and even as a narrow economic incentive, Section 198 falls short.

B. Brownfields Job Training and Workforce Development

The EPA, in various partnerships outlined in the Brownfields Federal Partnership Action Agenda, has created a pilot program to foster job training and skills development for the creation of jobs and future opportunities for inhabitants of brownfields communities. "Each Job Training Pilot is awarded up to \$200,000 over a two-year period. Colleges, universities, community job training organizations, nonprofit training centers, States, counties, municipalities, Federally recognized Indian Tribes, and U.S. territories are eligible....EPA has awarded a total of 37 Job Training Pilots across the nation."⁴⁶ There are two purposes to the Brownfields Job Training programs: First, to ensure that the brownfields cleanup projects have a skilled and capable workforce that can complete the redevelopment projects and, second, to allow members of the affected communities to not only participate in and benefit economically from the cleanup process, but also to train and enable the community members to compete for jobs in the environmental field after the brownfields cleanup process is completed. Theoretically, residents can use experiences from their own community to acquire the skills needed for economic success.

The success of the Brownfields Job Training and Workforce Development Programs is difficult to assess. Pilots have been granted and people from selected communities have been given jobs, but no proof has been provided that these jobs are sustainable. Additionally, these programs do not address the core problems contributing to brownfields. As explained above, employment alone does not remedy the social or economic problems that are created by brownfields. These programs are pilot programs, and they are too expensive and cannot be easily implemented nationwide.

Brownfields Job Training and Workforce Development and Stakeholder Concerns

The most noteworthy trait of Brownfields Job Training and Workforce Development as it exists today is size. The program is small, and is only a pilot program in nature. The agenda aims to teach disadvantaged groups new skills and technologies, and then follows their progress for a minimum of twelve months as they search for employment based on their new training. The money (\$200,000 per site) goes exclusively towards the empowerment of the members of the brownfields communities, and the only apparent external economic benefit to be gained by a developer participating in the program is the use of cheaper labor. While the idea of creating skills and jobs for disadvantaged labor is a wholesome one, the pilot program does not address all stakeholder concerns regarding project siting and related factors. The program works to appease the members of the community by offering them jobs and the potential for future economic gain by allowing them to participate in demonstration and pilot programs that will be pressed onto their communities. The Brownfields Job Training and Workforce Development Pilot Programs do more than just give incentives to developers, but while they appear to target part of the problem at the source, they still circumvent stakeholders in order to gain access to afflicted communities. Promises of job training and future income are used as a means to insert developers and the potential for redevelopment into communities that the government has decided need help most.

C. Brownfields Showcase Communities

Brownfields Showcase Communities, a venture started by Vice President Al Gore in coordination with the Brownfields Federal Partnership Action Agenda in 1997, were created as a means for the government and its partners to select what were considered to be exemplary locations to begin brownfields redevelopment projects. The overarching purpose of the program was to select different types of communities (most within federal empowerment zones recognized for their high poverty levels), and show the country how they could be redeveloped. In 1999, a similar program was initiated with a focus on brownfields that were the subject of RCRA regulation⁴⁷. These sites are meant to work as examples for potential redevelopers who are discouraged by potential liability under RCRA. The stated goals of Brownfields Showcase Communities are, "(To) Promote environmental protection and restoration, economic redevelopment, job creation, community revitalization, and public health protection...; (to) Link federal, state, local, and non-governmental action supporting community efforts...; and (to) Develop national models demonstrating the positive results of public and private collaboration in addressing brownfields challenges."⁴⁸

Although many federal partners are "designated" in EPA literature, it is unclear how developed the links are between the different levels of government and the community. There is no requirement within the stated actions of the plan to consult with particular entities or communities, and no plan for doing so. Although there may be participation with community leaders after site assessment and while choosing partners (contractors, employees, etc.) for the process, it is clear that the small number of sites are chosen by the federal government for their potential utility on the national stage as examples of poor communities being "fixed" by government action. The program is successful in the sense in that it does remediate and redevelop the small number of properties that it addresses.

Brownfields Showcase Communities and Stakeholder Concerns

Brownfields Showcase Communities take the same position regarding primary stakeholders as many of the other federal action plans. The developers who win the contract benefit from the publicity and facilitation that the EPA brings to each site. In the EPA fact sheet cited above, the "Community Benefits" as explained by the agency are truly ironic: "The communities benefit directly from targeted technical and financial assistance. A federal employee is assigned to each Showcase Community to assist with coordination of technical and financial support and to address the myriad of environmental issues. The Showcase Communities demonstrate successful brownfields activities, providing national

visibility for a community's brownfields efforts."⁴⁹ Perhaps the first statement, that the communities receive some type of financial assistance, may be true. The communities may benefit in some way from jobs, new developments, etc. The second statement regarding a federal employee, while an important part of the redevelopment process, is hardly a "community benefit," as it concerns an employee meant to oversee the technical aspects of the site, and not the community itself. Finally, the last statement regarding national visibility means everything for the EPA and nothing at all for the members of the community. National visibility is not the goal for impoverished residents impacted by environmental contamination. All publicity does is expose the community to the media and trivialize the situation of the residents. Throughout the entire process the community inhabitants are not consulted or given consideration; they are more or less spectators while the governments and its "partners" change their environment.

D. Brownfields Cleanup Revolving Loan Fund Pilot Program

The Brownfields Cleanup Revolving Loan Fund Pilot Program (BCRLF) is an attempt to encourage application and involvement from the communities affected rather than from developers who stand to benefit from becoming involved with properties in which they would otherwise hold no interest. The stated purpose of the program is to "Enable States, political subdivisions, and Indian tribes to make low interest loans to carryout cleanup activities at brownfields properties."⁵⁰ Each grant, which consists of up to \$1,000,000 of funding over five years, is to be used by the community to foster the remediation of brownfield sites that either pose an imminent threat or already endanger the environment or the health of the community. Sites that cannot be considered for the BCRLF Pilot Programs include: sites listed on the National Priorities List, sites at which removal actions must be taken within six months (because of the level of contamination), and sites where a federal or state agency is planning or conducting a response enforcement action. Sites are chosen through a competitive application process that considers various factors. These factors include: the intentions of the applicants to test innovative cleanup and redevelopment planning models, the direction of efforts toward removing regulatory barriers without sacrificing cleanup quality and protection, and assistance of synchronized cleanup and redevelopment actions at the federal, state and local levels. Only a limited number of sites are chosen, with the current number of active programs slightly above 100 (this includes sites that have been reauthorized for additional funding since 1997). These programs are successful in that they involve the community and provide otherwise unavailable funds for remediation efforts.

Brownfields Cleanup Revolving Loan Fund Pilot Programs and Stakeholder Concerns

The BCRLF Pilot Programs target stakeholders in a fundamentally different way than the other programs discussed thus far because the fund targets the communities themselves rather than developers. BCRLF also creates specific exclusions (listed above) to eligibility that limit the participants in the programs. These exceptions create interesting consequences for the types of communities and projects that are selected for the program. One important exclusion eliminates sites that are on the National Priorities List, and consequently removes many of the highly-impooverished and easily recognizable (i.e. areas known for blight, etc.) communities that developers have targeted for media and community attention. The remaining regulations also exclude highly-contaminated sites that are currently being targeted for some type of action. This opens up the BCRLF to communities that are not typical recipients of governmental assistance, which allows communities with brownfields that have the motivations, but do not fit the typical mold, to attain government aid and support. In effect, BCRLF is only open to sites that have volunteered, and this self-selection implies involvement of the participants at the grassroots level. This is not a decision imposed by outside influencers but, rather, a decision made by the community on its own behalf. The process guarantees discussion and participation, ensuring that primary stakeholders are entering into a "fair contract" for their own interests (or at least they have the ability to do so). Also, as stated above, the application process looks to innovative techniques, and communities that desire to perform cleanups without sacrificing environmental protection. This ensures that the participating actors will not sacrifice quality to lure outside financing, and helps to ensure that citizens will not be exposed to lower standards in exchange for economic benefits.

