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# **An Examination of Two of New York State's Brownfields Remediation Initiatives: Title V of the 1996 Bond Act and the Voluntary Remediation Program**

GLEN M. VOGEL, P.E.\*

[We stand] today poised on a pinnacle of wealth and power, yet we live in a land of vanishing beauty, of increasing ugliness, of shrinking open space and of an overall environment that is diminished daily by pollution and noise and blight. This, in brief, is the quiet conservation crisis.<sup>1</sup>

## **Introduction**

During the past two decades, there has been an exodus of industrial jobs from our nation's urban areas. This industrial migration has left many cities with abandoned or underutilized manufacturing or commercial facilities. Many of these sites are contaminated with hazardous substances, however, the risks posed by these sites usually are not serious enough to warrant inclusion on the National Priorities List<sup>2</sup> or comparable state lists of

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1. SIMPSON'S CONTEMPORARY QUOTATIONS (1988) (quoting Stewart L. Udall, United States Secretary of the Interior (1988)).

2. 42 U.S.C. § 9605 (1994). This is a list of highly contaminated sites. Being listed as a Superfund site can cause economic ruin to a property owner because it requires anyone who purchases the site to subject themselves to the remediation process under CERCLA. *See e.g.* Michael B. Gerrard and Deborah Goldberg, *Interaction of Toxic Tort and CERCLA Litigation*, N.Y.L.J., July 26, 1996, at 3 (noting that this process includes remedial and feasibility studies, public hearings, formal record of decision, extensive sampling and volumes of paperwork); *see also* Michael B. Gerrard, *The Benefits and Risks of Going it Alone*, NAT. RESOURCES AND THE ENVIRONMENT, Winter 1999, at 462 (stating that sites on the National Priorities List take on average almost twenty years to clean-up).

hazardous waste sites.<sup>3</sup>

Nevertheless, the mere suspicion of contamination has hampered redevelopment of many of these sites,<sup>4</sup> which are known as brownfields. The Environmental Protection Agency has defined brownfields as, "abandoned, idled or underutilized industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination."<sup>5</sup> These properties range from expansive unused rail yards and steel mills that can occupy hundreds of acres, to the relatively small local dry cleaning shops and corner gas stations.<sup>6</sup> Most of these industrial properties have lain fallow because, in the past, owners and developers have been reluctant to go through the cumbersome, costly, and complex clean-up regulations required by the federal Comprehensive Environmental Response, Compensation and Liability Act<sup>7</sup> (hereinafter "CERCLA") and its state counterparts.<sup>8</sup>

As a result of this multitude of federal and state environmental laws, an increasing number of these abandoned brownfields are not being redeveloped.<sup>9</sup> Instead, developers are utilizing pristine property, known as greenfields.<sup>10</sup> Furthermore, since these

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3. See *Proposals to Remove Barriers to Brownfields Redevelopment: Testimony before the Subcommittee on Superfund, Waste Control, and Risk Assessment, Committee on Environmental and Public Works, U.S. Senate, Mar. 4, 1997, GAO/T-RCED-97-87, at 3* (statement by Peter F. Guerrero, Director, Environmental Protection Issues, Resources, Community and Economic Development Division).

4. See *id.*

5. Bernard A. Weintraub, *Towards Voluntary 'Brownfield' Development in New York*, N.Y.L.J., Nov. 22, 1995, at 1; see also, Randi Schillinger and Laurie S. Jacobovitz, *The Brownfield Problem: Federal and State Clean-Up Efforts - Part I*, THE METROPOLITAN CORPORATE COUNSEL, July 1998, at 13.

6. See Andrew C. Revkin, *For Urban Wastelands, Tomatoes and Other Life*, N.Y. TIMES, March 3, 1998, at A1. These sites are also often acquired by municipalities via tax foreclosure. They are not classified as Superfund sites and thus because they typically do not pose an imminent threat to health or the environment they can remain vacant for decades; see e.g. Schillinger and Jacobovitz, *supra* note 5, at 13.

7. 42 U.S.C. §§ 9601-9675 (1994). "Superfund imposes rigorous, inflexible remedial standards and complex and time consuming procedural hurdles to the conduct of remediation without providing certainty about when remediation is completed." Gaines Gwathmey III and William J. O'Brien, *States Stimulate Brownfield Redevelopment*, N.Y.L.J., Nov. 14, 1994, at S1.

8. See Inactive Hazardous Waste Disposal Site Act (IHWDSA), N.Y. ENVTL. CONSERV. LAW §§ 27-1301-1305 (McKinney Supp. 1997). (Includes a section requiring the listing of the most hazardous sites in the state on a registry and granting the state the authority to force those responsible for the listed sites to take remedial action). See *id.* § 27-1305.

9. See *Much of Superfund Brownfields Money Going to Fund State Cleanup Efforts*, HAZARDOUS WASTE NEWS, May 4, 1998.

10. See *id.*

industrial and manufacturing enterprises have fled our cities, the urban centers they once occupied have been left behind to suffer the effects of lost jobs, decreased tax revenue for the local communities, a decayed environment, and diminution in the quality of life.<sup>11</sup>

To address these concerns and encourage redevelopment of these sites, federal, state, and local governments, as well as private organizations, have recently begun implementing initiatives to remove obstacles to brownfield redevelopment.<sup>12</sup> One such initiative is Title V of the New York State Clean Water/Clean Air Bond Act of 1996 (hereinafter "Title V").<sup>13</sup> Under Title V, the State has allocated \$200 million for "environmental restoration projects," which are supposed to lead to the remediation of brownfield sites.<sup>14</sup> Title V makes grants available to municipalities to reimburse up to seventy-five percent of their cost of cleaning up brownfields, and provides full release to the municipalities and all successors-in-interest from liability for any additional clean-up of contamination resulting from releases into the soil or groundwater that occurred prior to the remediation project.<sup>15</sup> The theory behind the enactment of Title V was that in creating state-funded incentives to remediate municipally owned brownfields sites, these properties would become productive again, leading to new jobs and other benefits for the communities where they are located.<sup>16</sup>

Title V is not New York's only attempt at a solution to brownfields. Its companion remedial program is the State Volun-

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11. See Charles E. Sullivan, Jr., *The Department of Environmental Conservation's VRP*, 8 ENVTL. LAW IN N.Y. at 17; see also Eisen, *infra* note 36 at 894-895.

12. See Warren Buchannan and E. Lynn Grayson, *Historical Overview of Brownfields*, in THE BROWNFIELDS BOOK 6 (Jenner & Block and Roy F. Weston eds., 1997) (offering a nationwide overview of the brownfields issue from the perspective of an environmental law firm from Chicago, IL, and an environmental engineering firm from West Chester, PA).

13. See N.Y. ENVTL. CONSERV. LAW §§ 56-0501-56-0511 (McKinney Supp. 1997).

14. David L. Markell, *Legal Development: Some Overall Observations About the 1996 New York State Environmental Bond Act and a Closer Look at Title V and its Approach to the "Brownfields" Dilemma*, 60 ALB. L. REV. 1217, 1224-25 (1997); see also N.Y. ENVTL. CONSERV. LAW § 56-0101(7) (defines an environmental restoration project as "a project to investigate or to remediate hazardous substances located on real property held in title by a municipality." *Id.*)

15. See Jonathan S. Karmel, *The Second Circuit Review: 1996-97 Term: Environmental Law: Title V of New York's Clean Water/Clean Air Bond Act Authorizes Risk Assessment to Clean Up Brownfields*, 63 BROOKLYN L. REV. 469, 470 (1997); see also N.Y. ENVTL. CONSERV. LAW §§ 56-0503, 0509.

16. See Markell, *supra* note 14, at 1227.

tary Clean-up Program (hereinafter "VCP").<sup>17</sup> The VCP differs significantly from Title V in the type of release from liability afforded participants, the availability of funding, which parties may participate in the program, and what standards are to be used to establish the clean-up levels.<sup>18</sup> One other significant difference between the programs is that, unlike Title V, the VCP is an administrative creation not embodied in any statute or legislation. Instead, the VCP is detailed in various forms of literature published and disbursed by officials from the New York State Department of Environmental Conservation.<sup>19</sup>

While both Title V and the VCP have made brownfields redevelopment more attractive, they are not without their issues and questions. There are financial and environmental justice issues, questions regarding each program's actual impact on the real estate and job markets, debates over the standards used during the approach to site remediation, and the question of who is eligible to participate in each program.<sup>20</sup> However, in spite of their imperfections, these programs have begun to address the serious issue of reclaiming contaminated properties, and have had some success to date.<sup>21</sup>

"Brownfields remediation is one of today's hottest environmental topics."<sup>22</sup> New legislation is constantly being proposed and articles and notices for conferences and lectures appear in various legal and environmental periodicals each day.<sup>23</sup> Since much has been said on the topic, this article will focus on only certain areas and issues. Part I of this article will look at the historical origins of brownfields, including CERCLA<sup>24</sup> and its New

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17. See Charles E. Sullivan, Jr., *Voluntary Cleanup: The DEC's Solution*, ALB. L. ENVTL. OUTLOOK 30-31, Summer 1995.

18. See *id.*; compare N.Y. ENVTL. CONSERV. LAW §§ 56-0501-0511.

19. See Michael B. Gerrard, 2 BROWNFIELDS LAW AND PRACTICE: THE CLEANUP AND REDEVELOPMENT OF CONTAMINATED LAND § NY.01[1] (Matthew Bender ed., 1998).

20. See generally, Christopher J. Daggett, *Brownfields: An Entrepreneur's Perspective*, 9 ENVTL. LAW IN N.Y. 3, Mar. 1998, at 33; Matic, Shelley & Cooper, *Chemical Engineering*, Oct. 1997 at 41.

21. See *infra* notes 122-160 and 219-265 (discussing projects successfully completed under Title V and the VCP).

22. Christopher J. Daggett, *Brownfields: An Entrepreneur's Perspective*, 9 ENVTL. LAW IN N.Y. 33 (Mar. 1998); see, e.g., Sullivan, *supra* note 11; Sullivan, *infra* note 26; see also Sullivan, *infra* note 37.

23. Christopher J. Daggett, *Brownfields: An Entrepreneur's Perspective*, 9 ENVTL. LAW IN N.Y. 33 (Mar. 1998).

24. 42 U.S.C. §§ 9601-9675 (1994).

York State counterpart,<sup>25</sup> which some environmentalists claim share a part of the responsibility for creating the disincentives to remediate brownfields. Part II will examine Title V in greater detail and will include an analysis of the Irvington Waterfront Park Project, a remediation project that is utilizing Title V funds. Part III will examine the VCP and how it compares and contrasts with Title V, and will discuss two projects that have achieved a measure of success under the program: Weyman Avenue in New Rochelle and a paper recycling facility in Staten Island. Finally, Part IV will briefly focus on some of the issues and problems that have not been addressed by these brownfield initiatives, including a few of the more visible problems associated with the effect brownfields have had on the issue of environmental justice. Part V will conclude with a discussion on how some of these issues may be resolved to increase the effectiveness of New York State's approach to brownfields remediation.

## I. Brownfields: A Historical Perspective

Roughly two centuries of industrial development in America have left their mark on current land use.<sup>26</sup> A particularly vexing issue facing environmentalists today is how to cope with the increasing number of abandoned, and often contaminated, industrial and commercial sites, known as brownfields.<sup>27</sup> The primary reason that countless acres of industrial property have been left to blight our nation's cities is economics.<sup>28</sup> During the period of the industrial revolution, manufacturing facilities were erected in close proximity to railways, major roadways and waterways.<sup>29</sup> The residential areas that developed around these facilities were filled with workers who most often walked or used public trans-

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25. See Inactive Hazardous Waste Disposal Site Act (IHWDSA), N.Y. ENVTL. CONSERV. LAW §§ 27-1301 to 27-1305 (McKinney Supp. 1997).

