The Brownfields Revitalization Amendment Act: DC's So-Slow Site Cleanup - Don't It Make Your Brownfields Blue?

John Bagwell
THE BROWNFIELDS REVITALIZATION AMENDMENT ACT:
DC'S SO-SLOW SITE CLEANUP—DON'T IT MAKE YOUR BROWNFIELDS BLUE?

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I. INTRODUCTION

During the 1990s, the population of the District of Columbia decreased while all other jurisdictions in its metropolitan regions experienced population growth.1 During this same period, the District's average poverty rate was nearly three times the regional average—15% for DC compared with 4.3% for the region.2 One of the results of these conditions was the abandonment of significant numbers of buildings and property throughout the city.3 Due to the land and water contamination that exists on many of these sites, some level of environmental cleanup will need to be taken before these properties can be redeveloped into active, functioning properties contributing to the local economy.4

Such nonproductive properties are termed "brownfields," which the U.S. Environmental Protection Agency ("EPA") has defined as "abandoned, idled or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination."5 The existence of such abandoned properties may, in part, be an unintended result of the primary federal environmental law addressing liability and cleanup issues for hazardous substances, the Comprehensive Environmental Response, Compensation

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2 See id.

3 See id.

4 See id.

and Liability Act ("CERCLA"). This law imposes strict liability for any hazardous substances located on a property. This liability extends to a number of parties including present and past owners who may not have contributed to the contamination.

While CERCLA only addresses liability for those properties listed on the National Priorities List ("NPL"), the potential that a non-listed brownfields property might later become the target of EPA action under CERCLA discourages many potential property developers from rehabilitating abandoned urban property.

These disincentives push property developers toward using greenfields—uncontaminated sites often located outside of urban areas. This allows them to avoid potential contamination liability when considering a new project. Developing greenfields instead of redeveloping brownfields reduces employment opportunities for city residents, takes tax revenues away from city governments, and can significantly increase urban sprawl.

Overcoming this incentive to locate new projects on greenfields is critical to the redevelopment of brownfields in the District of Columbia, which, as a jurisdiction of less than seventy square miles, has few undeveloped properties available. Developers have frequently turned to more out-lying areas in the DC-metro area, including property along I-66 in Virginia and I-270 in Maryland. D.C. Delegate Eleanor Holmes Norton alluded to this problem in addressing the siting of a new federal office building complex in Washington, "it would be a travesty to destroy green space in the suburbs to build federal office buildings when you have this vacant land, these brownfields, in the city."

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8 See U.S. Envtl. Prot. Agency, Policy on the Issuance of Comfort/Status Letters, available at http://www.epa.gov/brownfields/html-doc/comffact.htm (last visited Jan. 20, 2002) (noting that developers often contact the EPA seeking "some level of 'comfort' that if they purchase, develop, or operate on brownfield property, EPA will not pursue them for the costs to clean up any contamination resulting from the previous use").
9 See U.S. GENERAL ACCOUNTING OFFICE, SUPERFUND, RCED-96-125, BARRIERS TO BROWNFIELD REDEVELOPMENT (1996), at 3 (hereinafter SUPERFUND: BARRIERS TO BROWNFIELD REDEVELOPMENT).
10 See id.
11 See id.
In an effort to address the redevelopment of their own brownfields, many states and the federal government have instituted programs to encourage the cleanup and reuse of abandoned properties. These programs have taken a number of forms, ranging from mandatory to voluntary participation, and from strict cleanup standards to those that provide for acceptable ranges of cleanup based on the planned future use of the property.

On December 5, 2000, the Council District of Columbia passed the "Brownfield Revitalization Amendment Act of 2000." This legislation was the result of a year-and-a-half effort in the District government to craft a Voluntary Cleanup Program to address District brownfields and to help bring about urban redevelopment. The Act represents a combination of three pieces of legislation introduced into the District Council in 1999. The anchor legislation, the "Brownfield Revitalization Act of 1999," was introduced into the Council by its Chairperson, Linda Cropp, on behalf of District Mayor Anthony Williams. As he described it, the legislation "will help clean up contamination, improve the environment and ensure the participation of all community members in the overall revitalization effort."

Two additional brownfield related bills that were pending before the Council were melded into the Mayor's legislation. A joint public roundtable was also held on the three pieces of legislation to provide members of the public and other stakeholders an opportunity to comment upon the proposed cleanup program.

Mayor Williams signed this Act on January 22, 2001. Following the legislative procedure for the District of Columbia, the Act was then returned to the city Council which transmitted it to the District of Columbia Financial Responsibility and Management Assistance Authority

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16 See Memorandum from Council member Carol Schwartz, Chair, Committee on Public Works and the Environment, to the other District Council members (Oct. 18, 2000) (on file with author) (noting that the legislation included provisions from Bill 13-467, the "Brownfields Remediation and Redevelop [sic] Incentives Amendment Act of 1999" and Bill 13-348, "The Land Recycling Standards Amendment Act of 1999").
17 See id.

This Note summarizes the CERCLA program and the disincentives it creates for the redevelopment of brownfields. It then reviews several state programs that have been designed to stimulate brownfield redevelopment and alleviate some of the liability concerns. These programs were earlier analyzed for their effectiveness by the U.S. Department of Housing and Urban Development. The Note also examines the brownfields redevelopment program passed by the Council of the District of Columbia in December, 2000, comparing it with the lessons learned from state programs and earlier drafts of the District program. Finally, the Note argues that while the legislation is an important first step in addressing the brownfields situation in the District, several key provisions may serve to reduce its effectiveness and depress the participation by owners of small-and medium-sized properties.

II. CERCLA AND DISINCENTIVES TO BROWNFIELDS REDEVELOPMENT

On December 11, 1980, Congress passed CERCLA. The Act establishes a federal program for responding to releases or threatened releases of hazardous substances and the resulting contamination. This program provided strict liability for the recovery of a range of costs in addressing such contamination across a wide range of parties. It also established a detailed system of identifying a NPL of the most crucial sites to be remediated.

Among the "potentially responsible parties" ("PRPs") that may be held liable are (1) the owner and/or operator of a property; (2) any person

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18 In reviewing the legislation, the Control Board determined that the accompanying Financial Impact Statement was insufficient and returned the Act to the District Council for further analysis. Letter from Daniel Rezneck, General Counsel to the Control Board, to Phyllis Jones, Secretary to the District Council (Feb. 5, 2001) (on file with author); see also Council of the District of Columbia, How a Bill Becomes a Law, available at http://www.dccouncil.washington.dc.us/how.html (last visited Jan. 20, 2002).
22 See id.
who previously owned or operated a facility at which any hazardous substance was disposed; (3) any person who arranged for disposal or treatment of a hazardous substance or arranged with a transporter for transport to disposal of such a substance; and (4) any person who accepted a hazardous substance to transport it to a disposal site from which there is a release or threatened release which created response costs. Any of these parties can be held liable for all costs of removal and remediation of the contamination, as well as damages for injury or destruction of natural resources and costs of health assessments.

Contaminated sites for potential remediation action undergo a preliminary screening through the EPA’s Hazard Ranking System. This ranking is combined with a solicitation and response to public comments resulting in a “list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States.” While being listed on the NPL does not in itself constitute a judgment on the actions of the owner or operator or require any specific action, it does provide notice to PRPs that the EPA may take CERCLA enforcement action against them.

Because CERCLA imposes strict liability on such a range of parties, including those who neither caused the contamination nor are aware of such contamination, property developers are often unwilling to assume the risk of liability and are inherently steered away from brownfields as opportunities for redevelopment. This disincentive to redevelopment exists even though the vast majority of brownfields are unlikely to be added to the NPL list as they are not severely contaminated. Such disincentives discourage all three groups of actors required for effective redevelopment of abandoned brownfields—property owners, property redevelopers, and investment lenders.

Property owners are often unwilling to identify potentially contaminated properties as they can be held liable for the cleanup costs incurred regardless of whether the site is listed on the NPL. Instead they may reason that it is more profitable to allow such properties to become unused and abandoned.

