

OUTSOURCING THE FILTH: PRIVATIZING BROWNFIELD REMEDIATION IN NEW JERSEY

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Abstract: Environmental cleanup for contaminated properties is a complicated process, with liability existing at both state and federal levels. For many years, the federal government has largely deferred responsibility for the cleanup of contaminated properties to the states. New Jersey has recently privatized several aspects of its environmental cleanup process. Prior to privatizing the state cleanup process, New Jersey had refined the typical state model of a Voluntary Cleanup Program by creating the Brownfield Developmental Area initiative. The Brownfield Developmental Area initiative was extremely effective, yet it was expensive to administer. As a result, New Jersey implemented the Site Remediation Reform Act, which totally eliminated the state's Voluntary Cleanup Program, and privatized the cleanup process. This note argues against some of the policies associated with the privatization of environmental cleanup, and suggests several courses of action that can be implemented to maximize privatized site cleanup.

INTRODUCTION

In May 2009, the New Jersey legislature passed the Site Remediation Reform Act (SRRA), a piece of legislation that has drastically changed the way environmentally contaminated properties are cleaned up inside the state.¹ This legislation departs from previous state-run programs, as New Jersey joins a growing number of states who have privatized different aspects of environmental cleanup.² These changes came as a direct result of state budget cuts that left the New Jersey Department of Environmental Protection (NJ DEP) unable to continue administering its costly state-run Voluntary Cleanup Program (VCP).³

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¹ Site Remediation Reform Act (SRRA), N.J. STAT. ANN. § 58:10C-1 to -29 (West 2010).

² See *id.* § 58:10B-1.3 (West 2010) (“A person who initiates a remediation of a contaminated site . . . shall . . . hire a licensed site remediation professional to perform the remediation . . .”).

³ Interview with Kenneth Clue, N.J. Dep’t of Env’tl. Prot. (Jan. 15, 2010).

Site cleanup is a complicated process with layers of liability existing at both state and federal levels.⁴ Over the course of the last forty years, the interplay between federal and state liability has become quite settled, and the federal government has deferred site cleanup to state programs.⁵ In New Jersey these state programs have been quite progressive. The Spill Compensation and Control Act (Spill Act) of 1976 was the first comprehensive cleanup program in the nation.⁶ Similarly, New Jersey was one of the first states to enact a VCP that built on the Spill Act by maintaining its effective attributes, while solving liability problems that had arisen under the older model.⁷ Finally, New Jersey created the Brownfield Development Area (BDA) initiative, a program that takes a holistic approach to remediating contaminated sites.⁸ The wants and needs of entire communities are addressed more completely by this initiative, and it is seen as the most comprehensive program for addressing the problems associated with contaminated “brownfield” sites.⁹

However, most of these changes and advancements have been removed by SRRA, and the liability scheme in New Jersey is now what it was in 1976 under the Spill Act.¹⁰ The purpose of this Note is to explore the history of remediation in New Jersey, identify what recent changes mean for that history, and propose how to maximize the potential of New Jersey remediation under these changes. Part I explores the first instances of regulation for contaminated sites at both the state and federal level.¹¹ Part II identifies the issue of brownfields that came about

⁴ Amy Pilat McMorrow, Note, *CERCLA Liability Redefined: An Analysis of the Small Business Liability Relief and Brownfields Revitalization Act and Its Impact on State Voluntary Cleanup Programs*, 20 GA. ST. U. L. REV. 1087, 1087, 1096 (2004).

⁵ See Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9628 (2006).

⁶ See Spill Compensation and Control Act (Spill Act), N.J. STAT. ANN. § 58:10-23.11 to .11z (West 2010); Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 596 (2001) (“State involvement in cleanups predates the enactment of CERCLA. New Jersey led the way with the enactment of the Spill Compensation and Control Act in 1976, four years before the passage of CERCLA.”).

⁷ See Lynn Singband, *Brownfield Redevelopment Legislation: Too Little, but Never Too Late*, 14 FORDHAM ENVTL. L.J. 313, 320 (2003).

⁸ See *Brief Synopsis of NJDEP’s Brownfield Development Area Initiative*, N.J. DEP’T OF ENVTL. PROT. (Feb. 14, 2005), http://www.state.nj.us/dep//srp/brownfields/bda/bda_synopsis.pdf.

⁹ See *id.* The EPA definition of a brownfield is “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.” CERCLA, 42 U.S.C. § 9601(39) (A). Similarly, the New Jersey definition is, a “former or current commercial or industrial site that is currently vacant or underutilized and on which there has been, or there is suspected to have been, a discharge of a contaminant.” SRRA, N.J. STAT. ANN. § 58:10B-1 (West 2010).

¹⁰ See *id.* § 58:10B-1.3.

¹¹ See *infra* Part I.

because of the enactment of the regulations examined in Part I.¹² Part III explains the response efforts taken by state and federal legislatures to combat the problems identified in Part II.¹³ Part IV analyzes a new program that provides a comprehensive regulatory solution that surpasses previous remediation efforts in dealing with all aspects of a cleanup.¹⁴ Part V discusses the cancellation of a prominent remediation program and examines what changes the cancellation brings to New Jersey.¹⁵ Finally, Part VI analyzes the changes to remediation in New Jersey, discusses how those changes will affect the state, and explains how the changes can be implemented to maximize the goals of site cleanup.¹⁶

I. REGULATING BROWNFIELDS AT FEDERAL AND STATE LEVELS

A. *Liability Under the Federal Scheme*

Starting with the publication of *Silent Spring* in 1962, and moving into the 1970s and 1980s, public perception of environmental issues forced Congress to create legislation to protect the environment.¹⁷ One early piece of important environmental legislation was the Resource Conservation and Recovery Act (RCRA) of 1976.¹⁸ Although RCRA is an important piece of environmental legislation, it is only designed to monitor hazardous waste production, and does not extend to sites already contaminated with other materials.¹⁹ In response to what some commentators have referred to as a “gaping loophole” in RCRA’s scope, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980.²⁰ The hallmark of CERCLA is its overarching liability scheme—its ability to create broad liability for cleanup.²¹

¹² See *infra* Part II.

¹³ See *infra* Part III.

¹⁴ See *infra* Part IV.

¹⁵ See *infra* Part V.

¹⁶ See *infra* Part VI.

¹⁷ See Gabriel A. Espinosa, *Building on Brownfields: A Catalyst for Neighborhood Revitalization*, 11 VILL. ENVTL. L.J. 1, 6–7 (2000). See generally, RACHEL CARSON, *SILENT SPRING* (First Mariner Books 2002) (1962) (widely known text discussing environmental effects of pesticide use).

¹⁸ Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992 (2006).

¹⁹ Espinosa, *supra* note 17, at 6.

²⁰ CERCLA, 42 U.S.C. §§ 9601–9675 (2006); see Espinosa, *supra* note 17, at 6.

²¹ Singband, *supra* note 7, at 315–16 (“CERCLA classifies virtually anyone who touches contaminated property or its contaminant, as strictly, jointly, and severally liable for cleanup of the property.”).

CERCLA, also known as the “Superfund,” takes sites that have been identified as contaminated and applies strict guidelines on what type of cleanup each brownfield site requires.²² The “fund” part of Superfund refers to the EPA’s ability to pay for any emergency remediation or cleanup for a site that poses imminent danger to people or the environment.²³ However, the EPA is more apt to force potentially responsible parties (PRPs) to pay for remediation than it is to empty its own coffers.²⁴ The concept of PRPs is the central tenet of CERCLA’s ability to impose broad liability.²⁵ Many different individuals can be considered PRPs,²⁶ and they are jointly and severally liable for the costs of removal and remediation.²⁷

On its face, CERCLA appears to be concerned mostly with remediation of polluted property; however, by structuring the system of liability the way it did, the Act also made future releases less likely.²⁸ Knowing that business interests would factor into remediation costs, the drafters of CERCLA intended lenders and insurers to make conservative financial decisions when dealing with borrowers partaking in projects with a potential for environmental pollution.²⁹ Holding former, current, and future owners of a property potentially responsible, CERCLA created a system where an incredibly broad group of individuals could be held liable for cleanups with the potential for a large remediation cost.³⁰

²² See Shari Shapiro, *The Effectiveness of Pennsylvania’s Act 2: Are Good Mechanics Enough?*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 441, 444 (2005) (“The remedial actions must conform to the National Contingency Plan (NCP), which details the procedures for clean up of contaminated sites, including how much money should be spent to clean up the site and the extent of removal, remediation, and other actions.”).

²³ See CERCLA 42 U.S.C. § 9611(i).

²⁴ See McMorrow, *supra* note 4, at 1093–94 (explaining that CERCLA grants the EPA the power to obtain the cost of remediation from PRPs, or to force the PRPs to conduct their own remediation).

²⁵ See CERCLA 42 U.S.C. § 9607(a).

²⁶ See *id.* (stating that PRPs of contaminated property include: (1) the owner and operator of such a facility, (2) any person who owned or operated the facility at the time hazardous materials were disposed of, (3) any person who arranged for the disposal or treatment or who arranged for transport thereof, and (4) any person who accepted hazardous substances for transport or disposal).

²⁷ Jessica Higgins, Note, *Evaluating the Chicago Brownfields Initiative: The Effects of City-Initiated Brownfield Redevelopment on Surrounding Communities*, 3 NW. J. L. & SOC. POL’Y 240, 243 (2008).

²⁸ Espinosa, *supra* note 17, at 7–8.

²⁹ See *id.*

³⁰ See CERCLA 42 U.S.C. § 9607(a); Higgins, *supra* note 27, at 240.

