

# INDIANA’S BROWNFIELDS INITIATIVES: A VEHICLE FOR PURSUING ENVIRONMENTAL JUSTICE OR JUST BLOWING SMOKE?

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## INTRODUCTION

Dilapidated warehouses, unused gas stations, inactive factories, and other abandoned commercial and industrial properties litter the landscape in many older industrial regions throughout the United States.<sup>1</sup> These sites “drive down property values” and “contribute to community blight,” while generating “little or no tax revenue.”<sup>2</sup> Consider one such Indiana property. A ten-acre piece of land sat on the edge of a predominately minority city, vacant for over two decades.<sup>3</sup> “Midnight dumpers” frequented the site. This illegal dumping over the years resulted in the accumulation of “monstrous proportions” of garbage.<sup>4</sup> For years, fears of contamination hindered the site’s redevelopment. An environmental assessment indicated that removing the heaps of toxic trash would enable redevelopment to continue without further cleanup.

Next, the state investigated and identified the illegal dumpers, who incurred cleanup costs. Investors redeveloped the property. Soon after the property’s redevelopment, a neighboring company purchased the lot and expanded its operations. Throughout the assessment, cleanup, and redevelopment process, project officials kept the community apprised of the site’s progress. The company’s expansion onto the former vacant lot increased its business, provided additional employment opportunities for the city, and contributed to the tax rolls.<sup>5</sup>

The preceding scenario describes a successful brownfields redevelopment project. Brownfields are properties where the presence or potential presence of contamination complicates its expansion, redevelopment, or reuse.<sup>6</sup> Typically located in urban centers populated by predominately minority and lower-income populations, brownfields properties once played a vital role in commerce and industry.<sup>7</sup> Actual or perceived contamination, however, caused developers to

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1. H.R. REP. NO. 109-608, pt. 1, at 2 (2006).

2. *Id.*

3. See EPA, *Brownfield Success Stories: East Chicago Turns Garbage into Gold*, [http://www.epa.gov/brownfields/html-doc/ss\\_nwndi.htm](http://www.epa.gov/brownfields/html-doc/ss_nwndi.htm) (last visited Mar. 5, 2007) (discussing the redevelopment of a ten-acre property in East Chicago, Indiana).

4. *Id.*

5. See *id.*

6. See Bradford C. Mank, *Reforming State Brownfield Programs to Comply with Title VI*, 24 HARV. ENVTL. L. REV. 115, 120 (2000).

7. See Emily A. Green, *The Rustbelt and the Revitalization of Detroit: A Commentary and*

largely ignore such properties in recent years.<sup>8</sup> In many instances, developers have focused their efforts on “greenfields,” undeveloped land on the outskirts of cities that require little or no environmental remediation or attendant development delay.<sup>9</sup> Greenfields provide an attractive alternative for developers because numerous impediments hinder brownfields redevelopment.<sup>10</sup> Yet there is hope.

The advent of federal and state incentive programs over the past decade has significantly reduced barriers hampering brownfields redevelopment.<sup>11</sup> As a result, brownfields programs have returned thousands of properties to economically and socially productive uses.<sup>12</sup>

Indiana, along with the vast majority of states,<sup>13</sup> has implemented brownfields initiatives.<sup>14</sup> Indiana’s program mentions environmental justice as a key concern.<sup>15</sup> “Environmental justice is the fair treatment . . . of all people . . . with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>16</sup> “Brownfields redevelopment is closely associated with environmental justice because it [often] targets neighborhoods that have . . . not benefited from economic prosperity.”<sup>17</sup> However, with only minimal substantive requirements relating to environmental justice, Indiana’s programs may fail to adequately address this crucial concern.

This Note explores pursuing a proactive approach to achieving environmental justice in the context of brownfields redevelopment in Indiana. Public participation is the linchpin of a successful brownfields project incorporating environmental justice concerns.<sup>18</sup> Indiana’s programs contain minimal public

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*Criticism of Michigan Brownfield Legislation*, 5 J.L. SOC’Y 571, 572 (2004).

8. See Todd S. Davis, *Defining the Brownfields Problem*, in BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY 3, 7 (Todd S. Davis ed., 2002) [hereinafter BROWNFIELDS: A COMPREHENSIVE GUIDE].