24 See id.
25 See id.
27 See RECYCLING AMERICA’S LAND, supra note 6, at 7.
28 See SUPERFUND: BARRIERS TO BROWNFIELD REDEVELOPMENT, supra note 9, at 6.
29 See id. at 7.
Property redevelopers face similar disincentives. Given the "joint and several" liability created under CERCLA, redevelopers can become liable for hazardous substances later found on their property even if the contamination occurred prior to their purchase.\(^{30}\) For sites where contamination is known, redevelopers face even further disincentives— including the difficulty of predicting the cleanup costs of such sites, and the uncertainty of when a site will be remediated to a level allowing redevelopment. As a result, often "a return on the investment is uncertain in comparison with the potential return on a project on a greenfield [undeveloped] site."\(^{31}\) "Thus, even the suspicion of current or prior contamination may make lenders less willing to provide funds, developers hesitant to purchase brownfield properties and owners reluctant to place their properties on the real estate market."\(^{32}\)

The same disincentives that discourage property owners and developers from remediating abandoned sites have similar effects on lenders, discouraging them from making capital available. Under CERCLA, lenders who retain a security interest in contaminated property can be treated as "owners" if they engage in management functions.\(^{33}\) While lenders who do not participate in management are not considered "owners" for purposes of CERCLA liability, the U.S. General Accounting Office has noted that, "the statute does not define what actions constitute 'participation in the management of the contaminated property,' and the courts have given varying meaning to this phrase."\(^{34}\)

The not surprising result of these disincentives has been that pristine and undeveloped greenfields have become the primary location for new development—residential, industrial, and commercial.\(^{35}\) "As a result, our nation is consuming millions of acres of farmland and other open spaces at an ever increasing rate, while leaving hundreds of thousands of acres of brownfields abandoned or underutilized."\(^{36}\)

The impact of CERCLA's liability issues on brownfields redevelopment has been illustrated in several empirical studies. A survey of 232 cities conducted in 1999 by the U.S. Conference of Mayors found that the "lack of funds to cleanup these sites" was the primary obstacle to

\(^{30}\) See id. at 3.

\(^{31}\) Id. at 8.

\(^{32}\) Id. at 7.

\(^{33}\) See id. at 7.

\(^{34}\) See SUPERFUND: BARRIERS TO BROWNFIELD REDEVELOPMENT, supra note 9, at 7.

\(^{35}\) See RECYCLING AMERICA'S LAND, supra note 6, at 7.

\(^{36}\) Id.
redevelopment of brownfield sites for the third consecutive year.\textsuperscript{37} "Liability issues" placed second as an impediment.\textsuperscript{38} Similar results were found in a nationwide study of eighty community development agencies conducted for the U.S. Department of Housing and Urban Development ("HUD") and released in 1998.\textsuperscript{39} More than half of the respondents (forty-seven) listed cost issues as the primary deterrent to brownfield redevelopment.\textsuperscript{40} Potential liability issues ranked as the second most frequently mentioned deterrent.\textsuperscript{41}

These results provide good insight into the liability disincentives when one considers, as previously noted, that capital lenders are among the parties subject to these disincentives. Reductions in their potential liability might have a significant effect on the amount of funds available for redevelopment—addressing the two top redevelopment barriers in both studies: liability and funding.

While not addressed in-depth here, it should be noted that there are a number of other non-environmental barriers to the redevelopment of urban brownfields.\textsuperscript{42} As has been noted, "no amount of remediation can restore a brownfield if its real estate value is low."\textsuperscript{43}

III. GOVERNMENTAL EFFORTS TO REDEVELOP BROWNFIELDS

While no official listing of brownfields exists, government figures estimate that there are hundreds of thousands of acres at an estimated 500,000 abandoned or underutilized brownfields sites nationwide.\textsuperscript{44} The

\textsuperscript{37} See id. at 9.
\textsuperscript{38} See id.
\textsuperscript{39} See RESEARCH TRIANGLE, REDEVELOPING BROWNFIELDS: HOW STATES AND LOCALITIES USE CDBG FUNDS (1998) (Prepared for U.S. Department of Housing and Urban Development) [hereinafter HOW STATES AND LOCALITIES USE CDBG FUNDS].
\textsuperscript{40} See id.
\textsuperscript{41} See id.
\textsuperscript{42} See Heidi Gorovitz Robertson, One Piece of the Puzzle: Why State Brownfields Programs Can't Lure Businesses to the Urban Cores Without Finding the Missing Pieces, 51 RUTGERS L. REV. 1075, 1092 (1999) (listing among the other factors: (1) site location; (2) site accessibility; (3) site size; (4) site configuration; (5) existing buildings; (6) infrastructure; (7) zoning; (8) state/local tax burden; (9) utility rates; (10) residential suburbanization of workforce; and (11) local land use and environmental regulations).
\textsuperscript{44} See SUPERFUND: BARRIERS TO BROWNFIELD REDEVELOPMENT, supra note 9, at 4 (estimating that there are hundreds of thousands of acres); see also HOW STATES AND
Urban Land Institute has estimated that there are approximately 150,000 acres of industrial brownfields in major U.S. cities; however, as this estimate does not include certain residential and commercial brownfields, it is likely to be on the low end of the actual problem.\(^4\)

To address this widespread problem, the U.S. Federal Government, as well as most state governments, have implemented a number of programs to provide the resources and liability protection necessary to redevelop these urban blights.

The Brownfields National Partnership Action Agenda is a coordinated federal effort involving more than fifteen federal agencies investing $300 million in brownfields revitalization as well as $165 million in loan guarantees.\(^4\) Two of the lead federal agencies in this effort are the EPA, which is providing $125 million for assessment, cleanup, state cleanup programs, and job training, and HUD, which is providing $155 million for community development and $165 million in loan guarantees.\(^4\)

State efforts to address the redevelopment of brownfields have centered on efforts to overcome the fear of liability created by CERCLA. By late 1999, more than 90% of the U.S. states had implemented a “voluntary cleanup program” (“VCP”) establishing remediation and development guidelines that would allow developers to limit their liability.\(^4\) While generalizing about these state programs can be difficult to the degree that they differ in specifics, each contains three core elements:

- Provisions releasing participants from liability to the state for environmental damage if set criteria are followed.\(^4\)

- Provisions for various tiers or levels of cleanup standards. While often geared towards the type of use for which the site is being redeveloped, variable

\(^4\) See SUPERFUND: BARRIERS TO BROWNFIELD REDEVELOPMENT, supra note 9, at 4.
\(^4\) See id.
\(^4\) See ASSESSMENT OF STATE INITIATIVES, supra note 20, at 1.
\(^4\) See Robertson, supra note 42, at 1101.
standards allow some properties to be remediated at a lower cost, addressing the barrier created by general lack of funding available for redevelopment.\textsuperscript{50}

- Provisions for methods allowing use of physical barriers preventing human exposure to contamination, which may not be allowed under mandatory state and federal cleanup programs. Methods such as capping or paving a site can further reduce the cost of contamination.\textsuperscript{51}

IV. EFFECTIVENESS OF STATE PROGRAMS TO REDEVELOP BROWNFIELDS

Determining the effectiveness of these programs, both in revitalizing urban areas and even in redeveloping abandoned properties, is difficult not only because of the recent enactment of many of these programs, but also because of the limitations on available tracking data.\textsuperscript{52} A study prepared for HUD does offer some insight however into success. The study, released in December 1999, conducted an in-depth study of the VCPs in Massachusetts, Michigan, and Pennsylvania.\textsuperscript{53} These three state programs were selected based on their high level of program stability and the availability and access to program tracking data.\textsuperscript{54}

A. Massachusetts' Waste Site Cleanup Program

The Massachusetts "Waste Site Cleanup Program" provided developers of industrial and commercial sites with liability relief through "Covenant Not to Sue" agreements upon state certification that a site is clean or that mitigation requirements are met.\textsuperscript{55} Such liability relief is available through voluntary participation of any developer although "potentially responsible parties" are not allowed to participate in the