B. *Liability Under New Jersey State Acts: Spill Act & Environmental Cleanup Responsibility Act*

Around the time the federal government began to pass environmental protection legislation, states began a similar effort.³¹ New Jersey passed two major statutes that in the late 1970s and early 1980s, the Spill Act of 1976 and the Environmental Cleanup Responsibility Act (ECRA) of 1983.³² The Spill Act actually predated the passage of CERCLA, and ECRA predates analogous disclosure amendments incorporated into CERCLA.³³ Both the Spill Act and ECRA are enforced by the NJ DEP, the state version of the EPA.³⁴

1. The Spill Act

Despite predating CERCLA, both the Spill Act and ECRA bear striking resemblances to it, with the Spill Act actually serving as a model for CERCLA.³⁵ Between the Spill Act and ECRA, the Spill Act bears the most resemblance to CERCLA, as the Spill Act sets the liability and remediation provisions that extend to polluted sites, including sites with petroleum spills.³⁶ Like CERCLA, the Spill Act has a “superfund” out of which the state can pay for cleanup in emergency situations, and for cleanup of abandoned sites where no responsible parties can be identified.³⁷ Essentially, the Spill Act’s superfund program mirrors CERCLA’s independent legal authority to pursue remediation and restoration claims.³⁸ In addition to paying for emergency situations, if responsible parties have been identified, and they fail to participate in the cleanup, the Spill Act permits the NJ DEP to recover three times the money it spent cleaning the contaminated site.³⁹ Finally, responsible parties who

³¹ See McMorrow, *supra* note 4, at 1087 (indicating that the federal scheme has state analogues).

³² Industrial Site Recovery Act (ISRA), N.J. STAT. ANN. § 13:1K-6 to K-11.11 (West 2010) (amending and renaming the Environmental Cleanup Responsibility Act (ECRA), 1983 N.J. Laws 330 (codified at N.J. STAT. ANN. § 13:1K-6 to -14)).

³³ See Revesz, *supra* note 6, at 605 (“New Jersey has been the pioneer in [passing disclosure rules]. In 1983, three years before Congress passed the limited disclosure obligations discussed above, New Jersey adopted [ECRA].”).

³⁴ See Kathleen Chandler Schmid, Student Article, *The Depletion of the Superfund and Natural Resource Damages*, 16 N.Y.U. ENVTL. L.J. 483, 526 (2008).

³⁵ See John M. McGahren & Jeffrey P. LeJava, *Brownfield Redevelopment in the Garden State*, 15 NAT. RESOURCES & ENV’T 224, 225 (2001).

³⁶ Spill Act, N.J. STAT. ANN. § 58:10-23.11 (West 2010); see Schmid, *supra* note 34, at 526.

³⁷ See Schmid, *supra* note 34, at 526.

³⁸ See *id.*

³⁹ See Spill Act, § 58:10-23.11f.

fail to comply with NJ DEP remediation mandates may be stripped of any license or permit for operating hazardous or solid waste facilities.⁴⁰

Although the Spill Act mirrors the remediation structure imposed against responsible parties under CERCLA, it is unlike CERCLA in that it has no defined set of responsible parties.⁴¹ Through judicial interpretation, the New Jersey courts have produced a list of potentially responsible parties similar to CERCLA's.⁴² The Spill Act was amended in 1993 to clarify some of the existing judicial interpretations of who responsible parties were.⁴³ This, however, did little to reduce the traditional liability against all former, current, and future owners.⁴⁴ Essentially, the amendments only served to clarify what levels of management could be held as a responsible party,⁴⁵ as well as limiting the liability of those who receive land as part of a trust or estate.⁴⁶ Having a liability scheme similar to CERCLA means the Spill Act has virtually identical problems dealing with developer fear of remediation costs.⁴⁷

2. ECRA

ECRA, which has since been amended to be called the Industrial Site Recovery Act (ISRA), also had an impact on the creation of brown-fields in New Jersey. The original focus of ECRA, and the contemporary idea driving ISRA, is narrower in scope than the Spill Act.⁴⁸ ECRA, and now ISRA, specifically deals with the sale, closure, and transfer of indus-

⁴⁰ *Id.*; see also Kathleen Marchetti & James F. Fitzsimmons, *Trustee, Executor and Fiduciary Liability for Environmental Contamination in New Jersey*, 21 SETON HALL LEGIS. J. 347, 349 n.11 (1997).

⁴¹ Marchetti & Fitzsimmons, *supra* note 40, at 349.

⁴² See *id.* (New Jersey has a "crafted definition of 'responsible' person that includes owners and operators of businesses and real property, those who owned the hazardous substances, and more importantly, persons who have no moral culpability for the conditions, other than ownership or control of the facility.").

⁴³ See Spill Act § 58:10-23.11g4.

⁴⁴ See *id.* (making no changes to traditional owner/operator liability).

⁴⁵ See *id.*; see also Marchetti & Fitzsimmons, *supra* note 40, at 350 ("'Active participation' and 'participation in . . . management' are specifically defined to mean 'actual participation in management or operational affairs by the holder of the security interest.' Liability, for those who have the 'mere capacity or ability to influence' or control operations, but do not exercise that ability, is specifically excluded.").

⁴⁶ See Marchetti & Fitzsimmons, *supra* note 40, at 351-52.

⁴⁷ See *infra* Part III.

⁴⁸ Compare ISRA, N.J. STAT. ANN. § 13:1K-6 (West 2010), with Spill Act § 58:10-23.11 (ISRA is limited to the closure of contaminated industrial sites, and the Spill Act is a broader environmental regulation).

trial sites.⁴⁹ ECRA, and now ISRA, requires that industrial sites obtain approval before they were sold, closed, or transferred to different ownership.⁵⁰ To obtain the NJ DEP's approval, the owner of the site is required to take one of two actions.⁵¹ An owner's first option is to submit a declaration that there was either no discharge of a hazardous substance at that site, or that any discharge had been cleaned according to state standards.⁵² An owner's second option is to submit a cleanup plan to the DEP, listing the hazardous materials present and stating the owner's strategy for remediation, and to post a bond to guarantee the cleanup.⁵³ If a site owner fails to submit a declaration or cleanup plan, he is either fined or has his property transfer voided.⁵⁴

Because of complaints about ECRA's clarity and application process,⁵⁵ in 1993, the New Jersey Legislature amended the Act, renaming it ISRA.⁵⁶ ISRA has not veered from the original purpose of ECRA, to enforce environmental cleanup during the sale, closure, or transfer of real property.⁵⁷ Rather, the change to ISRA is an attempt to remedy the problems associated with the clarity of ECRA's language.⁵⁸ Some glaring examples of ECRA's failure to define essential language are evidenced by the imprecise definition of "industrial establishment" and "closing, terminating or transferring operations."⁵⁹ In fact, the failure to give language specific meaning and parameters "resulted in the over inclusion of certain non-hazardous waste or substance related operations."⁶⁰ The failure to use clear language also added uncertainty to ECRA.⁶¹ The amendments that changed ECRA into ISRA also gave IS-

⁴⁹ See *Cooper Dev. Co. v. First Nat'l Bank of Boston*, 762 F. Supp. 1145, 1149 (D.N.J. 1991).

⁵⁰ See ISRA § 13:1K-9.

⁵¹ See *id.*

⁵² See *id.*

⁵³ See *id.*; see also Diana R. D'Alonzo, M. Kay Hennessy & Alys B. Wakin, Comment, *ECRA to ISRA: Is It More than Just a Name Change?*, 7 VILL. ENVTL. L.J. 51, 53-55 (1996).

⁵⁴ ISRA § 13:1K-13.

⁵⁵ D'Alonzo et al., *supra* note 53, at 55 ("The problems with ECRA included imprecise statutory definitions, lack of definitions for key terms, excessive costs, and procedural delays.").

⁵⁶ ISRA § 13:1K-6.

⁵⁷ See D'Alonzo et al., *supra* note 53, at 58.

⁵⁸ See *id.*

⁵⁹ See *id.* at 55-56.

⁶⁰ *Id.*

⁶¹ See *id.* at 56 ("ECRA . . . left many of its key terms undefined, creating significant uncertainty as to ECRA's bite. The fact that 'owner' and 'operator' were not defined created ambiguity as to the chain of responsibility under ECRA . . .").

RA more power; important among these powers was the authority to initiate the state's original Voluntary Cleanup Program (VCP).⁶²

II. PROBLEMS IDENTIFIED WITH CERCLA, SPILL ACT, AND ECRA/ISRA

While CERCLA and the Spill Act have clearly been successful in identifying sites in need of remediation and forcing cleanup, there have been some negative byproducts of this type of environmental legislation.⁶³ Most problems growing out of CERCLA and the Spill Act deal with their broad liability schemes and the ability to hold parties responsible, regardless of their role in actual contamination.⁶⁴ Many would-be sellers and developers were scared of CERCLA's wide net of liability, and did not want to be responsible for a high-cost remediation.⁶⁵ The more likely a developer is to be held liable, the less likely he would participate in a site remediation project.⁶⁶ This fear of liability has caused the creation of many brownfields⁶⁷—vacant, contaminated sites—with some estimates reaching 450,000–500,000 sites nationwide⁶⁸ and upwards of 10,000 sites in New Jersey alone.⁶⁹

A. Social Problems Associated with Brownfields

One of the most glaring problems with brownfields is that their existence stymies and depresses entire communities.⁷⁰ First, and most importantly, these sites are considered brownfields because hazardous contaminants are either known or suspected to be present.⁷¹ These chemicals and pollutants, without remediation, are capable of discharging and releasing into surrounding areas, placing communities of in-

⁶² See Singband, *supra* note 7, at 319.

⁶³ See McMorrow, *supra* note 4, at 1087.

⁶⁴ See Shapiro, *supra* note 22, at 445; Higgins, *supra* note 27, at 243.

⁶⁵ See Higgins, *supra* note 27, at 243. "CERCLA's broad definition of PRPs and strict cleanup standards . . . deterred the development of any land that even seemed as though it might harbor some form of contamination." *Id.*

⁶⁶ See *id.*

⁶⁷ See McMorrow, *supra* note 4, at 1100.

⁶⁸ Anne Marie Pippin, Note, *Community Involvement in Brownfield Redevelopment Makes Cents: A Study of Brownfield Redevelopment Initiatives in the United States and Central And Eastern Europe*, 37 GA. J. INT'L & COMP. L. 589, 591 (2009).

