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CERCLA's Contribution to the Federal Brownfields Problem: A Proposal for Federal Reform

SARAH W. RUBENSTEIN†

Introduction

A wood products company, hoping to construct a new plant in the Chicago metropolitan area, located what it considered to be the perfect parcel of land: a 20-acre abandoned industrial park in downtown Hammond, Indiana. However, environmental assessments indicated the possibility of soil contamination on site. Out of fear of being slapped with millions of dollars of environmental liability, the wood products company walked away from the deal. The company took its development plans and many new jobs out to the suburbs, where it could buy uncontaminated, undeveloped land for much less money and no threat of environmental liability.¹

Unfortunately, the experience of the wood products company in the example above is very common today. Many potential purchasers and developers disregard previously developed urban “brownfields” for risk-free, yet undeveloped “greenfields.” Such developers and purchasers are afraid that environmental tests will reveal the “brownfields” to be contaminated with hazardous materials, and save themselves much cost and uncertainty by shopping instead for “greenfields.” This ironic situation is commonly referred to as the “brownfields effect.”² The brownfields effect is typically attributed to the liability threat posed by hazardous waste laws. Perhaps the most important hazardous waste law contributing to the brownfields effect is the federal Superfund law, officially known as the Comprehensive Environmental Re-

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sponse, Compensation, and Liability Act ("CERCLA"). By attaching liability to all parties connected to contaminated property through ownership, operation, waste generation, or waste disposal, CERCLA discourages the reuse and redevelopment of "brownfields" property. Rather than risk the threat of CERCLA liability, purchasers and developers opt for "greenfields."

The brownfields effect does more, however, than create hassles for prospective purchasers, and make it difficult for owners of contaminated sites to sell their property. It also creates a whole host of community problems. As industrial factories close or go out of business, communities are left with abandoned hazardous waste sites, depressed job markets and tax bases. Because of the brownfields effect, replacement businesses bearing the prospects of new jobs, increased tax revenues, and money to remediate contamination shy away from the contaminated sites. Meanwhile, the untouched contamination generates potential health problems for nearby residents, and the lack of replacement industry worsens the economic situation in the neighborhood. Yet the problems caused by the brownfields effect are not limited to the affected community. As business and industry shifts to undeveloped greenfields, scarce wilderness and natural resources become scarcer. In addition, the transplanted industries bring contamination to the new areas. As the job base shifts to locations farther away from the cities and residential areas, the work force becomes more dependent on automobiles for transportation, because mass transit cannot economically reach outlying areas. Increased use of automobiles decreases fuel efficiency, increases air pollution, and increases the use of automobile-related hazardous materials.

Hazardous waste laws, therefore, enacted to protect the environment, have stymied the remediation and redevelopment of America's urban environment while accelerating the destruction of America's wilderness. Needless to say, this ironic effect needs to be addressed. Federal reform of Superfund is required. This Comment explores solutions to the federal brownfields problem. Because there has been very little innovation in the way of brownfields reform at the federal level, but a considerable amount at the state level, the Comment investigates possible remedies to the federal brownfields problem by examining state brownfields reform programs. Using ideas uncovered in this investigation, the Comment proposes a "model brownfields statute" to be imposed through legislation or regulations on a federal level.

Part I of this Comment provides background on CERCLA law, and

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7. McWilliams, 21 Ecol L Q at 717 (cited in note 4).
8. Id at 721.
describes the ways in which CERCLA contributes to the brownfields effect. Part II analyzes and compares a group of state brownfields statutes, in order to identify possible programs to include in a federal brownfields legislative or regulatory proposal. Finally, Part III examines the status of brownfields reforms that have been taken on a federal level. As will be shown, these reforms do not adequately ameliorate the federal brownfields effect. Accordingly, the end of Part III proposes an effective federal brownfields reform package.

I. CERCLA’s Contribution to the Brownfields Problem

CERCLA was enacted in response to the fears and public outcry resulting from several hazardous waste disasters that came to light in the late 1970s. These disasters garnered significant coverage in the media, and exerted a great deal of pressure on the President and Congress. In response, the EPA perhaps too rapidly drafted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA" or "Superfund"). Congress followed suit, and hastily enacted the legislation. The statute builds upon "the polluter pays" principle by creating a trust fund from taxes on chemicals, petroleum products, and corporate income, which is then used to help reimburse government funded cleanup actions. In addition, by assigning liability for contamination, the statute attempts to create incentives for private owners to clean rather than abandon hazardous waste sites. CERCLA is not without its successes: since 1980, remedial actions at 237 waste sites have been completed, and actions at another 1100 sites are in varying stages of completion. In addition, hazardous substances posing immediate health and safety risks have been removed through more than 3500 federal emergency response actions around the country. However, there is widespread consensus that CERCLA is riddled with errors and inconsistencies, and is in dire need of reform. One aspect of CERCLA that needs to be reformed involves its contributions to the brownfields problem. This section of this Comment details the ways in which CERCLA contributes to the brownfields problem. First, though, a brief description of CERCLA’s statutory scheme is in order.

A. CERCLA’s Statutory Framework

CERCLA operates by regulating the cleanup of "releases" of "hazardous

12. Id.
substances” from “facilities.””13 “Release” is defined as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . .”14 “Hazardous Substances” include all those substances designated by CERCLA, the Solid Waste Disposal Act, the Federal Water Pollution Control Act, the Toxic Substances Control Act, and the Clean Air Act.15 “Facility” includes “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . .”16

CERCLA regulates hazardous waste cleanups in two ways. First, it authorizes the EPA to act in response to any release or threat of release of hazardous wastes to the environment “which may present an imminent and substantial danger to the public health or welfare.”17 The EPA and/or state environmental agencies may then remove and remediate such a release, and subsequently seek reimbursement from all potentially responsible parties (also known as “PRPs,” and defined below).18 If no PRPs can be found, the EPA will receive reimbursement from the “superfund,” a fund created by CERCLA-authorized taxes on petroleum, chemicals, and corporate income.19 The second way CERCLA regulates hazardous waste cleanups is by issuing court or administrative orders, requiring PRPs to undertake abatement actions.20

CERCLA assigns liability to PRPs, defined in Section 107 of the Act to include current and past owners and operators of facilities, parties who arrange for the disposal of hazardous waste, and transporters of hazardous wastes.21 The liability assigned to PRPs under CERCLA is strict liability, as defined under Section 101(32): “The terms ‘liable’ or ‘liability’ under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33.”22 The courts have interpreted liability under Section 1321 of Title 33, the Clean Water Act, to be strict.23 The liability may also be joint and several, meaning that all PRPs are assigned liability for the whole amount of the cleanup costs, and then permitted to allocate the costs amongst themselves, and other

18. Id.
21. 42 USC § 9607(a) (1994); see also Kerr-McGee Chem Corp v Lefton Iron & Metal Co, 14 F3d 321 (7th Cir 1994) (holding current owners of contaminated property liable under CERCLA); Farmland Indus, Inc v Morrison-Quirk Grain Corp, 987 F2d 1335 (8th Cir 1993) (holding past owner of contaminated property liable under CERCLA); Catellus Development Corp v United States, 34 F3d 748 (9th Cir 1994) (holding seller of spent auto batteries to lead reclamation plant liable under CERCLA for arranging for disposal); Tippins Inc v USX Corp, 37 F3d 87 (3d Cir 1994) (holding transporters of hazardous waste liable under CERCLA).
unnamed, but responsible parties. The rationale for joint and several liability is to create an incentive for named PRPs to search out other PRPs, so as to make all responsible polluters pay for cleanups. Finally, CERCLA liability is retroactive, so it applies to contaminated waste sites created prior to 1980.

In sum, CERCLA casts a broad net, by placing strict, joint and several, and retroactive liability on all current and past owners and operators of hazardous waste facilities, and generators and transporters of hazardous wastes found on such facilities. The consequences of CERCLA liability can be very severe for a PRP, considering that the cleanup at a typical CERCLA facility often costs several million dollars. The consequences of this CERCLA liability scheme can also be quite severe for brownfields property, as is discussed below.

B. CERCLA’S CONTRIBUTIONS TO THE BROWNFIELDS PROBLEM

The statutory scheme discussed above operates in connection with several more specific sections of Superfund to discourage the cleanup and redevelopment of contaminated waste sites. Each of the ways in which CERCLA contributes to the brownfields problem is discussed in detail below.

1. Purchaser Liability

The first and perhaps simplest way in which CERCLA discourages cleanup and redevelopment of brownfields sites is by assigning strict, joint and several, and retroactive liability to all purchasers of contaminated waste sites, whether or not the purchasers contribute to the hazardous waste contamination on the site. Purchasers assume CERCLA liability because they become “owners,” who are defined as PRPs under Section 107. The threat of being held responsible for the entire cost of remediating the property is typically enough to dissuade purchasers from acquiring contaminated property, as the costs of Superfund cleanup typically exceed the value of the property.