\textsuperscript{50} See id.
\textsuperscript{51} See id.
\textsuperscript{52} See ASSESSMENT OF STATE INITIATIVES, supra note 20, at 2.
\textsuperscript{53} See id. at 3. The study notes that the data used was accurate through July 1998, but that both the Massachusetts and Michigan programs had undergone changes during the analysis phase.
\textsuperscript{54} See id.
\textsuperscript{55} See id. at 15.
For properties where contamination is found, the state required developers to participate in the program.\textsuperscript{57} The Massachusetts program provided limited financial assistance for site assessment and mitigation, although this figure never exceeded $2.2 million annually.\textsuperscript{58} The HUD report found that the program focused more on reducing exposure to environmental contamination rather than economic redevelopment, and that brownfield redevelopment was a "spin-off benefit of environmental risk reduction efforts."\textsuperscript{59}

As many state VCPs do, the Massachusetts program included provisions for various levels of cleanup standards. Mitigation levels were structured based on the degree of permanence and the need for further site monitoring.\textsuperscript{60} Three "Response Action Outcomes" are provided for.\textsuperscript{61} About 89% of redeveloped sites underwent permanent remediation with no further remediation anticipated.\textsuperscript{62} Nearly 10% of sites have been remediated to a "No Significant Risk" status.\textsuperscript{63} The remaining sites are those locations where the remediation efforts are only temporary, with no significant environmental risk if the contamination remains for several years.\textsuperscript{64} Only 1.6% of remediated sites in Massachusetts were classified at this lowest level.\textsuperscript{65} As a liability protection, once a site has obtained state approval, further regulatory action can only be taken after the monitoring requirements established as a condition to approval have been violated.\textsuperscript{66}

Since the HUD study, Massachusetts enacted the "Brownfields Act" in 1998.\textsuperscript{67} This Act provided expanded liability relief, ending liability to "innocent" owners once they meet specified cleanup standards.\textsuperscript{68} Liability relief provisions are also included for owners and operators of sites where contamination has migrated onto their

\textsuperscript{56} See id.
\textsuperscript{57} See id.
\textsuperscript{58} See ASSESSMENT OF STATE INITIATIVES, supra note 20, at 16.
\textsuperscript{59} Id.
\textsuperscript{60} See id.
\textsuperscript{61} See id.
\textsuperscript{62} See id.
\textsuperscript{63} See id.
\textsuperscript{64} See ASSESSMENT OF STATE INITIATIVES, supra note 20.
\textsuperscript{65} See id.
\textsuperscript{66} See id.
\textsuperscript{67} See Bureau of Waste Site Cleanup, Summary of the Massachusetts Brownfield Act, at http://www.state.ma.us/dep/bwsc/files/bfhdout2.htm (last visited Jan. 20, 2002).
\textsuperscript{68} See id.
properties.\textsuperscript{69} As well, the “participation in management” liability standard for secured lenders was replaced with a “causation standard,” and the five-year limit on the exemption after the secured lender takes possession was eliminated.\textsuperscript{70}

The “Brownfields Act” provided additional financial incentives. These incentives include programs to encourage further private sector lending, a $30 million appropriation to provide low-interest loans and grants for redevelopment in “Economically Distressed Areas,” and a Brownfields Tax Credit of up to 25\% of cleanup costs.\textsuperscript{71} This tax credit can be expanded to 50\% for developers who remediate sites to standards beyond the minimum cleanup requirements, making the site safe for unrestricted use.\textsuperscript{72}

B. \textit{Michigan Site Reclamation Fund/ Site Assessment Fund}

The Michigan VCP was created in 1995 as part of the Michigan Environmental Response Act, which established both the Site Reclamation Fund and the Site Assessment Fund.\textsuperscript{73} In addition, “Covenant Not to Sue” agreements are used in Michigan; and additional third party liability relief is also available to lenders and innocent new site owners.\textsuperscript{74}

Flexible remediation standards are also available in the Michigan program based on the land developers’ intended use of the property.\textsuperscript{75} An analysis of the intended use of redeveloped sites shows a nearly even distribution between residential (29.4\%), commercial (41.2\%), and industrial (29.4\%) usage.\textsuperscript{76} This suggests that the standard selected is driven more by the local market of the site than by past contamination, with no indication of developers selecting lower standards to avoid the higher requirements for residential use.\textsuperscript{77}

Entry into the Michigan program requires public notification for any site receiving funding from the state.\textsuperscript{78} Once a developer has filed for

\textsuperscript{69}See id.
\textsuperscript{70}See id.
\textsuperscript{71}See id.
\textsuperscript{72}See id.
\textsuperscript{73}See Assessment of State Initiatives, supra note 20, at 17.
\textsuperscript{74}See id.
\textsuperscript{75}See id.
\textsuperscript{76}See id. at 24.
\textsuperscript{77}See id.
\textsuperscript{78}See id. at 17.
participation, the state has sixty days to respond although this period can be extended if public hearings are required. Provisions for liability relief from prior contamination are provided for new owners and operators who perform a "Baseline Environmental Assessment."  

The Michigan certification process also takes into account the cost-effectiveness of remediating to a specific standard. A favorable cost-benefit ratio can give a site preference over sites with lower ratios. Further regulatory action after certification can occur if previously undiscovered conditions are found, or if the established engineering controls fail.  

Funding for remediation activities has been much more extensive in the Michigan program. In 1998, the "Clean Michigan Initiative" authorized $675 million to be raised through bond issuance—half of which was designated specifically for brownfields redevelopment. While the remaining funds could be used for that purpose, they were not specifically earmarked for brownfields redevelopment. Other brownfields revitalization funding programs in Michigan include:

- Revitalization Loan Fund, which provides low interest loans to local brownfield redevelopment authorities for assessment and demolition on brownfields sites.
- Brownfield Redevelopment Grants, which provide up to $1 million to local governments and redevelopment authorities to remediate contaminated sites for economic development projects. $35 million in Site Reclamation Grants were awarded to communities

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79 See ASSESSMENT OF STATE INITIATIVES, supra note 20.
81 See ASSESSMENT OF STATE INITIATIVES, supra note 20, at 17.
83 See id.
85 See id.
86 See id.
leveraging private investments of $384 million and creating more than 5,000 new jobs.  

- Site Assessment Grants, which are available to local governments for determining the redevelopment potential of brownfields sites.  

Funding issues are also addressed through eleven tax-free Renaissance Zones throughout the state. The zones contain numerous brownfields sites, and the tax-free benefits provide further financial incentive for their redevelopment.

C. Pennsylvania’s Land Recycling Program

Pennsylvania’s “Land Recycling Program” VCP is designed to “effectively restore contaminated sites to safe and productive uses” and promote “the addition of jobs and economic stimulus to distressed communities.” Enacted in 1995, the program provides for remediation to four sets of cleanup standards: “background,” “statewide health standard,” “site specific,” and “special industrial.” The “statewide health standard” is most often used in the Pennsylvania program, constituting 70% of all state projects. The report indicates that the higher cleanup standards tend to be selected so developers can avoid the project delays, changes in the modification plan, and higher costs that might occur from public hearings. The “site-specific” standard in particular allows for community involvement in each step of the cleanup process, which can

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87 See id.
88 See id.
89 See id.
90 See id.
91 See id.
93 See ASSESSMENT OF STATE INITIATIVES, supra note 20, at 17.
94 See id.
95 See id at 18 (Prepared for U.S. Dep’t of Housing and Urban Development).
lead to further delays in the remediation process.\textsuperscript{96} Further state regulatory action can occur following certification if adverse changes occur after the redevelopment program is complete.\textsuperscript{97}

The Land Recycling Program is open to all types of property and requires the state to respond to developer applications within sixty days, which is expanded to ninety days when public hearings are required.\textsuperscript{98}