26. See Thomas M. Parris, *Browsing for Brownfields; Websites on Brownfields*, 40 ENV'T 5 at 3 (1998) (lists electronic information sources available to those interested in brownfields redevelopment); see also Charles E. Sullivan, Jr., *The Department of Environmental Conservation's Voluntary Clean up Program*, Oct. 16, 1996, at 3.

27. See Thomas M. Parris, *Browsing for Brownfields; Websites on Brownfields*, 40 ENV'T 5, at 3 (1998) (lists electronic information sources available to those interested in brownfields redevelopment).

28. See Warren Buchannan and E. Lynn Grayson, *Historical Overview of Brownfields*, in THE BROWNFIELDS BOOK 1 (Jenner et al. eds., 1997) (details the problems experienced by the states in the "rust-belt" of the northeast and mid-north region).

29. See *id.*

portation to get to work.<sup>30</sup> By the 1950s, the burst of expansion towards the suburbs, coupled with the construction of new highways and more efficient modes of transportation, made these inner city locations less residentially desirable for workers and less accessible to the larger trucks which were not able to navigate the narrow roads, low bridges, and weight capacity restrictions on certain thoroughfares.<sup>31</sup> Over time, it became cost prohibitive for an owner or developer to try to upgrade existing infrastructure because the clean-up expense and potential liability associated with a contaminated property often far exceeded the cost of starting with a fresh slate in a more rural area.<sup>32</sup> In addition, even though there would be costs associated with building on farmland, woodlands, or other rural plots, these costs were at least measurable and predictable, in contrast to the often unknown and potentially unlimited expense of assuming liability for, and cleaning up, a contaminated city lot.<sup>33</sup> As a result, in those decades that followed World War II, industries were forced to close inner city facilities that were deemed "inefficient, noncompetitive, and financially marginal," and to construct new, more modern facilities in suburban areas to compete with the growth of low-cost foreign manufacturing industries and shifting consumer markets.<sup>34</sup>

The fall-out from this suburban commercial and industrial sprawl often resulted in costly local infrastructure construction, increased emissions from the vehicles of commuters, and loss of precious open space and habitat.<sup>35</sup> Simultaneously, our once vibrant cities deteriorated.<sup>36</sup> Loss of employment and decreased commercial activity usually led to increased crime, and those fi-

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30. *See id.*

31. *See id.* at 2-3.

32. *See* Buchanan and Grayson, *supra* note 12, at 1; *see also* Poindexter, *infra* note 42, at 7.

33. *See* Revkin, *supra* note 6, at A1 (discussing that many sites lay vacant because no developer is willing to gamble on the cost of cleaning them up).

34. *Id.* at A1. These older industrial sites are not conducive to modern manufacturing processes because they often have limited productive reuse, low ceiling heights, cut-up floor space, restricted truck docking space and obsolete utility systems. *See id.* Furthermore, they usually have higher taxes than suburban or rural areas, they often have a perception of security problems, the relative cost of providing utility services such as electricity, natural gas, water and sewer facilities is higher in the cities, and the mass exodus of the skilled workforce along with the rising cost of employing that workforce have contributed to the movement of industries away from our cities. *See id.* at 2-3.

35. *See* Sullivan, *supra* note 11.

36. *See* Joel B. Eisen, "Brounfields of Dreams"?: Challenges and Limits of VCP and Incentives, 1996 U. ILL. L. REV., 883, 891-2 (1996).

nancially able to escape fled to the suburbs, leaving the poor and minorities behind to suffer devastating economic and social effects.<sup>37</sup> Consequently, not only had the cities become blighted, but now the suburbs were becoming the heirs to the cities' problems.<sup>38</sup> They were becoming more industrialized, which in turn, translated to more pollution, higher taxes, and crime. People thought they would escape all those things if they moved to the suburbs, but in actuality, the problem followed them.<sup>39</sup>

It is estimated that there are between 250,000 and 500,000 contaminated properties nationwide with a clean-up price tag that could reach as high as \$650 billion.<sup>40</sup> Because cities have not completed their individual inventories of brownfields, more exact national statistics are not yet available.<sup>41</sup> In spite of the staggering numbers of contaminated properties, the cities have created various brownfield remediation programs in an attempt "to provide an antidote to the bitter pill of deindustrialization by reusing the existing, vacant infrastructure through 'reindustrialization.' [It is believed that] [e]conomic life can be pumped into a dying neighborhood by lifting regulatory barriers that prevent productive use of abandoned property."<sup>42</sup> Since the brownfield pro-

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37. See Memorandum from Charles E. Sullivan, Jr., of the New York State Department of Environmental Conservation, at 1 (May 21, 1996) (on file with the author) (explaining why the Department created the Voluntary Remedial Program).

38. See SIMPSON'S CONTEMPORARY QUOTATIONS 1988 (citing N.Y. TIMES, Mar. 16, 1980, wherein Charles Haar discusses the problems associated with the shifting of industrial and commercial sites from the inner cities to the suburbs).

39. See *id.*

40. See Russ Banham, *Cooperation Helps Brownfields Bloom*, J. COMMERCE, Feb. 13, 1996, at 6A; see also David Ensign, *State Brownfields Initiatives Continue to Bloom*, SPECTRUM: THE J. STATE GOV'T, March 22, 1998, at 4; see also Judith Evans, *Cleaning Up the Nations 'Brownfields'; Critics Want Some Assurances Industrial Sites Aren't Re-Polluted*, THE WASHINGTON POST, Nov. 25, 1995, at E01; see also Revkin, *supra* note 6, at 1.

41. See UNITED STATES GENERAL ACCOUNTING OFFICE, BARRIERS TO BROWNFIELD REDEVELOPMENT 92-125, at 2 (1996).

42. Georgette C. Poindexter, *Separate and Unequal: A Comment on the Urban Development Aspect of Brownfields Programs*, 24 FORDHAM URB. L.J. 1, 9 (1996) (discussing the two goals of the Brownfields initiatives: creation of employment in economically distressed areas and preservation of pristine land from development); see also, John McGahren, P.E. and William S. Hatfield, *Brownfields by the Book*, CIVIL ENGINEERING, Nov. 1998, at 42 (discussing how brownfield laws are designed to bring industry back into the vacant urban centers and to protect existing greenfields by removing risk from developers). Approximately forty states, including New York, have created Voluntary Cleanup Programs. Some of the features common to these programs are: releases from liability, contribution protection, streamlined clean-up procedures, risk based clean-up standards and financial assistance such as tax incentives and loan programs. See *id.*



grams focus on areas affected by deindustrialization, the urban centers of the northeast are particularly well suited to receive such attention.<sup>43</sup>

The northeast's most urban state, New York, is reportedly home to thousands of brownfield properties.<sup>44</sup> Considering that New York State has been highly industrialized for over 100 years, and is the nation's second most populous state,<sup>45</sup> undoubtedly there are many more contaminated properties that have yet to be discovered.

#### A. CERCLA's Role in Contributing to the Proliferation of Brownfields

In reaction to the environmental damage caused by decades of industrialization, when disposal of hazardous waste and contaminated substances was virtually uncontrolled, the federal and state governments enacted some of the strictest environmental regulations in the world.<sup>46</sup> Those laws<sup>47</sup> provided our nation with

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43. See Eisen, *supra* note 36, at n.24.

44. See Charles E. Sullivan, Jr., *The Department of Environmental Conservation's Voluntary Remedial Program*, 8 ENVTL. LAW IN N.Y., Feb. 1997, at 17 (explaining the need for a Brownfield redevelopment program in New York State).

To provide a general quantitative sense of this, one should consider that there are . . . 873 inactive hazardous waste disposal sites listed in the April 1996 New York State Registry of Inactive Hazardous Waste Disposal sites and 86 suspected inactive hazardous waste disposal sites undergoing or awaiting investigation. Typically, about fourty confirmed or suspected sites are brought into the Department's inactive hazardous waste site disposal tracking system annually. There are over 130 known former manufactured gas plant sites across the State. Typically, about 6,200 petroleum underground storage tanks and 2,700 hazardous substance underground storage tanks are closed annually, and associated virtually with each is a discharge incident; additionally, it is estimated that over the next three years, about 30,000 petroleum underground storage tanks at 10,000 separate facilities will have closed. The Department's hazardous substances waste study noted the existence of at least 347 contaminated industrial sites and an additional 152 miscellaneous contaminated sites across the State.

*Id.*

45. See Michael B. Gerrard, *New York State's Brownfields Programs: More and Less Than Meets the Eye*, 28 ELR NEWS & ANALYSIS, Aug. 1998, at 10444 (discussing the various brownfield programs available in New York State).

46. See Kevin G. Ryan, *New Initiatives in Brownfield Redevelopment, Part Two*, MUNICIPAL LAWYER, Nov./Dec. 1995, at 4.

47. See e.g., National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. §§ 4321-4370 (1994); Clean Water Act (CWA), 33 U.S.C. §§ 1251-1272 (1994), Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671 (1994), Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992 (1994), Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2692 (1994), and CERCLA, 42 U.S.C. §§ 9601-9675 (1994).

cleaner air, drinking water, and navigable waterways, however, these laws have also had some detrimental side effects.<sup>48</sup> The proliferation of brownfields is precisely one of the detrimental results that could have been foreseen with the passage of CERCLA and its New York State counterpart.<sup>49</sup> In fact, the existence of brownfields is believed by some to be the child of broad reaching, strict liability based environmental statutes such as CERCLA.<sup>50</sup> Some of the elements of CERCLA that have impacted an owner or developer's decision whether or not to buy, sell, or develop a brownfield property include: the strict, joint, several and retroactive liability for all owners or operators of sites that are contaminated;<sup>51</sup> the monumental expense of litigating an action under CERCLA;<sup>52</sup> and the complex, far reaching clean-up levels that are required.<sup>53</sup>

It has become commonplace to pin the blame for unused brownfields on the liability provisions of CERCLA because its broad coverage has created a "phobia among many lenders or developers"<sup>54</sup> who otherwise might have pursued former industrial properties for redevelopment.<sup>55</sup> CERCLA imposes strict joint and several liability for all owners or operators of sites where hazardous substances have been disposed.<sup>56</sup> The liability for clean-up costs is not imposed according to the harm done, but rather as a

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48. See Ryan, *supra* note 46.

49. See Stephen L. Gordon and Bernard A. Weintraub, *Brownfield Development Around the Tri-State Area*, N.Y.L.J., Oct. 15, 1996, at 52. (Referring to CERCLA and the Inactive Hazardous Waste Disposal Site Act (IHWDSA)); see, e.g., 42 U.S.C. §§ 9601-9675 (1994), and N.Y. ENVTL. CONSERV. LAW §§ 27-1301-1321 (McKinney Supp. 1997).

50. See Lynne M. Miller and Douglas E. Gladstone, *Why the Brownfield Redevelopment Market is Up*, ENVTL. COMPLIANCE & LITIGATION STRATEGY, Nov. 1997, at 4; see also Ryan, *supra* note 46.