9. See Stephen M. Johnson, *The Brownfields Action Agenda: A Model for Future Federal/State Cooperation in the Quest for Environmental Justice?*, 37 SANTA CLARA L. REV. 85, 95 (1996).

10. See H.R. REP. NO. 109-608, pt. 1, at 2 (2006).

11. See *id.*

12. See *id.*

13. See NATIONAL BROWNFIELDS ASSOCIATION, WHAT WORKS: AN ANALYSIS OF STATE BROWNFIELD AND VOLUNTARY CLEANUP PROGRAMS 1, [http://www.brownfieldassociation.org/portals/0/pdf/NBA\\_Program\\_Analysis.pdf](http://www.brownfieldassociation.org/portals/0/pdf/NBA_Program_Analysis.pdf) (last visited Oct. 8, 2007).

14. See IND. CODE § 13-19-5-1 (Supp. 2007); see also IND. CODE § 13-25-5-1 (2004).

15. See Ind. Fin. Auth., *Indiana Brownfields Program*, <http://www.in.gov/ifa/brownfields/> (last visited Mar. 5, 2007).

16. See EPA, *Environmental Justice*, <http://www.epa.gov/compliance/environmentaljustice/index.html> (last visited Mar. 5, 2007).

17. MOLLY SINGER ET AL., RIGHTING THE WRONG: A MODEL PLAN FOR ENVIRONMENTAL JUSTICE IN BROWNFIELDS REDEVELOPMENT 8 (2001), available at <http://www.lgean.org/documents/Righting%20the%20Wrong.pdf>.

18. See generally Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, in BROWNFIELDS LAW AND PRACTICE: THE CLEANUP AND REDEVELOPMENT OF

participation requirements.<sup>19</sup> Therefore, Indiana's brownfields initiatives are on track to be minimally successful as a vehicle for pursuing environmental justice.

Part I provides background on brownfields. Specifically, this Part addresses the definition, nature, causes, and effects of brownfields sites, along with the barriers and benefits to redevelopment. Part II defines environmental justice and explores its intersection with brownfields redevelopment. Part III focuses on current laws impacting brownfields. This Part highlights federal and state legislative measures impacting brownfields. Part IV describes Indiana's brownfields initiatives: The Voluntary Remediation Program and the Indiana Brownfields Program. Part V analyzes Indiana's brownfields initiatives with respect to environmental justice considerations. Finally, Part VI posits that Indiana's brownfields initiatives should bolster the substantive requirements for public participation in order to adequately address environmental justice concerns. Specifically, this Part recommends that Indiana should adopt the use of technical assistance grants and community workgroups to facilitate meaningful public participation.

## I. BACKGROUND

Part I provides background on brownfields. Specifically, this Part provides a definition of brownfields followed by a description of the nature and extent of the problem. Next, this Part explores the various barriers to brownfields redevelopment. Finally, this Part discusses the positive attributes of brownfields redevelopment.

### A. *Defining the Problem*

Most older cities and towns have abandoned and contaminated land, commonly referred to as "brownfields," within the heart of the city.<sup>20</sup> "The most widely accepted definition of what constitutes a brownfields site is [employed] by the U.S. Environmental Protection Agency ('EPA')."<sup>21</sup> The EPA defines brownfields as, "property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."<sup>22</sup> Occasionally, "brownfields are defined as only sites

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CONTAMINATED LAND 31-1, 31-6 (Michael B. Gerrard ed., 2006) [hereinafter BROWNFIELDS LAW AND PRACTICE].

19. See generally IND. CODE § 13-19-5-8 (Supp. 2007); IND. CODE § 13-25-5-11 (2004).

20. Johnson, *supra* note 9, at 94.

21. William W. Buzbee, *Nature and Effects of the Brownfields Problem*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-4.

22. EPA, *Brownfields Mission*, <http://www.epa.gov/brownfields/mission.htm> (last visited Mar. 5, 2007). The brownfields definition is found in the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356, 2361 (2002). Indiana, for example, defines a brownfield as

a parcel of real estate: (1) that (A) is abandoned or inactive; or (B) may not be operated at its appropriate use, and on (2) which expansion, redevelopment, or reuse is

that are lightly contaminated.”<sup>23</sup> However, “[s]uch a limited definition is . . . misleading.”<sup>24</sup> A chief reason for abandonment or underutilization of brownfields is uncertainty regarding extent or existence of contamination.<sup>25</sup> Thus, the EPA definition is more complete; it suggests that complications to redevelopment abound not only in sites where actual contamination exists, but also in sites where contamination is *perceived* as well.