D. \textit{Analysis of What Has Worked—HUD}

1. Flexible Cleanup Standards

In analyzing the successes of the various redevelopment programs, the HUD report noted that one of the common features of state VCPs is the use of flexible cleanup standards not provided for under the strict federal CERCLA.\textsuperscript{99} Most of the flexibility of these programs comes from requiring remediation to levels based on the intended post-redevelopment use of the site.\textsuperscript{100} As a result, “the effort and cost associated with the mitigation of a particular pollution problem is likely to vary with the intended use of the site after remediation.”\textsuperscript{101} Such cleanup standard flexibility was seen as a “critical step” in the HUD report.\textsuperscript{102}

However, in constructing the levels of permitted remediation, a statewide default standard may provide some benefits. Using data from the Pennsylvania VCP, the HUD report noted that such a default standard was followed by nearly 80% of the projects.\textsuperscript{103} The other available standards in Pennsylvania tended to be more site specific, requiring the proposed remediation to involve greater public interaction and oversight by local governments.\textsuperscript{104} “Heavy reliance on the state-wide health standard reflects the value of this standard to developers, since it involves no institutional controls or local public oversight requirements.”\textsuperscript{105}

\textsuperscript{96} See Pa DEP Citizen’s Guide, supra note 92.

\textsuperscript{97} See \textit{Assessment of State Initiatives}, supra note 20, at 18.

\textsuperscript{98} See id.

\textsuperscript{99} See id. at 23.

\textsuperscript{100} See id.

\textsuperscript{101} Id.

\textsuperscript{102} See id. at 4.

\textsuperscript{103} See \textit{Assessment of State Initiatives}, supra note 20, at 25.

\textsuperscript{104} See id.

\textsuperscript{105} See id.
The report also found encouraging evidence suggesting that levels of heavy site contamination may not be an impossible barrier to overcome in redevelopment. Examining site uses in both pre- and post-development indicate that while the most frequent “upgrading” of site use was from industrial to commercial property, “there [was] also significant evidence of a shift of even heavy industrial sites to the least intensive use (residential).” As the report concludes, these findings challenge “the assumption that, due to past contamination, the marketplace and available subsidies will not support major changes in land use.”

2. Timely Approval Processes

The importance of avoiding unnecessary delays and creating a timely government approval and oversight process is underscored when the report rhetorically suggests that “the phrase ‘time is money’ may well have been first uttered by a developer.” The three state VCPs analyzed in depth, along with most other programs that focused on encouraging redevelopment efforts, contain time limitations on state review of cleanup proposals and/or completed mitigation reports.

Massachusetts uses Licensed Site Practitioners (“LSPs”), private companies which the state contracts with to design and implement site mitigations. While the state has the right to review cleanups conducted or approved by LSPs, it generally is not directly involved in remediation planning and oversight. State review of Response Action Outcomes (certification by level of sites that meet some level of cleanup standards) as proposed by LSPs takes less than two weeks for nearly 20% of projects, and more than 70% are approved in less than one month.

Pennsylvania requires Final Remedial Reports for sites cleaned to the two strictest standards (the standards most frequently used) to be reviewed within sixty days, which is expanded to ninety days for site-specific and industrial standards.

The HUD report concludes that many of the Pennsylvania sites seeking approval under the Land Recycling Program had “very simple

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106 Id. at 26.
107 Id at 26.
108 Id. at 29.
109 See ASSESSMENT OF STATE INITIATIVES, supra note 20, at 29.
110 Id.
111 See id.
112 Id.
cleanups” because approximately 65% of the plans were negotiated in less than two months. Approval of completed programs was found to be equally rapid. Responses were granted for more than 80% of the projects within sixty days, including twenty-three projects under the ninety-day deadline. Based on anecdotal evidence, the report found that many of the delays that did occur were motivated by a desire to get positive approval. The study in turn attributes that desire to the value of the liability protections for approved cleanup projects.

3. Availability of Financial Assistance

Based on the results of the Michigan and Pennsylvania programs, the report concluded that “the significance of the cleanup costs as a proportion of the full cost of a redevelopment is not as great as the reported range in data from state development agencies might make it appear.” However, the importance of state funding remains a key component.

In Michigan, twenty-six projects were studied, seven of which received less than 50% of their cleanup costs from state subsidies, nine of which received between 50% and 99%, and six of which had their cleanup costs completely covered by state funding.

The Pennsylvania program provided fewer funding opportunities to private developers. The report found only nineteen of 116 projects had a clear match to state funding. Redevelopment projects in this state typically received funding that amounted to only 1 or 2% of total project costs.

This may be explained partially by the funding mechanisms employed. Under the Pennsylvania program, local economic development agencies are eligible to receive grants, but private developers can only receive loans.

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113 Id. at 30.
114 Id.
115 See ASSESSMENT OF STATE INITIATIVES, supra note 20, at 30.
116 Id. at 31.
117 See id.
118 Id. at 32.
119 Id.
120 Id.
4. Leveraging of Private Funding

The report found substantial differences in the success of using public funds to leverage private funding. In Michigan, one-third of the projects studied resulted in a leveraging of more than 20:1 with nearly another third generating a 10:1 leveraging rate. The study concludes that these figures suggest both that many of the projects were stimulated into development by site assessments revealing little if any contamination and that higher levels of funding for cleanup were capable of bringing about large scale projects.

Leveraging efforts in Pennsylvania were less productive, with only two projects exceeding a 5:1 ratio. This result may however be misleading as fewer than 20% of the projects analyzed used any of the most closely linked-subsidies intended for such sites.

The report concludes that “the one clear finding from the data is that linked financial assistance for redevelopment on environmentally suspect sites was not a major factor contributing to their regeneration.” It finds that any leveraging successes were “clearly add-ons to the primary contribution of the VCPs to redevelopment: the regulatory relief and increased certainty of regulatory action.”

E. Brownfields in the District of Columbia

Like most major urban areas, the District of Columbia contains numerous sites with environmental issues that need to be addressed before they can be restored to viable functioning properties. The EPA lists ten DC superfund sites on the NPL. As of 1999, the District also reported an estimated fifty brownfield sites occupying approximately 300 acres of property. While the District never had a large heavy industry community leading to high levels of contamination, it has long had “rail yards, munitions factories, power plants, junkyards, refineries,

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121 See ASSESSMENT OF STATE INITIATIVES, supra note 20, at 32.
122 Id.
123 See id. at 33.
124 Id.
125 Id.
126 Id.
128 See RECYCLING AMERICA'S LAND, supra note 6, at 26.
warehouses, and small manufacturing operations” that have created a number of brownfields properties.\footnote{129}{Eric Lipton, After the Blight Abandoned Industrial Sites Poised for Development, WASH. POST, Oct. 20, 1999, at 1B.}

Drops in retail/wholesale trade and manufacturing, finance, and real estate industries during the past ten years have had a serious impact on the economic situation of the District.\footnote{130}{See U.S. Envtl. Prot. Agency, Office of Solid Waste and Emergency Response, Brownfields Assessment Demonstration Pilot—Washington, DC, available at http://www.epa.gov/swerosps/bf/html-doc/washdc.htm (last visited Jan. 20, 2002) [hereinafter Brownfields Assessment Demonstration Pilot].} During the period between 1970 and 1990, the District lost an estimated 157,000 residents and was subject to an unemployment rate that averaged 8.2%.\footnote{131}{See id.} The economic situation is particularly severe in the city’s southeastern section—approximately 20% of the properties east of the Anacostia River are vacant.\footnote{132}{See Brownfields Cleanup Revolving Loan Fund Pilot, supra note 2.}