E. Insurance and Brownfields Redevelopment

In 1997 the EPA conducted a survey of major insurance companies to gauge the availability and use of environmental insurance products throughout the United States. The purpose of the survey was to determine whether prospective brownfields redevelopers were aware that insurance existed and was available to ameliorate the potential costs of brownfields redevelopments. The concerns included risk taken when purchasing the property without complete knowledge regarding the potential contamination in the land, the risk of uncontrollable cleanup costs as remediation proceeds due to the inexact nature of environmental surveys and economic estimates, and the risk of having various types of employees working on a site with hazardous waste. The EPA found "two relevant issues: lack of knowledge of available risk transfer insurance products, and lack of explanation of clear risks and CERCLA liability encountered at potentially contaminated properties."⁵¹ With this knowledge the EPA concluded that "educating stakeholders about the availability and use of insurance risk transfer mechanisms, clarifying the liability encountered at these sites, and encouraging broader and more consistent implementation of financing and underwriting standards will help to encourage redevelopment and reuse of brownfields."⁵² The insurance concerns of brownfields redevelopments as addressed by the EPA consist exclusively of an informational campaign meant to educate possible remediators about the options available to them.

Insurance and Brownfields Redevelopment and Stakeholder Concerns

The promotion of insurance education regarding environmental concerns by the EPA is targeted towards any stakeholder that runs the risk of having any sort of unpredictable or uncontrollable liability forced upon them. Although this applies primarily to people and organizations that the EPA would like to encourage to develop brownfields, it also applies to the communities themselves in their attempts to remediate. Since there is technically no financing beyond the education, this program has an equal, educational effect on all stakeholders and can only contribute to the knowledge and consideration that each stakeholder brings to the table.

F. Application-based Funding Programs

Application-based funding programs distribute funds among contenders for specific grants based on predetermined criteria. These criteria change depending on the program and agency distributing the funds. Application-based funding programs align incentives in a couple of ways: First, application-based funding programs require the applicant(s) to plan and creatively construct a redevelopment scheme in order to compete for scarce funds. This not only forces a significant amount of planning, but also fosters innovations in implementational design due to the competitive nature of the funding. Innovations of this sort fuel progress on brownfields by encouraging communities and developers to think outside of the bounds of regular cleanup methods. Second, applications guarantee both the need and the accountability of the grant, as it is illogical for a state or locality to apply for a grant with this type of oversight if they already have money or investors to assist with their remediation. It can therefore be assumed that any entity applying for such funding not only wants to complete the remediation, but is willing to be scrutinized by the oversight process. Furthermore, the accountability of the federal government is high in regards to the application process and oversight policies. Intense scrutiny of government choices forces the selection of programs that do not just meet, but go above and beyond standards. William Buzbee elaborates on the benefits of application-based funding for brownfields:

Application-based funding schemes offer several benefits in their implementation. Programs like the federal brownfields initiative, which requires grant applicants to define and propose a particular project, create a market for creative thinkers interested in working to combat social ills like abandoned brownfields. A state or local government succeeding in obtaining a merit-based grant can claim political credit for bringing additional, elective dollars into the jurisdiction. Federal officials can similarly claim credit for funding for a particular tangible project. State and local governments having little actual use for targeted federal funds are unlikely to seek them, especially if such funds require matching state or local expenditures or the funds' applications require substantial investments of time and money. Applicants expending the time and money to secure such funds are likely to have actual programmatic needs. Federal officials providing such funds are also accountable for imprudent goals or ineffective programs, facing scrutiny and criticism if federal funds do little to achieve desired ends.⁵³

In these situations, the scrutiny placed on specific programs also forces the federal government to consider its environmental justice policies and to work with the selected communities to ensure each project meets all goals. This is where the creative process allows the government to select unique programs that go above and beyond the typical economic and environmental standards. These programs are successful in spurring innovations and creating a unique climate for different types of remediators and developers to propose their plans.

Application-based Funding Programs and Stakeholder Concerns

Application-based funding programs allow the government a unique means for choosing the programs that allow for the most community participation and creative developer solutions. That being said, it is extremely difficult to gauge whether funding is given more to a certain type of stakeholder, or whether developers are properly addressing stakeholder concerns when they are using application-based funding. Ideally, application-based funding can be used by the government as a way to oversee and ensure the inclusion of all stakeholders into the process. Currently, although the government may be giving the grants to groups that have environmental justice concerns in mind, it is difficult to be sure.

G. State Voluntary Cleanup Programs

More than forty states now have some type of voluntary cleanup program in which private parties that voluntarily remediate brownfields sites are offered some type of "no further action" or "covenant not to sue" letter from the state in exchange for their efforts. These programs take on a variety of forms, and are created and implemented by states with individual goals and concerns in mind. Since the key trait of these programs is the assurance from the state that no legal action will be taken against the developer, it should be noted that these guarantees do not protect the participating parties absolutely or indefinitely. "The releases and covenants offered to date have had 'reopeners' or 'reservation rights' with respect to site conditions not known at the time the settlement was framed. In addition, the releases offered typically relate to state and federal Superfund prosecution only. Settling parties may remain exposed to prosecution under other state and federal environmental statutes (such as RCRA or OPA) as well as to common law theories of liability."⁵⁴

Voluntary programs come in a variety of shapes and sizes, with varying degrees of public and private participation. Some are more or less government-initiated, with the state or locality choosing a site and seeking qualified developers to return it to full use. In this case, the states use the guarantee letters as a lure to draw in developers. A concern in these instances is that states which have an ulterior motive for seeing a particular site restored may surrender their capacity to seek legal remedy in order to reach the goal of redevelopment. In contrast, many states have setup programs where developers can propose to states a particular site for remediation along with their intentions and the plan for the restoration. In these situations, the state may exercise a greater degree of care in making choices, and choose to call for more stringent standards. In those cases, the state generally has no motive to allow any risk they can effectively eliminate.

The primary concern surrounding the state voluntary action programs is that they create incentives for states and localities to lower environmental standards and open the door for a collective "race to the bottom." In such a case, states lower environmental standards in inner-cities with redevelopment potential in order to draw in the highly lucrative new business that a industrial restoration can provide. The danger is that states and localities competing for willing participants will repeatedly lower their standards in attempts to gain new business until they reach the point where covenants not to sue are easy to obtain and environmental standards are practically nonexistent. While this scenario may represent an extreme outcome, the threat of lower standards is quite realistic. Most states currently allow from some type of "risk-based cleanup standards." These standards allow the party redeveloping the site to only clean the property to the degree that it is ready for its newly approved use. In other words, a developer cleaning a brownfield for reuse as an industrial facility does not have to clean the property to a flawless standard. While this may seem to be a productive way to clean such a vast number of sites, its shortsighted in terms of consequences.

As elaborated above, many brownfields sites are located within inner-city areas, and near to the residences of minority communities. Although cleaning up to individual standards may be sufficient to run a business in that location, it does not eliminate the threat posed to the communities that surround the site and literally verge on the property. Therefore, these standards raise environmental justice concerns, as the minority communities are exposed, given no voice in the decision-making process, and pressured into accepting lower standards in exchange for more jobs and a relatively cleaner community.⁵⁵ Additionally, the regulatory concerns related to these issues are enormous. With as many as 500,000 brownfields sites nationwide, it would be highly expensive and logistically improbable for the federal government to maintain strict oversight over state action at every site. Even if CERCLA still applies, the notion of the federal government using resources to address a site already remediated by a state (just not to the same standards) rather than an unaddressed site with concrete issues seems counterproductive. The decision of whether to guarantee strict, protective standards for their communities is left up to the states and, depending on their priorities, a protective decision may or may not be made.