51. See Charles D. Bader, *Brownfield Remediation*, REMEDIATION MANAGEMENT, May/June 1996, at 9. "Strict liability means that a party does not have to be found negligent to be found liable. Joint-and-several liability means that any single responsible party can be made to pay for all the clean-up costs at a site, even if other parties contributed to the contamination. Retroactive liability means that parties can be held liable for contamination that occurred before the law was passed." *Id.*

52. See David G. Balmer, *Why Build on Green When You Can Have Brown*, OHIO ENVTL. LETTER, Sept. 1997. A study conducted in 1991 "found that litigation costs for potentially responsible parties involved in federal CERCLA cases ranged from \$60,000 to \$90,000. . .", and this did not include the cost of the clean-up itself. *Id.*

53. See generally, *id.* (Reviewing the clean-up requirements under CERCLA); see also 42 U.S.C. § 9621.

54. Lynne M. Miller and Douglas E. Gladstone, *Why the Brownfield Redevelopment Market is Up*, ENVTL. COMPLIANCE & LITIGATION STRATEGY, Nov. 1997, at 4.

55. See *id.*

56. See 42 U.S.C. § 9607(a).

result of the degree of connection to the property.<sup>57</sup> Under CERCLA, "almost any party which has owned or operated the site since its initial exposure to contamination, or transported waste to the land, may be held liable for the full cost of cleaning up any hazardous waste release associated with the site."<sup>58</sup> The purpose of such a liability structure is to spread the costs among the various parties associated with the hazardous waste industry at a minimal cost to the government.<sup>59</sup> Consequently, purchasers and developers who seek to acquire contaminated property frequently subject themselves to the same liability that the present or past

57. *See id.*

58. Robert S. Berger, *Recycling Industrial Sites in Erie County: Meeting the Challenge of Brownfield Redevelopment*, 3 BUFF. ENVTL. L.J. 69, 80 (1995) (discussing the need for a comprehensive redevelopment strategy that goes beyond just voluntary clean-up programs); 42 U.S.C. § 9607 states:

(a) Notwithstanding any other provision or rule of law and subject only to the defenses set forth in subsection (b) of this section;

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement or otherwise arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity, and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the occurrence of response costs, of a hazardous substance, shall be liable for,

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including for reasonable costs of assessing such injury, destruction or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9404(I) of this title.

*Id.* The group of potentially responsible parties is specifically outlined in the statute, and it has been more precisely defined by case law in the years since CERCLA's creation; *see id.* at n.17, (citing cases including; *General Electric Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1418 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 1390 (1991); *United States v. Monsanto Co.*, 858 F.2d 160, 167 n.11 (4th Cir. 1988); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985); *United States v. Hooker Chems. and Plastics Corp.*, 680 F.Supp. 546 (W.D.N.Y. 1988); *Violet v. Picillo*, 648 F.Supp. 1283, 1290 (D.R.I. 1986)).

59. *See id.* at 82.

owner carries.<sup>60</sup> This has the unintended effect of discouraging the acquisition and remediation of contaminated commercial and industrial property.<sup>61</sup>

While the passage of the Superfund Amendment and Reauthorization Act in 1988<sup>62</sup> (hereinafter "SARA") has provided an innocent landowner exemption from liability for landowners who purchase property after it is contaminated, it is important to point out that the exemption applies only to owners who acquire the property without knowledge of its contaminated status.<sup>63</sup> Most lenders, with the threat of potential CERCLA liability looming, now require an environmental inspection of property prior to its purchase.<sup>64</sup> Thus, it is nearly impossible to purchase a contaminated industrial or commercial piece of property in New York without having some knowledge of its contamination. This makes it very difficult to use the innocent purchaser defense provided under SARA. Ironically, even if a purchaser is "innocent," if it still owns the property when the contamination is discovered, the previous "innocent" status affords little solace.

Once a property is deemed "contaminated," CERCLA's clean-up standards often become one of the biggest stumbling blocks to remediation.<sup>65</sup> The statute requires an "assessment of permanent solutions and alternative treatment technologies. . . that, in whole or in part, will result in a permanent and significant decrease in the toxicity, mobility, or volume of the hazardous substance, pollutant, or contaminant."<sup>66</sup> Traditionally, this has meant restoring

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60. *See id.* at 83.

61. *See id.* at 84.

62. 42 U.S.C §§ 9601-9626 (1994).

63. *See* 42 U.S.C. § 9601(35)(A)(I) (1988) (stating that "at the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility." *Id.*)

64. *See Berger, supra* note 58, at 85 (discussing the limited applicability of the innocent landowner defense).

65. *See Berger, supra* note 58 at 91.

66. 42 U.S.C. § 9621(b)(1) (1998). This section requires the President to take into account: (1) the long term uncertainties associated with land disposal; (2) the goals, objectives, and requirements of RCRA, 42 U.S.C. §§ 6901-6992 (1994); (3) the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous substances and their constituents; (4) short- and long-term potential for adverse health effects from human exposure; (5) long-term maintenance costs; (6) the potential for future remedial action costs if the alternative remedial action in question were to fail; and (7) the potential threat to human health and the environment associated with excavation, transportation, and redisposal, or containment. *See id.*, §§ 9621(b)(1)(A)-(G).

the site to its pre-disposal condition,<sup>67</sup> but, since this language leaves some room for interpretation, a responsible party can never be entirely sure what level of clean-up will actually be required.<sup>68</sup> Therefore, as a result of the contamination, developers and owners are hard pressed to predict what the clean-up costs will be or when the process will in fact be complete. As a consequence, "a return on [their] investment is uncertain in comparison with the potential return on a project on a greenfield site."<sup>69</sup>

CERCLA is not the only environmental statute that has discouraged a developer or owner from remediating contaminated property. There are state equivalents to CERCLA that have also had the incidental effect of discouraging parties from taking on a remediation project.<sup>70</sup>

#### B. New York State's Superfund Statute Discourages Brownfield Remediation

New York's inactive hazardous waste disposal legislation, which differs significantly from CERCLA, is found in section 27-1300 of the New York Environmental Conservation Law<sup>71</sup> (hereinafter "ECL"). The applicability of the ECL is more narrow than CERCLA because, whereas CERCLA applies to all hazardous substances (which includes hazardous waste), the ECL applies only to hazardous wastes.<sup>72</sup> Furthermore, the definition of "hazardous waste" is different under the two statutes. New York's definition includes certain substances specifically listed within the statute's regulations,<sup>73</sup> as well as any waste that may cause or significantly contribute to an increase in mortality or an increase in serious irreversible, incapacitating illnesses, or that poses a substantial present or potential hazard to human health or the environment.<sup>74</sup> Even though the ECL's application to "hazardous wastes" is a narrower field than CERCLA's "hazardous substances," it is

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67. See Karmel, *supra* note 15, at 484.

68. See Berger, *supra* note 58, at 76-77 (discussing specific barriers to redeveloping brownfields).

69. Berger, *supra* note 58 (discussing the many economic factors that must be considered by developers when selecting a site to erect their business including the deterrents caused by the liability imposed by CERCLA should they choose a contaminated site).

70. See N.Y. ENVTL. CONSERV. LAW §§ 27-1301-1321 (McKinney Supp. 1997).

71. N.Y. ENVTL. CONSERV. LAW § 27-1300 (McKinney Supp. 1997).

72. See Berger, *supra* note 58, at 90.

73. See 6 N.Y.C.R.R. Part 371.1 (1995).

74. See N.Y. ENVTL. CONSERV. LAW §§ 27-0901(3), 27-1301(1); see also N.Y. PUB. HEALTH LAW § 1389(a)(1) (McKinney Supp. 1997).

nonetheless confusing, not easily defined, and leads to uneasiness for owners or purchasers of contaminated property.<sup>75</sup> That uneasiness is exacerbated by the fact that, much like its federal companion, the ECL does not specifically define who may be a responsible party.<sup>76</sup> In fact, conversely to CERCLA's case law definitions of who may be a responsible party, the ECL leaves this determination to the discretion of the Commissioner of the Department of Environmental Conservation (hereinafter "DEC").<sup>77</sup> So far, the DEC has set forth regulations that define responsible parties to include the same cast of characters held responsible under CERCLA, but the Commissioner could add others at his or her discretion.<sup>78</sup>

Under the clean-up standards set forth in the guidance documents for interpreting the ECL, any remedial program undertaken must restore the site to pre-disposal conditions, limited to the extent feasible and authorized by law.<sup>79</sup> "[R]egulators have traditionally begun with the presumption that concentration levels of contaminants must be low enough for small children to ingest small quantities of soil with hardly any increased risk of cancer or other health problems."<sup>80</sup> Unlike the voluntary clean-up program discussed later in this article, the ECL regulations state that even if requiring clean-up to meet pre-disposal conditions is not feasible, the least preferable way of eliminating risks to human health is by restricting the future use of the property through engineering controls or deed restrictions.<sup>81</sup> Thus, it appears that the state clean-up standards follow the same path as, and are based largely on, the federal standards.<sup>82</sup> The standards and procedures under the ECL particularly mirror the federal standards in that they also require the use of threshold, modifying, and balancing criteria when evaluating a clean-up plan.<sup>83</sup>

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75. See Gerrard, *supra* note 19, at § NY.02[1].

76. See N.Y. ENVTL. CONSERV. LAW § 27-1313(4).

77. See *id.*

78. See 6 N.Y.C.R.R. § 375-1.3(u) (1995).

79. See Karmel, *supra* note 15, at 484 (remarking that the statute allows the use of engineering or institutional controls but prefers clean-up to pre-disposal conditions); see also 6 N.Y.C.R.R. § 375-1.10(b) (1995).

80. Karmel, *supra* note 15, at 484. "New York also assumes 'an intake rate of 0.2 gram/day for a five year exposure period for a 16-kg child.'" *Id.* at 475 n.29 (citing NYDEC, TAGM: DETERMINATION OF SOIL CLEANUP OBJECTIVES AND CLEANUP LEVELS (1994)).

81. See *id.* at 484.

82. See *id.*

83. See 40 C.F.R. § 300.430(f)(1)(I) (1996).

"The threshold criteria indicate the acceptable level of risk to human health which may exist after clean-up takes place, [and requires that the clean-up must] eliminate, reduce, or control risks to human health and the environment."<sup>84</sup> To satisfy these criteria, the clean-up must prevent human exposure to the contaminants.<sup>85</sup> The modifying criteria require that any proposed clean-up program must take into consideration the community's reasonable concerns, particularly the concerns of the residents who live or work near the property.<sup>86</sup> The third step, the balancing criteria, requires the parties involved to look at the long-term effectiveness and permanence of the clean-up; the reduction of toxicity, mobility, or volume through the proposed treatment; the plan's short-term effectiveness; its implementability; and the cost effectiveness of the remediation.<sup>87</sup> This, in essence, requires the balancing of the "risks and costs of removal and treatment with the risks and costs of a solution which prevents human exposure while leaving some or all of the contamination on site."<sup>88</sup> As mentioned in the discussion of CERCLA, in spite of the state and federal statutes' apparent flexibility toward clean-up levels, in the past the DEC has most often required the site to be returned to pre-contamination condition.<sup>89</sup>

Two important distinctions between the federal and state approaches must be noted. First, unlike SARA, the ECL provides no protection for innocent landowners who have become responsible parties solely because of their ownership interest.<sup>90</sup> Second, the ECL does not provide an exemption from liability for mere lenders or fiduciaries.<sup>91</sup> The New York State Superfund program, like the federal program, includes far reaching liability and rigorous clean-up standards.<sup>92</sup> Thus, the broad liability regimes associated with CERCLA and the ECL make taking responsibility for a contaminated parcel, even to remediate it, risky business.<sup>93</sup>

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84. Karmel, *supra* note 15, at 474-75 (citing 40 C.F.R. §§ 300.430(e)(9)(iii)(A)-(B), 300.430(a)(1)).

85. *See id.* at 476.

86. *See id.* (citing 40 C.F.R. § 300.430(f)(1)(i)(c)).

87. *See* 40 C.F.R. § 300.430(f)(1)(I)(B).