The District’s economic recovery and expansion is hampered by a number of factors, including its small geographic size of sixty-three square miles, competition from neighboring jurisdictions, and a restricted tax base resulting from federal government ownership of 41% of the land (which thus generates no tax revenue).\footnote{133}{See Brownfields Assessment Demonstration Pilot, supra note 130.} A further disincentive to the District’s economic recovery situation is its lack of opportunity to form partnerships and seek assistance from either a county or state government. In a recent study, nearly 80% of city governments reported they were actively working with their state government on brownfield issues.\footnote{134}{See RECYCLING AMERICA’S LAND, supra note 6, at 15.}

The situation has been summed up by noting that, “while state and local governments nationwide have taken great interest in brownfields during the 1990s, the District has not considered it a big issue . . . only recently has the District realized the value [and] organized an environmental program.”\footnote{135}{See Mike Cleary, Polluted Sites May Get Help To Clean Up, WASH. TIMES, Nov. 5, 1999, at B8.}

F. District of Columbia’s Brownfield Revitalization Amendment Act of 2000
While a number of federal programs and pilot projects have been active in the District for several years, only on December 5, 2000 did the Council of the District of Columbia pass the District’s own VCP. By passing the Brownfield Revitalization Amendment Act of 2000 (“The Act”) the District Council established a program to:

[e]stablish the Voluntary Cleanup Program for contaminated property; to exempt from liability those who voluntarily clean up contaminated property; to prescribe criminal and civil penalties for the contamination of property; to ensure that those who are responsible for the contamination of property are held accountable; to create incentives for the development of contaminated property; to amend the Tax Increment Financing Authority Act to include the cleanup and redevelopment of contaminated property in the priority development list; to amend the National Capital Revitalization Act to include contaminated property in the priority area list; and to amend the District of Columbia Community Development Act to include contaminated property in the annual community development program.

The legislation that was eventually passed in December 2000 was a combination of three separate pieces of legislation written to address the brownfields issue in the District and were introduced into the District Council between July and December of 1999. At least one council member had anticipated the legislation would have been passed by the spring of 2000.

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136 Certification Record, Council of the District of Columbia, Jan. 5, 2001

137 Memorandum from Council member Carol Schwartz, Chair, Committee on Public Works and the Environment, to the other District Council members (Oct. 18, 2000) (on file with author) [hereinafter Schwartz Memo].


139 See Cleary, supra note 135.
1. Liabilities and Defenses

The legislation as passed follows the pattern of most VCPs by establishing strict, joint and several liability for costs of abatement, remedial cleanup, and other responsive actions taken in response to the unlawful release of any hazardous substance in the District. This liability is imposed retroactively to any “responsible persons” which include (1) the current owner or operator of the contaminated property; (2) the property owner or operator at the time of the contamination; or (3) anyone who arranged for the release, disposal, or treatment of the hazardous substance; (4) anyone who caused or contributed to the contamination if they knew or had reason to know contamination would result; and (5) anyone who transferred ownership of the property after the Act was effective if they knew or had reason to know of the contamination. Provisions are made to exempt those persons who transfer property after the bill goes into effect if they did not participate in the management of the property, did not directly cause the contamination, or who acquired ownership through any of a number of methods other than purchase.

The lender liability provisions raise an issue that should be noted. Provisions are made that holders of mortgages, deeds of trust on contaminated property, or security interest in property on a contaminated property can escape liability if they can establish “by a preponderance of the evidence that [they] did not participate in the management of the property [and] did not cause the contamination.” As discussed above, the Massachusetts Brownfields Act replaced its “management participation” standard with a “causation standard” which can reduce redevelopment impediments from secured lenders concerned about possible future liability issues. The “management of the property” standard contained in the District legislation may subject more lenders to liability than had been proposed in the prior District draft legislation – legislation which would have exempted lenders who did not participate “in the day to day operational management of the property.” Past court interpretation of management participation has varied, and so the broader

141 Id. § 201(c).
142 Id. § 201(6).
143 Id. § 201(c)(6).
144 See supra text accompanying note 70.
145 See Bill 13-348, 1999 Council § 9(a).
definition and uncertainty may decrease the willingness of private lenders
to extend funds for redevelopment of brownfields properties.\footnote{See supra text accompanying note 34.}

The Act provides for a number of defenses to liability including
contamination resulting from (1) acts of God; (2) acts of war; (3)
migration of substances from other properties owned by an unrelated
person; (4) act/omissions of a third party where precautions had been
taken to prevent foreseeable contamination; (5) acts/omissions by a third
party where it was outside the scope of an existing contract and it was not
reasonably foreseeable; and (6) acts/omissions prior to the acquisition of
the property following a diligent investigation into the possibility of a
contamination except where the property was acquired through inheritance
or bequest, foreclosure for tax delinquency, or condemnation for blight or
“other threats to public health, safety, and welfare.”\footnote{Brownfield Revitalization Amendment Act § 202.} Here as well, the
final version of the bill provides somewhat stricter liability than earlier
draft legislation which would have exempted liability for contamination
that occurred prior to obtaining an ownership interest in the property,
“where the person acquired the facility by inheritance or bequest.”\footnote{Bill 13-531, 1999 Council § 3(b)(8).} The
Act also provides that persons who wish to redevelop brownfields
property, and have not been involved in any contamination of the
property, may seek certification as a “non-responsible person” who will
only be held liable for any future contamination he causes or contributes to
or if he exacerbates any then-existing contamination.\footnote{Brownfield Revitalization Amendment Act § 203.}

\section*{2. Voluntary Cleanup Program}

Title III of the Act establishes the District’s VCP “to encourage the
private voluntary cleanup of contaminated properties.”\footnote{Id. § 301.} The program is
to be administered by the District Environmental Health Administration
(“EHA”), which will assume responsibility for (1) investigating
brownfield properties; (2) establishing eligibility requirements for the
voluntary cleanup program and redevelopment incentives; (3) devising
cleanup standards; (4) providing oversight for cleanup activities; and (5)
certifying the finality of cleanup programs.\footnote{Id.}
The VCP is structured so that prospective participants file a detailed application with the EHA including "[a] detailed report, with all available relevant information on the environmental conditions of the property" and "[a]n environmental assessment of the property including, nature, and the location of all hazardous substances known by the applicant to be present" with a summary of the proposed action plan.  

The EHA is then given ninety business days to approve or deny the application. The EHA may also request additional information regarding the application, which tolls the ninety-day approval period. Should the EHA not reply within the ninety-day review period, the applicant "shall be entitled to a meeting with a designated EHA official to inquire about the status of the application" which must occur "within [ten] days of a request."  

Following the approval of the application to participate in the VCP, the participant must then file a cleanup action plan that is "in accordance with [yet to be determined] EHA cleanup standards." Another ninety business days are given for the EHA to approve or disapprove this cleanup action plan. Unlike the application process, however, no provisions are made to the participant if the District fails to respond within this ninety business day period.

As previously discussed, a timely approval process is a key factor in encouraging urban redevelopers to take part in the program. The two ninety business day approval periods could easily each translate into four-and-a-half calendar months, meaning an approval period of nine months—and longer periods are clearly anticipated with the provision allowing the demand of meetings with the EHA should the EHA miss its deadline. Somewhat ironically, in recommending passage of the Act, the Chair of the Committee on Public Works and the Environment noted that the ninety business day approval period was "consistent with the intention of the Council to provide for a quick review of applications." These lengthy approval processes seem even more questionable when noting that the Massachusetts review process for Response Action Outcomes (certifying

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152 Id. § 302.
153 Id. § 302(b)(1).
154 Id.
155 Brownfield Revitalization Amendment Act § 302(b)(2).
156 Id. § 303.
157 Id.
158 See supra text accompanying note 108.
159 See Schwartz Memo, supra note 137.
some level of cleanup standards have been met) occurs within less than two weeks for 20% of their projects, and more than 70% are completed in less than one calendar month.\textsuperscript{160}

Two of the three brownfields-related bills that developed into the Act contained provisions regarding the approval deadlines imposed on the EHA. The final legislation appears to have taken the most lengthy review processes from each piece of the legislation and combined them.