Congress and the EPA tried to fix this problem when they enacted the Superfund Amendments and Reauthorization Act of 1986 (SARA). SARA created an innocent landowner defense for purchasers of contaminated CERCLA property. Section 107(b) of CERCLA allows PRPs a defense against CERCLA liability in case of acts of God, acts of war, and acts or omissions of third parties not in contractual or agency relationships with the PRP, so long as the PRP “a) . . . exercised due care . . . and b) . . . took precautions against foreseeable acts or omissions . . . .” SARA’s innocent landowner defense builds upon the third party defense by defining “contractual relationship” to include land

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25. Id.
27. Monsanto Corp, 858 F2d at 168-69 (cited in note 24); New York v Shore Realty Corp, 759 F2d 1032, 1043-44 (2d Cir 1985).
contracts unless i) the purchaser acquired the property after hazardous waste contamination occurred, ii) at the time of purchase, the purchaser did not know, nor had reason to know of contamination on the property, and iii) the purchaser a) exercised due care and b) took precautions against foreseeable acts.\(^{29}\)

Although a noble attempt to exclude innocent purchasers from CERCLA liability, the innocent landowner defense has failed to encourage redevelopment of Superfund sites for two reasons. First, CERCLA defines “lack of knowledge” very stringently. In order to meet the lack of knowledge requirement, CERCLA requires the PRP to “have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property . . . ”\(^{30}\) CERCLA mandates that when assessing whether appropriate inquiry was taken, the court shall take into account any specialized knowledge . . . of the [purchaser], the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence . . . of contamination at the property, and the ability to detect such contamination by appropriate inspection.\(^{31}\)

The courts have interpreted these provisions stringently as well.\(^{32}\) The net result is that if contamination is present on a property, most purchasers will know or be held to have had reason to know of the contamination, and thus cannot qualify for the defense.

The second flaw of the innocent landowner defense is that purchasers who meet the stringent requirements for lack of knowledge at the time of purchase will rarely be able to meet the remaining requirements of the defense. The landowner must also exercise due care and take precautions against foreseeable acts. If a purchaser is unaware of contamination on their property, however, it is unlikely that the purchaser will take precautions against third party actions. This point has been echoed in the case law.\(^{33}\)

Recognizing CERCLA's much-maligned effect on purchasers, and SARA's failure to ameliorate the problem, the EPA issued a guidance in 1989 to help relieve purchasers of contaminated waste sites of liability.\(^{34}\) This guidance

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31. Id.
32. See, for example, *In re Hemingway Transport, Inc*, 993 F2d 915, 933 (1st Cir 1993) (holding that a commercial lender who became an owner of contaminated real estate through foreclosure did not qualify for the innocent landowner defense because it was a sophisticated party who should have been alerted by a reduced purchase price and public knowledge of a nearby Superfund site to contamination present on the acquired property).
permits prospective purchasers of contaminated property to enter into agreements with the EPA. Purchasers promise to take cleanup actions or contribute to cleanup costs on the property, and the EPA in exchange issues a covenant not to sue the purchaser for the contamination on the property in question. The EPA may enter into such agreements when:

1) an enforcement action is anticipated at the property, i.e., has been scheduled for cleanup under CERCLA;
2) a substantial benefit, not otherwise available, will be received by the Agency as a result of the cleanup, in the form of cleanup work performed, or costs reimbursed;
3) the purchaser's operation of the site will not aggravate or contribute to contamination on the site, or interfere with the cleanup remedies;
4) the purchaser's operation of the site will not pose health risks to those persons likely to be present on the site; and
5) the purchaser is financially solvent.

The EPA formulated this guidance in recognition of the assistance it would offer potential purchasers, and with the understanding that the guidance might facilitate otherwise unlikely cleanups. The EPA hoped the guidance would encourage the reuse and redevelopment of contaminated sites. Although the guidance seemed like a step in the right direction, the EPA had entered into only four such agreements in as many years. The paucity of agreements may be due to reluctance by the EPA to enter into such agreements, or could be an indication that the EPA is demanding greater cleanup efforts or cost contributions than prospective purchasers are willing to make. More importantly, the inadequacies of the 1989 Guidance indicate that it is not a significant solution to a problem as pervasive and widespread as the brownfields effect. In conclusion, purchaser liability under CERCLA remains a major cause of the brownfields effect.

2. Lender Liability

The second way that CERCLA contributes to the brownfields problem is by discouraging lenders from extending loans to borrowers for the purchase of contaminated waste sites. Lenders are discouraged from making these loans because they fear that CERCLA liability attaching to the purchaser will affect the financial viability of the borrower, and thus the viability of the loan. In addition, if CERCLA liability reduces the value of the property, the contaminated facility may not cover the bank's security interest. But CERCLA also discourages lenders in a more direct and serious way; by attaching liability directly to the lender in certain scenarios. It is perhaps this area of the law which has most directly discouraged lenders from financing potential purchasers of hazardous waste sites.

Section 101(20) of CERCLA grants a liability exemption to entities holding

35. Berger, et al, 3 Buff Envir L J at 87 (cited in note 4); McWilliams, 21 Ecol L Q at 728 (cited in note 4).
36. McWilliams, 21 Ecol L Q at 728 (cited in note 4).
security interests in contaminated property as follows: "A [owner or operator] does not include a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility." Some courts have held that a management situation only arises in case of foreclosure, and then only if the lender fails to resell the property in question in a timely fashion. The rationale behind these cases is that by pursuing foreclosure proceedings and promptly reselling the property, lenders are merely acting to protect their security interest, and should not be implicated in the CERCLA liability scheme.

However, other courts have held that lenders participate in the management of CERCLA facilities any time they purchase the secured property at a foreclosure sale, regardless of whether they resell the property promptly. The rationale of these cases is that such a purchase ceases to be justifiable as protection of the security interest, but instead constitutes a protection of the lender's investment. By protecting their investment, lenders become more like owners or operators, and must share in the CERCLA liability scheme.

A third line of cases has held that lenders can incur CERCLA liability as owners and operators even without instituting foreclosure proceedings, merely as a result of holding a security interest in a contaminated facility. Specifically, these cases reason that:

- a secured creditor may incur section 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable . . . .

Thus, in the right situation, lenders can become entwined in the CERCLA liability scheme, simply as a result of financing the purchase of contaminated property. This strict liability scheme for lenders has greatly discouraged lending

38. See, for example, Waterville Indus v Finance Auth of Me, 984 F2d 549, 553 (1st Cir 1993) ("[A] maturation of ownership does not divest the owner of protection under CERCLA's security interest exception so long as the owner proceeds within a reasonable time to divest itself of ownership."); United States v Mirabile, 15 Envir L Rptr 20,994, 20,996 (ED Pa 1985) (prompt sale of foreclosure property barred application of CERCLA liability to lender).
39. See, for example, Guidice v BFG Electroplating and Mfg Co, 732 F Supp 556, 563 (WD Pa 1989) (holding that lender purchasing mortgaged property at foreclosure sale was not eligible for protection under Section 101(20) of CERCLA); United States v Md Bank and Trust Co, 632 F Supp 573, 579 (D Md 1986) (holding that lender who purchased mortgaged property at foreclosure sale could not qualify for secured creditor exemption).
41. Id.
on property that has the potential for incurring CERCLA liability. In so doing, lender liability acts as another disincentive to the reuse and redevelopment of brownfields properties.

In response to the courts' broad interpretations of CERCLA with respect to financial lenders, in 1992 the EPA issued a regulation intended to clarify CERCLA's application to lenders, and also to reduce any burden placed on them by the act. The regulation provides that lenders only incur liability under CERCLA if they exercise decision-making or management-level control over the borrower's environmental compliance responsibilities, or otherwise become involved in the operational, as opposed to the financial, management of the property. In addition, the regulation clarifies that the secured creditor exemption permits lenders to police their security interest to a certain extent, by monitoring or inspecting the facility, and requiring that the borrower remain in compliance with environmental laws. The regulation also approves of certain workout activities should the loan near default, including renegotiations, requiring additional payments from the borrower, exercising rights pursuant to account assignments, and offering financial or other advice. Finally, in case of foreclosure, the regulation states that a lender will not lose protection under the secured creditor exemption either by purchasing the secured property at foreclosure sale, or by accepting deed to the property in lieu of foreclosure, so long as the lender divests itself of the property "in a reasonably expeditious manner." Thus, the regulation attempts to minimize the situations in which liability can attach to lenders as a result of loans on contaminated facilities. In addition, and perhaps more importantly, because the regulation clarifies when CERCLA liability should be applied to lenders, the regulation permits lenders to better assess the value of certain loans, and require additional security as needed. In theory, the regulation could go a long way towards reducing the effect of lender liability on the brownfields problem, by facilitating the lending process, and thus encouraging the reuse and redevelopment of potentially contaminated facilities.