88. Karmel, *supra* note 15, at 477.

89. *See* Eisen, *supra* note 36, at 909-910.

90. *See* Gerrard, *supra* note 19, at § NY.02[3].

91. *See id.* at § NY.02[4].

92. *See* Weintraub, *supra* note 5, at 7.

93. *See* Weintraub, *supra* note 5, at 1 (citing under-funding, under-staffing, complex procedures and slow pace of administration as the reasons why the existing state statutes play a limited role in remediating contaminated sites throughout the state).

Having traced the birth and proliferation of brownfields through the onset of federal and state statutes that have had the incidental effect of contributing to the failure to reclaim these contaminated sites, it is time to look at what New York State has done in the last five years to turn the tide and encourage industry to reuse and redevelopment of these properties.<sup>94</sup>

## II. Title V of the New York State Environmental Bond Act of 1996

The 1996 Bond Act, specifically Title V, represents one of New York State's responses to the growing problem of brownfields. Title V allows the state to borrow up to \$200 million to fund environmental restoration projects.<sup>95</sup> This substantial sum is the largest brownfields grant program in the country and should be sufficient to fund vast numbers of clean-ups.<sup>96</sup> Under Title V, eligibility is limited to municipalities<sup>97</sup> who can be reimbursed for as much as seventy-five percent of the clean-up costs they incur on a remediation project.<sup>98</sup> The funding is limited to "environmental restoration projects" which the 1996 Bond Act defines as "projects to investigate or to remediate hazardous substances located on real property held in title by a municipality."<sup>99</sup> Title V also requires that, as part of the tradeoff for receiving state funds, municipali-

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94. See generally Berger, *supra* note 58 (pointing out that New York's high clean-up standards and unyielding liability provisions have contributed to the growing brownfields problem); see also Karmel, *supra* note 15 (discussing the proliferation of brownfields resulting from strict interpretations of clean-up standards); see also Markell, *supra* note 14 (remarking that a concerted effort is needed to remediate abandoned or underutilized industrial sites).

95. See Gerrard, *supra* note 45, at 10444 (examining the status of the voluntary remediation program and how it comports with other programs designed to specifically address the brownfields dilemma); see also U.S. Environmental Protection Agency, Region 2, *New York Bond Act Funds Municipal Brownfields*, BROWNFIELDS Q. COMMUNITY REP., Spring 1997, at 1. (summarizing the features of Title V as part of the Agency's newsletter on brownfields) and Dale English, *For Sale or Lease: Region Struggles to Find Ways to Use Brownfields*, *Buffalo, New York*, BUSINESS FIRST OF BUFFALO, June 30, 1997, at 23 (discussing the City of Buffalo and the extensive problem they face in trying to remediate the vast number of abandoned contaminated properties).

96. See Gerrard, *supra* note 45, at 10444.

97. See Kevin G. Ryan, *Update On Implementation of the Clean Water / Clean Air Bond Act of 1996*, THE N.Y. ENVTL. LAWYER, Fall 1997, at 6 n.8 (publishing the first in a series of updates by the New York State Bar Association that will examine the Bond Act program as it develops).

98. See Gerrard, *supra* note 19, at § NY.08[1].

99. Markell, *supra* note 14, at 1229 n.58; see also Gerrard, *supra* note 19, at § NY.08[1](a) (discussing that eligibility for the program is limited to municipalities that are not responsible for the contamination).



ties make "all reasonable efforts" to recover the funds expended by the state from any responsible parties.<sup>100</sup> This requirement was included to prevent private owners from escaping liability by transferring property to a municipality to take advantage of Title V's funding.<sup>101</sup>

When considering whether to accept a project and to allocate Title V funds, the DEC uses four criteria listed in the statute for prioritizing and selecting from eligible projects.<sup>102</sup> These criteria are: (1) the environmental benefit if the project is remediated expeditiously; (2) the economic benefit to the state; (3) the site's potential use for public recreation; and (4) the opportunity to fund the remediation project through other means, such as Superfund.<sup>103</sup> Environmental projects for which other funding sources are not available will be given the highest priority.<sup>104</sup>

One of the most attractive benefits of Title V is that it provides liability protection for the municipality, any successors in title, and lessees and lenders.<sup>105</sup> The statute states that the parties "shall not be liable to the state upon any statutory or common law cause of action, or to any person upon any statutory cause of action arising out of the presence of any hazardous substance in or on the property at any time before the effective date of [the contract executed by the municipality and the DEC.]"<sup>106</sup> There are some conditions that apply to the release, such as the party cannot have been a responsible party, the release does not apply to future contamination, and the release can be revoked if it is discovered that the conditions at the site are not sufficiently protective of human health for its current use.<sup>107</sup> Along with the release from liability, "perhaps the most remarkable provision of Title V . . . is the section committing the state to indemnify these four catego-

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100. See N.Y. ENVTL. CONSERV. LAW § 56-0507(2) (McKinney Supp. 1997).

101. See Gerrard, *supra* note 45, at 10444.

102. See Markell, *supra* note 14, at 1230.

103. See N.Y. ENVTL. CONSERV. LAW §§ 56-0505(1)(a)-(d); see also Markell, *supra* note 14, at 1230-31; see also David J. Freeman and Gregory R. Belicamino, *Funding Procedures for Brownfields: Bond Act Offers an Opportunity for Revitalization*, N.Y.L.J., Oct. 30, 1997, at S3.

104. See N.Y. ENVTL. CONSERV. LAW § 56-0505(1)(d); see also Markell, *supra* note 14, at 1231.

105. See Kevin G. Ryan, *New Incentives in Brownfield Redevelopment*, 9 MUNICIPAL LAWYER, Nov./Dec. 1995, at 3.

106. N.Y. ENVTL. CONSERV. LAW § 56-0509(1)(a)(i).

107. See N.Y. ENVTL. CONSERV. LAW § 56-0509(2).

ries of parties against the amount of any judgment or settlement resulting from common-law tort actions.”<sup>108</sup>

While much of what has been mentioned so far seems attractive to parties interested in redeveloping brownfields, there are several potential drawbacks to Title V that need to be mentioned. First, Title V requires that environmental restoration projects be cleaned up according to state Superfund standards.<sup>109</sup> These standards require the elimination of significant threats to human health or the environment.<sup>110</sup> This most often means that the site must be returned to pre-contamination condition, or that the concentrations will be low enough for residential use.<sup>111</sup> These are extremely extensive and expensive clean-up standards and this requirement often turns away parties who may have been interested in reusing a contaminated property for industrial purposes.<sup>112</sup> To address this concern, the DEC has recently shown some flexibility in evaluating clean-up plans.<sup>113</sup>

The second issue that creates some problems is that Title V eligibility is limited to sites owned by municipalities.<sup>114</sup> The unfortunate result of this limitation is that many contaminated properties, which would otherwise meet the requirements of the statute, will remain unremediated because they are not municipally owned.<sup>115</sup> This may also result in private owners transferring their properties to municipalities to make them eligible for the funding, which in turn places an additional burden on taxpayers.<sup>116</sup> Finally, some municipalities themselves are passing on the opportunity to remediate sites under Title V because they feel it is “not worth applying for such restrictive aid”<sup>117</sup> and because of the strict clean-up standards, a project would be too costly and could take years to complete.<sup>118</sup>

In spite of these concerns, some communities are taking advantage of the Title V program. As of November 1998, the DEC

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108. N.Y. ENVTL. CONSERV. LAW § 56-0509(3); *see also* Ryan, *supra* note 105, at 4.

109. *See* N.Y. ENVTL. CONSERV. LAW § 56-0505(3).

110. *See id.* at § 27-1313(3).

111. *See* Markell, *supra* note 14, at 1237.

112. *See* Eisen, *supra* note 36, at 906-909.

113. *See generally*, Record of Decision, *infra* note 123. (The NY State DEC permitted contaminated soil to remain on the site and chose to cap the soil instead of requiring complete removal which would have been more costly.)

114. *See* Markell, *supra* note 14, at 1234.

115. *See id.* at 1234.

116. *See id.*

117. Revkin, *supra* note 6, at A1.

118. *See id.*

reportedly allocated approximately \$14.7 million for eighty-eight investigation or remediation projects throughout the State.<sup>119</sup> Of these eighty-eight Title V funded projects, eighty-three grants were for site investigation and the remaining five were for actual remediation.<sup>120</sup> The reason for the lopsided division of funds between investigation grants and remediation grants is because in the first year after Title V's enactment, the DEC only accepted applications for site investigations while they worked on developing formal rules and regulations to be used in evaluating and overseeing remediation projects.<sup>121</sup> By 1998, however, the agency was ready to start accepting applications and awarding grants for site remediations. One such remediation grant was for the remediation of the Irvington Waterfront Park.

#### A. Title V's First Success Story: The Revitalization of the Irvington Village Waterfront Park

In March 1998, the DEC approved \$2.9 million in funding to the Hudson River Village of Irvington (hereinafter "the Village") to transform two former industrial sites into a public park.<sup>122</sup> The Village has undertaken a project to remediate approximately 12.1 acres of waterfront property that, because of its contamination, was found to pose a current or potential threat to public health and the environment.<sup>123</sup> The site is situated on land that was created from 1890 through 1940 by using fill material consisting generally of demolition debris, ash, and furnace slag.<sup>124</sup> Until 1980, the property was used primarily as a storage and distribution site for lumber.<sup>125</sup> Since 1980, the property was split and a portion continued to be used as a lumber yard, while the other portion was

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119. See Memorandum from New York State Department of Environmental Conservation to Malcolm Pirnie, Environmental Engineers & Scientists 1 (Nov. 4, 1998) (on file with the author).

120. See *id.*

121. U.S. Environmental Protection Agency, Region 2, *New York Bond Act Funds Municipal Brownfields*, BROWNFIELDS Q. COMMUNITY REP. Spring 1997, at 1 (summarizing the features of Title V as part of the Agency's newsletter on brownfields).

122. See Revkin, *supra* note 6, at A1; see also Alex Philippidis, WESTCHESTER COUNTY BUS. J., Mar. 23, 1998, at 1 (remarking that many of the communities along Westchester County's forty-nine miles of Hudson River shore are developing or implementing plans to revitalize their waterfront properties).

123. See generally Record of Decision, Irvington Waterfront Park Environmental Restoration Project, Village of Irvington, Westchester County, Site Number B-00004-3, Department of Environmental Conservation 1 (Mar. 1998).

124. See *id.* at 1.

125. See Philippidis, *supra* note 122, at 1.

utilized for bus maintenance, furniture refinishing, and stage set storage.<sup>126</sup>

The Irvington property is unique in that it was jointly owned by the Village and a private corporation, Scenic Hudson Trust.<sup>127</sup> This joint municipal/private ownership status provided an opportunity to take advantage of the funds available under Title V as well as the benefits of the State's Voluntary Cleanup Program.<sup>128</sup> The voluntary clean-up portion of the project will be discussed in Part III of this article. In 1997, the Village entered into a contract with the DEC to investigate the entire site and to develop a remediation proposal.<sup>129</sup> The site investigation consisted of soil, groundwater, and sediment sampling, and it revealed the presence of inorganics (metals, including lead) and semi-volatile organic compounds that are commonly associated with "coal tars, ash, heavy petroleum oils and products of incomplete combustion."<sup>130</sup>

The investigation also provided that the possibility existed for human exposure to these contaminants through ingestion of contaminated soil, inhalation of contaminated dust, and ingestion of contaminated sediment.<sup>131</sup> It was further revealed that while the site was not presently causing contamination of the adjacent Hudson River, the deteriorating bulkhead and flow of the water table posed the potential threat of future release of contaminants into the river.<sup>132</sup> With this information in hand, the Village and Scenic Hudson Trust needed to develop feasible, cost effective remedial goals that would protect human health and the environment. Since the proposed future use of the Irvington Waterfront Park is as a public park, the goals of the remediation are:

1. to eliminate the potential for direct human or animal contact with contaminated soils and fill at the site;
2. reduce, control, or mitigate, to the extent practicable, the contamination present within the soils and fill at the site;
3. eliminate the threat of surface waters by preventing surface run-off from the contaminated soils and fill at the site;

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126. See Record of Decision, *supra* note 123, at 1.