⁶⁹ N.J. DEP'T. OF ENVTL. PROT., SRWM BROWNFIELDS FAQ, (Jan. 26, 2006), http://www.nj.gov/dep/srp/brownfields/faq/brownfields_faq.pdf.

⁷⁰ Sarah W. Rubenstein, Comment, *CERCLA's Contribution to the Federal Brownfields Problem: A Proposal for Federal Reform*, 4 U. CHI. L. SCH. ROUNDTABLE 149, 150 (1997).

⁷¹ CERCLA, 42 U.S.C. § 9601(39)(A) (2006) (EPA definition of a brownfield).

nocent individuals at risk.⁷² Additionally, brownfields are an eyesore and are typically concentrated in poor, urban neighborhoods.⁷³ These urban areas are typically populated by low-income minority groups.⁷⁴ The cyclical nature of poverty is exacerbated by the closure of industrial sites left vacant for fear of CERCLA, Spill Act, and ECRA liability.⁷⁵ When a factory or plant closes, the local work force no longer has employment, and this results in both depressed job markets and depressed tax bases.⁷⁶ The tax base becomes depressed because of the immediate loss of a large site paying city or municipal property taxes.⁷⁷

However, simply because there is difficulty in developing urban brownfields does not mean that new development does not persist; instead, new developments are pushed away from urban centers, into the previously unused greenfields of suburban and exurban areas.⁷⁸ By building on previously unused areas, the environmental problem is made exponentially worse; not only is a polluted site languishing, but greenfields and the benefits associated with such a space are removed.⁷⁹ The process of building on previously open space is linked to the economic detriment of those communities surrounding brownfields.⁸⁰ Employment sprawls with the development of new industrial and office parks, forcing the urban employees originally affected by the closure of plants within their communities to either leave those communities or make an onerous commute.⁸¹

B. Financial Problems

With the enactment of broad liability, it became less expensive for many property owners to let a site languish in disuse than it was to re-

⁷² McMorrow, *supra* note 4, at 1088.

⁷³ Singband, *supra* note 7, at 317.

⁷⁴ *Id.*

⁷⁵ See Rubenstein, *supra* note 70, at 150.

⁷⁶ *Id.*

⁷⁷ See *id.*

⁷⁸ See Singband, *supra* note 7, at 339 (discussing the impacts of “urban sprawl,” one such impact being the destruction of previously untouched land that is known as a “greenfield”).

⁷⁹ See McMorrow, *supra* note 4, at 1095–96 (defining greenfields as “previously undeveloped areas on the outskirts of urban locales”).

⁸⁰ See Rubenstein, *supra* note 70, at 150.

⁸¹ See *id.* (“As the job base shifts to locations farther away from cities and residential areas, the work force becomes more dependent on automobiles for transportation, because mass transit cannot economically reach outlying areas.”).

mediate it, or be exposed to liability during a sale.⁸² In New Jersey, the liability associated with a sale is even higher due to the rigorous standards under the current ISRA and former ECRA.⁸³ The problem of brownfields extends past the owner/seller paradigm, and reaches to buyers, developers, and financiers.⁸⁴ Developers who would potentially purchase a brownfield in an effort to revitalize a community eyesore would be jointly and severally liable for all remediation costs of that site, even if the developer had no involvement with the original dispersal of hazardous materials.⁸⁵ The potential for spending an incredible sum of money on remediation for land that the developer did not pollute was enough to cause interested developers to walk away.⁸⁶

Under CERCLA, lenders are less likely to lend money to developers for two distinct reasons: the inability for a lender to foreclose on a polluted property used as collateral in a secured transaction, and the general disinterest in lending to developers that have the potential to be driven into bankruptcy during a forced remediation.⁸⁷

Brownfields illustrate that there are both financial and social pitfalls to the liability scheme that CERCLA and analogous New Jersey acts set in place during the late 1970s and early 1980s.⁸⁸ The brownfield phenomenon became clearly linked with urban decay,⁸⁹ and when this was clear to federal and state legislatures, they began to take steps to fix the problem.⁹⁰

⁸² See Espinosa, *supra* note 17, at 8–9 (“Property owners attempting to sell unwanted facilities may be faced with large testing costs and potential cleanup bills that may render a ‘hold’ decision to be the most economically sound.”); Pippin, *supra* note 68, at 596.

⁸³ See ISRA, N.J. STAT. ANN. § 13:1K-6 (West 2010).

⁸⁴ See Espinosa, *supra* note 17, at 7–8; Scott Sherman, *Government Tax and Financial Incentives in Brownfields Redevelopment: Inside the Developer’s Pro Forma*, 11 N.Y.U. ENVTL. L.J. 317, 321 (2003).

⁸⁵ See CERCLA, 42 U.S.C. § 9607 (a) (1) (2006) (extending liability to any “owner” of a facility).

⁸⁶ See Espinosa, *supra* note 17, at 8–9 (“Among the litany of potential reasons for lack of use, however, PRP liability reigns supreme among contenders.”).

⁸⁷ See Sherman, *supra* note 84, at 321–22 (“Brownfield projects—like all other real estate ventures—cannot proceed if . . . the developer cannot obtain financing.”); Pippin, *supra* note 68, at 591.

⁸⁸ See Espinosa, *supra* note 17, at 8 (describing the unintentional “chilling effect” of CERCLA and state acts); Singband, *supra* note 7, at 339.

⁸⁹ Pippin, *supra* note 68, at 596 (listing the characteristics of urban decay as “depopulation, high unemployment, increased crime rates, poverty, and the decline of urban-poor and minority neighborhoods”).

⁹⁰ See *id.*; see also Higgins, *supra* note 27, at 245.

III. FEDERAL AND STATE RESPONSES TO BROWNFIELD PROBLEMS

A. CERCLA Amendments and the Brownfields Act

The federal response to the brownfields crisis was a gradual process starting in the late 1980s, building towards a major CERCLA amendment—the Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Act) of 2002.⁹¹ Previous to enacting the Brownfields Act, Congress had made some strides towards minimizing specific forms of purchaser liability and encouraging development of brownfields.⁹² The three most important adjustments to CERCLA before the Brownfields Act are: (1) the addition of a “third party defense”; (2) the “innocent landowner defense”; and (3) amendments to the EPA’s settlement authority.⁹³

The “third party defense” allows indemnity for landowners who can demonstrate several factors that prove the contamination in question was the fault of a third party.⁹⁴ In 1986, Congress built on the “third party” defense by creating the “innocent land owner defense.”⁹⁵ This defense is applicable to defendants who can demonstrate that the property’s contamination occurred before the defendants purchased the land, and that prior to the purchase the defendants had no reason to believe that any contamination existed.⁹⁶ Finally, in 1989, Congress broadened the scope of the EPA’s authority to enter into settlements.⁹⁷ The 1989 changes deal primarily with entering into settlements with “de minimus landowners and generators,”⁹⁸ but the ability to enter into set-

⁹¹ Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (codified as amended at 42 U.S.C. § 9628 (2006)).

⁹² See McMorrow, *supra* note 4, at 1096–99.

⁹³ See *id.* at 1097–98.

⁹⁴ CERCLA, 42 U.S.C. § 9607(b)(3) (2006) (defendant landowner must “establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by . . . an act or omission of a third party other than an employee or agent of the defendant”); see McMorrow, *supra* note 4, at 1097 (requiring that “(1) the contamination arose solely from acts or omissions of a third party with whom [defendant landowner] is not in a contractual relationship, (2) the owner exercised due care regarding the hazardous substances involved, and (3) the owner ‘took precautions against foreseeable acts or omissions of [a] third party’ . . .”) (citing CERCLA, 42 U.S.C. § 9607(b)(3)).

⁹⁵ See CERCLA, 42 U.S.C. § 9601(35); McMorrow, *supra* note 4, at 1097.

⁹⁶ See CERCLA, 42 U.S.C. § 9601(35); McMorrow, *supra* note 4, at 1097 (emphasizing the Act’s requirements of due care and the need to conduct “all appropriate inquiries”).

⁹⁷ See CERCLA, 42 U.S.C. § 9622(g); McMorrow, *supra* note 4, at 1098.

⁹⁸ See McMorrow, *supra* note 4, at 1098 (describing how the EPA can enter into a settlement where a PRP pays only a specific amount for remediation in return for indemnity).

tlements is the logical precursor to the EPA entering into a Memoranda of Agreement (MOA) with individual states under the Brownfields Act.⁹⁹

These changes eliminated purchaser liability, but only in narrow instances.¹⁰⁰ The changes during the 1980s laid the ground work for Congress's most substantial attempt at solving the brownfield problem—the Brownfields Act.¹⁰¹ The Brownfields Act made minor changes to existing CERCLA liability and revolutionized the manner in which cleanups were to be overseen.¹⁰² Some of the more superficial changes to CERCLA were changes to the “innocent land owner” exception, as well as the additions of “contiguous property owner” and “bona fide prospective purchaser” exemptions.¹⁰³ However, the most groundbreaking change that occurred as a result of the Brownfields Act was Congress's decision to defer almost all remediation efforts to state voluntary programs.¹⁰⁴

Until the passage of the Brownfields Act, developers completing remediation programs under state VCPs had a formal set of liabilities with the state; however, the possibility for federal action under CERCLA persisted.¹⁰⁵ The Brownfields Act is structured so that a site which has been, or is in the process of being remediated under a state program will not be subject to administrative or cost recovery actions by the EPA.¹⁰⁶ In fact, this Act applies to all state programs, despite the great disparity in remediation requirements between the programs; there is no specific set of standards required by the EPA, nor is there an approval process.¹⁰⁷ One of the driving factors behind the Brownfields Act was “slow-moving federal initiatives and a general lack of direction.”¹⁰⁸ The EPA did not want to continue this trend, so instead of creating a

⁹⁹ See *Voluntary Cleanup Program*, N.J. DEP'T OF ENVTL. PROT., <http://www.state.nj.us/dep/srp/volclean/> (last visited Feb. 15, 2011).

¹⁰⁰ See McMorrow, *supra* note 4, at 1096–99.

¹⁰¹ See *id.* at 1101.

