Brownfields Uncertainty: A Proposal To Reform Superfund

David Slutzky
University of Virginia

A.J. Frey
Washington and Lee University

Abstract

For decades Americans have been trying to reverse the momentum of urban decline. In an effort to ensure that abandoned, contaminated properties were cleaned up, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, or CERCLA, also known as the Superfund Act. With the creation of the Superfund program, a liability scheme was put in place to make sure that brownfields would be cleaned up so they could be put into productive reuse. Unfortunately, the uncertainties associated with this liability framework have been declared by some to be the primary impediment to brownfield redevelopment. Private developers, who might otherwise provide the resources needed for redeveloping brownfields into vital community assets, are driven away from purchasing or investing in brownfield sites by the potential for catastrophic federal and state regulatory and tort liability. As a result, many brownfields continue to sit vacant or underutilized.

This article offers a solution to the risk and uncertainty resulting from federal and state cleanup and third-party tort liability often associated with brownfield sites, while preserving the current liability scheme as it pertains to parties actually responsible for the contamination. To mitigate the liability and tort concerns of potential brownfield redevelopers, this article proposes the creation of an absolute waiver of federal and state cleanup and third-party tort liability for truly innocent private parties that undertake to redevelop brownfield sites. Our proposed federal legislative reforms, coupled with incentives for states' participation, should serve as a catalyst for private-party brownfield redevelopment while strengthening the fiscal vitality of the Superfund program without reliance on taxpayer dollars.

Brownfield Redevelopment: Why Is It Important and Why Is It Not Happening?

If you drive around any city in the United States, it will not take long before an abandoned gas station, shuttered steel mill, or long-defunct factory comes into view. These often-polluted urban properties, the vacant and abandoned relics of America's industrial past, are commonly referred to as brownfields, and they are emblematic of the urban blight plaguing U.S. cities today. According to statute, a "brownfield site" is any "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."[1] The U.S. Environmental Protection Agency (EPA) estimates that more than 450,000 brownfield sites currently exist in the United States, but other sources put the number at well over 1 million (EPA, 2010). Ranging in size from less than 1 acre to hundreds of acres, brownfield sites exist in cities and towns all over the country, where they drain local resources, waste vital urban space, and often provide a breeding ground for crime (see Eisen, 1996).

The label *brownfields* distinguishes these sites from their counterparts, *greenfields*, which are undeveloped suburban and rural parcels of land that real estate developers often prefer for their seemingly low development costs and freedom from environmental contamination and accompanying liability concerns. In actuality, the costs associated with the neglect of brownfields in favor of greenfield developments are quite high, but those costs are borne by the community as a whole rather than by individual developers. When the urban landform expands into greenfield sites, the resulting sprawl contributes to a litany of unwelcome consequences, such as increased vehicle miles traveled, which in turn leads to increased automobile emissions and longer commutes (Davis, 2002). Of even greater concern is the degradation of valuable ecological systems that provide essential service value to communities. The degradation results from lost farmland and open space when urban areas experience sprawl.

Throughout the past few decades, much attention has been focused on the importance of public policy in stemming the tide of urban sprawl. Much of this interest has manifested in the promotion of "livable communities" to attract people into urban centers and away from the periphery of the urban landform. Some localities have implemented policies designed to encourage more of a mixed-use, neighborhood feel to new urban developments, and others have included encouraging statements of intent in their comprehensive plans that suggest development be limited to designated growth areas (see, for example, U.S. Conference of Mayors, 2006; National Governor's Association, 2000). Unfortunately, brownfield sites continue to persist within the urban ring, and most efforts to reduce or prohibit further growth in rural greenfields have been ineffective.[2] Localities have relied on policies of persuasion and the enticement of the promise of livable urban neighborhoods rather than taking definitive steps to limit rural area development and to address obstacles to brownfield redevelopment.

[1] Small Business Liability Relief and Brownfields Revitalization Act, 42 U.S.C. § 9601(39)(A).

[2] The authors acknowledge that significant efforts and major investments have been made to reduce the number of brownfield sites, particularly by EPA and HUD, but it is our contention that, for the most part, these efforts have proved to be insufficient.

In response to several notorious hazardous waste catastrophes exposed in the 1970s, Congress passed comprehensive legislation designed to address growing public concern about the toxic legacy of our industrial past. The Resource Conservation and Recovery Act of 1976 (RCRA) provided a complex structure of cradle-to-grave rules governing the treatment, transportation, storage, and disposal of hazardous waste.[3] To provide further incentive for industry to comply with the mandates of RCRA and to address properties that became contaminated before the enactment of RCRA by imposing a comprehensive cleanup liability framework, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), commonly known as the Superfund Act.[4] Although these hazardous waste statutes in tandem provide much needed incentive for industry to avoid contaminating our lands and are therefore remarkably effective in protecting Americans from exposure to hazardous waste, their liability provisions provide powerful disincentives for potential redevelopment of urban properties. In fact, many would argue that the threat of Superfund liability is the single greatest impediment to the redevelopment of brownfield sites (see, for example, Davis, 2002; Rubenstein, 1997; Anderson, 1996).