Although state voluntary action programs may raise questions of control and liability standards, they do provide an important proving ground for new ideas, technologies, and innovations in the arena of brownfields redevelopment. These advances occur because the states have more latitude in which to move creatively and more resources to appropriate at specific levels, whereas the federal government has the complex task of trying to organize and oversee a broad range of programs in fifty different states and countless localities. States are able to more explicitly target specific areas and problems in their attempts to solve brownfields problems. Thus, the states are able to work as "laboratories" of ideas to develop and promote new projects and methods:

States occupy an increasingly prominent role in environmental regulation and that considerable innovation has occurred at the state and local levels, making these governmental efforts especially rich mines to explore. In his book *Public Policies for Environmental Protection*, Paul Portney of Resources for the Future notes that "over the past decade or so some of the most interesting environmental initiatives have arisen at the state level." J. William Futrell, President of the Environmental Law Institute, makes the same point in a recent article, stating that "the prospects for early innovation and experimentation on the state level are better than in Washington."⁵⁶

The abilities of the states, therefore, make the existence of state environmental regulations and their innovative results a valuable resource in the struggle for brownfields redevelopments and environmental cleanup.

State Voluntary Cleanup Program Stakeholder Concerns

State voluntary cleanup programs create an interesting dichotomy between stakeholder interests in the brownfields dilemma. On one side, states, with their relative lack of oversight and more susceptible business concerns, may kowtow to the interest of business, allowing brownfields sites to be remediated at lower standards and risking environmental justice concerns. This situation would ignore the community stakeholders in favor of the economic stakeholders:

If environmental justice seeks the more equitable distribution of environmental risk and meaningful community participation in environmental decision-making, how economic benefits alone can render faster, dirtier cleanups environmentally just is unclear. Creating incentives for developers to take advantage of more lenient environmental protections in certain communities rather than in others is not environmentally equitable. Furthermore, reducing administrative oversight to place cleanup on the fast-track is antithetical to increased public participation, which is by its nature a time-consuming process.⁵⁷

Clearly, the economic incentives do not foster proper treatment of all stakeholders.

On the other hand, the more personal and innovative approaches of the states may allow for enhanced community participation and the allowance of more vital stakeholders to obtain a seat at the bargaining table. By having the ability to experiment with new programs and partners, and not having the responsibility, as the federal government does, of targeting the most hazardous sites, the states have the opportunity to find new ways to involve various stakeholders and address relevant concerns. Currently, the status of stakeholder interests among the states, and even the status of different sites within individual states, is uncertain. A broad policy to address the issue nationally may be necessary to properly include all who need to be included and satisfy the Doctrine of Fair Contracts as outline above.

H. Other State Initiatives and Statutes

In addition to voluntary cleanup programs, states have also enacted statutes and programs to mimic many EPA actions and fill in holes in the regulatory scheme. Most states have created laws similar to CERCLA to impose liability on sites which were not considered contaminated enough to trigger federal CERCLA action, but were considered contaminated enough to warrant attention. The bulk of these laws are similar to the federal Superfund laws in all critical ways. Most states also have RCRA laws that serve the same purpose, and like the state CERCLAs, often go beyond the federal laws in terms of strictness of requirements and enforcement. Many of the provisions of the voluntary cleanup programs mentioned above are given the force of law as amendments to these laws. Some states have also created or expanded the use of environmental liens as a means of recovering damages or expenditures at environmentally contaminated sites. Restrictions created by state liens exceed those of the federal CERCLA lien by not only attaching to the property, but also attaching to other, unrelated assets of the violator. "These liens enable the government to ensure recovery for cleanup costs by attaching a lien on the property of the owner of the contaminated property subject to cleanup."⁵⁸ Another type of statute that states have enacted to protect brownfields purchasers are business transfer statutes, which were created to protect purchasers by legally forcing full disclosure of the environmental status of a property before the sale and transfer were completed. Although these statutes help prevent purposeful and negligent transfers by sellers, the deserted brownfields that are at the root of much of the problem are still not addressed. Additionally, cases where contamination is not already known are believed to make up a small minority of brownfield sites.

I. Recent Brownfields Related Law and Regulations

This section will provide descriptions and background—and attempt to assess—the effects of brownfields related laws and regulations not previously mentioned or explained in detail. The most relevant recent legislation is the Small Business Liability Relief and Brownfields Revitalization Act,⁵⁹ signed by President Bush at the beginning of 2002. The act had two major consequences: First, it exempted certain brownfields owners (or potential owners) based on the amount of waste on the site. This exclusion effectively eliminated those dealing with minimal (literally a few pounds or gallons of waste) contamination from the possibility of CERCLA liability. Second, the Act enlarges current brownfields programs by increasing funding authority to up to \$200 million per year, including a new provision for so-called "direct cleanup grants" of up to \$200,000. These grants are more or less supplementary grants that, although not part of any specific program, may still be provided for by the EPA. The stakeholder effects of the act are difficult to assess. Although the entirety of the act focuses on economic incentives, it does not encourage diminished cleanup standards or community detachment as much as many other programs. The small businesses targeted by the act are not the typical inner-city offenders, but rather, more suburban sites like gas stations and dry cleaners that have a minimal amount of contamination. Additionally, while the new funding could be used to target any type of program, it does not have program rules that restrict the type of grants that can be allowed.

Other laws and guidelines include liability guidance for states to use in determining how much latitude to take with their own constituents, policies towards owners of properties with contaminated aquifers and underground storage tanks, bona fide prospective purchaser agreement rules for CERCLA, policies on the issuance of comfort/status letters, the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (which addresses lender protection concerns in CERCLA, among other issues), CERCLA amendments regarding entities that acquire property involuntarily, incentives within the structure of the Community Reinvestment Act, and other supplementary materials to current laws and statutes. Most of these changes functioned as clarifications regarding poorly-addressed or newly-emerging issues related to brownfield redevelopment. Further discussion of these changes is beyond the scope of this paper, and does not affect the results to follow, as none of these changes has addressed the core problems as outlined above.

J. Summary of Current Programs, Pilots, Laws and Incentives – Addressing Needs

Addressing the Needs of Developers

In terms of addressing the needs of developers, many current brownfields programs have been implemented that favorably advantage private development and ownership needs. The only interest for this set of stakeholders is economic benefits. Additionally, as most of these stakeholders do not reside in the communities they affect, they are detached from the surrounding concerns of brownfield redevelopments that are the focus for other stakeholders. Developers are treated favorably due to the need for a group to bear some of the economic and material burden that would otherwise be placed entirely on government entities. Simply put, without private involvement, the government would have little hope of remediating even the most contaminated brownfield sites, and the only way to entice private industry on a large scale is with

economic incentives. There are many programs that provide economic and related incentives to developers in order to draw them into remediation projects. These programs include the pilot programs such as the Brownfields Showcase Communities, the Brownfields Job Training and Workforce Development, and the Brownfields Tax Incentive at the federal level. Government programs offer either conditional grants or tax breaks for the purchase and remediation of brownfields sites under certain restrictions (e.g., technology, workforce, etc.). At the state level this need is filled by the State Voluntary Cleanup Programs. These programs clearly target private interests by offering economic advantages and, often, lessened liability in exchange for participation at brownfields sites. It is clear that the primary need of developers and private interests, money, is being sufficiently served by governmental brownfields programs. However, as discussed above, the system is still replete with potentially-restrictive liability standards that prevent interested developers from entering into new projects.

Addressing the Needs of Communities

The other important stakeholder group is the communities that are impacted by the development-based changes. Currently, the key problem in brownfields redevelopments is that the programs do not properly involve (and address the needs of) these communities. This point is contentious, as there is no common agreement as to the requirements for these communities. While everyone can agree that eradication of the environmental contamination present in these communities is of paramount importance, various groups disagree as to the needed quality of the remediation, the economic benefits bestowed on the community, and the importance of participation by community members. Some are satisfied with programs that clean up sites enough for their newly-designated uses and offer limited jobs or the hope of economic revitalization for the community. Others insist that brownfields need to be cleaned to impeccable standards, and argue that offering a relatively trivial and limited number of jobs is just an attempt to placate the members of the community and keep them from the decision-making process. These critics argue that community involvement as a means of allowing environmental justice is more important than economic concerns. Most status quo programs only offer benefits in the form of economic considerations (Brownfields Tax Incentive, Brownfields Showcase Communities, State Voluntary Programs, etc.). Recently, some programs at the state level have begun to initiate a more meaningful community involvement process, but the efforts have been limited in size and scope. The true needs and rights of the stakeholders that make up the community are not sufficiently addressed under governmental brownfields policies. Section VI presents solutions that can be implemented to solve the problem of limited stakeholder involvement in brownfields decisions.