However, in 1994, the District of Columbia Circuit Court of Appeals vacated the EPA's lender liability regulation. The court held that the EPA had exceeded its statutory rulemaking authority under the statute because Congress designated the courts, not the EPA, as the adjudicator of the scope of CERCLA liability. In addition, the court held that the regulation could not be sustained as an interpretative rule, because "an interpretative rule is based on specific statutory provisions... and represents the agency's construction of the statute..." By contrast, in the lender liability regulation, the "EPA does not really define specific statutory terms, but rather takes off from those terms and devises a comprehensive regulatory regimen."

In sum, as a result of the vacation of the EPA lender liability rule, lenders

42. 57 Fed Reg 18,344 (1992).
43. Kelley v EPA, 15 F3d 1100 (DC Cir 1994).
44. Id at 1107-08.
45. Id at 1108.
46. Id.
continue to face considerable uncertainty and potential liability with respect to security interests held in CERCLA facilities. This liability will undoubtedly continue to discourage lenders from lending money to developers of potentially contaminated properties, and thus continue to contribute to the brownfields problem.


The third way that CERCLA contributes to the brownfields problem is by permitting federal and state environmental agencies to have overlapping jurisdiction over hazardous waste sites, so that PRPs may be liable under either CERCLA or state law, or both. In addition, PRPs will often be faced with uncertainty in determining whether state standards will require more stringent or different cleanup actions than CERCLA. The effect of this uncertainty paired with CERCLA's overlapping jurisdiction is to double the potential liability threats associated with contaminated property. The threat of double liability gives potential purchasers twice the incentive to reject brownfields properties.

The general provision in CERCLA establishing overlapping jurisdiction is Section 114, which provides that "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."\(^47\) One implication of this provision is that CERCLA does not preclude PRPs liable under CERCLA from recovering costs from private parties liable under state law but not under CERCLA.\(^48\) Another implication is that states have the right to regulate materials expressly excluded from CERCLA. For example, CERCLA excludes petroleum products from the definition of "hazardous substance," but most states regulate petroleum as a hazardous substance.\(^49\) Thus, simply because a PRP has settled her liability with the EPA, or has no such liability, it does not follow that the PRP will not still be subject to state or private cost recovery liability.

Yet another implication of overlapping federal and state liability under CERCLA is that notwithstanding compliance with CERCLA's cleanup standards, PRPs may be required to comply with more stringent state cleanup standards.\(^50\) In most cases, the EPA must incorporate any state standards that are more stringent than CERCLA standards into the remedial actions it oversees. However, under certain circumstances, the EPA can waive more stringent state standards. A state can choose to concur in the EPA's waiver, or can challenge the waiver in court. Even if the EPA's waiver is upheld, a state can chose to impose the more stringent standard on the PRP, so long as the state pays the costs of

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47. 42 USC § 9614(a) (1994).
48. See, for example, United States v Hooker Chem and Plastics Corp, 739 F Supp 125, 128 (WDNY 1990); Edward Hines Lumber Co v Vulcan Materials Co, 685 F Supp 651, 657 (ND Ill), affd, 861 F2d 155 (7th Cir 1988); New York v Shore Realty Corp, 759 F2d 1032, 1041 (2d Cir 1985).
administering the additional cleanup. Thus, PRPs can never count on CERCLA precluding more stringent state standards.

Many states have taken innovative steps towards trying to ameliorate the brownfields effects of hazardous waste laws. As will be seen in Section III, most so-called state brownfields programs involve state environmental agencies entering into agreements with PRPs and potential purchasers. Typically these agreements release parties from liability under state law if they agree to undertake certain remedial activities. In addition, some of these agreements attempt to release parties from liability under CERCLA at state-supervised federal clean-up sites. However, state agreements do not preclude the EPA from bringing actions under federal law against state-settling parties for contaminants present at the very same facilities that were certified as “clean” by state agencies. Thus, the benefits offered by these innovative programs are greatly diminished by CERCLA’s overlapping liability scheme.

The net effect of CERCLA’s choice of law provisions is to create great uncertainty as to whether state or federal laws will govern a given facility’s cleanup. Potential purchasers must bank on both applying, and plan for dual liability schemes. This creates additional disincentives to reuse and redevelop potentially contaminated industrial property, and furthers CERCLA’s contribution to the brownfields problem.


The fourth way that CERCLA contributes to the brownfields problem is through its settlement provisions. CERCLA provides that the EPA has the authority to enter into agreements with PRPs, whereby PRPs will perform cleanup actions in exchange for promises given by the EPA to limit future liability against the PRP as provided in the agreement.

CERCLA permits settlement agreements in four circumstances. First, settlements are permissible in general Section 106 court or administrative order actions, at the discretion of the EPA, so long as the agreement is in the public interest, the agreement will expedite cleanup at the facility, the PRP is in full compliance with the court or administrative order, and the President approves the agreement. Second, settlements are permissible in mixed funding situations; where part of the remedial action at the site is funded by the PRP, but other parts are funded by the superfund. Third, CERCLA requires the EPA to enter into so-called “special covenants not to sue” in two types of extraordinary

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52. See, for example, Ind Code § 13-25-5-18.
53. McWilliams, 21 Ecol L Q at 733 (cited in note 4).
54. Id.
circumstances; first, when the EPA requires a PRP to engage in offsite disposal, thus incurring potential CERCLA liability at a second facility; and second, when a PRP treats hazardous substances in such a way as to result in the substances no longer presenting any significant risk to the environment. Finally, CERCLA permits so-called de minimis settlement agreements in cases when a PRP’s share of the response costs at a CERCLA facility are minor, and either the amount and toxicity of the hazardous substances contributed by the settling PRP are minimal in comparison to other contributions at the facility, or the PRP was an innocent purchaser.

At first glance, these settlement provisions seem like a solution to the brownfields problem, because they provide four different scenarios through which PRPs can clarify the response costs at contaminated waste sites. This clarification in turn would enable potential purchasers to better estimate the costs associated with industrial property, and thus create an incentive to reuse and redevelop brownfields properties. However, there is a catch. In the same provisions that permit settlement agreements, CERCLA requires that most settlement agreements be subject to an additional condition: the right for the EPA to “reopen” the agreement in certain circumstances, and subject the PRP to future liability. Specifically, CERCLA provides that Section 122(f)(1) discretionary settlement agreements are subject to future enforcement actions, or reopeners, if liability “arises out of conditions which are unknown at the time [of the settlement],” or if additional information obtained by the EPA indicates that a remedial action has failed to “assure protection of public health, welfare and the environment.” This second reopener exception is also applicable to Section 122(f)(2) special covenants and Section 122(g) de minimis covenants. In a 1987 rule, the EPA explained that the second category of reopeners applies any time additional information reveals the settlement agreement is no longer protective of public health or the environment.

In sum, the exceptions to CERCLA’s settlement provisions serve to defeat any possible benefits the settlement provisions could have offered to ameliorating the brownfields effect. As one commentator put it, CERCLA’s reopener provisions “[leave] a settling PRP with no more than a covenant not to sue for the work performed . . . at the time of a response.” Even if PRPs are able to enter into agreements with the EPA, and clarify the liabilities associated with a facility, the reopener provisions obscure that clarity by making future liability a distinct possibility. Once again, when faced with unknown and potentially large liabilities, potential purchasers will undoubtedly be dissuaded from reused and redeveloping industrial property.

59. 42 USC § 9622(g) (1994).
5. Uncertain Cleanup Standards

The fifth way that CERCLA discourages the reuse and redevelopment of industrial property is by leaving a great deal of uncertainty as to the standards to be used for remedial actions. If potential purchasers are uncertain as to the degree of cleanliness a contaminated facility will be expected to be remediated, they will be unable to estimate the required remediation costs, and in turn, the value of the property. Uncertain values tend to make for bad investments, and as a result, purchasers pass up industrial property for undeveloped land.

Neither of the mechanisms by which CERCLA authorizes the EPA to regulate contaminated sites supply standards to be followed in remedial actions. Instead, both of these provisions are discretionary. Section 104 authorizes the President "to act . . . to remove . . . and provide for the remedial action . . . or take any other response measure . . . which the President deems necessary to protect the public health or welfare or the environment." Section 106 authorizes the President to "require the Attorney General of the United States to secure such relief as may be necessary to abate [any imminent and substantial endangerment to the public health or welfare or environment], and to issue "such orders as may be necessary to protect public health and welfare and the environment." To say the least, protection of the public health, welfare and the environment is a broad standard that does not lend itself to predictability.

In addition, other CERCLA provisions specifically designating applicable cleanup standards do not offer much more certainty as to what standards should be followed for remedial actions. Section 121 provides that in devising remedial orders, the EPA must conform orders to the cleanup standards found in certain other federal statutes, and to those provided by certain State statutes. However, the EPA only need follow these other standards if they are "legally applicable" or "relevant and appropriate," legal terms of art that, because of their vagueness and unclear definitions, lead to greater uncertainty in determining whether or not a standard applies. In addition, if certain requirements are met, the EPA can choose to waive these standards on a case by case basis, in favor of other, undefined standards. States have the option of challenging the EPA's waiver of their statutes, and if the challenge is rejected by the courts, the states have the option of forcing the EPA to follow the state statute by paying the additional costs incurred by the EPA. As a result, it is nearly impossible for a PRP to predict ahead of time the cleanup standard which will apply to their facility.