¹⁰² See *id.* at 1101–02.

¹⁰³ See *id.* at 1102–09.

¹⁰⁴ See Higgins, *supra* note 27, at 244–45. While state VCPs will take over many sites—the most badly contaminated sites—those on the National Priorities List (NPL) will remain the concern of the EPA. McMorrow, *supra* note 4, at 1100.

¹⁰⁵ See McMorrow, *supra* note 4, at 1113. A VCP is a program that “allows any party to voluntarily remediate non-priority contaminated sites that pose no immediate threat to human health or the environment.” Singband, *supra* note 7, at 319 (internal quotations omitted).

¹⁰⁶ CERCLA, 42 U.S.C. § 9628 (2006); see Robert D. Fox & Paul McIntyre, *A Summary and Analysis of the Federal Small Business Liability Relief and Brownfields Revitalization Act*, 21 TEMP. ENVTL. L. & TECH. J. 19, 26 (2002).

¹⁰⁷ See Fox & McIntyre, *supra* note 106, at 26–27.

¹⁰⁸ McMorrow, *supra* note 4, at 113.

complicated state application process, it chose to defer to states with the exception of a narrow set of “reopeners” designed to deal with problem sites.¹⁰⁹ As a result, the EPA will not interfere with an “eligible site” remediated through a state plan except if a “reopener” is triggered.¹¹⁰

Additionally, the EPA will enter into MOAs with each state, documenting its commitment not to pursue enforcement actions at those sites cleaned up under state VCPs.¹¹¹ Since the passage of this Act, there has been an increase in the number of developers and landowners who voluntarily come forward for remediation under their state programs.¹¹² Redevelopment initiatives now have clarity, and can proceed in a state-centric manner. By following a state VCP, developers will no longer be concerned with being hit by an EPA suit above and beyond what was agreed to in a developer-state agreement.¹¹³ Once a developer completes the VCP, it is absolved of virtually all liability.¹¹⁴

B. *New Jersey’s Initial Response: The New Jersey VCP*

New Jersey enacted its VCP in 1992, making it an early model for other states’ cleanup programs.¹¹⁵ Enacted pursuant to ISRA, the VCP is operated by the NJ DEP.¹¹⁶ Like the federal Brownfields Act, the New Jersey VCP is not applicable to all sites;¹¹⁷ rather, it is aimed at sites that have not been identified as “priority” sites, and therefore do not have the potential for immediate health or environmental effects.¹¹⁸ After the Brownfields Act delegated almost all authority of brownfield remediation to state VCPs, it became the job of each VCP to structure the

¹⁰⁹ See Fox & McIntyre, *supra* note 106, at 27.

¹¹⁰ CERCLA 42 U.S.C. § 9601(41) (defining an “eligible response site”); 42 U.S.C. § 9628(b)(1)(B) (listing reopening factors); see Fox & McIntyre, *supra* note 106, at 27 (summarizing types of sites that do not qualify as an “eligible response site” and listing the “reopener” factors).

¹¹¹ See McMorrow, *supra* note 4, at 1115.

¹¹² *Id.* at 1115 (attributing this to “The EPA’s commitment to memoranda of agreement, the Brownfields Act, and the realistic unlikelihood that the EPA will expend its limited resources pursuing a site that a party has already remediated under a state program . . .”).

¹¹³ See *id.* (discussing how the EPA and state VCPs are now “partners”).

¹¹⁴ See *id.*

¹¹⁵ Joel B. Eisen, *Brownfields at 20: A Critical Reevaluation*, 34 FORD. URB. L.J. 721, 737 (2007); *Voluntary Cleanup Program*, N.J. DEP’T OF ENVTL. PROT., *supra* note 99.

¹¹⁶ See N.J. ADMIN. CODE § 7:26B-1.1 (2010); *Voluntary Cleanup Program*, N.J. DEP’T OF ENVTL. PROT., *supra* note 99.

¹¹⁷ *Voluntary Cleanup Program*, N.J. DEP’T OF ENVTL. PROT., *supra* note 99.

¹¹⁸ See Singband, *supra* note 7, at 319.

programs in such a way that they would spur brownfield redevelopment—the original purpose of the state and federal amendments.¹¹⁹

In order to attract developers, the New Jersey VCP created a flexible program—one that allowed developers to clean up a site at whatever pace they chose.¹²⁰ The developer-scheduled pacing is established in a MOA entered into between the developer and New Jersey.¹²¹ Filing for an MOA is the first step in the New Jersey VCP process and that MOA not only governs the remediation schedule, but additionally stipulates the scope of cleanup for the site in question.¹²² Depending on the intended use, the level of remediation required can be negotiated in the MOA; however, the NJ DEP does have a list of “technical requirements” for site remediation.¹²³ Under an MOA, a developer who once feared that investigating a potential site for development would subject him to liability can conduct a partial investigation or remediation without penalty.¹²⁴

After entering into the MOA with NJ DEP, the next step for a developer is to actually remediate the site within the MOA’s stipulated guidelines.¹²⁵ After a site is remediated within those guidelines, the NJ DEP will issue a No Further Action Letter (NFAL).¹²⁶ The NFAL is the embodiment of the NJ DEP’s determination that the completed remediation is acceptable, and that it foresees no need for future remediation.¹²⁷ Specifically, the state statute indicates that such a letter is evidence that there are no discharged contaminants at the site, or that the contaminants once present have been acceptably removed.¹²⁸ In most circumstances, a covenant not to sue accompanies the NFAL.¹²⁹ The

¹¹⁹ See *id.* at 320 (“The [NJ] VCP went a long way toward providing developers with an incentive to touch brownfields.”).

¹²⁰ See Eisen, *supra* note 115, at 737 (describing flexibility as “a critical element” of the NJ VCP).

¹²¹ Singband, *supra* note 7, at 319.

¹²² N.J. ADMIN. CODE § 7:26C-2.1 (2002); see Singband, *supra* note 7, at 319.

¹²³ N.J. ADMIN. CODE § 7:26E.

¹²⁴ Eisen, *supra* note 115, at 737.

¹²⁵ See Singband, *supra* note 7, at 319.

¹²⁶ *Voluntary Cleanup Program*, N.J. DEP’T OF ENVTL. PROT., *supra* note 99.

¹²⁷ See Singband, *supra* note 7, at 319.

¹²⁸ N.J. ADMIN. CODE § 7:26C-2.6(a).

¹²⁹ See Singband, *supra* note 7, at 319–20. Some parties liable under different acts will receive an NFAL, but no covenant not to sue. *Id.* Specifically, “[a] party liable under the Spill Act is not eligible for a covenant not to sue. . . . However, persons who acquire property after a discharge occurs may obtain protection against state-imposed civil liability after a cleanup is completed and against private third-party liability upon commencement of site remediation.” See Norman W. Spindel, *N.J. Environmental Liability—From Innocence to Enlightenment*, ENVTL. COMPLIANCE & LITIG. STRATEGY, Apr. 1998, at 7, 7.

covenant not to sue formally acknowledges the conditions of the NFAL in a legal document.¹³⁰ Also included in the covenant is a release for any outside contractors brought to help in remediating the site; this release enables developers to seek professionals who might pass on a project but for such an indemnity.¹³¹

Through delegation of federal power to the New Jersey VCP, developers and prospective purchasers are left on surer footing.¹³² The use of MOAs through the VCP clearly outlines all liability, and if the developer follows those outlines while cleaning up the site, he can expect the state to issue a NFAL, as well as a covenant not to sue.¹³³ Having those documents to fall back on eliminates much of the apprehension associated with remediation; obviously, the developers will have to remediate the site, yet their possibility of unforeseen lawsuits becomes remote.¹³⁴

IV. MORE ANCILLARY PROBLEMS AND NEW JERSEY'S SECOND REMEDIATION PROGRAM

The version of the New Jersey VCP promulgated in the 1990s was only the first round of attempts to address brownfield remediation.¹³⁵ It is often referred to as a "first generation" program.¹³⁶ An unintended result of remediation under the first generation program was remediation on a site-by-site basis, where only the most desirable plots were used.¹³⁷ Following logic, the most "commercially viable brownfield properties in New Jersey have been cleaned up [first]."¹³⁸ However, in an urban area with dozens of brownfields, the remediation of one site hardly addresses the core problems of urban blight.¹³⁹ Site-by-site remediation is typically driven by purely financial motives; the best sites are selected, and the project is leveraged for as much money as possible.¹⁴⁰ Site-by-site remediation did little to alleviate the aesthetic, social, and

¹³⁰ See Singband, *supra* note 7, 319–20.

¹³¹ See *id.* at 320.

¹³² See *id.*

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ D. Evan van Hook, Judith Auer Shaw & Kenneth J. Kloo, *The Challenge of Brownfield Clusters: Implementing a Multi-Site Approach for Brownfield Remediation and Reuse*, 12 N.Y.U. ENVTL. L.J. 111, 113 (2003).

¹³⁶ *Id.*

¹³⁷ See *id.*

¹³⁸ *Id.*

¹³⁹ See *id.*

¹⁴⁰ See *id.* at 149 ("The property-by-property approach creates a strong imperative for individual property owners to maximize the commercial value of their individual properties.").

degenerative problems associated with the concentration of multiple brownfields within a single community.¹⁴¹

A. *The New Jersey Brownfield Development Area*

Several state legislatures, New Jersey in particular, saw a way of structuring the brownfield program to steer developers away from a site-by-site approach.¹⁴² It is in this vein that the “second generation” of brownfield remediation came to exist.¹⁴³ The second generation program in New Jersey is marked by the addition of a community steering committee and a desire to bring developers, NJ DEP agency employees, and the citizens of affected communities together.¹⁴⁴ During the creation of the second generation program, in addition to the New Jersey VCP, the state added a Brownfield Development Area (BDA) program.¹⁴⁵ The BDA’s goal is to help “communities containing multiple brownfield sites in close proximity to each other to design and implement remediation and reuse plans for each property simultaneously.”¹⁴⁶ Improvements of community remediation include increased efficiency in investigation and remediation, heightened community participation in planning, and greater coordination between developers and communities.¹⁴⁷

The BDA has been referred to as being both “structured and flexible.”¹⁴⁸ Flexibility is needed when dealing with multiple owners and different site contaminants, while structure is needed to succeed in ensuring compliance and remediation.¹⁴⁹ New Jersey only considers a handful of BDA projects per year, making the application process quite competitive.¹⁵⁰ In order to even submit an application, a community “steering committee” needs to be formed.¹⁵¹ Once an acceptable steering committee exists, it must produce an application that not only in-

¹⁴¹ See van Hook et al., *supra* note 135, at 117.