Scattered within and among some of the most commercially desirable urban centers in the country, brownfield sites are suspended in a sort of regulatory limbo; although not specifically designated as Superfund sites and listed by EPA on the National Priority List (NPL), they are nonetheless tarred by their potential—real or perceived—for costly environmental regulatory and third-party tort liability.

Uncertainty is the enemy of economic activity. Urban redevelopment activities are stymied in the face of uncertainty, and CERCLA liability represents great uncertainty. Before a developer will move forward with a project, he or she must be convinced that the effort will provide a favorable financial outcome. The potential for hazardous waste cleanup or third-party tort liability represents a significant uncertainty for a brownfields redeveloper. Because most development requires significant debt capital, and because lenders are notoriously risk adverse, it is no wonder that brownfield sites regularly fall victim to the uncertainties associated with CERCLA liability. Although many sites are only nominally contaminated, or indeed contamination free, the perceived stigma and uncertainty over regulatory and third-party tort liability attached to ownership of such sites keep otherwise desirable redevelopment opportunities off the market or off the radar of potential purchasers.

This article will attempt to offer a solution to what is possibly the most tenacious challenge facing brownfield redevelopment—the risk and uncertainty surrounding federal and state cleanup and third-party tort liability for private parties who wish to acquire and revitalize brownfield sites. This article proposes to mitigate the perils of brownfields redevelopment by allowing for an absolute waiver of federal and state regulatory and tort liability for truly innocent private parties that undertake to redevelop brownfield sites. The argument rests on the premise that the related objectives of (1) reducing barriers to urban redevelopment; (2) promoting livable, affordable urban housing; and (3) reducing the rate and intensity of rural and suburban greenfield development are normatively positive goals that ought to be vigorously pursued. This article focuses on the first objective: the reduction of barriers to urban redevelopment. It is important to recognize, however, that all

[3] 42 U.S.C. § 6901.

[4] 42 U.S.C. §§ 9601-9675.

three objectives are interconnected and indispensible to one another—facilitating one objective furthers them all.

Understanding Superfund Liability and Its Impact on Brownfields

RCRA was enacted to provide a structured approach to the private management of hazardous waste in an effort to ensure that such toxic byproducts of industry did not come into contact with people or sensitive ecological systems. Through CERCLA, however, EPA was given a mandate to respond to and ensure the cleanup of those properties that nevertheless have become the nation's worst hazardous waste sites. If a property has experienced a release of hazardous waste and is contaminated such that EPA determines that it must be cleaned up, the agency lists the site on the NPL and may then take action to ensure that the responsible parties clean it up. The "release" of hazardous substances includes the "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment" of any hazardous material.[5] On the state level, many legislatures have given their state environmental protection agencies similar powers under state statutory versions of CERCLA. Although the particulars of hazardous waste cleanup legislation vary from state to state, many of the state cleanup liability provisions are similar to those of CERCLA.

When EPA begins a cleanup of hazardous waste pursuant to CERCLA, it endeavors to identify those parties potentially responsible for the release pursuant to CERCLA's liability provisions. These potentially responsible parties (PRPs) include the individual or corporate owners of contaminated property, both past and present. They can also include site operators and managers, tenants, investors, people who transported hazardous substances to the site, or any other party found to have created or contributed to a hazardous substance's release on the site. CERCLA gives EPA the authority to require PRPs to undertake a cleanup to protect human health and the environment. Alternatively, EPA can proceed to clean up the site itself and then order PRPs to reimburse the government for the response actions.

CERCLA imposes extraordinary liability, in the form of joint and several as well as strict liability on PRPs. If a PRP meets the statutory standard for responsibility, it is potentially responsible for the entire cleanup by itself. Because this liability is retroactive, developers who purchase the property after all contaminating activities have ceased can still be held responsible for cleanup costs. Further, potential liability is not a function of negligence on the part of the PRP. Not surprisingly, the liability provisions of CERCLA and similar state hazardous waste cleanup statutes have had a profound chilling effect on brownfield redevelopment efforts, owing to concerns that the redevelopment of these sites might expose the property owner to potentially limitless cleanup liability.

A core principle behind CERCLA's tough liability provisions is the notion that polluters should be responsible for cleaning up contaminated sites. With the enactment of CERCLA, this polluter pays principle was expressed in two ways. First, parties that caused the contamination were held liable

[5] 42 U.S.C. § 9601.

for its cleanup. Second, producers of chemicals and petroleum were required to pay a tax that was put into a special trust fund to be used to support cleanup efforts at sites where no financially viable PRP could be identified. During the early years of the Superfund program, this polluter tax provided a significant portion of the funds needed to clean up sites on the NPL. In 1995, however, the polluter tax on chemical and petroleum producers was allowed to expire and has not been subsequently renewed. As a result, the fund has effectively run out of money and thus the cost of continued cleanup for those sites where the PRPs are either gone or insolvent comes out of EPA's yearly appropriations, giving EPA even more incentive to pursue and obtain cleanup costs from PRPs.