Finally, regulations promulgated under CERCLA also fail to clarify applicable cleanup standards. The regulations governing CERCLA removal actions67.
state that "[a]t any release where . . . there is a threat to public health or welfare of the United States or the environment, the lead agency may take any appropri-
ate removal action . . . ." By way of clarifying the meaning of the term "ap-
propriate," the regulations merely indicate factors that the EPA is to consider in
determining the appropriateness of a removal action, and types of removal ac-
tions that would be considered appropriate. Thus, removal standards are to be
derived on a case by case basis. As such, the regulations do not simply add to the
uncertainty of CERCLA's cleanup standards, indeed, they mandate it.

CERCLA's regulations governing remedial actions are much the same as
those governing removal actions. Rather than enumerating specific standards, the
regulations require appropriate remedial actions at contaminated sites to be
selected from alternatives developed through individual site investigations and
feasibility studies. The only guidance the regulations offer is to indicate criteria
to be used in identifying appropriate remedial actions, and types of appropriate,
but not exclusive, alternatives. Thus, remedial actions are completely site-specific.
In fact, the legislative history of CERCLA indicates that Congress purposely in-
tended remedial actions to be site-specific, rather than be based on previously
ascertained standards.

In sum, neither CERCLA's statutory provisions nor its regulations offer
much guidance to PRPs and potential purchasers as to the standards that will be
required in the remediation of contaminated property. Without some degree of
certainty, PRPs and purchasers are unable to plan the expected costs of cleanup
of a waste site. As a result, purchasers cannot properly assess the value of
industrial properties. This discourages the reuse and redevelopment of
brownfields property.

6. Administrative Problems

The final factors associated with CERCLA that contribute to the brownfields
effect involve the administrative hassles which result when previously developed
property is purchased. Prior to making investments in previously used property,
purchasers generally must pay for extensive testing and investigation on the
subject property. Often, lenders require this kind of investigation. Purchasers
who desire to qualify for CERCLA's innocent landowner defense must perform
such investigations so as to satisfy the "all appropriate inquiry" requirement.
Savvy purchasers conduct these tests so as to better assess the uncertain values
of the subject property. The costs of such investigations can be exorbitant; Phase
II assessments of industrial property can cost as much as $250,000 per loca-

70. Sheridan, 6 Stan Envir L J at 9 (cited in note 65).
71. Phase II assessments are subsurface investigations conducted to determine the nature
and extent of contamination on property. The subsurface investigations typically involve
extracting and testing soil and groundwater from the property.
tion. Thus, often the costs associated with investigation alone will dissuade potential purchasers from acquiring industrial property.

Furthermore, should a purchaser choose to acquire a contaminated brownfields site, it will undoubtedly take years before development of the site can begin. The EPA and state agencies tend to be large and inefficient, and are slow in processing cleanups. In addition, much time will likely be spent in the courts as PRPs embroil themselves in private cost recovery actions. As a result, both business costs and the time value of money may preclude the purchase of brownfields property.

Finally, it probably need not be said that the costs required to remediate a Superfund site are usually astronomical. One study found that the average costs of a Superfund cleanup run between 20 and 30 million dollars. Another study found that compliance with CERCLA (including remediation costs, but not including corporate legal costs) has led to an estimated 28 billion dollars of expenditures through fiscal year 1994. Developers are often hard pressed to find industrial property that makes these kind of expenditures economical. More likely, rational, profit-maximizing developers will opt for yet-undeveloped land as the desired situs of their development project.

II. State Brownfields Reform

The next section of this Comment examines what is being done to address the brownfields problem at the state level. It may be asked, why in a paper about federal brownfields reform, should there be an examination of state legislation? Perhaps the question is best answered by Supreme Court Justice Louis Brandeis: “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” States often tend to be innovators in legislative reform, partly because they are smaller, more centralized and thus more nimble, but also because the Constitution permits and encourages them to do so. This has certainly been the case with environmental law. Thus, it is natural to look to the states as laboratories in which to get ideas for federal legislation, and to test those ideas. As one scholar put it, “looking to state and local governments is likely to pay dividends because ideas developed there will have been ‘reality-tested.’”

Specifically, this Comment examines brownfields reform programs in the

72. McWilliams, 21 Ecol L Q at 736 (cited in note 4).
73. James Lis and Melinda Warren, Reforming Superfund 10 (Ctr for the Study of Am Bus, Policy Study No 118, 1994).
77. Id.
states located in the EPA's Region V Zone, including Indiana, Illinois, Michigan, Minnesota, Ohio and Wisconsin. This region seems to present a good "sample" for several reasons. First, because it is a region, the states are all geographically similar, so are likely addressing similar environmental effects at brownfields sites within their borders. Geography is especially relevant in Region V because all six member states border onto one or more of the Great Lakes. Second, all of the Region V member states have political similarities, in that their federal environmental issues are all handled by the same regional EPA office. Third, the EPA Region V office seems especially committed to addressing brownfields issues. It has issued its own "Brownfields Strategy," and has expressed a desire "to facilitate . . . the appropriate development and reuse of land within Region V . . . ." In addition, all of the member states have recently enacted brownfields legislation. Thus, Region V seems to be a good laboratory, exemplifying as it does innovation and testing in the area of brownfields reform.

The rest of this section of the Comment examines the types of legislative reforms enacted by the Region V member states to address the brownfields problem. These states utilize many of the same approaches to combating the brownfields problem; the differences lie in how these approaches are implemented. Thus, the analysis in this Comment proceeds by comparing different member states' means of implementing each approach. The approaches utilized by the member states to address the brownfields problem fall into five categories. First, most states implement some type of a voluntary cleanup program, a strategy which encourages but does not mandate cleanup in exchange for finalized liability. Finalized liability encourages purchasers to acquire brownfields property, because it clarifies the true purchase price of such land. In addition, finalized liability encourages PRPs to remediate their brownfields property, because of the increased value and marketability that results. All of the Region V member states except Michigan have incorporated a voluntary cleanup program into their brownfields legislation. Since the voluntary cleanup programs are typically the

A. VOLUNTARY CLEAN-UP PROGRAMS

The voluntary cleanup concept was devised to permit PRPs or potential PRPs to elect to remediate contaminated property in exchange for finalized liability at the site. Finalized liability encourages purchasers to acquire brownfields property, because it clarifies the true purchase price of such land. In addition, finalized liability encourages PRPs to remediate their brownfields property, because of the increased value and marketability that results. All of the Region V member states except Michigan have incorporated a voluntary cleanup program into their brownfields legislation. Since the voluntary cleanup programs are typically the

The voluntary cleanup program in Indiana is administered by the state Department of Environmental Management (the "Department"). The program is available to any person associated with any parcel of land in the state, unless there is currently a state or federal enforcement action pending at the site, or if contamination on the site presents an imminent and substantial threat to health and the environment. Persons proceeding under the Act enter into a negotiated bargaining agreement with the Department. The bargaining agreement binds both parties during the remediation and approval process to cost schedules, time schedules and dispute resolution procedures. The purpose of such an agreement is to both speed the remediation process, and to minimize any potential conflicts. After the bargaining agreement is in place, the applicant will submit a proposed remediation plan for the site to the Department, documenting the contamination present at the site, and including a plan for cleaning up the contamination. The Department will subject the remediation plan to a public comment period, and then will make an approval decision based on any comments received. If the plan is approved, the applicant will proceed with the remediation according to plan, subject to the Department's oversight.

Upon satisfactory completion of the remediation process, the Department will issue a certificate of completion and a covenant not to sue to the remediating party. The certificate must be recorded with the property deed, so as to provide notice to subsequent owners. The covenant protects the owner against all present and future liabilities associated with the remediated contamination on the site, and is transferable to all subsequent owners of the property. However, the covenant is subject to a reopener if future liabilities from the site arise as a result of conditions present on the site that were not known to the Department at the time of the agreement. As a result, the covenant is not an entirely absolute protection against future liability.

2. Illinois.

The voluntary cleanup scheme within the Illinois brownfields program is applicable to all sites where "there is a release, threatened release, or suspected release of hazardous substances," unless the facility is subject to federal enforcement, or is subject to federal or state underground storage tank laws. Persons can elect to proceed under the Act by submitting for review a remediation plan.

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79. The Indiana brownfields program, the Indiana Voluntary Remediation Act, was enacted in July of 1993, and can be found at Ind Code §§ 13-25-5-1 et seq (1996). All references to the Act in this Comment can be found therein.