¹⁴² See Pippin, *supra* note 68, at 605.

¹⁴³ See van Hook et al., *supra* note 135.

¹⁴⁴ See Pippin, *supra* note 68, at 606.

¹⁴⁵ See *id.* at 605.

¹⁴⁶ *Id.*

¹⁴⁷ van Hook et al., *supra* note 135, at 114.

¹⁴⁸ *Id.* at 118.

¹⁴⁹ See *id.* at 118–19.

¹⁵⁰ *Brief Synopsis of NJDEP’s Brownfield Development Area Initiative*, N.J. DEP’T OF ENVTL. PROT., *supra* note 8.

¹⁵¹ See van Hook et al., *supra* note 135, at 119 (indicating that steering committees are examined during the application process, and that typical members of the committee are “neighborhood residents, property owners, potential developers, community organizations, environmental groups, and others”).

cludes the names and locations of the brownfields potentially being addressed,¹⁵² but why these sites should be remitted, and what the committee wants them turned into.¹⁵³ Finally, the application must take into consideration the uses and effects of non-brownfield sites, as well as existing public transportation and other infrastructure.¹⁵⁴

A determination as to which communities will be granted a BDA program is made through a review of both the applications and the steering boards by NJ DEP in conjunction with other state agencies, including the New Jersey Economic Development Authority (NJ EDA) and the New Jersey Department of Community Affairs (NJ DCA).¹⁵⁵ The selection process is quite careful due to the limited number of projects available per year.¹⁵⁶ Upon the selection of a community for a BDA initiative, the community will receive special government assistance.¹⁵⁷ The government will lend financial assistance to the community as well as hire additional personnel to facilitate the BDA. Most notably, each project is assigned a case manager who will streamline the process of remediation planning, a significant advance from first generation programs.¹⁵⁸ Not only does assigning a single case manager streamline the process, it allows for consistency in all phases of the remediation effort.¹⁵⁹ In addition to the case manager, NJ DCA and NJ EDA employees are brought in, and they form what is known as the “BDA team.”¹⁶⁰

After the BDA team is in place, it, along with the steering committee and the affected municipal government, will begin discussing the actual process of remediation.¹⁶¹ There are four planning steps re-

¹⁵² *See id.*

¹⁵³ *See id.* at 120 (“The application need not include detailed plans for the brownfield properties, but it must articulate a meaningful and realistic vision for where the community, as represented by the steering committee, would like to be at the end of the process.”).

¹⁵⁴ *See Pippin, supra* note 68, at 605–06.

¹⁵⁵ *See van Hook et al., supra* note 135, at 120 (noting that the interagency determination helps balance financial, environmental, and social implications that must be addressed to further smart growth).

¹⁵⁶ *See Pippin, supra* note 68, at 606.

¹⁵⁷ *See van Hook et al., supra* note 135, at 120–21 (explaining that the selected communities receive a case manager and geologist to “oversee remediation necessary within the BDA”).

¹⁵⁸ *See id.* at 121 (BDA consolidates “multiple case teams” to a single manager who is able to work through problems encountered when dealing with “different categories of contaminated sites . . . subject to different statutory and regulatory structures, which are often administered by correspondingly separate administrative units”).

¹⁵⁹ *See id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

quired before actually engaging in remediation.¹⁶² The first step is an initial meeting and environmental assessment.¹⁶³ The most important function of the first planning step is the NJ DEP's guarantee that each brownfield within the BDA will receive a preliminary environmental assessment.¹⁶⁴ Until the implementation of the BDA, the state had not taken responsibility for environmental assessments, deferring the assessments to developers.¹⁶⁵ Under the BDA, the state has several ways to allocate funds for the preliminary environmental assessment.¹⁶⁶ Having diversified funding sources greatly alleviates the responsibility of the developer, increasing the likelihood that the developer will engage in such projects to begin with.¹⁶⁷ Even in the absence of outside funding, the state commits itself to making sure assessments are completed.¹⁶⁸

After the initial meeting and environmental assessments are completed, the second step, a preliminary planning meeting, can begin.¹⁶⁹ During the preliminary planning meeting, a feasibility study is completed for the steering committee's informal plan.¹⁷⁰ The study analyzes the goals of the informal plan while considering information gathered about "traffic patterns, location of park lands or other open space, [and] the use of marketing studies." This study is in addition to the environmental assessment.¹⁷¹

Third, a resource evaluation must be completed.¹⁷² Again, during the resource meeting, the benefits of coordinating different state agencies become apparent; resources such as grants, loans, and tax credits are administrated differently and by different agencies. Bringing resources together in one meeting helps identify those resources that exist and where they should be allocated based on the needs of different sites.¹⁷³ The process of separate agencies allocating their own resources,

¹⁶² See *id.* at 121–27.

¹⁶³ See van Hook et al., *supra* note 135, at 121.

¹⁶⁴ See *id.* at 123.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.* (funding options include payment by previously liable owners, state assessment grants, uncharged assessment by state employees, and finally, a burden-sharing payment resulting from developers compromising with the state).

¹⁶⁷ See *id.*

¹⁶⁸ *Id.* ("Irrespective of which combination of strategies is selected, the state's commitment is that the assessments will be completed. This ensures that the baseline information for all future planning will be available.").

¹⁶⁹ van Hook et al., *supra* note 135, at 124.

¹⁷⁰ See *id.* at 124.

¹⁷¹ *Id.*

¹⁷² See *id.*

¹⁷³ See *id.* at 124–25.

as well as securing participation from previously liable parties, has increased developer interest in remediation programs.¹⁷⁴

With interest from the affected communities, state agencies, and private developers, the final planning step—the creation of an executable remediation and reuse plan—begins.¹⁷⁵ This is the step where all raw data and different plans of remediation are examined by the BDA case manager, and where the manager “provides guidance on the environmental aspects of the remediation and whether the plans are realistic.”¹⁷⁶ The site uses are selected and a remediation schedule is constructed.¹⁷⁷ This remediation schedule is used by developers, contractors, and environmental engineers while they complete each project.¹⁷⁸ Throughout the course of remediation, the steering committee will meet with the case manager to ensure that all efforts are on schedule.¹⁷⁹ Beyond these meetings, little more is necessary to effectuate the remediation. Annual reviews monitor progress, as well as the overall timetable for remediation.¹⁸⁰

B. Results of the BDA Initiative

One assessment of New Jersey’s BDA program indicates that the program “results in a multi-site remediation and reuse plan that incorporates environmental and marketing data, planning considerations, and community preferences, including the preferences of both local residents and local elected officials.”¹⁸¹ This analysis is trifurcated into separate analyses of “technical responses,” “stakeholder involvement,” and “reuse benefits.”¹⁸² Each of these analyses demonstrates the ways in which New Jersey’s BDA program is superior to first generation programs.¹⁸³

¹⁷⁴ *Id.* at 124 (“Experience to date shows that, while the developer interest in redeveloping isolated brownfields may be low, this interest increases when the state collectively commit resources to ensuring comprehensive remediation and reuse of a BDA.”).

¹⁷⁵ See van Hook et al., *supra* note 135, at 124.

¹⁷⁶ *Id.* at 125–26.

¹⁷⁷ See *id.* (stating that the benefits of a remediation schedule are the maximization of both efficiency and resource allocation).

¹⁷⁸ See *id.*

¹⁷⁹ *Id.* at 127.

¹⁸⁰ *Id.* (demonstrating that annual reviews “encourage[] all parties to pay close attention to the process and the timetables”).

¹⁸¹ van Hook et al., *supra* note 135, at 140.

¹⁸² *Id.* at 128, 138, 142.

¹⁸³ See *id.* at 128–52.

While the BDA program's changes were primarily driven by the first generation's failure to improve communities during remediation, the changes to the second generation program have been able to remedy additional sites, helping the entire community.¹⁸⁴ By assigning each BDA initiative a case manager who participates in the entire planning process, the BDA program eliminates duplicative work, maximizes financial efficiency, and ensures all regulations are followed.¹⁸⁵ Essentially, each important step is streamlined and made more consistent by the presence of the case manager.¹⁸⁶ In addition to a streamlined process, the BDA program's structure enables the remediation of more sites.¹⁸⁷ Because all the potential brownfields in a community are cleaned during the BDA, some sites that otherwise would have fallen below the state's radar are caught in the BDA's net.¹⁸⁸ The second generation therefore remediates more sites, and it does so in a more efficient manner.

The second analysis, "stakeholder involvement," emphasizes the goals of community involvement that the BDA directly sought to implement.¹⁸⁹ The BDA program provides a careful balance that increases the power of communities and local government, yet vests traditional decision-making powers with the developers controlling each site.¹⁹⁰ This is important because it allows developers to find out which types of development local citizens appreciate.¹⁹¹ Compromises can be struck between developers and community leaders, where a for-profit site

¹⁸⁴ See *id.* at 129.

¹⁸⁵ *Id.* at 132–33 ("A single BDA case manager ensures . . . the consistent interpretation and application of regulatory requirements and remediation standards throughout the BDA. A single case manager can also coordinate the timing of specific steps of the individual remediation projects to maximize the benefit of the economies of scale . . .").

¹⁸⁶ See *id.* at 126.

¹⁸⁷ See Pippin, *supra* note 68, at 605.

¹⁸⁸ See van Hook et al., *supra* note 135, at 129–30 (citing the fact that only four of twenty-eight properties under a BDA project had previously been identified as environmental risks, as support for the proposition that without the BDA, many sites would continue to be unnoticed).