The degree of contamination at a brownfields site varies widely.<sup>26</sup> The majority of brownfields sites are only lightly contaminated, can be easily cleaned up, and offer viable opportunities for reuse.<sup>27</sup> Conversely, some brownfields are severely contaminated.<sup>28</sup> If a site investigation reveals substantial contamination, the site may be included on the National Priorities List (“NPL”) under the Federal Comprehensive Environmental Response Compensation and Liability Act of 1980 (“CERCLA”).<sup>29</sup> Properties on the NPL “demand monumental effort and resources to restore and manage.”<sup>30</sup> If such sites are redeveloped, the cleanup is far more costly compared with other brownfields properties.<sup>31</sup> The NPL sites are true environmental nightmares, oftentimes bearing significant health and safety risks. Therefore, such sites are less likely to be redeveloped.<sup>32</sup> Distinguishing between these sites and sites with lower levels of contamination is paramount to understanding the brownfields problem because brownfields incentives often exclude properties on the NPL.<sup>33</sup>

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complicated; because of the presence or potential presence of a hazardous substance, a contaminant, petroleum, or a petroleum product that poses a risk to human health and the environment.

IND. CODE § 13-11-2-19.3 (2004).

23. William W. Buzbee, *Nature and Effects of the Brownfields Problem*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-4.

24. *Id.* (discussing how some “brownfields” definitions use the “only lightly contaminated” definition because many federal and state brownfields laws and voluntary cleanup initiatives target lightly contaminated sites and exclude severely contaminated sites).

25. *Id.*

26. See Faith R. Dylewski, Comment, *Ohio’s Brownfield Problem and Possible Solutions: What is Required for a Successful Brownfield Initiative?*, 35 AKRON L. REV. 81, 85 (2001).

27. See William W. Buzbee, *Nature and Effects of the Brownfields Problem*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-4.

28. *See id.*

29. *See id.*; see also 42 U.S.C. §§ 9601-9675 (2000).

30. Todd S. Davis, *Defining the Brownfields Problem*, in BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 3, 6. The EPA has identified over 1250 NPL “sites that pose significant risks to human health and safety.” *Id.*

31. *Id.*

32. See William W. Buzbee, *Nature and Effects of the Brownfields Problem*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-4.

33. Todd S. Davis, *Defining the Brownfields Problem*, in BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 3, 6.

*B. The Extent of the Brownfields Problem*

Thousands of brownfields sites exist around the United States.<sup>34</sup> However, the exact number is difficult to obtain. Varying definitions of brownfields, and the reality that many former industrial and commercial sites are yet to be thoroughly investigated for contaminants, leads to a wide range of figures.<sup>35</sup> By some estimates, more than 450,000 brownfields exist in the United States,<sup>36</sup> comprising five million acres of wasted land nationwide.<sup>37</sup> In terms of dollars and cents, “[c]urrent estimates place the cost of cleaning up the nation’s brownfields at \$650 billion.”<sup>38</sup> Further, brownfields represent millions of dollars in lost tax revenue and wages.<sup>39</sup> According to a U.S. Conference of Mayors Report, “data suggests that more than 20,000 cities and other municipalities nationwide could be losing billions of dollars each year in local tax receipts resulting from their failure to restore brownfields to economic viability.”<sup>40</sup>

Although the numbers reflect the sheer enormity of the brownfields dilemma, they do little to explain the sources of the problem. One commentator suggests the creation of the problem can be viewed in “two distinct stages.”<sup>41</sup> First, “the initial decision to disinvest in such sites” occurred.<sup>42</sup> The initial decision to disinvest in what are now brownfields sites often originated decades ago as part of a “deindustrialization” trend in the United States.<sup>43</sup> This trend heavily impacted the Northeast and Midwest, leading to these geographic areas now containing the largest concentration of brownfields sites.<sup>44</sup> Secondly, the shift

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34. See William W. Buzbee, *Nature and Effects of the Brownfields Problem*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-4.

35. *Id.* at 1-5.