With the threat of liability hanging over these properties, developers are reluctant to buy them, even at discounted rates, and risk-averse lenders are even more reluctant to fund such projects for fear of losing their collateral in the event of major environmental liability. The disincentives created by federal and state cleanup liability affect both municipalities and private industry. Cities are rendered powerless to curtail sprawling greenfield development because they cannot offer cost-effective urban alternatives. They are forced to watch their tax bases languish as urban properties sit unused and development flees to the countryside. The otherwise willing private sector, which would seem to favor developing brownfields due to their proximity to existing infrastructure such as access to utilities and transportation corridors, is kept from injecting needed capital into urban development because of uncertainty over harsh environmental cleanup and tort liability.

The Innocent-Purchaser Defense to CERCLA Liability: Is It Enough?

Since CERCLA was enacted, concerns about its chilling effect on brownfield redevelopment have resulted in numerous efforts to modify the statute and its implementation. Beginning with the Brownfields Action Agenda initiated in 1995, EPA and interested stakeholders have tried to compromise the liability provisions of CERCLA and reassure lenders and prospective purchasers of brownfield sites in the hope of stimulating urban revitalization. In an effort that has proven to be only nominally helpful, EPA identified sites that appeared in the Superfund program's CERCLIS database, but that had been evaluated by EPA and determined to be of no further federal interest, and placed them into an archive database in the hope this would destigmatize these sites.

Both Congress and EPA have recognized the impediment that CERCLA liability presents to brownfield redevelopment and have attempted to remedy the situation. In 1996, Congress passed the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act (Lender Protection Act).[6] The act was meant to limit the liability of lenders who financed brownfield developments that were later foreclosed on. This amendment to CERCLA's liability structure fixed a problem that lenders had been having, wherein they were being held liable as PRPs under CERCLA for cleanups of properties that they did not actively manage, but which they became owners of by virtue of foreclosure. For those lenders who did not actively manage a contaminated property but merely held the property to protect their security interests, the Lender Protection Act amended CERCLA to exclude them from the statute's definition of owner or operator.

[6] 42 U.S.C. § 9601(a)(1).

Although the Lender Protection Act to some extent protects lenders from the grasp of Superfund liability, lenders can still find themselves suffering significant financial consequences. Lenders are still vulnerable to loss of value of the asset securing their loan and the uncertainties associated with the requirements of the Lender Protection Act. In addition, efforts have been made, both on the national and the state level, to attempt to mitigate liability for developers of brownfield sites who would not otherwise be liable for claims arising from the potentially hazardous condition of the properties. These efforts, however, have not proven to be effective enough to attract most redevelopment players into the brownfield market. More is still needed to ensure that private parties who voluntarily undertake to clean up and develop brownfield sites can achieve complete insulation from the uncertainties of cleanup and third-party tort liability.

Shortly after the enactment of CERCLA, the commercial real estate industry began to focus on a category of CERCLA defenses to liability based on the "act or omission of a third party" as a potential way to reduce liability uncertainty. The "innocent landowner" defense, which was enhanced through the Superfund Amendments and Reauthorization Act (SARA) of 1986,[7] granted liability relief to parties who could show that, prior to purchasing a contaminated property, they "did not know or have reason to know" that any hazardous substances had been or were being released on it. A property owner could show that he or she had "no reason to know" of the site's condition if he or she had conducted "all appropriate inquiries" into the history and condition of the property prior to purchase. This "all appropriate inquiries" (AAI) standard, although left undefined by SARA, became increasingly important in determining whether landowners could be considered PRPs in cleanup actions for contamination they had no part in causing. Tracking the statutory requirements of the innocent landowner defense, the commercial real estate industry collectively established a risk mitigation process known as a Phase I Environmental Site Assessment (Phase I), which was intended to satisfy the AAI requirement. The implementation of the Phase I assessment process was a great success, and within a few years of CERCLA's enactment, the industry had put in place institutional requirements for a Phase I on nearly every transaction in excess of $1 million.

Unfortunately, much of the uncertainty associated with cleanup liability remained. In an attempt to make access to the defense more effective, the commercial real estate industry joined forces with the emerging environmental consultant industry to create a standard definition for AAI through the American Society for Testing and Materials (ASTM). In 1993, ASTM published *E1527, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*. At its best, this standard provided consistency to what level of due diligence would qualify for a defense, but liability was not necessarily avoided and the uncertainty from CERCLA liability, as well as state cleanup liability and third-party tort liability, remained an impediment to brownfield redevelopment.

Congress again attempted to address some of this uncertainty with the passage of the Small Business Liability and Brownfields Revitalization Act (Brownfields Act) in 2002.[8] The act further clarified the standard of due diligence required for the innocent-purchaser defense, introduced the concept of the bona fide prospective purchaser (BFPP), and also clarified the situations in which liability applies to owners of properties contiguous to a Superfund site. The Brownfields

[7] 42 U.S.C. § 9601(35)(B)(i).

[8] 42 U.S.C. § 9601(40).