¹⁸⁹ See *id.* at 139.

¹⁹⁰ See *id.* at 140 (explaining that "the BDA Initiative does give the reuse preferences of the steering committee substantial persuasive force," even though community stakeholders "generally will not have the ability to dictate specific uses on properties they do not control").

¹⁹¹ See *id.* at 141 ("The support of the steering committee for the uses proposed in the remediation and reuse plan is also an indication that reuse in accordance with the plan would benefit from public support and would not face costly and time consuming public opposition.").

proposal would coincide with the addition of a green space or community-desired site.¹⁹²

Reuse benefits, the third and final point of analysis, represent the most basic elements of remediation. An examination of reuse benefits essentially encapsulates the success of a brownfield remediation.¹⁹³ The more sites that are cleaned the less brownfields exist, which in turn leads to more functioning developments, more jobs, greater residential housing, less urban sprawl, and more greenfields.¹⁹⁴ Positive reuse is the ultimate goal because it brings more benefits with each site that is completed.¹⁹⁵

The BDA initiative improves the likelihood of positive reuse in many ways.¹⁹⁶ Many of the benefits occur as a result of the certainty associated with the BDA process.¹⁹⁷ This certainty not only leads to effective remediation of already designated sites, but often coaxes developers to include additional properties to their plans.¹⁹⁸ Finally, the BDA provides a venue for multiple affected property owners to come together to create a remediation plan that will maximize potential that was unavailable under site-by-site remediation.¹⁹⁹ A site that was considered useless under the site-by-site approach can be given new life, as the BDA provides examples of “[s]mall properties within one BDA [being] combined to create a commercially viable parcel.”²⁰⁰ Combining properties not only creates one “viable” property, but also serves to limit exposure and limit costs associated with large scale remediation.²⁰¹

¹⁹² *See id.*

¹⁹³ *See id.* (explaining that remediation is primarily concerned with reusing land, and the more reuse benefits conferred upon contaminated sites, the better the BDA works).

¹⁹⁴ *See* Pippin, *supra* note 68, at 601–03 (highlighting the problems of loss of jobs, lack of affordable housing, problems of urban sprawl, and describing how the New Jersey BDA addresses those problems).

¹⁹⁵ *See* van Hook et al., *supra* note 135, at 142.

¹⁹⁶ *See id.* at 143–52 (improving reuse through coordinated timing, reduction of developer uncertainty, and improving ownership coordination).

¹⁹⁷ *See id.* at 145–46.

¹⁹⁸ *See id.* at 143 (“Once a comprehensive reuse plan begins to take shape, [developers] have, on more than one instance, identified how additional BDA properties can augment their original development plans and have taken responsibility for those properties as well.”).

¹⁹⁹ *See id.* at 148.

²⁰⁰ *Id.*

²⁰¹ *See* van Hook et al., *supra* note 135, at 148–49.

V. CANCELLATION OF THE NEW JERSEY VCP

A. *Actual Cancellation*

The BDA is admittedly a narrower program than the VCP.²⁰² Since 2002, sites not selected for the BDA initiative have been remediated in accordance with the New Jersey VCP, New Jersey's first generation program.²⁰³ Recently, however, New Jersey abandoned its VCP.²⁰⁴ On May 7, 2009 the New Jersey DEP enacted the Site Remediation Reform Act (SRRA), a major element of which is the elimination of the New Jersey VCP.²⁰⁵ Developers conducting remediation are not to wait for a MOA; rather, they are to "proceed through the [remediation] process without waiting for Department approvals."²⁰⁶ The VCP is a first generation remediation program, and the NJ DEP is only able to eliminate it by reverting back to the liabilities associated with the Spill Act.²⁰⁷ Indeed, the SRRA "contains a provision . . . which establishes an affirmative obligation on persons to remediate any discharge for which they would be liable pursuant to the Spill Compensation and Control Act."²⁰⁸ With this legislation, New Jersey moved from a state with a progressive second generation remediation program and an established safety-net first generation program, to a state with a second generation program whose unselected sites are subjected to the general liability New Jersey abandoned over twenty-five years ago.²⁰⁹

The return to the Spill Act, however, is just one of two major changes associated with the SRRA.²¹⁰ The SRRA also established a scheme where Licensed Site Remediation Professionals (LSRPs) are licensed by the state and conduct virtually all remediation in New Jersey.²¹¹ This licensing scheme requires that all parties who commence remediation after November 3, 2009 hire LSRPs to conduct site reme-

²⁰² See Pippin, *supra* note 68, at 606 (BDA only designates several projects each year).

²⁰³ See *id.* at 605 (BDA established in 2002); *Voluntary Cleanup Program*, N.J. DEP'T OF ENVTL. PROT., *supra* note 99 (VCP not discontinued until May 7, 2009).

²⁰⁴ *Voluntary Cleanup Program*, N.J. DEP'T OF ENVTL. PROT., *supra* note 99.

²⁰⁵ *Id.* (claiming that new implementations eliminate the need for a VCP).

²⁰⁶ *Id.* ("The Department has discontinued the Memorandum of Agreement (MOA) process.").

²⁰⁷ See *id.*

²⁰⁸ *Id.*

²⁰⁹ See *id.*

²¹⁰ SRRA, N.J. STAT. ANN. § 58:10B-1.3.a-b (West 2010).

²¹¹ *Id.* § 58:10B-1.3.b.(1) ("A person who initiates a remediation of a contaminated site . . . shall . . . hire a licensed site remediation professional to perform the remediation.").

diation.²¹² The LSRP program effectively removes the NJ DEP from any involvement in site cleanup beyond the initial licensing of LSRPs.²¹³ The move towards outsourcing remediation efforts to private professionals was mainly a result of insufficient funding and an inability of the NJ DEP to continue administering the VCP.²¹⁴ After the permitting process is complete, the remediation process, which was once very government intensive, is almost completely privatized.²¹⁵ Once an LSRP is hired by a developer, the LSRP will not only oversee the remediation, it will proffer to the NJ DEP that all work has been done and all aspects of the remediation are consistent with state statutory requirements.²¹⁶

Although the implementation of the LSRP program through the SRRA virtually eliminates the NJ DEP from the remediation process, they do retain some semblance of oversight.²¹⁷ The NJ DEP will review all documents submitted by LSRPs for each site.²¹⁸ However, for many sites, this is where oversight will cease.²¹⁹ Only when special factors are present will the NJ DEP be forced to complete additional review of submitted documents, and even then there is nothing that mandates that the NJ DEP “review the performance of a remediation.”²²⁰ Some of the main factors include: (1) if “the contamination at the site poses a significant detrimental impact on the public health, safety, or the environment as determined by a[n] . . . evaluation”; (2) if “the contamina-

²¹² *Id.*; see *Voluntary Cleanup Program*, N.J. DEP’T OF ENVTL. PROT., *supra* note 99.

²¹³ See SRRA § 58:10B-1.3.b.(3) (“A person who initiates a remediation of a contaminated site . . . shall . . . conduct the remediation without the prior approval of the department.”).

²¹⁴ Interview with Kenneth Clue, *supra* note 3 (making clear that the cancellation of the NJ VCP was propelled by budget constraints).

²¹⁵ See SRRA § 58:10C-7, -14. The permitting process is not done by the NJ DEP. *Id.* § 58:10C-7. A separate buffer entity, the LSRP board, does all the permitting. See *id.* During the screening process, “[t]he board shall conduct examinations to certify that an applicant possesses sufficient knowledge of the State laws, rules and regulations, standards and requirements applicable to site remediation and that the applicant is qualified to obtain a license or a license renewal.” *Id.*

²¹⁶ See *id.* § 58:10C-14 (“The licensed site remediation professional shall certify that the work was performed, the licensed site remediation professional managed, supervised, or performed the work that is the basis of the submission, and that the work and the submitted documents are consistent with all applicable remediation requirements adopted by the department.”).

²¹⁷ See *id.* § 58:10C-21 to -26.

²¹⁸ *Id.* § 58:10C-21.

²¹⁹ See *id.*

²²⁰ *Id.* (showing that depending on the type of the trigger, the department “shall perform additional review of any document, or shall review the performance of a remediation” or “may perform additional review of any document, or may review the performance of remediation”) (emphasis added).

tion at the site may affect a licensed child care center, school or other sensitive population”; or (3) if “State grants or loans are being used to remediate the site.”²²¹ If the submitted documents do not raise one of these issues, it is unlikely that the NJ DEP will pursue a remediated site any further.²²²

To keep LSRP documentation honest, the NJ DEP has set up an auditing process where the board in charge of issuing permits will annually audit at least ten percent of LSRPs.²²³ Depending on the outcome of a LSRP’s audit, the NJ DEP may recommend an investigation of an LSRP.²²⁴ The investigation is a safeguard that allows the board to “consider the suspension or revocation” of an LSRP’s license.²²⁵ Finally, the SRRA lays out protective guidelines for LSRPs who report damaging information about a site.²²⁶ Realizing that LSRPs are both employed by developers and owe fiduciary duties to properly remediate according to state regulations, the SRRA prevents “retaliatory action against licensed remediation professional[s].”²²⁷

B. Another Example of Cleanup Privatization: The Massachusetts Model

Massachusetts was the first state to create a scheme where the state environmental agency essentially privatized cleanup by outsourcing to licensed consultants.²²⁸ In fact, the Massachusetts model is one of the main examples that New Jersey relied upon when designing its own program.²²⁹ The Massachusetts model shares many similarities with the New Jersey LSRP program. At the most basic level, both programs outsource their brownfield remediation to private parties, with Massachusetts law “requir[ing] regulated entities to hire private consultants—licensed site professionals (LSPs)—and [to] receive their approval before mandatory remediation can be considered complete.”²³⁰ Like New

²²¹ *Id.*

²²² *See id.*

²²³ *Id.* § 58:10C-24.

²²⁴ *Id.* § 58:10C-23.

²²⁵ *Id.*

²²⁶ *Id.* § 58:10C-26.