VI. Recommendations

The final sections of this paper aim to bring together many of the concepts and ideas that have been illustrated thus far. The primary concern is to weave the concept of stakeholder theory into the variety of existing programs and propose new ways to better focus on the needs of all stakeholders. That being said, the recommendations and conclusion are not meant to be a concrete policy guide or implementation plan for future brownfields programs. The primary goal of this section is to help readers understand that a successful brownfields policy will need to be constructed from myriad different plans, both old and new, and at various levels of government and private industry. There is no panacea for the brownfields dilemma in the United States, but with a renewed focus on all stakeholders, programs can be implemented that will address the vital needs of those most affected, and hopefully spur redevelopment and economic revitalization for many of the 500,000 brownfields that litter the landscape of urban America.

A. Including All Stakeholders and Addressing Environmental Justice

As discussed above, the most desperate change needed in brownfields policy today is the inclusion of all concerned stakeholders into the decision-making process. Currently, only a few programs at the state or local level (and only in a few states) make an effort to truly involve the communities who have the most at risk in the redevelopment of brownfields. The policies at the federal and state level that make an attempt to include all stakeholders do so with efforts to increase awareness and address the problems of environmental justice. Although in recent years the federal government has led multiple attempts to convene councils on environmental justice, and stated the importance of environmental justice as a guiding policy directive, the actual implementation of programs addressing environmental justice concerns has been practically nonexistent. Status quo programs barely scratch the surface in terms of community participation and their ability to divert the focus from economics and look to the real impacts on communities. The federal government uses the defense that there are no current lawsuits against them under Title VI of the Civil Rights Act of 1964, and therefore no violations of any entity's civil rights at a brownfields site. This justification ignores the fact that most of these communities are low-income, blighted areas where the residents do not have the money or mobility to recognize the problems and file a lawsuit. It is precisely this type of justification that prevents the federal government from achieving success in this arena. Additionally, the goals of environmental justice, as stated below, are not being fulfilled:

The goals of the environmental justice movement are: (1) public policies without discrimination or bias; (2) an environmentally sustainable economy; (3) protection from pollution and hazardous waste; (4) the right of all peoples to political, economic, and environmental self-determination; (5) stopping or limiting the production of toxins, hazardous waste, and radioactive materials; and, (6) the right to participate as equal partners at every level of environmental decision-making. The use of traditional tools of regulatory

decisions about the environment, such as risk assessment and traditional environmental enforcement, affects each and every one of these goals. These goals underscore the emerging role for communities in environmental decision-making.⁶⁰

None of the cited goals above are being met: (1) public policies are still discriminatory in that they are not geared towards the communities, but rather, they are created with economic rewards and incentives in mind; (2) the economy and the environment are not yet issues that are intertwined, but problems whose solutions often detract from one another; (3) a community's protection from hazardous waste is often sacrificed for economic concerns; (4) the great majority of communities have no say in the choices made for their communities; (5) hazardous waste is still produced in these areas; and (6) participation by equal partners is far from a reality in most brownfields communities.

There is no definitive set of policy programs or schemes that can address the issues of stakeholder involvement and environmental justice. The entire paradigm that is used to address brownfields redevelopments must be revised and recreated. Currently, programs are created and implemented with primary and peripheral goals. From the programs discussed above, it is clear that the priority of the federal government is to clean the most dangerous brownfield sites and attempt to compel economic rejuvenation around the sites. From looking at the policy statements one can determine that environmental justice and community involvement are peripheral goals, with the fulfillment of these needs being addressed in a footnote, or nebulous statement of policy—never in the substance of a program. The states, however, have a number of mixed priorities at each site. While some concern themselves only with economic revitalization no matter what the cost is to the community, others have worked with localities to include communities in decision making and do what all stakeholders believe is the best choice for the community. This latter approach needs to become pervasive in all brownfields redevelopment decision making.

To determine whether these initiatives are the "right thing," residents of city neighborhoods should be included in the decision-making process... Without input into the siting process, local residents can comment only after a decision has been announced. This *ex post facto* involvement does not satisfy anyone. The operator of the proposed plant must face a hostile community, the government that sanctioned the siting becomes alienated from its constituency, and the surrounding community is left to protest without any power to effect change.⁶¹

Rather than choosing the best option for the community before a plan is implemented, or granting funds or plan approval to a developer or conglomerate and using justification like "no one else was going to clean it, so this is the best alternative," programs need to start by assessing the needs and desires of each affected community. Programs that do not properly address stakeholder concerns must be considered to have little value, regardless of economic returns or benefits. It should be clear to all involved that involving stakeholders is a morally necessary end in itself, to be given equal importance to all other concerns.

The Doctrine of Fair Contracts proposed by R. Edward Freeman and explained above can be a good starting point for the fair inclusion of the rights and concerns of all other stakeholders: By allowing fair entry and exit, stakeholders can have access to "escape clauses" that will allow communities that are being treated unfairly to break contracts; the required unanimous consent of all parties to change rules in contracts will allow stakeholders to ensure that one party does not dominate the process; the Principle of Externalities will ensure that all relevant players are included in a decision that affects them, guaranteeing their power in the decision; and, the agency principle will ensure that any agent involved in the redevelopment is looking out for all stakeholders. This extremely important idea of an agent representing all sides will force status quo actors who currently work to manipulate the system and communities to adhere to the needs of all concerned. Finally, the idea of "limited immortality" will force the parties involved in the project to maintain the ideals and goals of the project in terms of the interests of all stakeholders into the future, guaranteeing that during post-project planning and beyond no stakeholder will be neglected. If government planners and developers can maintain the tenets of these principles the brownfields redevelopment process can become a fair procedure for all stakeholders involved.

B. Broad Recommendations for the Current Actors

Government

The first step for the government is to determine a plan of action for addressing stakeholder concerns and for greater emphasis on environmental justice in brownfields communities. As the states have been recognized as proper and capable innovators and have the benefit of being able to closely plan and oversee specific sites, the implementation of such programs needs to occur at the state and local level. Unfortunately, that delegation of roles leaves the federal government with the same difficult and distant role it currently occupies, with hundreds of thousands of sites to address. For this reason, the federal government must refocus its efforts by moving away from trying to run all programs and moving towards state control and by promoting the tenets of the new policy for state and local implementation. The role of the EPA as the head of planning and oversight, not direct administration, is critical to national success. The first step the federal government should take is to make sure that all current programs are focused on the idea of sharing decisions with each community. Success will occur through increased efforts to make it clear to all involved that each decision is a *group decision* that affects more than just the direct economic beneficiaries of each plan. Once the communities are educated and informed regarding the process—and the ideas of the Doctrine of Fair Contracts and stakeholder theory have been applied to group decisions—the

plans can move forward with the opinions of all stakeholders being addressed. All of the current programs that offer successful benefits, such as the BCRLF, application-based funding, voluntary programs, and the successful pilots can be reformed around these priorities, with the states organizing and operating key actions. The important idea is that the way that the current process is implemented must be changed. All stakeholders must be aware of the problems that need to be addressed, and economic concerns can never be allowed to dominate the brownfields policy process.

Statutory Changes

A common suggestion for encouraging the redevelopment of brownfields is to alter the statutory rules that currently discourage brownfields investors. The recent Small Business Relief and Brownfields Revitalization Act signed by President Bush and cited above was a step towards limiting the liability of small business investors who clearly had no involvement with the contamination process. Beyond similar small concessions though, it is difficult for the government to lessen the power of laws such as Superfund, RCRA, and similar statutes. These codes prevent contamination and force investors to make careful decisions regarding their own uses of hazardous materials. It is therefore necessary to keep these statutes in approximately their current form. In looking to the impacts on all stakeholders, it can be argued that prohibitive statutes do the best job of protecting parties who otherwise have no actionable defense. It is these statutes that prevent selfish or ill-meaning actors from continually polluting or harming certain areas. Strict rules allow the government to force responsibility on the parties that have created the contamination. Well-rounded programs that properly address all stakeholders should allow interested parties who fear government liability to become involved in brownfields remediations with full confidence that they are not violating statutory regulations. Irresponsibly eliminating key laws could foster the increased exploitation of brownfields communities for economic gain. If all stakeholders can cooperate to fairly address the problem the statutory concerns should be not a problem.