36. EPA, *Brownfields Cleanup and Redevelopment*, <http://www.epa.gov/brownfields/about.htm> (last visited Mar. 5, 2007); see also Todd S. Davis, *Defining the Brownfields Problem*, in BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 3, 6.

37. U.S. Dep’t of Hous. & Urban Dev., *Brownfields Frequently Asked Questions*, <http://www.hud.gov/offices/cpd/economicdevelopment/programs/bedi/bfieldsfaq.cfm> (last visited Mar. 5, 2007).

38. Todd S. Davis, *Defining the Brownfields Problem*, in BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 3, 6.

39. CHARLES BARTSCH ET AL., NE.-MIDWEST INST., COMING CLEAN FOR ECONOMIC DEVELOPMENT: A RESOURCE BOOK ON ENVIRONMENTAL CLEANUP AND ECONOMIC DEVELOPMENT OPPORTUNITIES 1-2 (1996); Northeast-Midwest Inst., *Framework of Environmental and Economic Development Concerns*, <http://www.nemw.org/cmclean1.htm> (last visited Oct. 8, 2007).

40. Todd S. Davis, *Defining the Brownfields Problem*, in BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 3, 6.

41. William W. Buzbee, *Nature and Effects of the Brownfields Problem*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-6.1.

42. *Id.*

43. *Id.*

44. See *id.* at 1-6.1 to -7 (explaining how manufacturing operations from the predominately unionized jurisdictions of the Northeast and Midwest shifted to the South and Southwest as a result

from a primarily industrial economy to a service-oriented economy contributed to the problem.<sup>45</sup> Manufacturers increasingly moved operations abroad, particularly to Latin America and Asia.<sup>46</sup>

Brownfields include sites with many prior uses including: dry cleaners, factories, plants, and office buildings.<sup>47</sup> Brownfields can be as small as an abandoned “mom-and-pop” gas station on a one-acre plot or as expansive as a vacant steel-manufacturing campus sprawling out over several hundred acres.<sup>48</sup> Although the greatest concentration of brownfields properties are in inner cities, brownfields are also located in rural areas as well.<sup>49</sup> Left unchecked and underutilized, brownfields pose a plethora of burdens to the surrounding community.<sup>50</sup>

### *C. Effects of Undeveloped Brownfields Sites*

The effects of undeveloped brownfields are “manifold.”<sup>51</sup> Economic, social, and environmental problems represent the stigmatic impacts of brownfields on communities.<sup>52</sup> First, undeveloped brownfields can create hazards resulting from environmental contamination.<sup>53</sup> The potential harm to the ecology surrounding brownfields sites includes sustained environmental damage.<sup>54</sup> Inherent in the definition of brownfields is “either real or perceived . . . environmental contamination.”<sup>55</sup> Accordingly, the associated contamination may be chemical, biological, or in remote instances, nuclear.<sup>56</sup> A property in this condition increases the loss of revenue due to real or perceived potential harm.<sup>57</sup>

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of lower wages and financial incentives).

45. *Id.* (noting that more than “[ninety] percent of new jobs created in the United States between 1974 and 1989 were . . . in the service sector”).

46. *Id.*

47. Dylewski, *supra* note 26, at 85.

48. Todd S. Davis, *Defining the Brownfields Problem*, in BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 3, 5.

49. See William W. Buzbee, *Nature and Effects of the Brownfields Problem*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-5.

50. *Id.*

51. Todd S. Davis, *Defining the Brownfields Problem*, in BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 3, 7.

52. See generally *id.* at 3.

53. Kurt A. Frantzen & James N. Christman, *Cleanup Standards*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 22-1, 22-4.

54. See *id.*

55. *Id.* The authors define actual risk and perceived risk. *Id.* An actual risk is “the probability that the adverse effect will occur with a certain frequency and level of intensity.” *Id.* A perceived risk is defined as “a mental construct defined by the hazard’s importance and significance to individuals, the community, and society.” *Id.*