The Brownfield Revitalization Act of 1999, legislation introduced into the District Council by its Chair at the request of the Mayor, provided a ninety-day approval period for the proposed cleanup program.\textsuperscript{161} However, while this proposed bill did not contain any deadline for the initial participation application, its language does not indicate it anticipated a long approval process, noting that an application may be denied if “the facility is listed on the National Priorities List . . . or is the subject of an ongoing enforcement proceeding under a federal environmental statute or program.”\textsuperscript{162} This legislation also provided that applications could be denied if “there are grounds to believe that the applicant lacks the intent or ability to implement a response action that will protect public health, welfare and the environment.”\textsuperscript{163}

The Land Recycling Standards Amendment Act of 1999 provided a sixty-day application approval period, with a thirty-day extension where the application involved “unusually complex environmental or legal issues.”\textsuperscript{164} While this legislation provided no timeline for approval of the cleanup program itself, it did require a thirty-day written comment period.\textsuperscript{165}

The incorporation of the longer application approval period and a similarly lengthy cleanup plan approval seems to have taken the most prolonged provisions from both pieces of proposed legislation and combined them, thus making the program less attractive to outside redevelopers.

Should the EHA fail to respond during the ninety business day application approval process, the Act provides only a questionably effective remedy. It allows for a “meeting with a designated EHA official

\textsuperscript{160} See ASSESSMENT OF STATE INITIATIVES, supra note 20, at 29.
\textsuperscript{161} See Bill 13-531, 1999 Council § 6(c)(2).
\textsuperscript{162} Id. § 6(a)(2)(A).
\textsuperscript{163} Id. § 6(a)(2)(B).
\textsuperscript{164} Bill 13-348, 1999 Council §2(c).
\textsuperscript{165} See id. § 3(d)(4).
to inquire about the status of the application." More egregious is that not even this remedy is provided if the EHA is similarly unresponsive after the ninety business day cleanup plan approval process.

This reflects a watered-down version of the language originally proposed by the Mayor. The original Brownfield Revitalization Act of 1999 would allow the participant to demand a meeting to determine the “timetable for completing review of the proposed [cleanup] plan.” The final Act as passed not only provides no relief should the EHA miss the ninety-day cleanup plan approval process, but the meeting which can be requested only inquires into “the status of the application” with no requirement of a timetable for completion.

The Land Recycling Standards Amendment Act proposed a much more pro-development procedure. If the participation application was not approved within the sixty day period (expandable to ninety days in some circumstances), it automatically became effective if certain items have been certified by an attorney and a licensed environmental professional. As indicated, this legislation did not establish a firm deadline for the approval of the cleanup plan.

3. VCP Application Fee

Another significant anti-development provision is found in the $10,000 fee that must be paid with the application to participate in the program. This fee is in no way tied to the level of contamination on a property, and in fact would be required even for those sites where the fear of potential contamination may prove to be false. Such a high fee is likely to discourage small- and medium-sized property owners from participating in the program at all. Also, this fee is much higher than what many states charge to oversee their VCPs. Pennsylvania, for example, charges no application fees when parties submit their “Notice of Intent to RemEDIATE.” A fee of $250 is assessed for the filing of a final report for projects remediated either to the background or statewide health

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167 Bill 13-531, 1999 Council § 6(c)(2)(E).
168 Brownfield Revitalization Amendment Act § 302(b)(2).
169 See Bill 13-348, 1999 Council § 2(d).
170 See supra text accompanying note 165.
171 Brownfield Revitalization Amendment Act § 304(a).
172 See generally Brownfield Revitalization Amendment Act (containing no such refund provision).
For properties remediated to a "site-specific" standard, a $250 fee is assessed with the filing of each of the remedial investigation report, risk assessment report, and the cleanup plan. A $500 fee is assessed with the submission of the final report for "site-specific" properties.

Massachusetts law allows the Department of Environmental Quality to establish application fees for the program, however it also provides that they are to be "based on a scale that accounts for the extent of such enforcement and compliance activity that is appropriate for different categories of permits." These fees are capped at $10,000 for "the category of permit that involves the most extensive enforcement and compliance activity." Many states use a cost-per-hour structure to correlate the fees with the complexity of the cleanup. A review of other small jurisdictions demonstrates that Connecticut charges a $500 application fee and a $50/hour cost; Delaware requires a $5,000 deposit with additional costs billed at $45-$65/hour, and Vermont charges a $500 application fee.

The potential that this significant assessment fee could have the unintended consequence of stifling the redevelopment of abandoned or underused property is seen in an analysis of the results of the Michigan program. One of the conclusions drawn from the leveraging trends of public money in that program was that "many projects were stimulated by nothing more than a site assessment revealing little or no contamination." The high program application fee provided for in the District VCP will potentially result in fewer brownfield property owners applying to participate in the program—property owners who might discover that in fact their properties had little if any contamination, and could redevelop or resell them for productive use.

The $10,000 application fee specified in the final Act reflects a potentially anti-development modification from the draft Brownfield

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174 Id.
175 Id.
177 Id.
179 See ASSESSMENT OF STATE INITIATIVES, supra note 20, at 32.
Revitalization Act of 1999 which called for the collection of "fees to cover the costs of implementing the provisions of this Act."\textsuperscript{180}

In addition to the application fee, the Act also provides that a performance bond, in an amount determined by the EHA, be posted by an approved participant before beginning any remediation action.\textsuperscript{181} The bond is to be used "to secure and stabilize the eligible property if the cleanup action plan is not implemented."\textsuperscript{182} The obligation of the bond is removed on certification of completion of the remediation or after sixteen months if the participant withdraws from the VCP.\textsuperscript{183}

4. Certificate of Completion

Once the cleanup program has been completed, the Act provides that the participant shall file a completion report with the EHA stating sampling results, remediation measures taken, a description of any engineering or institutional controls used in meeting the cleanup standards and any measures necessary to maintain those controls, a listing of any hazardous substances, and a statement of intended future use of the property.\textsuperscript{184}

Unlike the lengthy initial approval periods, the EHA is required to approve or disapprove the completion report within thirty business days.\textsuperscript{185} If approved, the EHA will issue a Certificate of Completion that releases the participant from "further liability under this act and any other District law or regulation, for the cleanup of the eligible property and for any contamination identified in the environmental assessment of the property, and that the participant may not be subject to a contribution action instituted by a responsible person."\textsuperscript{186} This release from liability does not relieve the participant from any liability for any previously undiscovered contamination on the property even after the Certificate of Completion has been issued.\textsuperscript{187}

\textsuperscript{180} Bill 13-531, 1999 Council § 6(m)(1).
\textsuperscript{182} Id.
\textsuperscript{183} See id.
\textsuperscript{184} See id. § 306(b).
\textsuperscript{185} See id. § 306(c).
\textsuperscript{186} Id. § 306(d)(3).
\textsuperscript{187} Brownfield Revitalization Amendment Act § 306(i)(4) (2000).
5. Cleanup Standards

The Act vests authority in the EHA to determine the VCP's cleanup standards, based on "sound science and acceptable industry standards for the cleanup of contaminated properties to protect public health, welfare, and the environment." While the Act does not specifically provide for flexible cleanup standards, it does allow the EHA to establish specific engineering controls it considers effective in particular circumstances. VCP participants in these designated situations who use these presumptive remedies may seek approval of their cleanup action plan without first conducting a risk assessment.

Further indication that flexible cleanup standards would be permitted under the Act is found in the provision permitting a Certificate of Completion conditioned on certain limited permissible commercial or industrial uses. Specific standards for such limited uses could be promulgated by the EHA rather than relying on site-specific standards which would likely require a more time-consuming review process.

The call for flexible cleanup standards has also come from the Maryland-National Capital Building Industry Association. In testifying on their behalf on the proposed legislation, James Witkin noted that "[b]y clarifying that the applicant need not remediate a property beyond a level determined to be safe for the site's proposed use, the program will avoid unnecessary expenditures that will not enhance the protection of human health or the environment."