Act's clarification of these two important defenses, the innocent-prospective purchaser defense and the contiguous-property-holder defense, marks the most significant step yet toward eliminating liability barriers to brownfield redevelopment.

The contiguous-property-holder defense evolved, in part, out of a policy directive that EPA originally issued in June 1995. Recognizing the need to grant liability relief to property owners whose ground water became contaminated by hazardous substance releases on nearby properties, EPA issued a policy memorandum that stated that "subject to certain conditions, where hazardous substances have come to be located on or in a property solely as a result of subsurface migration in an aquifer from a source or sources outside the property, EPA will not take enforcement actions against the owner of such property" (Diamond, 1995). Property owners had to meet certain conditions to be eligible for contaminated-aquifer protection. They could not have caused or contributed to the release, been affiliated with or been in a direct or indirect contractual relationship with the party or parties responsible for the release, and could not be otherwise potentially liable for the release. In addition, EPA could, at its discretion, accept payment of a de minimis settlement from a contaminated-aquifer owner in exchange for a grant of immunity from third-party contribution.

The bona fide prospective-purchaser defense, perhaps the most important feature of the 2002 Brownfields Act, was an effort to clarify and expand the innocent-purchaser defense and encourage private parties to undertake brownfield redevelopment. Under the statute, as amended, if a party satisfies the following conditions, they are considered eligible for the prospective-purchaser defense:

- The property must have been purchased after January 11, 2002.
- The purchaser must show that all disposal of hazardous waste occurred before the purchaser acquired the property.
- The purchaser must undertake AAI into the site's "previous ownership and uses."
- The purchaser must provide "all legally required notices" of any future hazardous substance releases on the property.
- The purchaser must "exercise appropriate care with respect to hazardous substances found at the facility" by taking reasonable steps to "stop the release, prevent future releases, and limit exposure to released substances."
- The purchaser must not be "potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility." Affiliation, under the act, can be familial, contractual, financial, or corporate.[9]

The Brownfields Act officially mandated that EPA promulgate a rule to define the previously vague AAI standard within 2 years of the act's passage. Until such time as EPA issued its rulemaking, the Brownfields Act established that the 1997 revision of the ASTM E1527 would constitute the standard for AAIs. In 2005, EPA completed its rulemaking process, issuing Standards and Practices for All Appropriate Inquiries, 40 DFR Part 312 (November 2005) (the AAI Rule). Currently, this is the operative definition of AAI with respect to the innocent-purchaser defense under CERCLA.

[9] 42 U.S.C. § 9601(40).

Although it is a welcome clarification for potential brownfield redevelopers and their lenders, this standard is still difficult to satisfy, because it requires, as a condition precedent to establishing the innocent-purchaser defense, that the Phase I not contain any data gaps. Under the definitions set forth in the AAI Rule, it is often quite difficult to avoid having at least some data gaps.

The Unavailable Solution to the Problem of Uncertainty

Ideally, the developer of a hypothetical brownfield site would be able to reduce the uncertainty associated with CERCLA liability (as well as state cleanup liability) if, after performing a Phase I, the developer could ask EPA to review the report and then have the Agency issue a letter stating that the Phase I satisfies the AAI Rule and that the developer is not liable for any future cleanup costs attributable to prior activities at the site.

Similarly, if some level of contamination was discovered at the site, the developer might still be willing to remediate the site. In this case, the developer would want to ask EPA to review the final cleanup documentation to confirm that the site has been cleaned up to the satisfaction of the Agency, and that no liability for future cleanup remains. If the remediation is extensive, the developer would want to ask EPA to review the remediation work plan before performing the cleanup to ensure that it is appropriate and then ask EPA to perform oversight and review of the final documentation of the remediation, again establishing that no further liability exists.

Unfortunately, EPA is unable to provide these services to the private sector. One reason is that the review of these efforts would require significant staff time. Although the development community would be pleased to pay for that time, under current law EPA cannot accept payment, because it would be considered a supplemental appropriation. EPA would be required to remit the payments received to the Treasury, and the money would not be returned to EPA to cover the cost of the staff time. Further, no current mechanism exists through which EPA can routinely guarantee the developer that no further liability exists. In addition to concerns about federal cleanup liability, further uncertainty is associated with state cleanup mandates and third-party tort liability, and no available mechanisms exist to address these concerns.

A Proposal for Superfund Reauthorization

As previously discussed, the current Superfund regime suffers from two major problems. First, significant uncertainty—attributable to the liability provisions of CERCLA, state cleanup liability, and third-party tort liability—represents a major disincentive for urban redevelopment. Second, what is now known as the Superfund Trust Fund, which is used for remediating sites where no financially viable PRP exists, is chronically underfunded.

We propose that Congress reauthorize CERCLA in a manner designed to address these two concerns. First, the proposal aims to reduce and, in time, eliminate the cleanup liability risks that accompany voluntary, private-party brownfield redevelopment projects. Second, the proposal aims to provide a renewed and continuous flow of funding to the Superfund Trust Fund, which has been steadily diminishing since the suspension of the polluter tax. By making contributions to the fund volun-

tary and by spreading the responsibility for sustaining the fund to many more private actors, the proposal will ensure the continuing vitality of the Superfund Trust Fund, establishing a sustainable funding source for the nation's most serious Superfund cleanup responses.