127. See Record of Decision, *supra* note 123, at 1.

128. See Record of Decision, *supra* note 123, at 1.

129. See Record of Decision, *supra* note 123, at 1.

130. See Record of Decision, *supra* note 123, at 4.

131. See Record of Decision, *supra* note 123, at 7-8.

132. See Record of Decision, *supra* note 123, at 8.

4. eliminate the threat to sediments by preventing the surface and subsurface discharge of contaminated fill material into the Hudson River;

5. prevent, to the extent possible, the migration of contaminants in the fill to groundwater; and]

6. provide for attainment of SCGs [Standards, Criteria, and Guidance values] for groundwater quality at the limits of the site, to the extent practicable.<sup>133</sup>

The DEC evaluated the Village's application for Title V funding, including the site investigation and several proposed remedial plans, and in March 1998, they issued their Record of Decision outlining the necessary environmental remediation steps required to provide safe public access and use of the Waterfront Park.<sup>134</sup> The DEC approved the Village's plan to install a thirty-inch soil cover to prevent direct contact with, and infiltration through, the contaminated fill.<sup>135</sup> The soil cover would consist of twelve inches of low permeability soil to "seal off" the contaminated fill, followed by a twelve-inch drainage layer and 6 inches of topsoil.<sup>136</sup> It is estimated that 41,800 cubic yards of soil would be required to create this sloped cover, which would be designed to direct seventy percent of precipitation away from the contaminated subsurface.<sup>137</sup> This remedial measure obviously does not restore the site to its "pre-release condition," as is often the interpretation of the clean-up requirements under Title V.<sup>138</sup> The plan does, however, eliminate significant threats to human health and the environment, which is the actual requirement; and this is where the DEC showed their ability to be flexible by depending on a plan's feasibility when considered with its alternatives.

Using the three "criteria" required by the ECL, and referred to in Title V,<sup>139</sup> the engineers on the project developed a remediation plan that would not require the removal of the tens of thousands of yards of contaminated fill.<sup>140</sup> First, under the threshold criteria, it was determined that the soil cap would provide "sufficient containment that no migration of contaminated fill

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133. See Record of Decision, *supra* note 123, at 9.

134. See Record of Decision, *supra* note 123, at 9.

135. See Record of Decision, *supra* note 123, at 15.

136. See Record of Decision, *supra* note 123, at 10.

137. See Record of Decision, *supra* note 123, at 10.

138. See Karmel, *supra* note 80 and accompanying text.

139. See 6 N.Y.C.R.R. § 375-1.10(c) (1995) (referring to 40 C.F.R. § 300.430(f)(1)(I) (1996)).

140. See Record of Decision, *supra* note 123, at 15-17.

would occur. . . .”<sup>141</sup> This would virtually eliminate the risk of human exposure to the contaminants. Second, the modifying criteria was satisfied by the plan to cap the site in lieu of the alternative to remove the soil which would have resulted in a tremendous volume of truck traffic rumbling through the community carrying contaminated payloads.<sup>142</sup> The community was generally opposed to solutions that required the transporting of removed contaminants through their streets which the approved remedial plan would not require.<sup>143</sup> Third, the various elements of the balancing criteria were satisfied by the determination that the soil cap would result in: 1) little short- or long-term exposure to the contaminated fill by humans or the environment; 2) long-term management at a non-prohibitive cost; 3) a reduction in the mobility of the contaminants; and 4) an implementation that would be no more time consuming or difficult to complete than the other suggested solutions.<sup>144</sup>

In addition to the soil cover, the DEC approved a bulkhead rehabilitation plan that would provide structural support for the cover fill and would help prevent the release of contaminated fill particles into the Hudson River.<sup>145</sup> Since the approved remedy would result in untreated hazardous substances remaining at the site, the DEC also required that a long-term groundwater and sediment monitoring system be instituted.<sup>146</sup> Finally, under this Record of Decision, the DEC provided the Village and Scenic Hudson Trust with liability releases after it determined that they were not responsible parties under the definition of Title V.<sup>147</sup>

The rehabilitation of the Irvington Waterfront Park is the first remediation project in the State that has begun construction utilizing Title V grant funds.<sup>148</sup> There are presently four other remedial grants totaling approximately \$5 million that have not yet begun the construction phase, which are earmarked for the cities of Syracuse, East Rome, Rochester, and Buffalo.<sup>149</sup> It was estimated that, when complete, the total cost to implement the remedial measures at Irvington Park, which includes the annual

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141. Record of Decision, *supra* note 123, at 15-17.

142. See Record of Decision, *supra* note 123, at 15-17.

143. See Record of Decision, *supra* note 123, at 15.

144. See Record of Decision, *supra* note 123, at 13-15.

145. See Record of Decision, *supra* note 123, at 16.

146. See Record of Decision, *supra* note 123, at 16.

147. See Record of Decision, *supra* note 123, at 8.

148. See Memorandum, *supra* note 119, at 1.

149. See Memorandum, *supra* note 119, at 1.

operating costs for the monitoring system for the next thirty years, will be \$3,834,450.<sup>150</sup>

B. The Next Title V Project on the Horizon: The South Buffalo Redevelopment Project

The Title V remedial grant recently awarded to the City of Buffalo is expected to be used as part of a master plan to redevelop approximately 1,200 acres of brownfields properties in downtown Buffalo, the Union Ship Canal area, historic sections of the City, and many former industrial facilities.<sup>151</sup> The present goal of the plan is to attract light industry, preserve open space, develop waterfront parks and recreation, and enhance habitat.<sup>152</sup> This undertaking is still in the planning process but it is estimated to require a public investment of approximately \$75 to \$100 million over a ten to twenty year period.<sup>153</sup> At one time, Buffalo was a crossroads of transportation and a center of industrial growth and trade.<sup>154</sup> Much like the rest of the northeast region, "changing times and market forces have caused heavy industry to decline,"<sup>155</sup> leaving vacant properties with challenging environmental conditions.<sup>156</sup> With the help of Title V, Buffalo hopes to turn this decline around over the next decade.<sup>157</sup>

Title V of the 1996 Clean Water/Clean Air Bond Act offers municipalities an "excellent opportunity to revitalize individual properties or entire [industrial complexes covering hundreds of] acres, that lie dormant or underutilized because of actual or potential environmental contamination."<sup>158</sup> The DEC has tried to make the application process fairly simple, however, it is important to remember that once the application is accepted, the requirements of the next steps in the process can be complex.<sup>159</sup> However, as demonstrated by the success of the Village of Irvington, and the anticipated success of the City of Buffalo, municipali-

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150. See Record of Decision, *supra* note 123, at 16.

151. See generally City of Buffalo, Division of Planning, South Buffalo Redevelopment Plan, Project Summary, Feb. 1997 (on file with the author).

152. See *id.* at 1.

153. See *id.* at 3.

154. See *id.* at 1.

155. *Id.* at 1.

156. See *id.*

157. See *id.* at 3

158. David J. Freeman and Gregory R. Belicamino, *Funding Procedures for Brownfields; Bond Act Offers An Opportunity for Revitalization*, N.Y.L.J., Oct. 30, 1997, at S3.

159. See *id.*

ties may still find it advantageous to participate in this state initiative.

### III. New York State's Voluntary Cleanup Program

Title V funding can be a very effective tool for a municipality to reclaim properties lost to environmental contamination.<sup>160</sup> But what do you do if you are a private owner or developer who wishes to remediate or purchase a brownfield site? Title V funding is not available to private owners.<sup>161</sup> New York State answered that question a few years before Title V was even enacted.<sup>162</sup> Initiated in October 1994, the New York State DEC's Voluntary Cleanup Program (hereinafter "VCP") allows a "volunteer"<sup>163</sup> to enter into an agreement with the DEC to clean up a brownfield site.<sup>164</sup> The VCP is neither statute based nor is it supported by formalized agency regulations.<sup>165</sup> The DEC operates the program "based on its authority to oversee remediation of environmental contamination,"<sup>166</sup> and the guidelines for participation have been set forth in several articles published by the Agency.<sup>167</sup> This program was created with the intent of encouraging the "return of contaminated parcels to productive use, thereby getting those sites cleaned up with private dollars, and obviating the need to develop uncontaminated lands when there exist well situated, but contaminated parcels."<sup>168</sup>

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160. See Markell, *supra* note 14, at 1223.

161. See N.Y. ENVTL. CONSERV. LAW § 56-0101(7); see also Ryan, *supra* note 97, at 6.

162. In late 1994 the New York State Department of Environmental Conservation launched its Voluntary Remedial Program. See Sullivan, *supra* note 11, at 25.

163. Volunteers can include site owners, operators, tenants, prospective purchasers, lenders, municipalities and innocent purchasers. This is provided that none of the above are deemed a potentially responsible party except by reason of ownership. See Alan J. Wax, *Commercial Real Estate/New Life For Abandoned Properties*, NEWSDAY, Apr. 7, 1997, at C13; see also Nixon, Hargrave, Devans & Doyle, NEW YORK ENVTL. LAW HANDBOOK 336 (Government Institutes, Inc., 4th ed.) (1998).

164. See Todd S. Davis and Kevin D. Margolis, BROWNFIELDS, A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY 532 (1997) (breaking down the voluntary clean-up programs offered on a state-by-state basis).

165. See *id.* at 532.

166. Weintraub, *supra* note 5, at 1 (detailing the elements that make up the New York State VCP, along with some proposed legislation to formally codify the program).

167. See Sullivan, *supra* note 11; see also Sullivan, *supra* note 17, and Sullivan, *supra* note 44.

168. Sullivan, *supra* note 11, at 25.



One of the VCP's most attractive features is that eligibility to participate in the program is much broader than that of Title V.<sup>169</sup> Eligible parties "may include private and public parties, site owners and operators, potentially responsible parties (hereinafter "PRPs"), prospective purchasers, lenders, and others."<sup>170</sup> The program however, does not permit parties that are responsible for the contamination to participate if the site is listed as a Class 1 or 2 Registry site,<sup>171</sup> or if the site is already subject to an environmental enforcement action by the state or federal government.<sup>172</sup> Perhaps the DEC was concerned that allowing a potentially responsible party to participate and gain a release from future liability, would preclude the state from seeking cost recovery from that same party.<sup>173</sup> The drawback to this approach is that these parties are the owners of many of the contaminated properties within the state. Since these properties are often not contaminated enough to fall under CERCLA's jurisdiction, and their owners are excluded from the VCP, the unfortunate result will be that these properties will probably go unremediated.<sup>174</sup>

To participate in the program, the volunteer must either enter into a consent order or a legally enforceable agreement with the DEC.<sup>175</sup> The agreement must contain the method and technical standards of the clean-up, as well as the final clean-up level the remediation must meet.<sup>176</sup> There are economic issues, such as tax deductibility, and whether or not the volunteer can seek con-

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169. See *id.* at 25; compare Gerrard, *supra* note 19, at § NY.08[1][2].

170. Gerrard, *supra* note 45, at 10445; see also Sullivan, *supra* note 44, at 25, and Rigano, *supra* note 288, at 1; see also Davis & Margolis, *supra* note 164, at 533.