56. *Id.*

57. *Id.*

Second, the potential harm to people includes “sickness or death.”<sup>58</sup> Site contamination may pose a risk to those who work near a brownfields site.<sup>59</sup> Untreated contaminants located on the sites “may leech into the air and water.”<sup>60</sup> Thus, abandoned brownfields sites create the potential for negative health consequences for the surrounding community.<sup>61</sup> Consequently, abandoned industrial sites are often blamed for a variety of adverse health problems “ranging from birth defects to cancer clusters.”<sup>62</sup> Although a correlation between the location of brownfields and an increase in certain health problems may exist, oftentimes, the blame is placed before any investigation supports this assertion.<sup>63</sup> Nevertheless, the actual or perceived contribution to human illness from continual exposure to hazardous physical environments fuels the stigma.<sup>64</sup>

In addition to the potential environmental and associated health risks, brownfields also contribute to the area’s economic and social problems.<sup>65</sup> “Potential investors, concerned about liability,” avoid developing brownfields.<sup>66</sup>

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58. *See id.*

59. William W. Buzbee, *Nature and Effects of the Brownfields Problem*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-5.

60. *Id.*

61. Jennifer Felten, *Brownfield Redevelopment 1995-2005: An Environmental Justice Success Story?*, 40 REAL PROP. PROB. & TR. J. 679, 682 (2006).

62. *See* Kurt A. Frantzen & James N. Christman, *Cleanup Standards*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 22-1, 22-5.

63. *See id.*

64. *See* NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL WASTE AND FACILITY SITING SUBCOMMITTEE, ENVIRONMENTAL JUSTICE, URBAN REVITALIZATION, AND BROWNFIELDS: THE SEARCH FOR AUTHENTIC SIGNS OF HOPE, A REPORT ON THE “PUBLIC DIALOGUES ON URBAN REVITALIZATION AND BROWNFIELDS: ENVISIONING HEALTHY AND SUSTAINABLE COMMUNITIES” 18 (1996), available at [http://www.epa.gov/Compliance/resources/publications/ej/public\\_dialogue\\_brownfields\\_1296.pdf](http://www.epa.gov/Compliance/resources/publications/ej/public_dialogue_brownfields_1296.pdf).

65. *See generally* Todd S. Davis, *Defining the Brownfields Problem*, in BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 3, 6-7. In short, the cycle of decline . . . can be depicted as follows:

1. A property owner, unwilling or unable to sell contaminated property, mothballs it, thus undermining the local tax base.
2. Vacant facilities deteriorate and invite arson, illegal dumping, and vandalism, including the stripping of parts and materials.
3. Unaddressed contamination may spread, further eroding the property value, escalating the cleanup cost, and threatening the economic viability of adjoining properties.
4. Potential investors, faced with uncertain costs and legal liabilities, seek development opportunities elsewhere.
5. Brownfield sites become unwanted legal, regulatory, and financial burdens on the community and its taxpayers.

*Id.*

66. *Id.* at 7.

As a result, real estate investors are reluctant to invest in such properties.<sup>67</sup> Hence, the value of brownfields properties further diminishes in value.<sup>68</sup> Not only is the value of the brownfields sites diminished, the property can depress the value of surrounding property as well.<sup>69</sup> Further, a concentration of brownfields sites creates the perception that the site is somehow dangerous due to crime or contamination fears.<sup>70</sup>

Similarly, the community surrounding the brownfields suffers from the effects. The architectural eyesores and urban blight plague the communities where brownfields are situated.<sup>71</sup> The neighborhoods also suffer from a decreased tax base.<sup>72</sup> A decrease in property-tax collection leads to a decline in revenue available for urban schools and other public services.<sup>73</sup> Additionally, because brownfields provide no employment, the properties play a role in chronic unemployment.<sup>74</sup> Local government budgets are drained in areas of high unemployment, while contributing no long-term benefits.<sup>75</sup> High unemployment rates necessitate local government expenditures; yet, the community gleans no long-term benefits. The host of negative effects related to brownfields stems, in large part, from barriers to brownfields redevelopment.

#### *D. Barriers to Brownfields Redevelopment*

Although deindustrialization and associated demographic shifts supplied the initial impetus for brownfields creation, a litany of obstacles currently discourages progress.<sup>76</sup> Such obstacles to brownfields redevelopment include: “ambiguous legal liability, potentially substantial capital costs, insufficient financing, clouded environmental policies, [the] absence of a consistent redevelopment framework, public opposition, [and] a limited demand for redeveloped sites [due to] competition from greenfields.”<sup>77</sup> Among the obstacles,

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67. *Id.*

68. *Id.*

69. Daniel A. Schenck, Note and Commentary, *The Next Step for Brownfields: Government Reinsurance of Environmental “Cleanup” Policies*, 10 CONN. INS. L.J. 401, 402 (2004).