The proposal consists of four elements:

1. Creating a new Superfund Trust Fund, called the Superfund Certification Trust Fund, to be managed by EPA for the purpose of receiving contributions from private parties to cover the staff needed to review Phase I's, cleanup work plans, and remediation closure documents on behalf of parties who wish to purchase and redevelop brownfield sites.

2. Authorizing EPA to issue a Certificate of Eligibility for Waiver of Liability to a party purchasing real property, upon request, based on a review by EPA of the satisfactorily completed Phase I and site cleanup, if necessary.

3. Authorizing EPA to issue a Waiver of Liability to a purchasing party who (a) acquires a Certificate of Eligibility for Waiver of Liability and (b) makes a small (de minimis) contribution to the original Superfund Trust Fund, now called the Superfund Cleanup Trust Fund. The Waiver of Liability grants immunity from federal CERCLA and third-party tort liability potentially arising from pre-existing hazardous environmental conditions on the site in question.

4. Delegating to state environmental agencies the authority to administer the new oversight and certification programs, subject to the condition precedent that states seeking delegation enact comprehensive legislation granting immunity from state regulatory and state third-party tort liability to holders of EPA-issued Waivers of Liability.

To illustrate how the proposal would work in practice, envision a hypothetical scenario in which a real estate developer is considering investing in a brownfield redevelopment project. The brownfield sits in an urban area with potential for growth and redevelopment. The developer wants to build a mixed-use residential and commercial complex on the site and estimates that the project would yield a reasonable return on investment, but for the cost of the uncertainties attributable to environmental liability. The site is a former industrial plant, which, based on its previous use, may be contaminated with hazardous waste, although no environmental site assessment has been completed for the site. The developer may be driven away by the environmental uncertainties, or, if not, may have limited access to development capital due to potential lenders' traditional intolerance of risk. The developer cannot purchase and redevelop the property while the risk of potentially ruinous environmental response and third-party tort liability hangs over his or her head. As a result, the property remains vacant and unused.

With the proposal's amendments to CERCLA in place, the developer's situation becomes much different. The developer begins the process by commissioning a Phase I, just as is done today. If the report reveals no indications of potential contamination, the developer submits the report to EPA, along with a request for review and a check for a predetermined amount, payable to the Superfund Certification Trust Fund.[10] EPA (or the state, if it has qualified for delegation of authority to

[10] We expect the price of the Certificate to be about $500, based on the anticipated cost of review time, including the reviewer's salary and associated overhead.

administer the program by adopting appropriate state legislation and requesting delegation from EPA) then reviews the report and determines if it satisfies the standards of the AAI Rule and reveals no indications of environmental concern. If the report is satisfactory, EPA then issues a Certificate of Eligibility for a Waiver of Liability.

It is possible that the developer will be satisfied with the Certificate; however, the developer's lender may require the developer to proceed to seek a Waiver of Liability for the site. This waiver would be automatically provided upon receipt of a predetermined contribution to the Superfund Cleanup Trust Fund.[11] The Waiver would be written in such a way that it protects the purchaser of the property and the purchaser's lender; however, it would not protect subsequent parties. The Waiver would be structured to exempt the developer from liability associated with any subsequently discovered contamination that occurred before his or her ownership, but the developer would be "kept on the hook" for any contamination that clearly occurs after he or she takes ownership. The developer must be kept on the hook to ensure that any intervening contamination events at the site are identified and, further, that the party in ownership of the property who was in a position to avoid this contamination event is now responsible for its cleanup. This provision would prevent the Waiver from becoming a license to allow subsequent contamination of the site. When a property subject to a Waiver is sold, the purchaser would need to go through the same process if they were to avail themselves of a Waiver, which would have the beneficial result of additional revenue for the Superfund Cleanup Trust Fund.

If the Phase I reveals a potential contamination issue, then the developer commissions a Phase II Environmental Site Assessment, seeking to determine if contamination exists. This assessment may result in a clean report or a report that recommends cleanup. A clean report would result in the issuance of a Certificate of Eligibility for a Waiver of Liability. If the report identifies the need for remediation activities, the property owner could pay EPA to review the proposed work plan and then review the documentation demonstrating the results of the cleanup activities. This way, the cleanup activities would be conducted subject to EPA review and, in some cases, oversight, which should result in greater uniformity of cleanup standards across the country and better assurance that work is performed correctly. In all cases, after the property owner has adequate documentation that the site is indeed clean, the site would earn a Certificate of Eligibility for a Waiver of Liability.