As noted above, flexible cleanup standards are considered a "critical step" in many existing state VCPs. Prior drafts of the legislation provide no further discussion of flexible standards, but the memorandum recommending passage of the Act written by the Chair of the Council Committee which drafted this bill noted that because of the

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188 Id. § 305(a).
189 See id. § 305(a)(2).
190 See id.
191 See id. § 306(f).
193 See supra text accompanying note 102.
technical nature of cleanup standards, "the Council prefers to defer to the expert judgment of EHA" in their creation.\(^{194}\) To the degree the Act permits, it seems the EHA would encourage greater brownfield redevelopment by setting flexible cleanup standards.

6. Public Participation

Public participation plays a significant role in the brownfields revitalization process. The District Council noted that it is their intention that "the public [be] adequately informed of cleanup action and appropriately afforded the opportunity to comment."\(^{195}\) To provide this notice, the EHA is required to provide a fourteen-day public notice and comment period prior to the approval of an application to participate, a proposed cleanup plan, or issuance a Certificate of Completion.\(^{196}\) The EHA is to then consider these public comments in approving or disapproving of the application, cleanup action plan, or Certificate of Completion.\(^{197}\)

The Act provides that notice of the comment period is to be listed in the District of Columbia Register and mailed to the Advisory Neighborhood Commission ("ANC") where the property is located.\(^{198}\) The Act also says "notice may also be published in a newspaper of general circulation."\(^{199}\) In addition to this required public comment period, the Act empowers the EHA to develop other public involvement activities, including public hearings and posted notices of action on the property.\(^{200}\)

The Act also provides for public participation by allowing any person to bring "an action to compel the Mayor to perform any non-discretionary duty under this act; or to commence a civil action on his or her own behalf against any person who is in violation of any standard, regulations, requirements, or orders pursuant to this act."\(^{201}\) To prevent

\(^{194}\) See Schwartz Memo, supra note 137, at 9.
\(^{195}\) Id. at 4.
\(^{196}\) Brownfield Revitalization Amendment Act § 601(a) (2000).
\(^{197}\) See id.
\(^{198}\) See id. § 601(b). ANCs are made up of elected representatives from 37 local neighborhoods that advise "the District government on issues relating to zoning, social service programs, health, police protection, sanitation, and recreation." District of Columbia, Citizen Services: Neighborhoods, Washington, DC, available at http://www.washingtondc.gov/neigh_ciz/neigh_alpha.htm (last visited Jan. 20, 2002).
\(^{199}\) Brownfield Revitalization Amendment Act § 601(b).
\(^{200}\) See id. § 602(a).
\(^{201}\) Id. § 602(b).
frivolous lawsuits, courts are permitted to award attorney’s fees and other costs to the successful party.\textsuperscript{202}

The public notice provisions of the Act are somewhat less stringent than those proposed in the prior draft legislation. The Land Recycling Standards Amendment Act of 1999 provided that prior to approving a cleanup plan, notice of the plan and a brief summary had to be published in the District of Columbia Register and either the \textit{Washington Post} or the \textit{Washington Times}.\textsuperscript{203} The EHA was further required to “make reasonable attempts to provide personal notice” of the plan to all known responsible parties, owners, and residents of property located within the vicinity of the property and to hold a public hearing to solicit comments upon the request of a person working or residing within the vicinity.\textsuperscript{204} The required public comment period in this proposed legislation was to last thirty days.\textsuperscript{205}

The Brownfield Revitalization Act of 1999 proposed a somewhat different scheme of public involvement. It required participants filing their proposed cleanup plan or completion report to provide notice to the local ANC, as well as public notice of the availability of the report and a thirty-day comment period in the District of Columbia Register and both the \textit{Washington Post} and the \textit{Washington Times}.\textsuperscript{206} The program participant was then required to review these comments and modify their proposed cleanup plans in response.\textsuperscript{207} The participant was to summarize its response actions to these comments and explain why it chose not to act appropriately.\textsuperscript{208} This proposed legislation would have required even greater public participation. The program participants were to develop a public participation program that “involve[d] the public in the cleanup and proposed use of the facility”\textsuperscript{209} and “in the development and review of the cleanup plan and completion report.”\textsuperscript{210} The legislation proposed such public involvement as including:

\begin{quote}
Developing a pro-active community information and consultation program that includes door-step notice of
\end{quote}

\textsuperscript{202} See id. § 602(b).
\textsuperscript{203} See Bill 13-348, 1999 Council § 3(d).
\textsuperscript{204} \textit{Id.}
\textsuperscript{205} See id.
\textsuperscript{206} See Bill 13-531, 1999 Council § 6(1)(2)(A).
\textsuperscript{207} See id. § 6(1)(2)(B).
\textsuperscript{208} \textit{Id.}
\textsuperscript{209} \textit{Id.} § 6(1)(3).
\textsuperscript{210} \textit{Id.}
activities related to cleanup; holding public meetings and roundtable discussions; establishing convenient location where documents related to a cleanup can be made available to the public; designating a single contact person to whom community residents can ask questions; forming a community-based group that is used to solicit suggestions and comments on the various reports required by this section; and if needed, retaining trained, independent third parties to facilitate meetings and discussion and perform mediation services.\footnote{211}

While the shortening of the public comment period from the proposed thirty days to fourteen days is not likely to speed the process dramatically, the decision not to include the heavy public involvement requirements, particularly those requiring the property remediator to develop public participation programs, is likely to stimulate more participation and more brownfields redevelopment. One District Council member indicated that the provision permitting, but not requiring, the EHA to develop further public participation plans was “consistent with the Council’s determination to involve the public in environmental issues without unnecessarily hindering the timely implementation of the program.”\footnote{212} One might wonder if this goal would not have been better met by providing for slightly more public participation while drastically reducing the two ninety business day approval periods given to the EHA.

It should be noted that even stricter public participation requirements had been suggested. The New Columbia Chapter of the Sierra Club called for multiple public notices to be published in multiple newspapers, notice to be “provided to all ANCs within 3 miles of the site, to all interested environmental organizations and should be posted on EHA’s web site.”\footnote{213} The New Columbia Chapter further argued that hearings should be held “upon request by any interested member of the public.”\footnote{214}

Sustainable DC in its public testimony on the draft legislation also stressed extensive public participation integrated into the remediation and redevelopment process. Testifying on their behalf, Doug Siglin suggested

\footnote{211}{Id.}
\footnote{212}{See Schwartz Memo, supra note 137, at 14.}
\footnote{213}{Letter from Jim Dougherty, President, New Columbia Chapter, Sierra Club, to District Council member Sandra Allen, Chair of the Committee on Human Services 3 (Oct. 7, 1999) (on file with author).}
\footnote{214}{Id.}
that "making the community more than a sounding board requires something more than merely have [sic] notice and comment provisions, and/or a single hearing. It requires that there be a mechanism for on-going involvement of the community."\textsuperscript{215}

The HUD report demonstrates some of the negative implications of public involvement in the process. It noted that in Pennsylvania, developers in approximately 80\% of the remediation projects chose to use the statewide remediation standard in part because it limited public participation, illustrating further the importance of shortening the time period for administrative oversight.\textsuperscript{216}

7. Brownfield Redevelopment Financial Incentives

The Act creates a number of programs to provide funding and other financial incentives for the development of District brownfields.

a. "Clean Land Fund"

The Act establishes a non-lapsing, revolving "Clean Land Fund," which can be used "for the administration, improvement and maintenance of the Program . . . pursuant to the contaminated property cleanup assistance [program], and any other brownfield revitalization incentives established by this act."\textsuperscript{217} Funds distributed from this program will either be given at grants or low-interest loans (not to exceed 2\%) in amounts up to 75\% of the cost of the environmental assessment, remediation, and redevelopment of brownfields property.\textsuperscript{218} In distributing these funds, the Mayor is to consider a variety of factors, including, the benefit to public health, safety and the environment, permanence of the remediation, cost effectiveness of the remedy, financial situation of the applicant, economic situation of the area in which the property is located, and the potential for economic redevelopment.\textsuperscript{219} In granting loans from this fund, the projected ability to repay may be considered, and a mortgage or other collateral may be required to secure the loan.\textsuperscript{220} Funds from repayment of


\textsuperscript{216} See supra text accompanying notes 104 and 105.