80. The Illinois brownfields program was enacted in December of 1995 as an amendment to the Illinois Environmental Protection Act. The amendment can be found at Ill Rev Stat ch 415, §§ 5/58 et seq (1995), and all references to the amendment in this Comment can be found therein.
describing the nature of the site, the extent of contamination present, and the
proposed methods of cleanup. After approval, persons proceeding under the Act
must complete the remediation as described in the plan and submit for review a
remediation completion report demonstrating that the approved remediation plan
was followed. Upon approval, the State will issue a “No Further Remediation
Letter,” which must be recorded with the property deed. This letter serves as
prima facie evidence that the site does not constitute a threat to human health
and the environment, and as such, constitutes a fairly effective release from any
present and future liability at the site. The letter is transferable to any subsequent
owners of the property, and to lenders holding a security interest in the property.

A unique feature of Illinois’ voluntary cleanup program is that it authorizes
persons proceeding under the Act to contract with a state-licensed professional
engineer (“LPE”) to perform review services. The Act requires a reviewing LPE
to be completely independent of the applicant, the site owner and the site
operator. In addition, although the applicant and the LPE will be in a contractu-
al relationship, the LPE must act on behalf and under the direction of the Illinois
Environmental Protection Agency (the “Agency”). Thus, the Agency retains the
final authority to approve plans and reports, and is the only entity empowered
to issue No Further Remediation Letters.

3. Minnesota

Minnesota’s voluntary cleanup program is available to both PRPs and non-
PRPs. The program requires interested parties to submit investigation and
remediation reports to the Minnesota Pollution Control Agency (the “Agency”) for
approval. These reports must detail the extent of contamination present on
the site, and the proposed remediation to be undertaken. After approval, parties
may proceed with remediation activities in accordance with their proposals. Once
remediation is complete, an interested party must apply to the Agency for a
certificate of completion. If remediation was conducted properly in accordance
with the remediation report, the Agency will grant the interested party such a
certificate, which exempts the party from all present and future liability under
the Minnesota Environmental Response and Liability Act for releases cleaned up
at the site. Certificates of completion are transferable to subsequent owners of
the property, and offer protection to lenders extending financing on the property.

4. Ohio

The Ohio voluntary cleanup program can be used at any property in the
state except that where a federal or state enforcement action is pending.

81. Minnesota’s brownfields program was enacted in 1992 as an amendment to Minne-
sota Environmental Response and Liability Act (“MERLA”), and can be found at Minn
Stat §§ 115B.175 et seq (1992). All references to the Act and its amendments in this
Comment can be found therein.

82. The Ohio brownfields program, the Ohio Voluntary Action Program, was enacted
in June of 1994, and can be found at Ohio Rev Code Ann §§ 3746.01 et seq (1994). All
references to the Program in this Comment can be found therein.
Parties proceed under the program by conducting investigations assessing the nature and extent of contamination on the property. If contaminants present on site fail to comply with applicable state standards, parties must conduct remedial actions. Once remedial work has been completed so that the property meets applicable standards, an interested party must contract with a state-certified professional to review remedial actions taken at the property. If the contracted professional is satisfied that the conditions present on the property after remediation meet applicable state standards, the professional will grant a No Further Action Letter to the interested party. Within 30 days of issuance of the letter, the Ohio Environmental Protection Agency (the “Agency”) will issue a covenant not to sue to the interested party, as long as the Agency determines the letter was properly issued. The covenant must be recorded with the property deed to serve as notice to subsequent owners. Once properly filed, the covenant releases the holder and all transferrees of the holder from all present and future liability to the Agency associated with the property, even if applicable standards change, indicating that the property is no longer in compliance.

As the professional contracted by the interested party conducts most of the review under the program, the Ohio voluntary cleanup scheme relies almost entirely on self-administration. However, as a protective measure, the Act requires the Agency to conduct periodic audits of certified professionals and No Further Action Letters to ensure compliance with applicable standards and rules. The Agency retains the right to repeal or refuse to issue covenants not to sue to interested parties holding improperly issued No Further Action Letters, or working with improperly certified professionals.

5. Wisconsin

The Wisconsin voluntary cleanup program calls itself an innocent purchaser provision, because it is available to all “purchasers” acquiring contaminated property either before or after the date of enactment of the program. However, the program only exempts a qualified purchaser from liability if the purchaser remediates the property in accordance with rules promulgated by the Wisconsin Department of Natural Resources (the “Department”). As a result, Wisconsin’s scheme is more appropriately classified as a voluntary cleanup program. To proceed under the program, purchasers must conduct an investigation detailing the extent of contamination on the property. After approval of this investigation by the Department, a purchaser must remediate the property in accordance with Department regulations. Finally, the purchaser must maintain and monitor the property after completion of the remediation. If these requirements are met, the

83. The Act defines “purchaser” as one who acquires property through a good faith arms-length transaction, who did not own or participate in the management of a business causing the release on the site, who did not own the property at the time of the release, and did not otherwise cause the release. Wis Stat § 144.765(1)(c) (1994).

84. The Wisconsin brownfields statute, known as the Wisconsin Land Recycling Act, was enacted in May of 1994, and can be found at Wis Stat §§ 144.765 et seq (1994). All references to the Act in this Comment can be found therein.
Department will issue a certificate of completion on the property. The certificate entitles the purchaser to protection against present and future liability associated with the site. This protection applies despite changes in regulations that might impose greater responsibilities on the purchaser. It also applies even if subsequent monitoring with more advanced technology reveals that approved cleanup activities failed to minimize the effects of the release, or if contamination is later found to be more extensive than the purchaser or the Department originally understood. In addition, the certificate is transferable to subsequent owners of the property.

6. Summary

The voluntary cleanup programs examined above are all commendable in that they make an effort to clarify the costs of contamination on brownfields property, and in so doing, encourage the remediation of such property. However, several of the programs limit the finality of the liability exemptions they grant. These limitations will discourage participation in the program, because they may represent unknown future costs. A better program would offer participants finalized liability even in the face of changes in regulations or technology identifying additional necessary response actions at the site. In this regard, Wisconsin’s program is commendable.

Another important component of a voluntary cleanup program is its applicability. Most of the states examined make their voluntary cleanup programs available to both PRPs and innocent purchasers, but Wisconsin requires participants to be able to prove that they are not responsible parties. Responsible parties and those who are unable to prove their lack of responsibility for contamination are precisely the ones who are impeding the sale and reuse of brownfields property. As a result, it is very important that a voluntary cleanup program include all of these parties.

Finally, the provisions for privatized review seen in the Illinois and Ohio programs are commendable. These provisions should greatly help to speed up the remediation process, and to constrain the typically exorbitant costs of the process.

B. RELAXED CLEAN-UP STANDARDS

Several of the Region V member states incorporate relaxed cleanup standards into their brownfields statutes. The purpose of relaxing the cleanup standards applicable to certain types of property is to reduce the cost and time of remediation where such additional remediation is unnecessary given the expected future use of the property. This reduced time and cost serves to remove one of the barriers to remediation and redevelopment of brownfields property, and as such, should help to alleviate the brownfields problem in the states where the relaxed standards are utilized. The states seem to provide relaxed cleanup standards either on a formal basis, wherein cleanup levels and formulas are provided to interested parties by statute or regulation, or on an informal basis, wherein cleanup levels are still determined on a case-by-case basis, but supervis-
ing agencies are directed to consider the future use of the property in devising such cleanup levels.

Illinois and Ohio have implemented versions of the former scheme. Illinois permits remediating parties and their contracted LPE to elect one of four tiers of cleanup levels. First, a party may elect to remediate the property to background, or pre-existing contaminant levels, so long as the property is not slated for residential use and the background levels are not higher than residential cleanup standards. Second, a party may elect to utilize cleanup levels specified by regulation according to the types of contaminants present and the expected land-use. Third, a party may choose to calculate cleanup levels using agency-delineated equations and formulas, given the conditions at the site and the future use of the property. Finally, a party may devise its own formulas and equations to calculate cleanup levels, as long as the LPE approves of the formulas ahead of time. Ohio’s brownfields statute proceeds in a similar fashion, permitting interested parties and their certified professional to elect to utilize agency specified cleanup levels based on the future use of the property, agency-devised cleanup formulas incorporating the future use of the property, or background contamination levels.

Both Michigan’s and Minnesota’s brownfields statutes incorporate relaxed cleanup standards in a less formal way. Michigan’s statute provides that the Michigan Department of Natural Resources (the “Department”) may establish different cleanup criteria for different property uses, including residential, commercial, recreational and industrial. Specifically, the cleanup criteria are to be based on the human health risks of contaminants given the exposures associated with these different land uses. Minnesota’s brownfields statute permits the Agency, “[i]n determining the appropriate standards to be achieved by response actions . . . [t]o consider the planned use of the property where the release or threatened release is located.”

Most of the states permitting the use of relaxed cleanup standards incorporate companion provisions requiring the imposition of use restrictions as a protective measure. Ohio and Illinois require a memorandum to be recorded with the property deed. Michigan requires either a notice to be recorded with the property deed, or zoning restrictions to be imposed. In sum, all of these provisions should encourage the remediation of brownfields property by decreasing the breadth, and thus the time and cost, of required remedial activities.