The Certificate of Eligibility for a Waiver of Liability would not in itself grant any immunity to the developer. In effect, it is a record establishing that the developer has met the requirements for BFPP status. If the developer stops the process here, the Certificate provides strong evidence to present in court that he or she has undertaken AAI, in the event that the developer must defend himself or herself against an EPA cleanup enforcement or contribution action. The developer, however, now has a further step he or she can take to ensure immunity. If, after receiving the Certificate, the developer makes a de minimis contribution to the Superfund Cleanup Trust Fund—in effect, a settlement with EPA to limit his or her liability for any future discovery of hazardous releases previously occurring on site—he or she would be granted a Waiver of Liability. The

[11] For a property valued at between $1 million and $10 million, we anticipate that the waiver will be priced between $10,000 and $20,000—significantly below the market value of the reduction of risk associated with the waiver (see, for example, Wernstedt et al., 2004).

Waiver would grant the developer immunity from cleanup and third-party tort liability arising from future response actions on the site, provided, of course, that the developer had no part in causing the hazardous release in question. In this way, the developer would be insulated from liability arising from any unanticipated hazardous conditions on the site, which he or she has had no part in creating and which he or she has made every reasonable effort to locate and clean up.

A key to the effectiveness of this process is the willingness of states to take on delegated authority to oversee site assessments and cleanups and to issue Certificates and Waivers. As a condition of having this authority delegated to state agencies, state legislatures would need to pass legislation giving the federal Waiver of Liability full force and effect on the state level and declaring that a Waiver of Liability relieves the holder of any potential state regulatory or third-party tort liability connected to environmental conditions on the site, as long as the holder is not otherwise responsible for creating such conditions. States would have an incentive to take on this oversight and certification authority because it would give them a role in the cleanup of brownfield sites and would generate jobs either in state government or in the private sector, because state agents or private contractors would be needed to perform the review, oversight, and processing of requests for Certificates and Waivers.

Evidence of Market Demand for CERCLA Liability Reform: The Price of Uncertainty

The proposal's success relies on a demand for increased certainty in the field of environmental liability for private parties. If the value of acquiring an official Waiver of Liability is less than the perceived cost of the risk, then developers and, more importantly, lenders will not take advantage of the changes in CERCLA's liability framework. Although further research is needed to establish exactly what price the market will put on the Waivers of Liability, existing research supports the existence of a general demand for such protection. In a 2004 discussion paper published by Resources for the Future, a Washington, D.C. think tank, Kris Wernstedt, Lauren Heberle, Anna Alberini, and Peter Meyer examine the relative interest to private developers of various public interventions to promote brownfield redevelopment. They conclude that, of a number of options offered to developers in a written survey, "relief from liability for future cleanup at the [brownfield] site" and "relief from liability claims by third parties such as site workers and adjacent land owners" are the most highly valued by developers in assessing the effect on a hypothetical brownfield redevelopment project (Wernstedt et al., 2004: 16–18).

The survey was sent to a sample of more than 300 real estate developers—some specialists in brownfield redevelopment, some generalists. They were asked to assess a hypothetical contaminated site where they would be building a residential complex. In addition to financial figures, such as "expected land purchase, investigation, remediation, and redevelopment costs and expected gross returns on the property," the survey offered "a number of different public interventions that developers could choose to improve their expected return on the site." The study estimated the relative value of different public incentives based on analysis of the respondents' choices. The results of the survey show that the value to developers of liability relief for future cleanups and third-party tort liability is significant. The average monetary value that the survey respondents placed on relief from future

cleanup liability risk was 3.1 percent of the project's total cost and 15.6 percent of expected profit. The average value that respondents placed on relief from future third-party liability risk was 4.1 percent of total project cost and 21.5 percent of profits (Wernstedt et al., 2004).

The message of the Wernstedt survey is clear: developers value and desire relief from liability risk in the context of brownfield redevelopment. In fact, they value it significantly. Applied to the expected costs and profits from the survey's hypothetical brownfield redevelopment project—the expected value of the project at completion was $30 million—the respondents' valuation of the immunity from cleanup liability risk (3.1 percent of cost and 15.6 percent of profit) was $702,000, and their valuation of the immunity from third-party tort liability risk (4.1 percent of cost and 21.5 percent of profit) was $969,000 (Wernstedt et al., 2004). These values are not insubstantial, and, although the survey offers just one estimate of the market's valuation of a hypothetical liability waiver, it provides a starting point and confirms the idea that the elimination of cleanup liability and third-party tort liability risk for developers will have a positive effect on their decisions to undertake brownfield projects.

Responding to Questions and Concerns

The elegance of the proposal is encapsulated in the idea that the only parties "let off the hook" under the new framework are those that are not "on the hook" currently and are not likely to allow themselves to get on the hook. Polluters currently liable for contamination would still be held responsible for all future cleanups just as they currently are, but voluntary private purchasers who did not cause the existing contamination but who want to redevelop brownfield sites would not be liable. The same people who are PRPs today will be PRPs tomorrow; however, innocent parties who wish to contribute to the revitalization of urban landscapes but are unwilling to do so in the face of current liability uncertainty would be able to proceed without concern.