70. William W. Buzbee, *Nature and Effects of the Brownfields Problem*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-6.

71. See generally 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, 1079 (1999).

72. *Id.*

73. *Id.*

74. See *id.*

75. William W. Buzbee, *Nature and Effects of the Brownfields Problem*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-6.

76. See Todd S. Davis, *Defining the Brownfields Problem*, in BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 3, 9.

77. Paul D. Flynn, Note, *Finding Environmental Justice Amidst Brownfield Redevelopment*, 19 VA. ENVTL. L.J. 463, 471 (2000).



the potential for crushing liability is a principal concern for developers contemplating whether to redevelop a brownfield.<sup>78</sup> Without regard to fault, environmental laws can impose liability on current and previous owners of contaminated properties.<sup>79</sup> Perhaps the most daunting environmental law affecting whether and how contaminated properties are cleaned and redeveloped is CERCLA.<sup>80</sup>

1. *The Potential for CERCLA Liability is the Chief Statutory Disincentive to Brownfields Redevelopment.*—In the late 1970s, Americans first began to recognize the threats buried toxic waste presented to human health and the environment.<sup>81</sup> The most infamous case to receive widespread public and government attention during this time occurred at a former landfill in Love Canal, New York.<sup>82</sup> At Love Canal, residents complained of health problems that were eventually attributed to exposure to toxic wastes buried in their community.<sup>83</sup> Ultimately, the exposure required the residents to abandon their homes.<sup>84</sup> By the end of the 1970s, thousands of abandoned sites considered to pose potential threats to human health and the environment generated pressure for governmental action.<sup>85</sup> “Although industrial waste-disposal practices were largely unregulated for nearly a century, once it became evident that federal government involvement was necessary, that federal presence came with a vengeance.”<sup>86</sup>

Congress passed CERCLA<sup>87</sup> in 1980.<sup>88</sup> The hastily drafted compromise bill followed a lengthy legislative history.<sup>89</sup> Consequently, “the statute as enacted in 1980 was characterized by numerous ambiguities, omissions, and poorly drafted provisions, and the legislative history is of limited assistance in interpreting it.”<sup>90</sup> The purpose of CERCLA is to identify and remediate chemical waste sites.<sup>91</sup> To

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78. Tara Burns Koch, Comment, *Betting on Brownfields—Does Florida's Brownfields Redevelopment Act Transform Liability into Opportunity?*, 28 STETSON L. REV. 171, 176 (1998).

79. *See id.* at 181.

80. *See generally* Donald S. Berry, *Principal Cause of Brownfields Problem—Superfund Liability*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 3-1, 3-1.

81. OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, EPA, SUPERFUND: 20 YEARS OF PROTECTING HUMAN HEALTH AND THE ENVIRONMENT 2 (2000), available at <http://www.epa.gov/superfund/20years/20yrptl.pdf>.

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

83. *Id.* at 3.

84. *Id.*

85. Donald S. Berry, *Principal Cause of Brownfields Problem—Superfund Liability*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 3-1, 3-5.

86. Wendy E. Wagner, *Overview of Federal and State Law Governing Brownfields Cleanups*, in BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 15, 15.

87. 42 U.S.C. §§ 9601-9675 (2000).

88. *See generally* Donald S. Berry, *Principal Cause of Brownfields Problem—Superfund Liability*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 3-1, 3-7.

89. *Id.*

90. *Id.*

91. *See* H.R. REP. NO. 96-1016, pt. 1, at 17 (1980), as reprinted in 1980 U.S.C.C.A.N. 6119,

this end, CERCLA authorized the imposition of taxes on certain industries involved in the creation of hazardous wastes to create a trust fund, known as the Superfund.<sup>92</sup> Superfund relied on potentially responsible parties reimbursing it for the costs of government-led cleanup.<sup>93</sup> In fact, lawsuits to establish liability, and the subsequent imposition of financial responsibility, became the “principal funding strategy” for the Superfund.<sup>94</sup> CERCLA’s broad liability scheme imposes the cleanup cost on the party responsible for the hazardous waste disposal.<sup>95</sup>