C. INNOCENT PURCHASER LIABILITY EXEMPTIONS

Two of the Region V member states provide liability exemptions to innocent purchasers of brownfields property. Although these provisions do not help to encourage the remediation of such property, they do encourage purchasers and

85. The Michigan brownfields program was enacted in 1995 as an amendment to the Michigan Environmental Response Act, and can be found at Mich Comp Laws §§ 324.201 et seq (1995). All references to the Act and its amendments in this Comment can be found therein.

lenders to acquire and finance such property, thus facilitating its redevelopment.

Michigan provides an innocent purchaser liability exemption to two categories of purchasers. First, Michigan's statute grants a liability exemption to those who have purchased contaminated property prior to the effective date of the amendment, but who were not responsible for activities causing the releases present on the property. The statute also grants an exemption to parties purchasing contaminated property after the effective date of the amendment, as long as the purchaser conducts and files with the Department a baseline environmental assessment documenting the nature and extent of contamination present on the property. The exemption is only available to purchasers falling into these two groups, however, if they prevent the exacerbation of contamination on the site, take reasonable precautions against the reasonably foreseeable acts or omissions of third parties, and undertake any remedial activities necessary to mitigate exposure to the contamination and to allow for the intended use of the facility. These provisions should facilitate the purchase and redevelopment of contaminated property by innocent parties.

Minnesota's brownfields program exempts innocent purchasers from liability associated with contaminated purchased property as long as the purchaser enters into a cooperation agreement with the Agency. The cooperation agreement requires the purchaser to agree to cooperate with the Agency and any parties responsible for cleaning up wastes present on the property by agreeing to provide access to the property as necessary, by allowing the commissioner to undertake remediation activities on the property, by granting easements and other interests in the property as necessary, and by binding successors and assignees to this agreement as well. In accordance with this last requirement, the purchaser must record a copy of the cooperation agreement with the property deed so that future owners of the property have notice of the agreement. Again, these provisions should encourage innocent purchasers to acquire and develop otherwise stagnant, contaminated property.

D. LENDER LIABILITY EXEMPTIONS

Ohio's and Wisconsin's brownfields statutes include lender liability exemptions. These provisions exempt lenders from liability associated with contaminated property in which they have taken some sort of a security interest. The purpose of these provisions is to reduce the influence lenders' fear of brownfields liability has on lending behavior, in turn facilitating the purchase and redevelopment of contaminated property.

Ohio's lender liability exemption is very similar to the EPA's 1992 Lender Liability regulation that was vacated by the District of Columbia Circuit Court of Appeals. Specifically, this section of the Act provides that lenders who do not participate in the operation and management of contaminated property in which they hold a security interest cannot be held liable for the costs of hazardous materials response actions taken or required on the property. The exemption continues to protect lenders who acquire title to contaminated property through foreclosure proceedings, so long as the lenders make reasonable efforts to divest
themselves of the property within 12 months of foreclosure. However, if a lender outbids a buyer at a foreclosure sale, or fails to act upon a reasonable offer, the liability protections end. As was discussed in Section I of this Comment, this type of lender protection should greatly ameliorate the brownfields problems in the State of Ohio caused by the behavior of financial lenders.

Wisconsin's lender liability exemption provisions similarly provide protections for lenders holding security interests in contaminated property both before and throughout foreclosure proceedings. Wisconsin lenders incur no hazardous waste liability for lending activities conducted prior to foreclosure on contaminated property, so long as the lenders do not cause or exacerbate discharges on the property. Lenders are similarly protected throughout the foreclosure process so long as the lenders do not intentionally or negligently cause a discharge of hazardous waste on the site, the lenders notify the Department of any known releases on the site, and within 180 days of acquisition via foreclosure, conduct and submit to the Department an environmental assessment detailing the extent of contamination present on the site. Again, these provisions should greatly influence lending behavior in the State of Wisconsin.

E. FINANCIAL INCENTIVES

The State of Ohio has enhanced its brownfields program by incorporating two provisions creating financial incentives to use the brownfields program. First, the State added a tax exemption to the State tax code. This provision exempts property on which a covenant not to sue has been issued by the State pursuant to the voluntary cleanup program from an increase in property taxes for 10 years. Thus, if the assessed value of the property increases as a result of the voluntary action (which will undoubtedly occur if the property is redeveloped), the taxpayer is exempt from the increase in property tax which results for 10 years. Second, the State created a fund making low-interest rate loans available to parties electing to proceed under the Act to help offset the costs of remediation. These funds are available to interested parties undertaking voluntary cleanup actions that "create or preserve jobs and employment opportunities, [or] improve the economic welfare of the people of the state." Both of these provisions should serve as enticements to potential purchasers and PRPs to utilize the Ohio Voluntary Action Program, and thus put brownfields property to good use.

87. Wisconsin's lender liability protections can be found at Wis Stat §§ 144.76(9m) et seq (1994). All references to these provisions in this Comment can be found therein.
90. Id.
III. Federal Brownfields Reform

The next section of this Comment examines brownfields reforms that are in place or have been proposed at the federal level. It may be more obvious why brownfields reform should take place on a federal level. For starters, as was discussed in Section I of this Comment, CERCLA is one of the major causes of the brownfields effect in America. Thus, it seems reasonable to look to the source of the problem for a solution, and to call for CERCLA to be repaired. In addition, CERCLA permits overlapping federal and state jurisdiction over environmental problems. Thus, state brownfields reform could never be enough to reverse the brownfields problem alone. Some kind of federal reform is absolutely necessary to provide protection from federal CERCLA liability. Modest brownfields reforms have been seen in the EPA, and potentially sweeping, but as-yet unenacted proposals are pending in Congress. The first two sections of this portion of the Comment examine the status of these reforms.

However, as will be discussed, Congress has failed to act on any of its proposed reforms, and the EPA’s reforms are not powerful or sweeping enough to address all of the nation’s brownfields problems. Comprehensive federal legislation is needed to amend CERCLA and cure the brownfields effects occurring on a national level. Thus, the last section of this portion of the Comment is devoted to proposing a federal brownfields reform package. The ideas for this package are drawn almost exclusively from the Region V member state programs examined in Section II. Thus, the proposal advanced in this Comment has been “reality tested,” and as such, would prevent the federal government from reinventing the wheel.

A. ENVIRONMENTAL PROTECTION AGENCY REFORM

The first rumblings of federal executive branch attempts to address the brownfields problem were heard in November of 1993, when President Clinton launched the Administration’s Brownfields Economic Redevelopment Initiative. This Initiative was advanced in recognition that environmental protection, namely CERCLA, is hindering the remediation, redevelopment and reuse of contaminated waste sites, and is contributing to the economic depression of communities in neighborhoods surrounding contaminated property. The purpose of the Initiative is to encourage the redevelopment of abandoned contaminated properties, so as to eliminate health risks and restore economic vitality to neighborhoods surrounding the contaminated sites. In connection with this Initiative, in January of 1995, the EPA issued a Brownfields Action Agenda.

93. 59 Fed Reg 60,012 (1994).
94. The EPA’s Brownfields Action Agenda can be found at the Agency’s World Wide
The Agenda represents the steps the EPA has taken or plans to take to address the federal brownfields problem.

The first item on the Agenda involved the EPA recharacterizing the more than 20,000 sites at which CERCLA remedial activities have been completed. The EPA maintains and publishes a database of potentially contaminated waste sites. This database includes pre-remedial, remedial, and removal and enforcement sites. Prior to March of 1995, the database also included sites at which CERCLA activities had been concluded. Sites found on this list by potential purchasers and lenders raise red flags, out of concern for potential liability. Red-flagged property may serve to exacerbate the brownfields problem, because often a listing on the contaminated sites list alone is enough to scare off a potential purchaser or a lender. However, now these sites have been removed from the EPA's database, in hopes of alleviating the fears of potential purchasers, lenders and PRPs. While the EPA's actions on this project are certainly commendable, it is questionable whether they will really have a significant impact on the federal brownfields problem. CERCLA's strict liability requires potential purchasers and lenders to conduct extensive investigations into contaminated sites. As a result, interested parties most likely already have access to the new information the EPA is providing. Thus, it is doubtful that the effort will significantly influence relevant parties' behavior.

The second item on the EPA's Agenda involves the establishment of 50 Brownfields Pilot Cities. These cities will be given $200,000 each to try to ameliorate the brownfields effects felt in their neighborhoods. The EPA hopes that the Pilots will stimulate innovation that will combine economic growth with environmental cleanup. In addition, the Pilots will test model brownfields programs, and facilitate federal and state coordination of the brownfields reform process. Most importantly, the Pilots will resolve contamination and liability at the experimental sites. The Brownfields Pilots will likely be beneficial to federal brownfields reform in much the same way state brownfields reform can be, by creating testing laboratories for the EPA. In addition, the Pilots may help to redevelop some of the brownfields property in the chosen cities. However, it is estimated that more than 100,000 brownfields sites exist nationwide. As the Pilot project will only address 50 of these sites, the project will not be enough alone to combat the federal brownfields problem.