The Waiver of Liability would apply only to hazardous releases occurring before the redeveloper's taking title. It would not exempt even a good-faith voluntary redeveloper from liability for contamination he or she creates or contributes to. Much like the current liability framework, parties who are in any way related to potential PRPs through business, familial, or contractual ties, would not be eligible for a Waiver of Liability. Furthermore, each new owner of the property would be required to obtain a new Certificate of Eligibility and Waiver of Liability, ensuring that the site is periodically reexamined and that contributions continue to flow to the Superfund Cleanup Trust Fund. The standards that private parties must satisfy in performing environmental due diligence and in remediating contaminated property would remain as they are today. Upon successful completion of these efforts, however, potential brownfield redevelopers would be able to reduce their uncertainty and obtain a Waiver of Liability pertaining to federal, state, and third-party tort liability.

Certificates of Eligibility need not vary significantly from current EPA standards for undertaking AAI. However, EPA would, in effect, waive the current data-gap exception in the AAI standard. It is unreasonable to expect private parties to be able to provide data for the site's entire history of use and ownership. Assuming a proper and thorough environmental site assessment is conducted according to EPA standards, unavoidable missing pieces in the site's history should not stymie the

granting of a Certificate, provided that reasonable efforts are made to fill in all data gaps. Again, the parties that would be absolved of liability in these instances are parties that would not otherwise subject themselves to the liability under the current Superfund regulatory regime.

A number of values would need to be established by the market for the new system to work properly. The amount that private developers would be required to contribute to the Superfund Cleanup Trust Fund in order to receive a Waiver of Liability would be significantly below the Waiver's market value but would need to be determined. Lenders, eager to minimize or eliminate the risk of their investment collateral being diminished in value by environmental liability, would be willing to discount interest rates for brownfield developers who can provide Waivers of Liability for their sites. The market would determine the value of this discounted rate. It is likely that lenders would require that developers obtain Waivers of Liability before financing brownfield redevelopment projects, much as they require a Phase I on all commercial real estate transactions greater than $1 million. The contribution to the Superfund Cleanup Trust Fund would in essence operate like a premium for a liability insurance policy that protects the owner and lender from the uncertainties of environmental liability.

Similarly, the revenue streams contributed annually to the Superfund Cleanup Trust Fund would be a function of the number and size of commercial real estate transactions made each year. It is expected, however, that these amounts would be significantly larger than the current level of appropriations allocated to Superfund cleanup actions, and the funding would, in effect, be entirely voluntary on the part of the contributors.

Essentially, this proposal provides potential redevelopers of brownfield sites a mechanism by which they can reduce or eliminate the uncertainties associated with environmental liability that currently operate as disincentives to such redevelopment activity. If the real estate industry can get EPA to absolve them of cleanup liability and third party tort liability, and that absolution is effective at both the federal and state level, a major increase in the redevelopment of brownfield sites should occur nationally. This increase is possible, however, only if the certainty of the Waiver of Liability is available.

The Waiver would function in a manner not unlike an insurance policy, which transfers risk away from the policyholder to another party. In this proposal, the Superfund Cleanup Trust Fund would become the recipient of the transferred risk, and the payment by the Waiver holder into that fund would be not unlike the payment of an insurance premium. The public would suffer no additional burden, because the parties obtaining Waivers are, for the most part, parties that would not have subjected themselves to liability without the Waiver, and thus would not have been PRPs. The public, however, would benefit greatly by increasing the opportunity for brownfield sites to be redeveloped.

By allowing the states to participate in the Waiver process, this proposal creates an incentive for states to enact legislation that would include state cleanup and third-party tort liability in the Waiver. State participation allows for devolution of the administrative implementation of the Waiver process, which reallocates some of the revenue streams associated with the Superfund Certification Trust Fund to the states, which in turn provides an opportunity for states to distribute their agency overhead costs across a larger universe of activities.

It is important to note that this proposal has many very specific dimensions that this article does not thoroughly address. Although many would say that the devil is always in the details, this proposal represents the framework for a significant solution to one of the greatest impediments to brownfield redevelopment. The authors plan to provide more details of this proposal in a future article.

Final Thoughts

Of perhaps the greatest importance for the cleanup of our nation's worst hazardous waste sites, this proposal is expected to provide significantly greater resources to the Superfund Cleanup Trust Fund than are currently available.[12] Much has been written about the cost of the Superfund program, in terms of money spent on cleanup activities by the government and PRPs, but the benefits of cleanup are also significant. Having a funding mechanism in place that provides possibly several billion dollars of funding for cleanup activities annually, without those funds coming from taxes, represents a good bargain for taxpayers, who are among the ultimate beneficiaries of the cleanup of these sites.

Another benefit of this proposed regulatory reform is that a larger number of private site-cleanup efforts will come under the scrutiny of EPA and the states. Under the current CERCLA approach, many private sector remediation efforts are undertaken without any government oversight, or they are done under state oversight with differing cleanup standards being applied, because state standards vary. With the proposed process in place, many more remediation efforts at brownfield sites will be done with EPA oversight and will be subject to uniform standards.