The interpretation of the “party responsible” includes a broad range of potential parties.<sup>96</sup> CERCLA’s broad liability scheme encompasses several key elements in imposing responsibility. First, CERCLA liability requires the contaminated site to qualify as a “facility.”<sup>97</sup> The broad scope of “facility” includes virtually any area contaminated with hazardous wastes.<sup>98</sup> It includes not only buildings and other structures, but also “any . . . area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.”<sup>99</sup>

The second element to establish liability under CERCLA requires that the

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6119 (stating that CERCLA’s purpose is “to provide for a national inventory of inactive hazardous waste sites and to establish a program for appropriate environmental response action to protect public health and the environment from the dangers posed by such sites”).

92. Wendy E. Wagner, *Overview of Federal and State Law Governing Brownfields Cleanups*, in *BROWNFIELDS: A COMPREHENSIVE GUIDE*, *supra* note 8, at 15, 16-17.

93. 42 U.S.C. § 9607 (2000). CERCLA recognized four categories of potentially responsible parties including: current owners and operators of a facility where hazardous material is released, owners and operators at the time of a hazardous material was put there, persons or the entities who arranged for the treatment or disposal of the hazardous material, and the persons or entities that selected the facilities for the disposal of hazardous waste or any persons and entities that transported hazardous material to or from the facility. *See id.*

94. James A. Kushner, *Brownfield Redevelopment Strategies in the United States*, 22 GA. ST. U. L. REV. 857, 867 (2006).

95. *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997).

96. Donald S. Berry, *Principal Cause of Brownfields Problem—Superfund Liability*, in *BROWNFIELDS LAW AND PRACTICE*, *supra* note 18, at 3-1, 3-4 (“These liability provisions have been interpreted to apply to a broad range of parties that are considered to fall within the ‘owner or operator’ or ‘arranger’ category but have not caused or contributed to contamination of the properties requiring cleanup. These parties include owners and operators who acquired contaminated property after the contamination occurred, lenders holding security interests in such properties, and companies and individuals related in various ways to the property owners or operators, or to the generators of the contaminants at such properties.”).

97. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989).

98. *See* 42 U.S.C. § 9601(9)(B) (2000).

99. *Id.*; *see also* *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986) (quoting *United States v. Ward*, 618 F. Supp. 884, 895 (E.D.N.C. 1985)) (stating that facility should be defined broadly to include almost anywhere that hazardous waste has been placed or is located).

defendant is established as a “potentially responsible party” (“PRP”).<sup>100</sup> A PRP includes a wide range of entities involved with a hazardous waste site.<sup>101</sup> A PRP includes any entity which arranged for disposal or treatment of the hazardous substances at the facility and any entity that transported the substances to a facility.<sup>102</sup>

Additionally, CERCLA imposes strict liability on any PRP for any release or threatened release of a hazardous substance.<sup>103</sup> The statute makes no provision for the minimum volume requirement of release in order to sustain a cause of action.<sup>104</sup> Finally, CERCLA liability requires that the plaintiff incur response costs resulting from the release or threatened release of hazardous substances, and it also imposes joint and several liability on any PRP.<sup>105</sup>

Under CERCLA, anyone in the chain of title for a contaminated site may have liability.<sup>106</sup> Thus, “[l]iability is based on the status of ownership[,] rather than” culpability or causation.<sup>107</sup> Consequently, potential developers and lenders are often discouraged “from becoming involved with ownership, cleanup, development, and use of brownfields sites.”<sup>108</sup> “Although designed to expedite [the] cleanup of past environmental” hazards and eliminate future hazards, “CERCLA unintentionally deters brownfield redevelopment” because it exposes property owners to cleanup liability.<sup>109</sup>

2. *Additional Barriers Hinder Brownfields Redevelopment.*—Along with the liability issues associated with contaminated properties from CERCLA, non-environmental factors also play a role in deciding whether to redevelop a brownfield property.<sup>110</sup> “For example, location and future profitability of a proposed . . . project may [deter redevelopment] for reasons unrelated to environmental liability.”<sup>111</sup> One typical concern of this nature facing developers

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100. See *Amoco Oil Co.*, 889 F.2d at 668.

101. 42 U.S.C. § 9607(a) (2000).