C. Specific Solutions, Practices, and Changes

Mediation

One way to encourage enhanced stakeholder participation is to use a form of consensus-based decision making known as mediation. This process ensures, via the use of a mediator (either experienced stakeholder or third-party), that the opinions and needs of all stakeholders are addressed. Mediation allows the interests of each party to hold equal influence, and strives to reach consensus on every issue. Agreements reached via mediation are meant to be built on the basis of long-term expectations and goals, and thus are considered both durable and realistic in their chances for implementation:

The benefits of mediation include a final decision that incorporates the interests of all the parties. These agreements create not just a short-term solution to a particular issue with which all parties are satisfied (such as cleanup levels), but also establish a long-term relationship between the parties upon which all future communications can be based. Identifying mediation as the format for brownfields discussions will also address problems with inclusivity and consistency. Inclusivity is addressed because the foundation of mediation is to ensure that all parties essential to the debate are present and the interests of all parties share the same weight. Consistency will be addressed because mediation skills and the process of mediation are not dependent on the subject matter of the discussion.⁶²

Additionally, the use of mediation can encourage the use of a new paradigm of social and environmental decision making that can guarantee that a similar process is used in the future as a means of involving all parties and allowing the voice of each stakeholder group to be fairly heard:

The most important benefit of mediation is the long-term benefit to society of training stakeholders in a more appropriate form of conflict resolution. As stated by Bush and Folger in their book, *The Promise of Mediation*, "a conscious choice to employ certain social processes can itself help enact and reinforce an emerging paradigm . . . The future of mediation is a matter of utmost importance, not just for its own sake but for the sake of the much larger choice involved." This means that EPA, by choosing to use a consensus-based approach, will be teaching a broad range of stakeholders a new way of reaching agreement, giving them tools to reach agreement on future issues.⁶³

Incorporating mediation into the brownfields process can encourage a new type of group thought, where government programs are not dictated by government agencies to the self-sufficient economic beneficiaries but, instead, programs are created via the involvement and planning of all stakeholders in a group process, and the decision is based on long-term mutual understanding of each side's interests and needs. The EPA's involvement in such a process is crucial to prevent status quo problems from resurfacing. Currently, this idea is not far from what has been proposed by the EPA – however, there has been no concrete implementation or enforcement, only suggestion. The EPA cannot stand back and allow "innovative" state solutions and self-interested developers dwarf the benefits of mediation. The process must include oversight, training and certification for mediators, and the guarantee that the agreements reached in mediation will conform to the Doctrine of Fair Contracts outlined above. The EPA can use its resources as well as the threat of its regulatory power to ensure that these goals are met.

Public Dialogues and Working Groups

Two similar forms of public involvement in the planning process are public dialogues and working groups. Generally, the form of a public dialogue could be that project developers and planners gather members from the community to obtain their opinions and recommendations regarding the project. To date, programs that encourage public dialogue have been largely piecemeal solutions to the problem, as developers have used them as excuses to say that they have listened to the needs of the community. No matter what issues or objections may be raised in the dialogue, the ultimate decision is left to the developer, who is often praised by agencies such as the EPA for opening up to the community. Despite these current shortcomings, the importance of these discussions are high. "A key ingredient to a successful brownfield initiative that is often overlooked is involving those members of the community that will be affected. A study conducted in 1997 revealed that 'non-environmental factors' were primarily responsible for brownfield development failures....Developers must be cognizant of, and responsive to, community concerns and work with community members to successfully achieve the common goal of revitalization. Members of the affected community should be involved in...brownfield development plans."⁶⁴ Thus, it is important that developers work with communities not only to fulfill the need for stakeholder inclusion, but also to ensure that there is a community-based consensus on the project that will allow the remediation to be completed successfully.

In order to revise current programs, public dialogues would need to be given increased publicity and accountability. The EPA would need to create a rule, law, or restriction that would make it abundantly clear to developers that ideas and concerns uncovered during public dialogues would hold weight. Such a process could be adequately achieved through the use of statewide oversight committees that could send delegates to each community. Having an impartial reporter from each constituency would lessen the moral hazards at stake as each delegate would ideally attempt to achieve equity for all sides as they would hope their counterparts would do the same for their respective communities. Additionally, EPA representatives who maintained fewer susceptible connections (i.e., not the typical local EPA representative) with the community would be included. Developers and communities that thoroughly followed the program could receive fast-track funding and additional support. Formal conferences and creative ideas for implementing public dialogues at the state and local level could foster the type of new developments for which the states are known, and hopefully spur the development of ideas to improve the process.

Working groups are a smaller and more focused form of public dialogue that create and utilize committees comprised of community leaders and government officials. These community leaders represent the interests of their communities in voicing the needs and desires of the neighborhood in regards to brownfields development. Working groups address one primary concern that public dialogues do not, which is that most of the public does not care or does not have the time to attend brownfields meetings, which they view as only marginally affecting them. Working groups give all of the responsibility to a small group of community leaders who then represent the community at the meeting. This form of involvement also demands fewer voices be heard, which makes a community's arguments and needs easier to assess and address.

One problem with these programs is that community representatives may not be able to be held accountable in any substantive way for the decisions they may make. For instance, a representative with economic concerns regarding a brownfield project may be inclined to downplay the needs of the community for their own economic benefit. Additionally, those willing to step forward may not actually represent the entire group. To solve these problems, a similar plan to the public dialogue oversight committees and delegates explained above could be created. For communities where public dialogues are unrealistic, working groups could be created to give the community stakeholders a voice in the issue. This would allow flexibility in the involvement of communities, and the oversight and organization of the EPA would guarantee that these committees were properly addressing the concerns that need to be confronted.

Focus Groups and Education – Getting the Word Out

The most relevant part of the EPA's environmental justice effort thus far has been its attempt to advise different stakeholders and interested parties about ways to incorporate environmental justice into the decision-making process. The NEJAC (discussed above) has filled this role. Despite attempts to acknowledge and address issues, progress has been limited due to the scope and size of the plans, and, NEJAC efforts have been little more than rhetoric. The EPA needs to use the efforts and recommendations of the NEJAC to implement extensive programs based on the principles of environmental justice and stakeholder theory. Programs should include mandatory education, participation, and reporting of relevant issues to federal, state, and local advisory committees that will focus on the relevant needs of those involved. The guiding principle of these programs must be that education and enlightenment on these issues can change the way that urban blight and environmental problems are perceived.

Nonprofit Organizations

Current brownfields situations have seen the involvement of two primary types of nonprofit organizations: community-based organizations (CBOs) and "nonprofit intermediaries." Nonprofit intermediaries are groups that work with CBOs to facilitate the redevelopment process. The organizations enable communities to create an entity with which they can accomplish the business of brownfields remediations. CBOs are generally composed of various stakeholders from within the community, and are created to facilitate development in a certain area. Many different levels and types of CBOs can be

created, ranging from relatively simple organizations formed to address one specific site, to more complicated organizations formed to redevelop an entire area. The power of the organizational form gives the stakeholders within the community a structure to address other relevant participants (e.g., when applying for government grants), and also allows financial benefits in terms of organizational and tax advantages.

CBOs address the issue of stakeholder involvement in communities where residents may be more mobilized and ready to work primarily on their own. CBOs also provide the added benefit of avoiding duplicative and competing efforts in communities where multiple redevelopments may need to be completed. The CBO can provide a means for arbitrating conflict and planning these developments. Further education about and encouragement of the creation of CBOs is needed. Government efforts could focus on targeting community-leaders or even developers to help form these more efficient and business-like entities. Special incentives and grants can be given to communities in exchange for the creation of and cooperation with these organizations. The expansion of CBOs could allow those with greater experience to take their understanding and expertise to other communities to help create and implement similar programs. Helping communities form organizations that allow for empowerment and planning at the highest level is the best way to ensure their participation and the satisfaction of environmental justice concerns.