171. See Gerrard, *supra* note 19, § NY.05[1][a].

The DEC compiles a registry of inactive hazardous waste disposal sites known as the State Superfund list. Each site on the list is placed within one of six categories. The categories are:

Class (1) sites are when immediate attention is required (no site has ever been so classified);

Class (2) sites are when action is required;

Class (2a) sites where insufficient data exists to determine if action is required;

Class (3) sites where action may be deferred;

Class (4) sites are closed but require continued management and;

Class (5) sites are closed and no further action is required.

*Id.*

172. See Sullivan, *supra* note 11, at 25.

173. See Weintraub, *supra* note 5, at 1.

174. See Weintraub, *supra* note 5, at 1.

175. See Gerard, *supra* note 19, at § NY.01[2][b]-[c].

176. See Gerrard, *supra* note 45, at 10445; see also Weintraub, *supra* note 3, at 1 (discussing the first step in the remediation process under the VCP).

tribution from others, that are associated with choosing either a consent order or an agreement that will not be explored in greater detail here other than to say there are advantages and disadvantages to both approaches.<sup>177</sup> Once a volunteer chooses to proceed via the order or agreement, the volunteer will be committed to an initial site investigation, at the end of which they can either walk away with no further obligation, or if they wish they may enter into a commitment to complete the full remediation.<sup>178</sup> If the volunteer chooses to commit to the remediation of the site, the nature of the clean-up required will depend, in part, on the volunteer's relationship to the contamination on site.<sup>179</sup> One distinctive difference between the VCP and Title V is that under the VCP, not only is the volunteer responsible for all clean-up costs himself, he also has the obligation of reimbursing the DEC for the costs of the Agency's oversight,<sup>180</sup> whereas under Title V, the government makes funds available to its participants to cover up to 75% of the clean-up costs.<sup>181</sup>

Another difference between the two programs is that under the VCP, a qualified release is normally executed by the DEC as part of the consent order or agreement and takes effect after the site is remediated.<sup>182</sup> Under this agreement, the DEC states that it does not intend further action against the party for the contamination at the site with the proviso that this release is subject to certain reopeners.<sup>183</sup> These reopeners include changes in the site's use that will require an additional clean-up; unknown conditions at the time of the remediation are discovered and require further remedial work; a fraudulently induced agreement; and the discovery that the original response is not sufficient for the site's intended use.<sup>184</sup> The difference here is that the qualified release given under the VCP binds only the DEC and thus leaves the volunteer open to enforcement or litigation from private parties, the

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177. For a more detailed discussion of the economic, insurance and contribution issues associated with consent orders or agreements, see Sullivan, *supra* note 11, at 25-26.

178. See *id.* at 26.

179. See Gerrard, *supra* note 45, at 10445. "A volunteer who is not a PRP (or who is a PRP only because of site ownership) need not address off-site contamination, while other volunteers must address such contamination." Gerrard, *supra* note 45, at 10445.

180. See Davis & Margolis, *supra* note 164, at 532-33.

181. See Karmel, *supra* note 15, at 470.

182. See Rigano, *infra* note 288, at 1.

183. See Gerrard, *supra* note 19, § NY.01[4].

184. See Memorandum, *supra* note 119, at 7.

EPA, or the state attorney general.<sup>185</sup> Although there are no formal agreements not to do so, to date, neither the attorney general nor the EPA has instituted enforcement actions against any sites that have received protection under the VCP.<sup>186</sup> Generally the EPA does not anticipate taking action against a participant in an approved state VCP unless it determines that there "may be an imminent and substantial endangerment to the public health, welfare, or the environment."<sup>187</sup> This is quite different from the release provided under Title V, wherein the DEC actually agrees to indemnify the participant, lenders and future owners against any common-law tort actions.<sup>188</sup>

Typically, a private party cleaning up a contaminated site does so as an investment because they intend to develop it or sell it to a developer.<sup>189</sup> While the DEC fully expects that economic development will be the main purpose behind an overwhelming majority of the clean-ups under the VCP, an economic objective need not exist.<sup>190</sup> Nonetheless, when a volunteer has a specific use in mind that will require state and/or local agency approval(s), the VCP work plan would be subject to a SEQRA<sup>191</sup> review to de-

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185. See Sullivan, *supra* note 11, at 26-27.

186. See Gerrard, *supra* note 45, at 10445.

187. Memorandum from Elliott P. Laws and Steven A. Herman, New York State DEC, Office of Solid Waste and Emergency Response, and the Office of Enforcement and Compliance Assurance, respectively, to the Superfund National Policy Members at 2 (Nov. 14, 1996) (on file with the author). The Regions will review the State VCPs to determine if they meet the following criteria:

1. The program provides the community with opportunities for meaningful involvement;
2. The program ensures that response actions are protective of human health and the environment;
3. The program has the sufficient resources to ensure timely and appropriate completion of actions, and that the agencies supporting the program have technical abilities and streamlined procedures;
4. The program provides written approval of plans and a certification upon their completion;
5. The agency has sufficient oversight to ensure the plan is conducted in such a manner as to protect human health and the environment;
6. That the agency has the enforcement authority to ensure completion of the response plan if the volunteer(s) fail or refuse to complete the plan.

*Id.* at 2.

188. See Kevin G. Ryan, *The Clean Water/Clean Air Bond Act of 1996*, MUNICIPAL LAWYER, Nov./Dec. 1996, at 3.

189. See Julie Bailey, *Brownfields and Legal Liability*, PLANT SITES AND PARKS, April 1998, at 20.

190. See Sullivan, *supra* note 11, at 27.

191. See State Environmental Quality Review Act (SEQRA), N.Y. ENVTL. CONSERV. LAW §§ 3-0301, 8-0113; see also 6 N.Y.C.R.R. § 617.

cide whether or not to proceed with the clean-up.<sup>192</sup> This could result in a volunteer being required to complete an environmental impact statement prior to the start of any remediation.<sup>193</sup>

One of the most attractive elements of the VCP is that, in contrast to Title V, the VCP considers the likely uses of the property when determining clean-up standards.<sup>194</sup> This difference makes the VCP more flexible than Title V by allowing the use of institutional and engineering controls, deed restrictions, and risk-based evaluations when planning clean-up levels.<sup>195</sup> Under the VCP, current owners or prospective purchasers of property can offer to clean up a site to a safe level according to the site's intended future use.<sup>196</sup> Thus, if the volunteer proposes to clean-up to a level less than what would be adequate for residential use, then, as part of the DEC's acceptance of that plan, deed restrictions which will bind all future owners will be placed on the property.<sup>197</sup>

Since the level and the type of contamination at each site and each volunteer's intended post-remediation use differs, the DEC has been willing to demonstrate case-by-case flexibility when setting clean-up levels, provided that institutional controls such as deed restrictions are attached to the agreement and the property to prevent future incompatible uses.<sup>198</sup> Since this approach to evaluating clean-up levels based on future land use and the "risks" associated with the remedial measures are vastly different from what has been done when formulating clean-up plans under CERCLA and New York State's Superfund statute, this approach deserves a closer look.

#### A. The New York State VCP Authorizes the Use of Risk-Based Analysis and Institutional Controls

Risk assessment is the process of comparing the value of multiple clean-up options intended to reduce the risks to human health, with the actual costs of each program to come up with a ratio of risks eliminated per dollar spent for each option.<sup>199</sup> The

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192. See Sullivan, *supra* note 11, at 27.

193. See Rigano, *infra* note 289, at 1. Doing an environmental impact statement is very often a time-consuming task. See *id.*

194. Compare Davis and Margolis, *supra* note 165, at 535 with Gerrard, *supra* note 19 at § NY.08[1].

195. See Gerrard, *supra* note 45, at 10447.

196. See Karmel, *supra* note 15, at 481.

197. See generally Edwards and North, *infra* note 213.

198. See Gerrard, *supra* note 45, at 10447; see also Karmel, *supra* note 15, at 481.

199. See Karmel, *supra* note 15, at 482.

VCP allows the use of risk analysis when determining the most effective clean-up plan for a particular site.<sup>200</sup>

The days of the ultra-expensive environmental clean-ups aimed at purifying a site are past.<sup>201</sup> Many brownfields deals will be economically unattractive unless some of the costs are minimized because the cost of remediating a brownfield is generally higher than the cost of starting anew on a greenfield.<sup>202</sup> These costs can often be reduced by utilizing risk-based corrective plans that allow for some contamination to remain at the site by being either "capped over" or enclosed.<sup>203</sup> A number of states, including New York, have implemented risk-based remedial standards as part of their voluntary clean-up programs.<sup>204</sup> These programs allow for less rigorous standards when the property is not to be used for residential purposes, which results in reduced development costs.<sup>205</sup> "If a contaminated piece of property was historically a factory, it doesn't make much sense to clean it up to the standards of a pristine children's playground."<sup>206</sup>

As technology advances, and technologies once thought of as experimental become commonplace in clean-up programs, professionals are no longer limited in how they can approach the

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200. As an example, suppose there are two clean-up plans to choose from - A and B. According to the scientific evidence presented, choice B will save 100 more lives than choice A, but will also cost an additional \$100 million more than choice A. If we select B, then for every additional \$1 million spent, we save one additional life. But suppose that choice A were selected, except we added a health plan requirement that would cost \$1 million but would save 10 more lives. Under these conditions, selecting choice A, with the additional plan, would spend \$1 million for 10 lives, and plan B would spend \$1 million for one life. It would be economically better to select plan A because we would save an additional 9 lives for each \$1 million spent. See Karmel, *supra* note 15, at 482 (utilizing a hypothetical problem to demonstrate how risk analysis works in the area of brownfield remediation).

201. See Charles D. Bader, *Brownfield Remediation*, REMEDIATION MANAGEMENT, May/June 1996, at 17 (noting that management and engineering controls are established to lower the risks to human health and the environment as long as the intended use is not changed or these controls interrupted).

202. See Robert A. Simons, *Don't Just Clean Brownfields*, ENGINEERING NEWS-RECORD, Nov. 23, 1998, at 139. From a real estate perspective, many contaminated sites are not located in areas where the market can absorb these increased costs for site preparation. "Research on 15 successful brownfields cases shows that site preparation costs are about 10% higher than for equivalent greenfield sites . . ." *Id.*

203. See *id.*

204. See Gwathmey & O'Brien, *supra* note 7, at S1.

205. See Gwathmey & O'Brien, *supra* note 7, at S1.

206. Russ Banham, *Cooperation Helps Brownfields Bloom*, J. OF COMMERCE, Feb. 13, 1996, at 6A (discussing how regulators are now realizing that one set of standards should not apply to all clean-up situations).

remediation of many contaminated sites.<sup>207</sup> Such newer technologies include: bioremediation, in-situ vapor extraction, air sparging and stabilization.<sup>208</sup> By allowing the use of these technologies on a risk-based clean-up project, site management and remediation activities have been accelerated.<sup>209</sup> Additionally, the ability of the properties to move through the real estate market more swiftly has spurred new interest in VCP programs.<sup>210</sup>

Along with newer technology, institutional controls have been put to use as part of risk-based clean-up programs.<sup>211</sup> Institutional controls are "legal or physical restrictions on the use of, or access to, a site or facility to eliminate or minimize potential exposure to contaminants."<sup>212</sup> Some simple examples of institutional controls are fences, deed restrictions, in-place contamination monitors, restrictions on who may access a site, and site-use restrictions.<sup>213</sup> Once these controls are in place, they cannot be modified without first notifying the DEC, and they are most often permanently attached to the properties through the deed even as the site is repeatedly resold to different parties.<sup>214</sup> As many as fifteen states currently include the use of institutional controls as part of their VCPs, and their growing acceptance and use has helped stir additional interest in the area of brownfield remediation.<sup>215</sup>

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207. See Miller & Gladstone, *supra* note 50, at 4 (stating that the regulatory agencies are now recognizing that there is a greater benefit to promoting the reclamation of contaminated properties through the use of flexible programs as opposed to the continued enforcement of the rigid uniform standards of the past).