\textsuperscript{218} Id. § 704(a).

\textsuperscript{219} See id. § 704(b).

\textsuperscript{220} See id. § 704(c).
these development loans are to be redeposited into the Clean Land Fund. 221

b. Real Property and Business Franchise Tax Credits

The Act also allows the Mayor to propose rules to establish tax credits for real property and business franchise taxes in connection with the remediation of brownfield properties. 222 These tax credits can be for amounts up to the total costs of cleanup, but are not to exceed 25% of the costs for redevelopment of the property. 223

The Mayor may also reduce property taxes on contaminated property for its remediation and may defer or dismiss “delinquent real property taxes, delinquent special assessments, cost or fees assessed to correct any condition that exists on the contaminated property in violation of the law.” 224 Such forgiveness must take into account the public benefits of the redeveloped property, including estimates of the number of persons to be employed as a result of the redevelopment, including their estimated annual salaries and the number of District resident employees, as well as an estimate of the increase in the assessed property value and of the increase in tax activity for the property. 225

The Mayor is also empowered to grant franchise tax credits on income expected to be earned by a business as a result of the remediation of contaminated property. 226 If these property and business franchise tax credits exceed the value of taxes owed, they may be carried forward for up to twenty-five years. 227

c. Environmental Savings Accounts Program

Under the Act, the Mayor is to establish an Environmental Savings Account Program that “shall permit any person, to establish an Environmental Savings Account (“ESA”) for the purpose of accumulating funds to be used for the cleanup or the redevelopment of a contaminated

221 See id. § 704(d).
222 Brownfield Revitalization Amendment Act § 701(a) (2000).
223 See id. § 701(b).
224 Id. § 702(a).
225 See id. § 702(a)(5)(c).
226 See id. § 702(b).
227 See id. § 702(c).
property." Funds in this savings program earn interest at an undetermined rate and are exempt from District income tax. A 10% penalty is provided for if the funds are withdrawn but not used for property remediation and redevelopment.

The Act incorporates the financial development incentives from the Brownfield Revitalization Act of 1999 and the Brownfields Remediation and Redevelopment Incentives Amendment Act of 1999 without significant modification. In the draft legislation, a separate fund for financing environmental assessments of property had been considered. The final Act incorporates environmental assessment funding into the Clean Land Fund program.

The proposed Brownfields Revitalization Act of 1999 provided a bounty-hunter style reward program for any person providing information leading to the conviction of persons for illegal releases of contamination as detailed. This reward was to be one-third of any fines collected from the conviction, with a $100 minimum. However, final legislation did not provide for such a reward program.

In providing comments on the Land Recycling Standards Act of 1999, Jim Dougherty, President of the New Columbia Chapter of the Sierra Club suggested implementing funding "programs for local rehabilitation tax exemptions and historic rehabilitation tax credits to encourage rehabilitation and restoration of older and historic structures." These specific tax incentives were also not included in the final legislation.

G. District VCP as an Effective Tool to District Revitalization

The VCP passed by the District Council represents a significant step in addressing the redevelopment of abandoned and underutilized properties in Washington, DC. Numerous District constituencies ranging from the building industry to citizen environmental organizations have

228 Brownfield Revitalization Amendment Act § 703.
229 Id.
230 See id.
231 Bill 13-531, 1999 Council § 8 (a); Bill 13-467, 1999 Council § 205.
232 Brownfield Revitalization Amendment Act § 704(a).
233 Bill 13-531, 1999 Council § 10(c).
234 See id.
235 Dougherty, supra note 213, at 2.
praised its creation. A selection of the public comments on the various pieces of legislation used to craft the Act is illustrative:

- "Overall, [the People of the New Columbia Chapter of the Sierra Club] applaud [this] brownfields bill as a way to convert abandoned areas inside the city to sites which enhance our communities and contribute to the economy." 236

- "I think that Mayor Williams’ draft legislation provides an excellent framework for you to work with." 237

- "Board of Trade member Robert M. Pinkard ... praised the Mayor for his proposed initiative to redevelop vacant and blighted properties." 238

- "The proposed legislation would make the District more competitive in attracting in-fill development, particularly in light of the fact that both Virginia and Maryland have had similar legislation for the past several years." 239

However, as seen when the District VCP is compared with successful programs that have been crafted and implemented in other jurisdictions, there are a number of elements that appear likely to frustrate the greatest possible success of the program.

The use of a “management participation” standard for lenders may cause greater anxiety on behalf of such lenders in making available the funding that is often crucial to redevelopment projects. A seemingly more

236 Id. (commenting on the Land Recycling Standards Act of 1999).
237 Siglin, supra note 215 at 6 (commenting on the three pieces of draft legislation at a February 2000 public hearing).
238 Press Release, Greater Washington Board of Trade, Board of Trade Lauds Mayor’s Brownfields Initiative (Nov. 4, 1999) (on file with author). The Greater Washington Board of Trade represents businesses across the region and stresses the importance of a healthy Capital City as the heart of a healthy region.
appropriate standard is illustrated in Massachusetts where a "causation" standard has been employed for lender liability.\textsuperscript{240}

The lengthy ninety business day application approval process given to EHA seems excessively long and likely to discourage developers who require a quicker return on their investment from participating in the program. The addition of the weak remedy of being able to call a meeting with the EHA should the Agency fail to approve the application in the provided time only serves to further question the timeliness with which the Agency is expected to address applications.\textsuperscript{241}

Providing another ninety business day approval period for the proposed cleanup plan stretches the potential approval process to nearly nine months—a time period that may be too excessive for many developers, discouraging participation in the program and discouraging the redevelopment of the District—the goal of the program. The lack of any remedy should this second 90-business day period only raises even further questions on the programs anticipated efficiency.

The $10,000 application fee appears to be higher than those charged in many other jurisdictions and seems likely to discourage owners of smaller properties from participating in the program. A better solution might have been to require a smaller application fee and tie the complete costs to the complexity of the program as several states have done.\textsuperscript{242} Recognizing that, by definition, brownfields include properties where there is only "perceived" environmental contamination,\textsuperscript{243} it seems particularly harsh to charge applicants $10,000 only to discover on completing an environmental assessment that their property contained no contamination at all.

The development of flexible cleanup standards was not expressly provided for by the District Council, but should be devised by the EHA to the ability the agency is permitted. As indicated, such flexibility can potentially avoid unnecessary financial expenditures.\textsuperscript{244} With high costs and scarce available financing, any efforts to avoid such unnecessary costs should lead to higher program participation and greater redevelopment for the District.

The public participation standards appear to be designed to provide a level of public input without overly burdening the redevelopment

\textsuperscript{240} See supra text accompanying note 144.
\textsuperscript{241} See supra text accompanying note 155.
\textsuperscript{242} See supra text accompanying note 178.
\textsuperscript{243} See supra text accompanying note 5.
\textsuperscript{244} See Witkin, supra note 192.
process. While there may have been disagreements on the level of participation desirable, it seems somewhat anti-public participation to have more limited public input while providing significant blocks of time for the EHA approval process.

Finally, the financial incentives provided for in the legislation should serve to encourage greater participation in the program to the degree such funding is appropriated and made available. As noted by the Maryland-National Capital Building Industry Association, given the numerous funding priorities in the District, the use of tax credits becomes even more effective for those time when full funding is not available.245

While the District Council Committee that crafted the final legislation noted that it "does not anticipate a flood of applicants for the programs [or an] overwhelming [number of] cleanup activities,"246 it should be hoped that the provisions of the program itself do not discourage widespread participation and redevelopment of the District.

245 Id.
246 Schwartz Memo, supra note 137, at 16.