Nonprofit intermediaries are a more flexible and innovative type of organization that can step into a community or specific project and offer a number of benefits. These companies work with communities purely for the purpose of facilitating community needs and brownfields developments. "As to brownfields redevelopment, these nonprofit intermediary organizations are new players whose involvement can range from accepting donated property to providing predevelopment funds for site investigation/analysis....These new third sector organizations are filling the critical niche necessary to achieve eco-development, as they play many roles that add value to brownfields projects."⁶⁵ The benefit of these organizations is that they can organize to play specific roles that can differ from community to community. Thus, a nonprofit intermediary in a certain area can resolve problems in specific brownfield projects to raise the number of successes that are possible. These organizations, as nonprofits, are also superior in that they are not susceptible to the enticement of economic gain. "Market-based environmental reforms in brownfields policy tend to be at odds with environmental justice and this is precisely where nonprofit organizations can be the interstice in eco-development. Unlike private developers whose eye is on the bottom line, and unlike burdensome bureaucratic agencies that bog down the process, nonprofits specializing in brownfields redevelopment can partner with communities and...all parties concerned."⁶⁶ As they are nonprofit, it can be guaranteed that they are working for the best interest of the stakeholders involved. These organizations do exist now, but on an extremely small scale. It is important that the government at all levels encourage the creation and involvement of these organizations in brownfields redevelopments. Government initiatives can include incentives for these organizations to be created, such as economic incentives for their creators, and the granting of "special powers" to allow for great latitude in their abilities at the local level. This status would allow nonprofit intermediaries to fill-in for, and take pressure off, the government in a number of brownfields communities.

Issues of Federalism

The programs and statutes that make up the governmental brownfields effort abound with issues of federalism. Federalism can be broadly defined as a system of government with a central government authority and regional governments with at least some degree of sovereignty. This division of power is a central issue in the brownfields movement as it exists today. As illustrated above, numerous programs currently exist at the federal, state, and local level. These programs contain various types of delegation, authority, and cooperation.

A key example of federalism in action is Superfund. Although Superfund has existed for more than two decades at the federal level and authorities have used the power of the law to force regulatory schemes upon the states, the current trend has been for states to pass their own versions of the law. In many situations this has allowed the states to appease the authority of the federal government and control much of their own regulation. Despite these laws, the federal government still has the ability to impose its law upon the states. Additionally, there are federal laws that offer benefits to or force rules on communities without the consultation or approval of state governments (e.g., Brownfields Showcase Communities) and state programs that attempt to waive liability under federal law without federal approval (State Voluntary Remediation Programs).

There are various recognized theories regarding federalism, including "constitutional federalism," which addresses issues of federal and state power as outlined in the constitutions; "normative federalism," which holds that the constitution calls for state power as the norm, with federal oversight only legitimate when necessary; and, "instrumental federalism," which tries to determine which particular authority would be the most capable and appropriate actor when looking at each situation.⁶⁷ Although each of these theories has legitimate justifications, this paper argues that instrumental federalism should be used as a means for adjudicating brownfields conflicts. As demonstrated by the example encompassing the Superfund laws above, if each level of government could agree as to which actor is the most appropriate for a certain situation excess bureaucracy, disagreement, and redundant use of funds could be avoided.

When using the lens of federalism to evaluate and determine future policy alternatives for brownfields programs and legislation, it is necessary to understand the context in which many of the historical assumptions surrounding the issue have been made. One useful way to remove the debate from potentially detrimental determinations regarding the various actors is

to recognize the idea of institutional determinism. Institutional determinism can be defined as the idea that certain actors always behave in certain ways. In brownfields situations, some common themes would be that states always undermine environmental concerns in favor of economic benefits, or that the federal government always shapes laws to be as prohibitive as possible. These ideas become commonplace throughout the customary thought of those evaluating and implementing policy, and begin to create a self-fulfilling prophecy. These generalizations about particular actors condemn future programs to the limitations of under which they are placed. This negative process must be avoided in order to foster the innovation and cooperation necessary to allow brownfields programs to succeed across all levels of government. "The history of Brownfields policy, and environmental laws generally, shows shifting institutional roles, responses, successes, and failures. Rather than making assumptions of static institutional proclivities, policy analysts must examine in more detail the historical context of a problem, the task and institution under consideration to remedy that problem, and the particular constellation of relevant environmental, market, and political pressures."⁶⁸ These prerequisites for thought about brownfields will allow policymakers to break the mold of institutional determinism, and also foster the creativity of thought that will allow those shaping future brownfields decisions to properly address the concerns of all stakeholders involved.

Another theory of thought is that of "cooperative federalism," the idea that federal and state governments can work together to assess and implement the programs that are fair and effective for the collective constituents. Cooperative federalism encompasses the idea of instrumental federalism, and is underscored by the need for each side to not take steps that undermine the power or goals of the collective whole. In other words, the parties must cooperate to strike a meaningful balance of power between each side as opposed to a forced balance of power based on constitutional rights, legal decisions, etc. It is this idea of cooperative federalism that allows the potential of each actor to be fully recognized:

Policies constructed on the basis of multiple perspectives permit decisionmakers to triangulate on the "truth." Issues misunderstood at one level may be better analyzed at another. Thus, the quality of decisions about toxic waste sites, where the risk of exposure to certain hazardous chemicals was not fully appreciated locally, improves with federal knowledge about the harms. Where, however, the policy shortcomings derive from lack of federal understanding about the future use of a particular parcel, the infusion of local knowledge will improve outcomes. Under circumstances of vertical competition, the federal authorities have an incentive to bring to bear information that others might not have and local officials are motivated to shape the outcome in ways that reflect their knowledge base.⁶⁹

By working together to reach goals, each side can experiment with and implement ideas that best resolve the problems. Collaboration and experimentation can be allowed without the restraints imposed by concerns of being overruled or chastised by the other side. For these reasons, it is under the scope of cooperative federalism and without the limits of institutional determinism that a new nationwide brownfields effort should be constructed. No matter what policies are proposed and no matter which level of government implements them, unless the limitations established by the current lack of cooperation and conflict due to issues of federalism are removed, it will be difficult for any brownfields policy to achieve widespread success at the national level.

D. The Need for Advocacy

Throughout this paper, the idea of increasing stakeholder participation and enhancing the focus on environmental justice has been advocated. Although some of the proposed policy solutions above can structurally alter the way in which the problem is approached, environmental justice and the problems facing brownfields communities today cannot be solved without going a step beyond a simple change in policy. Those creating the policies that surround and consume the brownfields movement need to change the way they approach and advocate decisions regarding brownfields. Policymakers, and the citizens supporting and influencing their decisions, must realize that brownfields are not only a problem of environmental contamination, but a crisis that has been woven into the social fabric of many American communities. In some situations, cleaning the sites to passable standards and giving community members a few jobs may solve the problem without any apparent troubles. However, in many situations, deeper concerns and injustices abound. Communities are being exposed to potentially lethal environmental harms, and the government is not making these harms the top concern in brownfields policy.

To change the way the situation is being approached, individuals and organizations must advocate a change in the way that problem is addressed. Each person must become an advocate of just and moral priorities as the starting point for brownfields decision making. This is true not only because people have the duty to act against injustice that they may be able to control, but because many in American society have benefited indirectly from the placement of waste in inner-city communities. The benefit has come from the fact that everyone does not have to deal with environmental contamination because the waste is placed in specific, relatively powerless communities. Note, for example, that one rarely, if ever, sees a contaminated old property in an affluent suburb. Thus, by being complicit and allowing these acts many people are benefiting. In her book, *Environmental Justice*, Kristin Shrader-Frechette argues that, "If more people had behaved as justice advocates, for example, Nazi experimentation on prisoners, Jews, gypsies, and leftists never might have occurred. Likewise, EJ problems – such as placing most hazardous-waste incinerators in minority communities – might stop if citizens, scholars, and other professionals took partisan stances against them. Advocates could help educate fellow citizens, join a civic group,

or work with an NGO that has been organized to protect vulnerable people.”⁷⁰ Only after concerns of justice have been attended to can the normal policy process of economic incentives and political bargaining continue.