208. See Miller & Gladstone, *supra* note 50, at 4. Bioremediation uses naturally-occurring organisms to degrade organic contaminants. Air sparging is where air is injected into contaminated groundwater to remove volatile organic chemicals through volatilization or biodegradation. See *id.*

209. See Dean Jeffery Telego, *A Growing Role: Environmental Risk Management in 1998*, RISK MANAGEMENT, March 1998, at 19.

210. See *id.*

211. See Amy L. Edwards and Karis Lynn North, *Institutional Controls Minimize Risks at Restored Brownfields*, LEGAL TIMES, June 16, 1997, at S40 (noting that in the past institutional controls were used only as temporary measures during the remediation process until the clean-up was completed, but now they have become an integral part of many corrective actions).

212. *Id.*

213. See *id.* "The most commonly used controls can be divided into eight categories: deed restrictions, use restrictions, access controls, compliance monitoring, notice, registry act requirements, transfer act requirements, and restrictive zoning." *Id.*

214. See Eisen, *supra* note 36, at 949.

215. See Eisen, *supra* note 36, at 949. As of mid 1997, Arkansas, California, Connecticut, Delaware, Illinois, Iowa, Maine, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, Oregon, and Texas all included institutional controls in their VCPs. See *id.*

As many as forty states have already passed voluntary clean-up or brownfield legislation.<sup>216</sup> In New York, in spite of the fact that the VCP is not statutorily based, more than 120 voluntary agreements and consent orders have been signed since the program's inception.<sup>217</sup>

B. The City of New Rochelle and the Weyman Avenue Project:  
One of New York's First Sites to be Remediated Under  
the State VCP

One of the first brownfield sites to receive approval under the VCP was a twenty-four acre plot in New Rochelle, Westchester County, called the Weyman Avenue Urban Renewal Area. The site consisted of two parcels that had been contaminated from years of industrial use. The first parcel was approximately eleven acres which held eight separate privately owned industrial facilities, each of which was environmentally deficient and in dilapidated condition.<sup>218</sup> The second parcel of approximately thirteen acres had contained an animal shelter and a municipal incinerator that had ceased operation in 1975.<sup>219</sup> The incinerator had been in operation for close to 50 years prior to its closure and the ash it produced was deposited on both parcels.<sup>220</sup> The City of New Rochelle (hereinafter "City") was the lead volunteer in this undertaking, which eventually included two private developers.<sup>221</sup> The City first set out to create an overall development plan that would attract financially stable developers and make the process of remediation economically worthwhile.<sup>222</sup> As part of their development plan, the City needed to conduct an environmental assessment of the site. To do this, the City retained the services of an environmental engineering consulting firm.

The engineer retained by the City concluded that the site contained lead and other metals within the buried ash, semi-volatiles, and pockets of hydrocarbons from leaking underground storage

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216. See, e.g., FLA. STAT. § 3078 et seq.; N.J. ADMIN. CODE tit. 7, § 26C (1993); CONN. GEN. STAT. § 22A, chap. 445 (1993); MASS. GEN. LAWS ch. 21E (1993).

217. See Gerrard, *supra* note 45, at 10445.

218. See Frederick J. Koelsch, *Using Municipal Authority to Facilitate Brownfield Redevelopment: New Rochelle Weyman Avenue Urban Renewal Project*, 8 ENVTL. LAW IN N.Y. 33 (Mar. 1997).

219. See *id.*

220. See *id.*

221. See generally *id.*

222. See *id.* at 41.

tanks.<sup>223</sup> The assessment also revealed that the contamination had not spread into the aquifer under the site which was helpful in lowering the risks associated with developing the site.<sup>224</sup> With this knowledge in hand, the City moved forward in its negotiations with the DEC to formulate a consent order and closure plan.<sup>225</sup> As part of this plan, the City decided that the erection of large retail facilities would be the type of revenue-producing, job-creating businesses best suited for this site.<sup>226</sup> The City sought proposals from qualified developers and eventually settled on Home Depot and G&S Investors to bring financial stability to the program and participate in the redevelopment of these two sites.<sup>227</sup> Thus, on Parcel One a Home Depot would be built, and Parcel Two would contain a Price Club.

With these two well known retail stores on board, the City next set out to acquire the properties situated within Parcel Number One. To do this, the City believed condemnation was necessary because it would be too difficult for the private developers to assemble the eight privately owned plots.<sup>228</sup> In urban areas like New Rochelle, "condemnation can be a valuable tool for advancing brownfields redevelopment. . . as it allows a municipality to take control of large tracts of blighted, contaminated property for transfer to a third party developer . . . ."<sup>229</sup> As part of the condemnation process, the City was required to relocate the existing businesses.<sup>230</sup>

Like most environmental remediations, the exact costs associated with site preparation and eventual clean-up were unclear. The City and the two developers agreed to a cost-sharing plan whereby the developers paid for all of the cost beyond a predetermined amount paid by the City, with the right to terminate the agreement if the costs went beyond a designated threshold.<sup>231</sup> The developers also agreed to property-transfer restrictions and to operate the retail stores for a minimum number of years to guar-

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223. See Koelsch, *supra* note 217, at 41.

224. See *id.* at 41 (detailing the initial characterization of the site during the negotiations with the N.Y.S. DEC).

225. See *id.*

226. See *id.*

227. See *id.*

228. See *id.* at 42.

229. *Id.* at 42-43.

230. See Koelsch, *supra* note 217, at 42-43.

231. See *id.* at 42.



antee that the City would reclaim some of the debt it had incurred as a result of the project.<sup>232</sup>

Once the properties were acquired, the City conducted a Generic Environmental Impact Statement (hereinafter "GEIS") to evaluate general planning, environmental issues and financial issues.<sup>233</sup> The City was then required under SEQRA to complete a formal Environmental Impact Statement (hereinafter "EIS") for each of the two parcels prior to the start of remediation.<sup>234</sup> The lengthy amount of time required to produce these statements often causes the developer to back out. The City was able to significantly shorten this period because the individual environmental impact statements for each parcel only needed to cover those specific items not covered in the original GEIS.<sup>235</sup>

Once the plan, the developers and the EIS were all in place, it was time to complete the process of acquiring the DEC's approval of the remediation plan. The success of the project has been largely due to the DEC's flexibility in evaluating the remediation proposal as a whole and not just the existence and type of contaminants at the site.<sup>236</sup> The "NY DEC recognized the redevelopment of the site represented the best opportunity to remediate long-standing environmental deficiencies and at the same time return the properties to beneficial, revenue-generating uses."<sup>237</sup> The DEC determined that the City's proposed remedial plan would prevent the conditions at the site from presenting a significant threat to human health or the environment, and on June 17, 1994, the consent order was signed by the DEC and the plan was approved.<sup>238</sup>

The plan included the construction of a multi-layered low-permeability soil cap, much like what would be used at Irvington, and it required long-term monitoring and maintenance with some provisions for the safety of the workers who would be remediating the site.<sup>239</sup> The soil cap would also be topped in some areas by an asphalt layer in locations where there was to be a parking lot. These measures were included to prevent infiltration of the contaminated layer and prohibit the eventual run-off of contaminated

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232. *See id.*

233. *See id.* at 44.

234. *See id.*

235. *See id.*

236. *See* Koelsch, *supra* note 217, at 44.

237. *Id.*

238. *See id.* at 45.

239. *See id.*

water into the nearby stream and drainage structures.<sup>240</sup> The plan also required the installation of vents to prevent the build-up of volatile gases within the contaminated layer. The monitoring plan would provide for the checking of the vent gases, stormwater runoff, and groundwater for any sign of contaminants.<sup>241</sup>

Since the VCP does not provide any financial assistance to its volunteers, the parties involved at Weyman Avenue had to come up with the funds on their own.<sup>242</sup> The City financed close to \$27 million in bonds to pay for the project.<sup>243</sup> The City provided the majority of the financing for the environmental remediation and relied on recouping this investment via the commitments from the two retail stores to operate at the Weyman Avenue location for a specified minimum number of years.<sup>244</sup> Since it opened in 1996, the Home Depot has done approximately \$2 million in sales per week, with taxable sales estimated at \$1.5 million per week.<sup>245</sup> The Price Club is projected to generate the same tax revenue for the City. With 2.5% of the taxable sales going to the City in the form of sales tax,<sup>246</sup> these two new stores will generate approximately \$3.9 million in sales tax annually.<sup>247</sup> Along with this sales tax revenue, the City will also receive property taxes from both parcels. In addition to the money generated for the City, each store has created hundreds of new jobs and revitalized an area once thought dead from environmental devastation.<sup>248</sup> "The successful redevelopment of the Weyman Avenue brownfields proves municipalities, public agencies and private developers can work together to transform underutilized and contaminated sites into viable, revenue producing properties."<sup>249</sup>

#### C. Staten Island's Paper Recycling Plant: An Example of a VCP Project in New York City

The Weyman Avenue site is not the only site to undergo a dramatic turnaround as a result of the VCP. Under the shadows of the state's largest landfill at Fresh Kills, Staten Island, con-

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240. *See id.*

241. *See id.*

242. *See Koelsch, supra* note 217, at 45.

243. *See id.*

244. *See id.* at 42.

245. *See id.* at 45

246. *See id.*

247. *See id.*

248. *See generally* Koelsch, *supra* note 217.

249. *Id.* at 40.

struction of a new factory began March 1, 1997 to turn part of the city's trash into recycled paper to be used in the manufacturing of cardboard boxes.<sup>250</sup> "The \$250 million factory, on 35 acres facing the Arthur Kill, is one of the largest industrial investments in the city in recent decades . . . ."<sup>251</sup> The site was an old Consolidated Edison plant that is considered lightly contaminated.<sup>252</sup> The site is the first to be remediated under the VCP in New York City.<sup>253</sup> The plan is to erect two plants that will produce cardboard boxes using 100% recycled paper.<sup>254</sup> The plants will account for almost \$750 million in industrial development, provide over 1,000 permanent jobs, thousands of construction jobs, and will take approximately 150,000 tons of paper from the city trash each year to be recycled for reuse in the construction of the cardboard boxes.<sup>255</sup> The location of the facilities provides for lower raw material transportation costs since they are near highways, Newark Airport, and the landfill's garbage barge docks.<sup>256</sup> One particularly unique aspect of this project is that the site's previous owners, Consolidated Edison and Carbonic Industries, agreed to clean up the site under the VCP prior to turning it over to the developer.<sup>257</sup> This project will not only recycle paper, but it will also recycle a piece of commercial property that might have been left to sit idle as a result of the presence of contamination.

#### D. A Return to the Village of Irvington: the Role of the VCP in Revitalizing the Waterfront Park

Finally, let us not forget about the portion of the Irvington Waterfront Park project that was performed under the VCP. Like the Weyman Avenue site, the site in Irvington was partially owned by a private development company.<sup>258</sup> This private developer entered into a VCP agreement with the DEC to perform a site investigation on a portion of the property prior to the remediation that is presently being conducted under Title V.<sup>259</sup> At Irving-

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250. See John Holusha, *Commercial Property/Recycling: A New Factory and New Jobs? For New York? Yes*, N.Y. TIMES, (Sunday-late edition) July 1996, at 7.