²²⁷ *Id.*

²²⁸ *See* Miriam Seifter, *Rent-a-Regulator: Design and Innovation in Environmental Decision Making*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 93, 94 (Jody Freeman & Martha Minow eds., 2009).

²²⁹ Interview with Kenneth Clue, *supra* note 3.

²³⁰ Seifter, *supra* note 228, at 94.

Jersey, the Massachusetts LSP program oversees the entire hazardous waste cleanup with virtually no DEP oversight.²³¹

The LSP program also has an auditing feature that is actually broader than the New Jersey LSRP.²³² As in New Jersey, the Massachusetts board has the ability to discipline any LSPs following a negative audit.²³³ However, it is difficult for an LSP to receive a negative audit, because the “approval process allows LSPs substantial discretion” as to the level at which remediation should occur.²³⁴ This is a result of the LSP board’s focus on procedure over outcome.²³⁵ The Massachusetts LSP program lists all of the different services an LSP can potentially provide to a client.²³⁶ With many ways to participate in the remediation process and significant discretion to choose a method, it is not uncommon for a private LSP’s remediation effort to fail to comply with existing regulations, let alone meet agency expectations.²³⁷

Failure to comply with regulations is typically documented by the audits conducted by the Massachusetts DEP.²³⁸ These audits show that “LSPs routinely fail to comply with the regulations governing hazardous waste site cleanups, sometimes creating serious risks to human health and the environment.”²³⁹ In fact, a study of the program from its implementation in 1994 through 2005, shows that every year no more than twenty-nine percent of “completed sites” are given passing evaluations.²⁴⁰ A possible reason for the low pass rate is that by privatizing remediation, Massachusetts—and anyone following this model—has cre-

²³¹ See *id.* at 97.

²³² See *id.* (explaining that Massachusetts statute requires audits for twenty percent of completed cleanups).

²³³ *Id.* (“The state licensing board possesses the authority to discipline LSPs for unprofessional conduct.”).

²³⁴ *Id.*

²³⁵ See *id.* at 97–98.

²³⁶ Seifter, *supra* note 228, at 98–99.

Although LSPs only act in their official capacity when they approve and seal a document, their range of services may be far broader; LSPs often perform the very work they are approving. They frequently design site investigations, crunch the numbers of a risk assessment, and draft work plans. They or their firms may also carry out the physical remediation, and some LSPs also provide legal or regulatory advice, acting as a point person for the entire project.

Id.

²³⁷ See *id.* at 99.

²³⁸ See *id.*

²³⁹ *Id.*

²⁴⁰ *Id.* tbl.4.1 (showing the number of passing evaluations hit an all time low of thirteen percent in 2003).

ated inherent conflicts of interest. This happens in two ways: (1) since the LSP responsible for cleanup is often the LSP tasked with approving site completion, it behooves the LSP to expend minimal effort before approving completion; and (2) the LSP is a private entity hired by a developer to remediate a property, yet the LSP simultaneously is charged with complying with state regulations.²⁴¹ The more an LSP complies with state regulations, the more costly it is for a developer to retain the LSP, thereby diminishing the incentive to hire a good LSP.²⁴²

In addition to issues involving conflicts of interest, the Massachusetts LSP program has also been cited for management and discipline problems.²⁴³ Some of the management pitfalls are related to its failure to provide ongoing monitoring.²⁴⁴ This problem stems from the fact that only twenty percent of sites are required to be audited.²⁴⁵ And of the twenty percent, most of the audits are only a review of paperwork submitted by the LSP.²⁴⁶ In reality, slightly less than two percent of all sites actually get a “full fledged ‘comprehensive evaluation’ involving actions like sample collection and site visits to ensure compliance.”²⁴⁷ Because the Massachusetts DEP and the LSP board are separate entities, each holding limited power, even when failure is detected, “the disciplinary architecture fails to deter regulatory [problems].”²⁴⁸ Despite its problems, there are many benefits claimed to be associated with the Massachusetts LSP program.²⁴⁹ The program is “widely praised for enabling the cleanup of thousands more sites per year” than the previous government-administered program.²⁵⁰

VI. IS NEW JERSEY MOVING FORWARD BY MOVING BACKWARDS?

New Jersey is often cited as one of the most progressive states for environment and brownfield cleanup policy.²⁵¹ However, its decision to eliminate its VCP and to privatize remediation is a curious change. The state’s reversion to the Spill Act necessitates an analysis about what this

²⁴¹ See *id.* at 103.

²⁴² See Seifter, *supra* note 228, at 103.

²⁴³ See *id.* at 104–07.

²⁴⁴ *Id.* at 105.

²⁴⁵ *Id.*

²⁴⁶ See *id.*

²⁴⁷ *Id.*

²⁴⁸ Seifter, *supra* note 228, at 106.

²⁴⁹ See *id.* at 95 (claiming the program is more expedient, flexible, and productive than traditional government regulation).

²⁵⁰ *Id.*

²⁵¹ See Revesz, *supra* note 6, at 605.

means for New Jersey's interaction with the federal government under the Brownfields Act, as well as what the LSRP program means for those remediating in New Jersey.

A. Federal-State Interplay

Until the passage of the federal Brownfields Act, anyone remediating a site was potentially liable on both the state and federal levels.²⁵² With the passage of the Brownfields Act, the federal government declared that it would not interfere with an eligible site if remediated through a state plan.²⁵³ In virtually all states, remediation is under the state VCP.²⁵⁴ However, since the passage of the SRRA, New Jersey no longer has a VCP.²⁵⁵ The New Jersey VCP has been replaced by the sweeping liability of the Spill Act.²⁵⁶

The federal government's promises not to begin administrative or cost recovery actions against sites being remediated under a state plan, and New Jersey's loss of a central plan, is a precarious combination. However, New Jersey can still obtain a bar against federal action because the SRRA makes parties comply with the requirements of the Spill Act.²⁵⁷ In reality, the Brownfields Act merely requires that a state have a plan, and that the plan is not limited to VCPs:

Section 128 bars federal enforcement under CERCLA against any person who has complied with a VCP that qualifies under the 2002 Amendments. The Environmental Protection Agency (EPA) has entered into memoranda of agreement (MOA) with most states confirming the circumstances under which compliance with the state program constitutes compliance with a VCP for purposes of the enforcement bar of section 128. . . . However, nothing in CERCLA requires a memorandum of agreement in order to invoke the enforcement bar of section 128.²⁵⁸

²⁵² See McMorrow, *supra* note 4, at 1087.

²⁵³ CERCLA, 42 U.S.C. § 9628(b)(1)(A) (2006).

²⁵⁴ See Fox & McIntyre, *supra* note 106, at 19–20.

²⁵⁵ See SRRA, N.J. STAT. ANN. § 58:10B-1.3 (West 2010).

²⁵⁶ See *id.*

²⁵⁷ See *id.*

²⁵⁸ David G. Mandelbaum, *Did Cooper Industries v. Aviall Services Suggest a New Contribution Claim Under CERCLA §113(f)(3) for Voluntary Responders?*, ABA SPECIAL COMM. ON SMART GROWTH & URBAN POL'Y NEWSL., June 2005, at 3, available at <http://www.abanet.org/enviro/committees/smartgrowth/newsletter/jun05/smartgrowth0605.pdf>.

This is important because the Spill Act is a state program, and the Brownfields Act will apply in the same way it would to a VCP.²⁵⁹ As long as one of the limited federal reopeners is not triggered, the federal government is unlikely to become involved.²⁶⁰ In fact, the Spill Act has stricter liability and standards than the VCP program, making it less likely to produce a reopener and trigger federal action.²⁶¹

B. *The SRRA's State Implications*

As federal liability is even less likely to occur despite the changes the SRRA has made, the new Act's most important impact will be at the state level. The effect occurs in two areas: the substance of the Act, and its procedure.

1. Moving Backwards: The Substance of SRRA

Under the SRRA, parties have "an affirmative obligation . . . to remediate any discharge for which they would be liable pursuant to the Spill Act."²⁶² This one change annihilated most of the development that had occurred over the last thirty years. From 1976, when the Spill Act was enacted, until May 2009, when the SRRA repealed the state's VCP, the progression of New Jersey's remediation programs was linear, progressive, and logical.²⁶³ While no environmental liability plan was perfect, each used the lessons learned from previous models to positively increase the efficiency, desirability, and end result of brownfield remediation.²⁶⁴ Each generation of programs was able to plug holes left by its predecessor.²⁶⁵ The changes made by the New Jersey Legislature have effectively reversed those advancements.²⁶⁶ While the Spill Act was

²⁵⁹ See *id.*

²⁶⁰ See Fox & McIntyre, *supra* note 106, at 27.

²⁶¹ See Eisen, *supra* note 115, at 737. The VCP clarified remediation standards in an effort to lower developer anxiety about costs and liability. *Id.* (describing the NJ VCP as being flexible in order to induce developers to remediate under the program).

²⁶² See *Voluntary Cleanup Program*, N.J. DEP'T OF ENVTL. PROT., *supra* note 99.

²⁶³ See SRRA, N.J. STAT. ANN. § 58:10C-1 (West 2010); Spill Act, N.J. STAT. ANN. § 58:10-23.11 (West 2010).

²⁶⁴ See CERCLA, 42 U.S.C. § 9628 (2006); N.J. DEP'T OF ENVTL. PROT., *supra* note 8; *Voluntary Cleanup Program*, N.J. DEP'T OF ENVTL. PROT., *supra* note 99.

²⁶⁵ See *supra* Parts III.A–B, IV.B. (explaining federal and state responses to broad liability schemes, and New Jersey's attempt to implement a second generation program to make up for some aspects overlooked by its predecessors).