Beyond regular citizens that are less involved in the actual process, the key actors and decision-makers must adopt a fair approach to the brownfields process. That approach must involve not only the consideration of environmental justice issues, but also the guarantee that all stakeholders will be treated equally. By following the guidelines of fair and equitable participation when entering into the process of brownfields remediations, the government and developers can guarantee on their own that they are helping the problem by relinquishing some of the control they have on decisions in order to fairly empower all stakeholders. Personal and policy advocacy with an increased focus on environmental justice concerns that include all stakeholders in the decision process can guarantee that the proper problems are being addressed, and open the door for balanced and fair solutions to the brownfields problem.

VII. Conclusion

Current brownfields solutions in the United States are a jumbled mass of disorganized, unfocused, and piecemeal answers to a number of serious problems that are created by the existence of environmentally-contaminated properties. Brownfields problems are created not only by historical socioeconomic factors, but by current statutes and regulations and by the perceived concerns of those making brownfields policy. Although little can be done about the socioeconomic realities that have created the situation, the government has made attempts to properly remove statutory barriers from the path of brownfield developers. Most recently, the Small Business Relief and Brownfields Revitalization Act and liability releases from many state and local governments have led to increased optimism and interest from private actors. However, beyond these recent developments most government programs exist only as fragments or pilots of real programs and do little to address the majority of brownfields and help the communities with which they are intertwined. Rather, redevelopments are set up with economic and political concerns in mind, and are predominantly financial motivations for developers who stand to benefit economically from government involvement. Only a small amount of sites are developed, and communities are not treated as partners in the effort, but as spectators while their lives and habitats are changed without consent. Despite any relative success, there is only so much change that these small programs and statutory amendments can create, and the focus of these programs largely ignores what should perhaps be the largest concern regarding brownfields communities – stakeholder rights and environmental justice.

Issues of environmental justice run rampant at many brownfield sites. Due to the nature of many of these properties, brownfields are located predominantly in inner-cities or blighted areas that are inhabited mostly by minorities. As many of these sites are rife with environmental contamination, these communities are disproportionately exposed to the health hazards that lie within. The current efforts of the EPA, via reaction to Title VI complaints and the actions of the NEJAC, barely scratch the surface of the problem. No real policy action has been taken to address environmental justice concerns and alleviate the injustices that many communities are facing. Additionally, current programs tend to ignore or irreverently placate the concerns of many of the most important stakeholders within the communities. Decisions are made based on the involvement and commitment of developers who have little to do with the communities affected. Although these outsiders may sometimes involve communities in the process, this involvement usually consists of “concessions” like job training for community residents. Such empty concessions are used as a justification for the developer’s actions, and a demonstration of how committed they are to the community. However, economics are the primary determinant of power and action, and the communities are left with little control to influence the process. The shortsightedness of status quo programs not only risks the health and lives of the people who inhabit communities with brownfields, but fails to properly address the rights of citizens within these communities.

With as many as 500,000 brownfields sites across the country, it is an undeniable fact that the problem will not go away without a comprehensive strategy that encompasses all levels of government and private industry. Although it must be acknowledged that the brownfields problem is overwhelming in size, and the remediation of all or even most brownfield sites is unrealistic, there are positive steps that can be taken that have not been implemented. Government agencies, led by the EPA, have failed to address the brownfields dilemma and evenly consider the concerns and rights of all stakeholders affected by the existence of brownfields. While some policies have been admirable attempts to address all stakeholders, the problem will not yield to a simple economic or programmatic solution, and the solution must reach beyond the bounds of government policy. A new paradigm is needed for the manner in which brownfields-related problems are approached. Collaborative discourse involving the federal, state and local governments, developers and, most importantly, the communities at risk, needs to be created and implemented in order to properly alleviate the brownfields problem from the perspective of all concerned stakeholders. Cooperative policy at all levels of government and private industry without the bounds of institutional determinism must be used as the launching point for these paradigmatic changes. It is only with the genuine involvement and participation of the communities themselves that unique and tailored solutions can be created to accommodate the diverse needs of each community that experiences the depression and blight connected to the brownfields problem. Finally, it must be acknowledged that there is no brownfields panacea, but by addressing the most urgent needs and concerns of all relevant stakeholders, the brownfields crisis can be engaged in a constructive and progressive manner free from political influence and economic control. A new forum for brownfields thinking and remediation can foster innovation

and cooperation that can allow all interested parties to benefit without the need for political or economic manipulation or domination.

Beyond the policy process everyone involved at any level must advocate the confrontation of environmental justice problems in their own lives. That may mean speaking out against certain policies or programs, or just sharing one's thoughts on a particular situation that contributes to the problem. Strong individual advocacy can encourage government and private actors to think before they engage in projects that they view purely as economically beneficial urban revitalization when the lives, rights, and well-being of other citizens are at stake. The courage of advocacy and cooperation is needed within and outside of the policy-making process in order to refocus and organize the brownfields solution process and spur the remediation of many of these sites into productive properties that can add value—not only economic, but social, moral, and physical—to blighted communities around the United States.

Footnotes

¹ Bachelor of Business Administration 2003, University of Michigan Business School

² See Victoria Pebbles, *Case Studies: Milan, Illinois*, The Great Lakes Regional Online Brownfield Information Network (ROBIN), at <http://www.glc.org/robin/cases/jims.html> (last modified November 4, 2002).

³ See Victoria Pebbles, *Case Studies: Clark County, Indiana*, The Great Lakes Regional Online Brownfields Information Network (ROBIN), at <http://www.glc.org/robin/cases/occidental.html> (last modified November 4, 2002).

⁴ See Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118 (H.R. 2869), Stat. (January 11, 2002).

⁵ See 42 U.S.C. § 2000D (1994).

⁶ See Small Business Liability Relief and Brownfields Revitalization Act, *supra* note 4.

⁷ See CHARLES BARTSCH, ELIZABETH COLLATON, INDUSTRIAL SITE REUSE, CONTAMINATION, AND URBAN REDEVELOPMENT: COPING WITH THE CHALLENGES OF BROWNFIELDS (Northeast Midwest Institute 1994).

⁸ See *Brownfields, Possible Liability Reforms Spur Growth in Environmental Insurance*, HAZARDOUS WASTE NEWS, February 20, 1995.

⁹ See ROBERT A. SIMONS, TURNING BROWNFIELDS INTO GREENBACKS: DEVELOPING AND FINANCING ENVIRONMENTALLY CONTAMINATED REAL ESTATE (Urban Land Institute 1998). At 29

¹⁰ See Small Business Liability Relief and Brownfields Revitalization Act, *supra* note 4.

¹¹ See *Brownfields Federal Partnership Action Agenda*, United States Environmental Protection Agency, at <http://www.epa.gov/brownfields/pdf/fedparaa.pdf> (November, 2002).

¹² See Georgette C. Poindexter, Addressing Morality in Urban Brownfield Redevelopment: Using Stakeholder Theory to Craft Legal Process, 15 VA. ENVTL. L.J. 37 (Fall, 1995).

¹³ See *id.*

¹⁴ See Johnine J. Brown, *Environmental Justice Conflict Could End With Justice If Brownfields Are Reclaimed*, ILLINOIS LEGAL TIMES 13 (June 1995).

¹⁵ See 42 COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION U.S.C. § (1980).

¹⁶ See ELIZABETH GELTMAN GLASS, RECYCLING LAND: UNDERSTANDING THE LEGAL LANDSCAPE OF BROWNFIELD DEVELOPMENT (The University of Michigan Press 2000) at 34.

¹⁷ See Julia A. Solo, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and the Prospects for Change*, 43 BUFF. L. REV. 285 (Spring, 1995).