251. *Id.*

252. *See id.*

253. *See id.*

254. *See id.*

255. *See id.*

256. See John Holusha, *supra* note 250, at 7.

257. *See id.*

258. See Record of Decision, *supra* note 123, at 1.

259. *See id.*

ton, a site with both municipal and private ownership, the parties involved took advantage of the programs offered to each by the state to work toward the common goal of remediation and redevelopment.<sup>260</sup>

As has been shown by the examples of Irvington Park, Weyman Avenue, and Staten Island, with some creativity, financial backing, and broad beneficial economic goals, a volunteer or a municipality can find a great deal of success under both Title V and the New York State VCP. Clearer and more predictable remedial standards based upon the health risks of possible exposure through the future use of the property can dramatically reduce the expense of clean-ups and can, in fact, encourage brownfield redevelopment.<sup>261</sup>

The issue of brownfields, or “environmentally impaired properties,” is not a new one; yet it is only recently that parties other than environmentalists have sought newer and more attractive ways to develop an interest in their rehabilitation.<sup>262</sup> This growing level of interest and change in attitudes can be attributed to: (1) the collection of experience in dealing with brownfields issues now that many are being remediated; (2) a better and clearer understanding of the costs associated with clean-ups; (3) the onset of more definable objectives and measurable standards; and (4) a changing of opinions on the use of risk-based standards in evaluating clean-up objectives.<sup>263</sup> As more success stories unfold, like Irvington Park and Weyman Avenue, the public and municipal participation in these remediation initiatives will likely increase.

#### IV. New York State's Two Brownfields Initiatives Do Not Solve All of the Problems

As positive as the above experiences sound, there are some issues and questions that have been left unaddressed and unanswered by both the VCP and Title V. For instance, for the remediation of a site to be profitable, it has to be sufficiently sized, in an excellent location, and the contamination must be at a level

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260. See *id.* at 7. (Detailing how the Village of Irvington and Scenic Hudson entered into a Voluntary Cleanup Agreement with DEC which helped enable the village to receive funding under Title V for site investigation.)

261. See Gwathmey & O'Brien, *supra* note 7, at S1.

262. See Daggett, *supra* note 23, at 33.

263. See James P. Rigano, *Brownfields and Redevelopment Of Contaminated Property*, N.Y.L.J., Feb. 14, 1997, at 1.

that can reasonably be remediated.<sup>264</sup> Not every contaminated site satisfies these criteria. In addition, even though these programs provide ample initiatives, redevelopment might not be worth the risks that come with unknown, and often unquantifiable, clean-up costs.<sup>265</sup> While there are insurance policies available to absorb some of these financial risks, these policies usually become more expensive as the level of risk grows.

Other critics believe that states, in their haste to make brownfield programs available and user-friendly, have loosened clean-up standards to the point that they jeopardize public health and safety.<sup>266</sup> Since these initiatives are in their infancy, a collection of data detailing the long-term success or failure of encapsulating hazardous materials on brownfields properties does not exist.

Remediation projects also typically require well capitalized developers with knowledge of available insurance, regulatory procedures and environmental remedies.<sup>267</sup> To demonstrate further, decontamination and demolition often require asbestos abatement and disposal of petroleum products and hazardous wastes.<sup>268</sup> Not only does the removal of these wastes contribute to the cost of the remediation, they also must be handled by approved waste and asbestos contractors.<sup>269</sup>

Skeptics have also pointed to one other significant aspect of these programs that raises concern: dealing with any government agency can entail delay, expense, and general aggravation.<sup>270</sup> Furthermore, even "though a clean-up today may seem comprehensive by today's standards, how can assurances be given that improvements in scientific understanding of fate and transport issues for chemicals will not result in new knowledge which calls

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264. See Jelena Matic, Suzanne Shelley and Cathy Cooper, *Opportunity Beckons in Brownfields*, CHEMICAL ENGINEERING, Oct. 1997, at 41.

265. See *id.*

266. See Judith Evans, *Cleaning Up the Nation's 'Brownfields': Critics Want Some Assurances Industrial Sites Aren't Re-Polluted*, THE WASHINGTON POST, Nov. 25, 1995 at E01.

267. See *Brownfield Update*, BUILDING DESIGN & CONSTRUCTION, Aug. 1998 at 20.

268. See Jerry Ackerman, *Turning Brownfields into Green; Contaminated Sites*, WORLD WASTES, May 1998 at 28.

269. See generally *id.*

270. See Carey S. Rosemarin and Christina M. Riewer, *Purchasing Brownfields*, THE NAT'L LAW JOURNAL, Sept. 2, 1996, at B7.

into question the previously completed clean-up."<sup>271</sup> In addition, the point most often raised, it seems, is the effect that brownfields initiatives have on the issue of environmental justice.

Despite improvements in environmental protection in recent decades, millions of Americans continue to live, work, play, and go to school in unhealthy environments.<sup>272</sup> Dozens of studies have shown that those who live closest to toxic sites, with the worst air and water pollution, highest levels of lead and pesticide poisoning and least environmental enforcement, are persons with low income or minorities.<sup>273</sup> Environmental justice is defined by the EPA as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to development, implementation, and enforcement of environmental laws, regulations and policies."<sup>274</sup> With that in mind, brownfields redevelopment and environmental justice concerns will need to walk hand in hand when they settle upon the clean-up standards to be implemented for inner-city contaminated properties.<sup>275</sup>

Most of these inner-city contaminated sites seeking to be reclaimed are located in low income and minority communities.<sup>276</sup> The continued abandonment of these sites perpetuates the environmental health hazards that frequent these economically depressed urban locales.<sup>277</sup> While the initial offer of job creation and economic revitalization may spark the interest of a community, the possibility that clean-up standards will be used that are lower than their suburban, non-minority counterparts may be a reason to forgo the opportunity. Programs that provide any clean-up flexibility, such as the New York State VCP and Title V, are under the continuous watch of environmentalists who are concerned that

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271. Daggett, *supra* note 23, at 47 (listing numerous points of concern raised as brownfields remediation programs continue their rapid growth throughout the country).

272. See Luke W. Cole and Richard Moore, *Attacks on EPA Unfair*, USA TODAY, July 20, 1998, at 14A.

273. See *id.*; see also Poindexter, *supra* note 42, at 8, n.23 ("In 1991, 36 million people (14.7% of the total United States population) lived in poverty. 42% of the poor people lived in America's 'center' cities.") (quoting BUSINESS WEEKLY, May 18, 1992, at 38).

274. Malcolm Pirnie Envtl. Engineers, *Environmental Justice Presentation* (in-house workshop presentation) (text on file with author).

275. See THE BROWNFIELDS BOOK, *supra* note 12, at 65.

276. See Berger, *supra* note 58, at 73.

277. See Berger, *supra* note 58, at 73.

"flexibility in clean-up standards will lead to second-class clean-ups, especially in low-income and minority communities."<sup>278</sup>

The creation of jobs is not the only incentive that these communities should consider. Minority residents should have some input into the remediation proposal to ensure that significant value will be added to the neighborhood and that there exists a goal to enhance the community as a whole.<sup>279</sup> It is no surprise that the brownfield programs focus their attention on urban areas. Some critics argue that, by lowering the clean-up standards and encouraging the return of industries that create environmental contamination to these lower income urban centers, we will only ensure that our nation's environmental illness will remain in the city.<sup>280</sup> Unfortunately, many of these low-income communities feel the pressure of allowing environmentally unfriendly industry to return versus no industry at all, rationalizing that the value that additional jobs bring would outweigh the potential environmental threat caused by the industry.<sup>281</sup> To avoid having to make such a choice, residents and advocates for these communities should insist on clean-ups, and the return of the types of industry, that afford their communities the same level of clean as their suburban neighbors.

One author has suggested that environmental contamination is one part of a cancer that is slowly killing our cities.<sup>282</sup> Brownfield programs that leave some contamination in place as part of the clean-up plan are only a "drug to alleviate the symptoms"<sup>283</sup> of this cancer. At the same time, they effectively eliminate the possibility for a cure.<sup>284</sup> Below the quiet, clean surface will lie a contaminated stratum seeking a catalyst to provide it the opportunity to work its way back to the surface. The advocates for environmental justice and brownfield remediation will have to work together if they want to find a cure for this "cancer" and succeed in

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278. Gerrard, *supra* note 19, § NY.07

279. See *Environmental Justice: Brownfields Initiative Grants Citizens New Opportunities to Voice Concerns*, HAZARDOUS WASTE NEWS, June 9, 1997 (noting how, in the past, minority residents of low-income communities had very little interaction with developers).

280. See Poindexter, *supra* note 42, at 4.

281. See *Environmental Justice Presentation*, *supra* note 274, at 13.

282. See *Environmental Justice Presentation*, *supra* note 274, at 3.

283. See *Environmental Justice Presentation*, *supra* note 274, at 3.

284. See *Environmental Justice Presentation*, *supra* note 274, at 3.

reclaiming contaminated properties while being environmentally sound and economically fruitful.<sup>285</sup>

## V. Conclusion

The latest trend in the environmental field is the redevelopment of contaminated properties.<sup>286</sup> Developers have concluded that many of these parcels are ripe for acquisition and remediation.<sup>287</sup> This trend towards recycling industrial sites is a vital component of long-term environmental protection because it promotes the cleaning of contaminated property while simultaneously protecting our quickly vanishing pristine open lands. For this trend to continue, the DEC and state legislators must continue to work on revising existing programs or creating new initiatives to address some of the shortfalls of Title V and the VCP.

Perhaps the state's commitment to indemnify municipalities under Title V can be extended to the volunteers who participate in the VCP. This certainly would encourage more contaminated-property owners to come forth and return their parcels to productive, safe uses. Or maybe the use of risk-based clean-up standards, which has found success in the VCP, can be utilized more often when formulating a Title V plan. Remedial strategies that are driven by the end use of the site will open the doors to many municipalities which do not want to go through the process of cleaning a future industrial site as if it were going to be the location of a pre-school.

Finally, the issues arising from the problem of addressing environmental justice concerns which have unfortunately always been with us, will continue to plague the poor and minority communities of our inner cities as long as there is industry. There are some things these communities can do to minimize or lessen their effects. They can insist on more rigid clean-up monitoring and supervision on those sites that are not returned to pristine condition; but more importantly, they must become a part of the planning process to ensure that when a site is to be reclaimed, it truly brings a benefit to their community as a whole.

Both the VCP and Title V are in their infancy, so it is too early to judge their long-term success both in attracting participants

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285. See THE BROWNFIELDS BOOK, *supra* note 12, at 70.

286. See Miller and Gladstone, *supra* note 54, at 4.

287. See James P. Rigano, *Brownfields and Redevelopment of Contaminated Property*, N.Y.L.J., Feb. 14, 1997, at 1.



and in returning environmental and economic benefits to the communities where they are located. From the examples of Irvington Park and Weyman Avenue, it is evident that utilizing both the statutory and agency created initiatives can be rewarding to the developer and community at large. As we cross into the new millennium, it will be the responsibility of today's legislators, engineers, scientists, and business owners to see that the dream of our 35th President becomes a reality. John F. Kennedy, in his last public address, given at Amherst College on October 26, 1963 said,

I look forward to an America which will not be afraid of grace and beauty, which will protect the beauty of our natural environment, which preserves the great old American houses and squares and parks of our national past and which will build handsome and balanced cities for our future.<sup>288</sup>

With programs such as Title V and the VCP, New York State is on its way to preserving its precious open space and natural habitat, but more can still be done. These programs need to be strengthened to continue this trend towards preservation of our environment and economic revitalization of our inner cities.

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288. SIMPSON'S CONTEMPORARY QUOTATIONS (1988).