The uncertainty of environmental liability has served as a major impediment to urban revitalization efforts. These proposed reforms would remove this obstacle and serve as a major catalyst for brownfield redevelopment, taking development pressure off rural lands at the periphery of the urban landform, and thus reducing sprawl. The locational benefits of brownfield redevelopment are potentially enormous. Perhaps, most importantly, the preservation of rural ecosystems will be sustained as a result of this reform effort.

Acknowledgments

The authors thank the students of Professor Slutzky's Brownfields Redevelopment class at the University of Virginia for their thoughtful insights regarding our proposed Superfund reforms. The topic has been discussed in the class for the past several years, with the result that students' insights provided the foundation for several of our ideas.

[12] Based on data provided by CoreLogic, 135,774 commercial real estate purchase transactions, on average, occurred in the United States during each of the years 2005 through 2009. These data do not include multifamily residential properties with fewer than 10 units, and they do not include loan-refinancing transactions. If the price of the Waiver were to be $10,000 per Waiver, and if the commercial real estate industry were to routinely require a Waiver much as Phase I is currently required on nearly all transactions in excess of $1 million, the Superfund Cleanup Trust Fund would receive about $1.3 billion per year, *excluding loan refinancing and smaller multifamily transactions*. By comparison, fees generated by the polluter tax provided about $1.5 billion per year to the Fund until 1995, when the tax expired.

Authors

David Slutzky is a member of the faculty in the Department of Urban and Environmental Planning at the University of Virginia.

A.J. Frey is a second-year law student at Washington and Lee University School of Law.

References

Anderson, Mark D. 1996. "The State Voluntary Cleanup Program Alternative," *Natural Resources and the Environment* 22 (10-Winter): 3–8.

Davis, Todd S. 2002. "Defining the Brownfields Problem." In *Brownfields: A Comparative Guide to Redeveloping Contaminated Property*, edited by Todd S. Davis. Chicago: American Bar Association: 3–13.

Diamond, Bruce M. 1995 (May 24). "Final Policy Toward Owners of Property Containing Contaminated Aquifers." Memorandum, U.S. Environmental Protection Agency, Office of Site Remediation Enforcement.

Eisen, Joel B. 1996. "Brownfields of Dreams? Challenges and Limits of Voluntary Cleanup Programs and Incentives," *1996 University of Illinois Law Review* 883: 890–914.

Kirsch, Laurence S., and Geraldine E. Edens. 2005. "Federal Environmental Liability," *Environmental Aspects of Real Estate Transactions* 3: 4–8, 17–25, 31–32.

National Governors' Association. 2000. "New Mission for Brownfields: Attacking Sprawl by Revitalizing Older Communities." In *Where Do We GROW From Here*? Washington, DC: National Governors' Association: 7–17, 21–24.

Rubenstein, Sarah W. 1997. "CERCLA's Contribution to the Federal Brownfields Problem: A Proposal for Federal Reform," *4 University of Chicago Law School Roundtable* 149: 2–7, 16–22.

U.S. Conference of Mayors. 2006. *Recycling America's Land: A National Report on Brownfields Redevelopment*, Vol. VI, 5. http://usmayors.org/74thAnnualMeeting/brownfieldsreport_060506.pdf (accessed June 21, 2010).

U.S. Environmental Protection Agency. 2010a. "About Brownfields." http://www.epa.gov/brownfields/about.htm (accessed June 19, 2010).

———. 2010b. "EPA's Brownfields and Land Revitalization Programs: Changing American Land and Lives." http://www.epa.gov/brownfields/about.htm (accessed June 19, 2010).

Werdstedt, Kris, Lauren Heberle, Anna Alberini, and Peter Meyer. 2004. *The Brownfields Phenomenon: Much Ado about Something or the Timing of the Shrewd?* Discussion Paper 04–46. Washington, DC: Resources for the Future.

Additional Reading

Bartsch, Charles, and Rachel Deane. 2002. *Brownfields State of the States: An End-of-Session Review of Initiatives and Program Impacts in the 50 States.* Washington, DC: Northeast-Midwest Institute.

Eisen, Joel B. 2009. "Brownfields Development: From Individual Sites to Smart Growth." In *Agenda for a Sustainable America*, edited by John C. Dernbach. Washington, DC: Environmental Law Institute: 57–70.

Environment California Research & Policy Center. 2003. "Cleanup Slowdown: How Under-Funding the Superfund Program Harms Communities Across America." http://www.environmentcalifornia.org/uploads/1V/_q/1V_qSkxdK30pKFda13xm8w/Cleanup_Slowdown.pdf (accessed June 19, 2010).

National Environmental Policy Institute. 1995. "Beyond Brownfields: Idle Land, Suburban Sprawl, and the Law." In *Proceedings of the National Environmental Policy Institute's October 16, 1995 Forum*: 6–13.

Wagner, Wendy E. 2002. "Overview of Federal and State Law Governing Brownfields Cleanups." In *Brownfields: A Comparative Guide to Redeveloping Contaminated Property*, edited by Todd S. Davis. Chicago: American Bar Association: 15–29.