The third item on the EPA's Brownfields Agenda involves the May 1995 issuance of the "Guidance on Agreements with Prospective Purchasers of Contaminated Property." This internal policy guidance supersedes the EPA's 1989 Prospective Purchaser Guidance, discussed in detail in Section I of this Web site, <http://www.epa.gov/docs/AdminSpeeches/actagen.txt.html> ("Brownfields Action Agenda").

95. Id at 1.
97. Brownfields Action Agenda at 1 (cited in note 94); 59 Fed Reg at 60,012 (cited in note 93).
Comment. As was stated in the discussion in Section II, the 1989 Guidance has resulted in a very small number of purchaser settlements. The purpose of the new Guidance is to expand the use of the prospective purchaser settlement provision, so that more potential purchasers will benefit. The main difference in the new Guidance is that the Agency will now issue covenants not to sue interested purchasers not only where federal action has occurred or is planned, but also where it is anticipated. In addition, the Agency will enter into agreements even where there will be less direct benefit to the Agency, so long as there will be benefits to the neighboring community in the form of alleviated health and economic effects as a result of the remediation. While this Guidance has not been reality tested, if it works, it should encourage purchasers to acquire brownfields property by finalizing and clarifying the liability of brownfields sites. However, its form is not adequate as a long term solution to the brownfields problem, because it is merely an internal agency guidance. Therefore, the provision creates no substantive rights in private parties, and the EPA is not required by law to follow the policy. A more permanent solution would need to take the form of a formal rule or congressional legislation.

The fourth item the EPA has tackled is lender liability under CERCLA. When the District of Columbia Court of Appeals vacated the EPA’s 1992 regulation concerning lender liability, the court left room for the EPA to reissue the regulation as an EPA and Department of Justice enforcement policy. In December of 1995, the EPA did just that. As was discussed in Section I of this Comment, the 1992 rule greatly relieves lenders holding security interests in contaminated property of CERCLA liability, up to and including foreclosure. As a result, the rule has the potential to greatly impact lender behavior, and in turn, the federal brownfields effect. However, as is the case with the Prospective Purchaser Guidance, the new lender liability rule takes the wrong form to provide any reliable relief to lenders. Because the rule is merely an enforcement policy, it cannot be relied on to create substantive rights in private parties. In addition, the EPA and the Department of Justice have every right to refuse to comply with the policy. These factors likely make the policy much too indefinite for lenders to rely on. As a result, it is unlikely that the policy will have a significant impact on the federal brownfields problem.

The fifth prong on the EPA’s Action Agenda involved its issuance of a policy “Reassuring Owners of Property Situated Above Contaminated Aquifers.” This policy applies to parties owning land contaminated solely by the migration of contaminated groundwater onto their property from offsite. These parties are completely without fault, but are liable as “owners” under CERCLA.

99. 60 Fed Reg at 34,792; 54 Fed Reg at 34,235 (cited in note 34).
104. 60 Fed Reg 34,790, 34,790 (1995).
Because of the potential liability, such property is unmarketable, and contributes to the brownfields problem. The EPA's policy indicates that the EPA will not pursue enforcement actions against such innocent landowners under the rationale that these parties are protected by the third party defense to CERCLA. In addition, the EPA has indicated a willingness to enter de minimis settlements with owners of property containing contaminated aquifers. While these provisions could serve to reverse the brownfields effect on contaminated aquifer property, once again, the form of the policy will likely prevent it from having a significant effect on the brownfields problem. The policy creates no substantive rights, and does not bind the EPA. As a result, purchasers and lenders will tend not to find much definitive comfort in the policy, and the federal brownfields problem will not be helped much thereby.

The Brownfields Action Agenda was designed as a work in progress. The EPA hopes to use it to undertake further brownfields reform efforts in the future, including job training, the creation of inner city empowerment zones, and by creating partnerships with state agencies, industry groups and environmental activists. While these kinds of reforms are certainly commendable, the EPA needs to take more than a soft internal policy stance on brownfields issues. In order to really "take a bite" out of the problem, the EPA should issue formal regulations, or sponsor congressional legislation. Given the state of uncertainty of the law, and the potential liability at stake, interested parties need definitive assurances of protection before their behavior will be significantly impacted and the federal brownfields problem ameliorated.

B. CONGRESSIONAL REFORM

More than twenty Superfund liability reform proposals are pending in the 104th Congress. Many of these reform proposals, if enacted, could have a significant impact on the federal brownfields problem. However, none of these bills have made it out of committee, and many appear to have been abandoned. This Comment examines some of these bills in order to illustrate the types of reforms Congress is currently considering to address the federal brownfields problem.

One of the most sweeping reform proposals still pending in Congress is the Reform of Superfund Act of 1995 ("ROSA"). This legislation includes an interesting mechanism to eliminate the joint and several liability faced by CERCLA PRPs. The process would involve a PRP-selected mediator allocat-
Assigning liability between all PRPs at a contaminated site based on evidence of the PRPs actual share of liability. The PRPs would then be entitled to enter into final settlements with the EPA based on these shares, whereby the EPA would release the settling PRP from all liability to the EPA and private parties in exchange for the PRP conducting all necessary remediation activities associated with their allocated share of liability. This kind of a program would be very beneficial to federal brownfields reform, because it would clarify and finalize the liability of PRPs on contaminated property, encouraging the remediation and redevelopment of the property, thereby increasing its market value.

ROSA would also create a National Risk Protocol (the “Protocol”). The Protocol would devise generic cleanup standards and formulas, enabling parties to determine in advance what kind of response actions will be required at a facility. The protocol would also allow parties to elect to utilize case by case cleanup standards, tailored to the future use and risks of the property. In so doing, the Protocol would enable PRPs and potential purchasers to determine "how clean is clean," thereby clarifying the amount of liability associated with brownfields property. The Protocol would also facilitate more efficient and less costly response actions by tailoring cleanup standards to the future use of the property. Both of these factors would help to ameliorate the brownfields effect.

In addition, ROSA includes innocent purchaser and lender liability exemptions. Both of these exemptions would codify, in essence, the EPA’s current internal policies regarding lender liability and agreements with prospective purchasers. As was discussed earlier in this Comment, these provisions could have a significant impact on the federal brownfields effect, since the provisions would no longer be in the form of non-binding internal agency policies, but would constitute binding legislative reforms. The bill also would try to eliminate the overlap in state and federal jurisdiction over brownfields properties. Finally, the legislation includes provisions to encourage community involvement in the reuse and redevelopment of contaminated sites, which could help to alleviate some of the harmful community effects of the brownfields problem.

A similar sweeping reform bill pending in the Senate would create, in addition to the types of reforms included in ROSA, liability exemptions for landowners and operators who find themselves subject to CERCLA liability solely because of their proximity to brownfields properties. The Accelerated Cleanup and Environmental Restoration Act of 1996 would exempt parties from CERCLA liability arising merely because the property they own or operate is located next to, and thus potentially contaminated by, brownfields property. The Act would also give liability exemptions to entities liable under CERCLA solely as a result of migration of contaminated groundwater onto their property from a nearby brownfields site. By removing the threat of liability from property

109. HR 2500, 104th Cong, 1st Sess § 102.
110. HR 2500, 104th Cong, 1st Sess §§ 302-305.
111. HR 2500, 104th Cong, 1st Sess §§ 502-503.
112. HR 2500, 104th Cong, 1st Sess §§ 102-106.
adjacent to brownfields sites, these provisions would encourage purchasers to acquire and redevelop such adjacent property.

Four different brownfields bills have been introduced in the House and Senate. The first of these proposals, the Brownfields Environmental Cleanup Act of 1996, would make federal grants available to states and local governments to encourage the cleanup of certain contaminated property.114 This bill would help to support state brownfields projects like those discussed in Section II of this Comment. Another pending bill, the Brownfields Cleanup and Redevelopment Revolving Loan Fund Pilot Project, would provide federal funds for the establishment of brownfields pilot projects around the country.115 This bill would codify, in effect, the brownfields pilot project initiative sponsored by the EPA as part of its Brownfields Action Agenda. As was discussed above, a pilot project will help to resolve liability at the pilot sites, and thus contribute to the amelioration of the brownfields effect.

A third brownfields proposal, the Brownfields Remediation and Economic Development Act of 1996, would require the EPA to certify state brownfields programs like those discussed in Section II of this Comment, if they meet certain requirements.116 Certified states would be given complete responsibility for the remediation of certain types of contaminated property in the state. The Act would eliminate the problem of overlapping federal and state jurisdiction at qualified properties in certified states, thereby facilitating the finalization and clarification of liability at certain brownfields properties. The fourth important brownfields bill currently pending in Congress would establish a fund for low or no interest loans to conduct assessment and remediation activities at certain brownfields sites.117 Although this last provision would do nothing to clarify CERCLA liability for PRPs and potential purchasers, it would encourage the remediation, and thus redevelopment of brownfields property.