¹⁸ See Brown, *supra* note 14.

¹⁹ See Joel B. Eisen, "Brownfields of Dreams"?: Challenges and Limits of Voluntary Cleanup Programs and Incentives, 1996 U. ILL. L. REV. 883 (1996).

²⁰ See *Hearings Before the Subcomm. on Commerce, Trade, and Hazardous Materials Waste Site Cleanups under Superfund of the House Commerce Committee* (July 20, 1995) (statement of Don Clay, Former Assistant Administrator, EPA Office of Solid Waste and Emergency Response).

²¹ See *Hearings Before the Subcomm. on Commerce, Trade, and Hazardous Material Waste Site Cleanups under Superfund of the House Commerce Committee*, 104th Cong. (July 20, 1995) (statement of Michael Oxley).

²² See Simons, *supra* note 9.

²³ See Small Business Liability Relief and Brownfields Revitalization Act, *supra* note 4.

²⁴ See Leonard O. Townsend, *Love Lies Bleeding: Brownfields in the New Millennium*, 11 FORDHAM ENVTL. L.J. 873 (2000).

²⁵ See HAZARDOUS WASTE NEWS, *Supra* note 8.

²⁶ See *EPA Waste Programs Environmental Justice Homepage*, Environmental Protection Agency, at <http://www.epa.gov/swerosps/ej/> (January 5, 2003).

²⁷ See JAMES P. LESTER, DAVID W. ALLEN, KELLY M. HILL, ENVIRONMENTAL INJUSTICE IN THE UNITED STATES: MYTHS AND REALITIES (Westview Press 2001). At 21

-
- ²⁸ See Bradford C. Mank, *Reforming State Brownfield Programs to Comply with Title VI*, 24 HARV. ENVTL. L. REV. 115 (2000).
- ²⁹ See 42 U.S.C., *supra* note 5.
- ³⁰ See U.S. EPA, *Brownfields Title VI Case Studies: Summary Report*, U.S. Environmental Protection Agency Website, at <http://www.epa.gov/brownfields> (June, 1999).
- ³¹ See *id.*
- ³² See Paul D. Flynn, *Finding Environmental Justice Amidst Brownfield Redevelopment*, 19 VA. ENVTL. L.J. 463 (2000).
- ³³ See *id.*
- ³⁴ See Mank, *supra* note 28.
- ³⁵ See *National Environmental Justice Advisory Council Charter*, EPA, at http://www.epa.gov/compliance/environmentaljustice/nejac/pdf/nejac_charter_2001.pdf (September 27, 2001).
- ³⁶ See *Environmental Justice, Urban Revitalization, and Brownfields: The Search for Authentic Signs of Hope*, EPA, at http://www.epa.gov/compliance/resources/publications/ej/public_dialogue_brownfields_1296.pdf (December, 1996).
- ³⁷ See William M. Evan, R. Edward Freeman, *A Stakeholder Theory of the Modern Corporation: Kantian Capitalism*, in *ETHICAL THEORY AND BUSINESS* 311 (T. Beauchamp and N. Bowie, Englewood Cliffs: Prentice Hall 3rd 1988).
- ³⁸ See Evan and Freeman, *supra* note 37.
- ³⁹ See R. Edward Freeman, *Some Future Directions*, 4 BUS. ETHICS Q. 409 (1994).
- ⁴⁰ See Poindexter, *supra* note 12.
- ⁴¹ See *Brownfields Tax Incentive Fact Sheet*, U.S. EPA, at <http://www.epa.gov/brownfields/html-doc/taxfact.htm> (August, 2001).
- ⁴² See Taxpayer Relief Act of 2000, H.R. 5542, 106th Cong. (2000).
- ⁴³ See *Brownfields Tax Incentive - Frequently Asked Questions*, U.S. EPA, at <http://www.epa.gov/brownfields/html-doc/taxfaq.htm> (visited January, 2003).
- ⁴⁴ See John W. Lee, W. Eugene Seago, : *Policy Entrepreneurship, Public Choice, and Symbolic Reform Analysis of Section 198, the Brownfields Tax Incentive: Carrot or Stick or Just Never Mind?*, 26 WM. & MARY ENVTL. L & POL'Y REV. 613 (Spring, 2002).
- ⁴⁵ See Kashif Haque, *SYMPOSIUM ON INTELLECTUAL PROPERTY, DIGITAL TECHNOLOGY & ELECTRONIC COMMERCE: NOTE: Internal Revenue Code Section 198, The Tax Incentive for Brownfield Redevelopment: a Sheep in Wolf's Clothing*, 8 WASH. U. J.L. & POL'Y 371 (2002).
- ⁴⁶ See *Brownfields - Workforce Development*, Environmental Protection Agency, at <http://www.epa.gov/brownfields/pdf/wrkfrc2.pdf> (June, 2000).
- ⁴⁷ See *RCRA Helps Turn Brownfields Green Fact Sheet*, Environmental Protection Agency, at <http://www.epa.gov/swerosps/rcraf/pdf/bfgreen.pdf> (December, 1999).
- ⁴⁸ See *Brownfields Showcase Communities*, Environmental Protection Agency, at <http://www.epa.gov/brownfields/pdf/showfact.pdf> (October, 2000).
- ⁴⁹ See *id.*
- ⁵⁰ See *Brownfields Cleanup Revolving Loan Fund Pilot Program*, Environmental Protection Agency, at <http://www.epa.gov/brownfields/pdf/bcrlf-fs.pdf> (September, 2001).
- ⁵¹ See *Potential Insurance Products for Brownfields Cleanup and Redevelopment*, at <http://www.epa.gov/brownfields/pdf/insurnce.pdf> (April, 1997).
- ⁵² See *id.*
- ⁵³ See William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57 (October, 1999).
- ⁵⁴ See Glass, *supra* note 16 at 68.
- ⁵⁵ See Heidi Gorovitz Robertson, *Legislative Innovation in State Brownfields Redevelopment Programs*, 16 J. ENVTL. L. & LITIG. 1 (Spring, 2001).
- ⁵⁶ See David L. Markell, *States as Innovators: It's Time for a New Look to Our "Laboratories of Democracy" in the Effort to Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 347 (1994). Portney, quoted from Paul R. Portney, *Overall Assessment and Future Directions*, in *Public Policies for Environmental Protection* at 275, 283. Futrell, quoted from J. William Futrell, *Law of Sustainable Development*, *Envtl. F.*, Mar.-Apr. 1994, at 16, 20.
- ⁵⁷ See Flynn, *supra* note 33.
- ⁵⁸ See Glass, *supra* note 16 at 70.
- ⁵⁹ See *Small Business Relief and Brownfields Revitalization Act* *supra* note 4.
- ⁶⁰ See Robert W. Collin, Robin Morris Collin, *The Role of Communities in Environmental Decisions: Communities Speaking for Themselves*, 13 J. ENVTL. L. & LITIG. 37 (1998).
- ⁶¹ See Poindexter, *supra* note 12.
- ⁶² See Teresa B. Salamone and Steve McKinney, *Brownfields and the Promise of Mediation*, 14 NAT. RESOURCES & ENV'T 54 (Summer, 1999).

⁶³ See *id.*

⁶⁴ See Faith R. Dylewski, *Ohio's Brownfield Problem and Possible Solutions: What is Required for a Successful Brownfield Initiative*, 35 ALA. L. REV. 81 (2001).

⁶⁵ See Ellen B. Sturm, *Nonprofit Organizations in Brownfields Redevelopment: Leveling the Playing Brownfield*, 8 BUFF. ENVTL. L.J. 99 (Fall, 2000).

⁶⁶ See *id.*

⁶⁷ See William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 1 (Winter, 1997).

⁶⁸ See *id.*

⁶⁹ See Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495 (December, 1999).

⁷⁰ See KRISTIN SHRADER-FRECHETTE, *ENVIRONMENTAL JUSTICE: CREATING EQUALITY, RECLAIMING DEMOCRACY* (Oxford University Press 2002) at 195.