²⁶⁶ See *id.*

an important step when it was enacted,²⁶⁷ future legislation was a response to its shortcomings.²⁶⁸

The removal of the VCP would not be as harsh if the SRRA enacted legislation that prevented the freefall from the VCP all the way back to the Spill Act. With no intermediate plan, all the problems associated with the Spill Act resurface. Again, individuals will be held responsible for remediation costs no matter what their actual involvement with the property has been.²⁶⁹ The same fears of liability would exist for developers, returning to the concern that they would be caught in the wide net of liability, and subject to a high-cost removal.²⁷⁰ The social and financial costs associated with broad liability schemes are documented and well known.²⁷¹ If financiers and developers are deterred, brownfields will continue to languish, leaving eyesores that place communities of innocent individuals at risk, depress job markets and tax bases, and cause the acceleration of urban sprawl.²⁷²

Developers were known to let contaminated sites languish, rather than put them into use because they were afraid to be held jointly and severally liable for site remediation—joint and several liability being the main feature of the Spill Act.²⁷³ A reversion to this method is of questionable value, considering the changes made to move away from it. It may not matter if the new program is capable of enabling the cleanup of many more sites, if developers are too afraid to actually come forward about owning contaminated sites.²⁷⁴ The New Jersey VCP may have been slower and more cumbersome, but this is a natural byproduct for a program that nurtured the flexibility needed to attract contaminated site owners to remediate sites.²⁷⁵

The broad liability of the Spill Act will continue to exist under the SRRA, yet the LSRP program has the potential to control how sites are remediated once a site comes forward.²⁷⁶ With this power, the LSRP can mitigate many of the distressing factors outlined in this Note by

²⁶⁷ See McGahren & LeJava, *supra* note 35, at 225; Schmid, *supra* note 34, at 526.

²⁶⁸ See *supra* Part II (identifying problems with Spill Act broad liability); Part III.B. (changes implemented under VCP to deal with some of these issues).

²⁶⁹ See Shapiro, *supra* note 22, at 445; Higgins, *supra* note 27, at 243.

²⁷⁰ See Higgins, *supra* note 27, at 243.

²⁷¹ *Supra* Part II.A–B.

²⁷² See McMorrow, *supra* note 4, at 1088; Rubenstein, *supra* note 70, at 150.

²⁷³ See Shapiro, *supra* note 22, at 445.

²⁷⁴ See Seifter, *supra* note 228, at 97.

²⁷⁵ See Eisen, *supra* note 115, at 737 (describing flexibility as “a critical element” of the NJ VCP).

²⁷⁶ See van Hook et al., *supra* note 135, at 120–21.

having the licensed professionals administer remediation with flexibility akin to the New Jersey VCP.²⁷⁷ The problems with broad liability can be offset if LSRPs take steps to retain the flexibility of the old VCP.²⁷⁸

2. Implementation: Structuring the LSRP Program to Maximize Cleanup Potential

The changes enacted by the SRRA were designed to be permanent. New Jersey is in severe financial trouble, and by outsourcing site remediation to private companies, the state is saving a tremendous amount of money.²⁷⁹ The fact that New Jersey lacks the resources to administer a full-time VCP does not mean that it cannot remain involved in the remediation of its own brownfields. Remediation does not need to be an all or nothing, public versus private affair; if the state intends on keeping the privatized structure of LSRP, then it should structure the program to meet as many of the fundamental goals of brown-field remediation as it can.

As it is currently situated, the New Jersey LSRP program is destined to encounter many of the same pitfalls as the Massachusetts model on which it is based.²⁸⁰ Because the programs are structured almost identically, it is a logical conclusion that New Jersey will suffer from many of the same problems that the Massachusetts program has.²⁸¹ Observers have already identified problems with conflicts of interest for the licensed professionals, as well as issues dealing with the state DEP control over management and discipline.²⁸² By correcting these problems, New Jersey could turn the SRRA, an Act that initially appeared to be a step backwards, into a program that provides standards as high as any past program, while doing so more efficiently.²⁸³ The positive aspects of outsourced remediation, “namely volume and speed of cleanups completed,” will be better utilized in a system where the remediation taking place is actually meeting its stated goals.²⁸⁴

The major problems with an outsourced remediation program can be broken down into two areas: conflicts of interest and manage-

²⁷⁷ *See id.*

²⁷⁸ *See* Seifter, *supra* note 228, at 107.

²⁷⁹ Interview with Kenneth Clue, *supra* note 3.

²⁸⁰ Seifter, *supra* note 228, at 107 (“Despite its success in other areas . . . the LSP program exhibits several structural flaws . . .”).

²⁸¹ *See supra* Part V.B.

²⁸² *See* Seifter, *supra* note 228, at 103–04.

²⁸³ *See id.* at 107.

²⁸⁴ *Id.*

ment.²⁸⁵ Conflicts of interest can occur internally and externally for LSRPs.²⁸⁶ Internal conflicts of interest occur when an LSRP is both responsible for remediating the site in question and for approving the site.²⁸⁷ Academics have already identified this problem in Massachusetts and have come up with easily implemented, cost-effective solutions to deal with this problem.²⁸⁸ Simply put, New Jersey should promulgate a regulation saying “that an LS[R]P cannot render a professional opinion on a site for which she herself drafted the plans.”²⁸⁹ This way, LSRPs are double-checking the work of their peers; no one would be able to cut corners and get away with it simply by approving his or her own misdeed.²⁹⁰ As to external conflicts of interest, the state could act as a middle man between the LSRP and the site owners.²⁹¹ This would remove the double-edged sword of both being employed by a site owner and needing to report on infractions which could be quite costly to the same owner.²⁹² Having the state hire the LSRP, then charging site clients itself would create a needed buffer.²⁹³ New Jersey’s anti-retaliation regulation partially addresses this issue, but not to the extent needed to ensure proper reporting.²⁹⁴

The management problems will require more substantive changes to correct. A more extensive audit process would disabuse LSRPs of the notion that shoddy remediation will go overlooked; it will show them that such work will be identified and punished.²⁹⁵ Massachusetts has problems with the breadth of its audit process despite having a system with twice as many mandatory audits.²⁹⁶ Obviously this suggestion would require the NJ DEP to reinvest some of the money it saved by outsourcing remediation in the first place, but it would go a long way towards providing better results.²⁹⁷ To buttress their audits, it would also behoove the NJ DEP to unify the disciplinary scheme.²⁹⁸ Splitting the

²⁸⁵ See *id.* at 103–07.

²⁸⁶ See *id.* at 103–04.

²⁸⁷ See *id.* at 103.

²⁸⁸ See Seifter, *supra* note 228, at 107–08.

²⁸⁹ See *id.* at 107.

²⁹⁰ See *id.* at 95 (explaining that violations are so common because there is “little fear of getting caught”).

²⁹¹ See *id.* at 107–08.

²⁹² See *id.*

²⁹³ See *id.*

²⁹⁴ See SRRA, N.J. STAT. ANN. § 58:10C-26 (West 2010).

²⁹⁵ See Seifter, *supra* note 228, at 108.

²⁹⁶ See SRRA § 58:10C-24; Seifter, *supra* note 228, at 97.

²⁹⁷ See Seifter, *supra* note 228, at 108.

²⁹⁸ See *id.*

power between the board and the NJ DEP limits its effectiveness.²⁹⁹ Implementing these changes is the most effective route towards providing quality remediation under the SRRA. Although the New Jersey VCP was effective in its time, and the logical progression for site remediation would appear to be BDA initiatives, the reality is that in difficult economic times, there is little chance of their broad implementation.³⁰⁰

CONCLUSION

The New Jersey BDA initiative is the ideal remediation program for every state. Since the implementation of broad liability legislation, site remediation programs have been on a slow track towards the BDA and its complete vision of site remediation.³⁰¹ The problems associated with broad liability were identified and many of those problems were addressed with the NJ VCP.³⁰² That program was refined even more thoroughly with the creation of the BDA, which finally achieve total community remediation.³⁰³ In the linear progression of environmental regulations, the BDA is the farthest that New Jersey has come. Therefore, it makes little sense that New Jersey has moved backwards toward the Spill Act, the BDA's archaic counterpart. However, environmental cleanup does not take place in a vacuum. State budgets are limited, and not every brownfield remediation can be performed with the level of care exemplified by the BDA.³⁰⁴ New Jersey in particular has seen massive budget cuts and faced the difficult decision to abandon most of its control over the remediation process by privatizing it.³⁰⁵

These changes have not been ideal. The sweeping liability reenacted by SRRA is cause for some unease.³⁰⁶ However, the LSRP program implemented by SRRA has the potential to make several changes that will maximize its effectiveness as a remediation program.³⁰⁷ Ultimately, environmental cleanup is not about public versus private remediation. It is concerned with addressing the host of problems outlined in Part III, and encouraging developers to remediate their brownfield sites.³⁰⁸

²⁹⁹ See *id.* at 106.

³⁰⁰ See Interview with Kenneth Clue, *supra* note 3.

³⁰¹ *Supra* Parts I.B, IV.

³⁰² *Supra* Part III.B.

³⁰³ See *supra* Part IV.A.

³⁰⁴ See van Hook et al., *supra* note 135, at 118–19; Interview with Kenneth Clue, *supra* note 3.

³⁰⁵ See Interview with Kenneth Clue, *supra* note 3.

³⁰⁶ See Higgins, *supra* note 27, at 243.

³⁰⁷ See Seifter, *supra* note 228, at 103–08.

³⁰⁸ See *supra* Part III.B.

As a fiscally constrained state, New Jersey is unlikely to move away from the privatized scheme of SRRA,³⁰⁹ but by implementing regulations that limit conflicts of interests, for virtually no cost, the program can become more effective.³¹⁰ With an understanding of the brownfield problem, and a similar understanding of the effectiveness of programs used to remediate them, the NJ DEP can implement regulations to maximize review and avoid conflicts of interest.³¹¹ Privatized cleanups have already been touted as being able to remediate a large number of sites in a more rapid manner than traditional state programs.³¹² By coupling these benefits with greater LSRP accountability, New Jersey will have effectively taken its lessons learned and made the SRRA the best it can possibly be.³¹³

³⁰⁹ See Interview with Kenneth Clue, *supra* note 3.

³¹⁰ *Supra* Part VI.B.2.

³¹¹ *Supra* Part VI.B.2.

³¹² See Seifter, *supra* note 228, at 106.

³¹³ See *supra* Part VI.B.2