Finally, several different bills have been introduced to Congress which would amend the Internal Revenue Code in order to create an incentive to remediate brownfields property.118 Most of these proposals would allow PRPs and other remediating parties to expense the costs of remediation and assessment incurred at certain types of contaminated property. Currently, the costs of remediation must be capitalized.119 The proposal, however, would enable businesses to deduct these types of expenses fully in the year incurred. As was discussed above, because the costs of remediation at brownfields sites are typically very high, enabling businesses to deduct these expenses would greatly encourage the remediation, and thus redevelopment and reuse, of brownfields property.

In sum, there are many bills currently pending in Congress which could have

115. HR 1620, 104th Cong, 1st Sess (May 11, 1995).
116. HR 2919, 104th Cong, 2d Sess (Jan 21, 1996).
117. HR 3093, 104th Cong, 2d Sess (Mar 14, 1996).
118. See, for example, HR 3747, 104th Cong, 2d Sess (Jan 26, 1996); S 1542, 104th Cong, 2d Sess (Jun 27, 1996).
119. Treas Reg § 1.263(a)-1.
a significant impact on the federal brownfields problem. It is encouraging that members of Congress have recognized the need to address the brownfields effect. It is also promising that Congress has developed several different approaches to rectifying the effect, many of which have already been reality tested in state brownfields programs such as those examined in Section II of this Comment. However, none of these proposals have even made it out of committee, let alone be enacted. Thus, a push for federal brownfields legislation is needed.

C. PROPOSED FEDERAL SOLUTION

As stated above, noble as the intentions of Congress and the EPA may be, federal reforms to date have stopped short of solving the brownfields problem. As a result, comprehensive federal reform is needed. By cherry-picking from the brownfields reform packages that have been implemented in the various Region V member states, this Comment has devised a proposal for such reform.

A federal brownfields reform package should include some kind of a voluntary cleanup program. This program should allow both PRPs and purchasers to participate by conducting investigations and remedial activities. Once parties achieve applicable standards, the program should require the EPA to issue a covenant not to sue. The covenant not to sue should run with the land and be transferrable. In addition, the covenant should protect the holder from all present and future liability to the United States and private parties associated with the addressed releases on the land, even if technology and cleanup standards change in the future.

The EPA's review and approval process should be privatized, as is seen in Illinois and Ohio, so that federally-certified professional engineers, and not the EPA, review and approve of cleanup actions. However, the EPA should have some kind of oversight of the approval process, perhaps by adopting Ohio's model whereby the EPA audits a requisite number of covenants per year, or by utilizing Illinois' model, whereby the EPA reserves the authority to approve all remedial actions.

The voluntary cleanup program should be augmented by the adoption of risk and use-based cleanup standards. In order to ensure that the property use is restricted in accordance with the remediation program, the program should require interested parties to file use restrictions with the property's deed in the county recorder's office. If the use of a use-restricted property changes in the future, the covenant not to sue would be voided until further remedial actions were taken.

An EPA voluntary cleanup program would serve to clarify and finalize the liability of PRPs and purchasers, thereby enabling parties to quantify the costs of remediating a contaminated property. In addition, because of finalized liability and relaxed cleanup standards, this program would create an incentive for PRPs to remediate property, thereby helping to reduce the negative community and health effects associated with unremediated, contaminated property. The privatized review system would help to keep the administrative costs and delays of a voluntary cleanup program to a minimum, and would undoubtedly be more
efficient. In addition, this kind of a system would be inexpensive for the EPA to administer, with the only significant costs to the EPA coming from the oversight process. Perhaps the costs of the oversight process could be offset by requiring participants to remit application fees. Finally, the relaxed cleanup standards would help to reduce the burdensome costs and time of remediation to PRPs.

A federal brownfields reform program should also include a lender liability exemption provision. The lender liability exemption should codify the 1992 EPA Lender Liability regulation. This provision would exempt lenders from CERCLA liability for holding security interests in contaminated property, even in case of foreclosure, so long as lenders do not participate in the management of the property, do not contribute to the contamination at a site, and make reasonable attempts to divest themselves of foreclosed property within one year. This kind of a provision would undoubtedly change lending behavior, so that lenders would no longer be discouraged from taking security interests in brownfields property.

In addition, a federal program should include some kind of an innocent purchaser exemption provision that combats CERCLA's strict liability and ensures that brownfields property price tags equate those of greenfields property. This kind of a provision could look like that used in Michigan, wherein innocent purchasers can obtain covenants not to sue in exchange for producing investigations demonstrating that they were not the cause of contamination present on the site. The covenants would operate much the same as those in the voluntary cleanup program. The purchaser exemption would create a great incentive for purchasers to acquire and redevelop contaminated property, because by relieving purchasers of responsibility for remediation costs, the exemption would make brownfields property much more economical. Long term owners and operators might find it more difficult to meet the exemption because they would have more difficulty proving that contamination was pre-existing. Yet, the combination of the purchaser exemption with the voluntary cleanup provisions should provide adequate protections for long-term owners and operators. It should be noted, however, that a purchaser exemption too favorable to purchasers might create a disincentive for PRPs to remediate property. Specifically, by making contaminated property marketable without requiring remedial activities, the exemption might leave no reason for PRPs to engage in voluntary cleanups. This problem could be solved, however, by making a purchaser's covenant not to sue conditional on the property's PRPs agreeing to perform a voluntary cleanup action.

Finally, a federal program should incorporate additional financial incentives encouraging the reuse and redevelopment of brownfields property. As in the State of Ohio and as has been proposed by Congress, the IRS could grant tax exemptions to parties purchasing brownfields property, or to PRPs engaging in voluntary cleanup actions. In addition, the EPA could create a fund providing low-interest loans to parties undertaking voluntary cleanups and needing financial assistance. While these last suggestions would be more expensive for the federal government, they would greatly encourage people to utilize the program, and thereby would encourage the reuse and redevelopment of contaminated property.
Conclusion

Current hazardous waste liability schemes discourage purchasers, developers and lenders from reusing and redeveloping potentially contaminated property, typically located in urban areas. These liability schemes instead invite new development to ensue in greenfields, or previously undeveloped areas. This "brownfields effect" contributes to the economic decline of communities, facilitates the spread of environmental problems to the outlying parts of metropolitan areas, and results in other far-reaching and significant environmental problems.

The liability scheme at the root of the brownfields problem is in large part CERCLA, the federal government's hazardous waste cleanup program. CERCLA contributes to the brownfields problem in a variety of ways. It directly discourages purchasers from acquiring brownfields property by subjecting them to joint and several liability. It discourages lenders from offering potential purchasers of brownfields property financial assistance by risking the viability of the lender's security interest should the borrower become liable under CERCLA, and by subjecting the lender to potential liability under the statute as an owner or operator of the mortgaged site. It potentially subjects PRPs to dual state and federal liability schemes, because CERCLA grants federal and state environmental agencies overlapping jurisdiction. It fails to ameliorate its strict liability scheme with settlement provisions, because it conditions settlements on the EPA's right to reopen virtually any settlement. CERCLA purposely fails to provide clear, ascertainable cleanup standards, so that parties interested in planning the costs associated with the remediation of brownfields property are left completely in the dark. Finally, CERCLA creates many administrative headaches such as extensive costs of investigation and cleanup, and considerable delays, which often make the purchase of brownfields property unfeasible. As a result of these many factors acting alone and in concert, the brownfields problem is a serious one that needs to be addressed. As such, CERCLA needs to be reformed.

Both the EPA and Congress have taken steps to reform CERCLA so as to address the federal brownfields problem. The EPA's Brownfields Action Agenda indicates that the EPA is willing to address brownfields issues. The introduction of legislative reforms into Congress during both of the last two years suggests that members of Congress are interested in reform as well. However, the actions taken on a federal level have not yet been adequate to solve the federal brownfields problem. This Comment tries to devise a solution to the federal brownfields problem by examining state brownfields reforms. It uses several states in the midwest that have enacted their own reforms as laboratories to identify and test various means for reversing the federal brownfields effect. The model federal brownfields reform program proposed in this Comment incorporates the following provisions:

1. The program includes a voluntary cleanup program wherein the EPA issues final liability releases in exchange for remediation of contaminated property, so as to limit and finalize the liability associated with contaminated land;
(2) provides for private sector administration of the program to reduce the costs and increase the efficiency of participation in the program;
(3) incorporates use and risk-based cleanup standards to reduce the costs and increase the efficiency of remediation activities;
(4) exempts financial lenders holding security interests in contaminated property from CERCLA liability under certain circumstances;
(5) exempts innocent purchasers from CERCLA liability so long as PRPs for the acquired property agree to participate in the voluntary cleanup program; and
(6) includes additional financial incentives to encourage participation in the voluntary cleanup program, such as low-interest loans, and tax exemptions.

If imposed on a federal level, such a program should encourage the reuse and redevelopment of brownfields property, and in so doing, help to reverse the brownfields effect.