102. *Id.*

103. *Amoco Oil Co.*, 889 F.2d at 670 n.8. A release is defined as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant).” *Id.* at 669 (quoting 42 U.S.C. § 9601(22) (1983 & Supp. 1989)).

104. *Id.*

105. *Id.* at 672.

106. See generally Hope Whitney, *Cities and Superfund: Encouraging Brownfield Redevelopment*, 30 *ECOLOGY L.Q.* 59, 72-84 (2003).

107. Kushner, *supra* note 94, at 868.

108. Donald S. Berry, *Principal Cause of Brownfields Problem—Superfund Liability*, in *BROWNFIELDS LAW AND PRACTICE*, *supra* note 18, at 3-1, 3-4.

109. Flynn, *supra* note 77, at 472.

110. William W. Buzbee, *A Roadmap to the Brownfields Transition—Perspectives and Goals of the Parties*, in *BROWNFIELDS LAW AND PRACTICE*, *supra* note 18, at 2-1, 2-4.1.

111. *Id.*

is whether a site is located “in an area suffering from widespread . . . blight.”<sup>112</sup> In blighted areas, even lightly contaminated properties may prove too risky to redevelop.<sup>113</sup>

*E. Positive Attributes of Brownfields Redevelopment*

Though brownfields present challenges to both developers and the communities where situated, they offer important opportunities as well. Scarcity of centrally located urban land may be the most important factor to encourage brownfields redevelopment.<sup>114</sup> Therefore, brownfields offer desirable locations for industrial, commercial, or other uses, which attract developers and investors.<sup>115</sup> In many cases, “infrastructure systems and energy sources are readily available.”<sup>116</sup> They are often located near public transportation and near restaurants, shopping, and other amenities.<sup>117</sup> Further, costs to a developer may be lowered by using an existing building.<sup>118</sup> In short, brownfields properties can be purchased in prime locations for substantially less than similarly situated, uncontaminated properties.<sup>119</sup>

For communities, numerous benefits follow brownfields redevelopment. Redevelopment of brownfields properties often results in bringing new businesses, jobs, and an improved tax base to areas where the quality of life had been dwindling.<sup>120</sup> According to the EPA, “[b]rownfields revitalization provides communities with the tools to reduce environmental and health risks, reuse abandoned properties, take advantage of existing infrastructure, create a robust tax base, attract new businesses and jobs, create new recreational areas, and reduce the pressure to develop open spaces.”<sup>121</sup> Brownfields redevelopment also helps to reduce blight and eliminate eyesores.<sup>122</sup> Accordingly, federal and state brownfields programs promoting cleanup of contaminated properties facilitate

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112. *Id.*

113. *Id.*

114. Deborah A. Sivas, *Nature and Effects of the Brownfields Problem*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-19.

115. IND. FIN. AUTH., BROWNFIELDS BASICS 1 (2006), <http://www.in.gov/ifa/brownfields/BrownfieldsBasics.pdf>.

116. *Id.*

117. *See generally* Whitney, *supra* note 106, at 65.

118. IND. FIN. AUTH., INDIANA BROWNFIELDS REDEVELOPMENT RESOURCE GUIDE 7 (2003), available at <http://www.in.gov/ifa/brownfields/pdf/files/guidance/resourceguide.pdf> [hereinafter IND. FIN. AUTH., RESOURCE GUIDE].

119. *See generally* William W. Buzbee, *Nature and Effects of the Brownfields Problem*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-7.

120. IND. FIN. AUTH., RESOURCE GUIDE, *supra* note 118, at 7.

121. EPA, THE NEW BROWNFIELDS LAW 1 (2002), available at <http://www.epa.gov/brownfields/pdf/bflawbrochure.pdf>.

122. *See* IND. FIN. AUTH., RESOURCE GUIDE, *supra* note 118, at 7.

growth and revitalization in these areas.<sup>123</sup>

## II. ENVIRONMENTAL JUSTICE AND BROWNFIELDS REDEVELOPMENT

First, Part II provides an overview of environmental justice; it defines environmental justice and explores the history of the movement. Then, this Part explains the connection between environmental justice and brownfields redevelopment.

### A. *Environmental Justice Overview*

Through the years, no universally accepted definition of environmental justice emerged.<sup>124</sup> In fact, some have called the term “maddeningly vague.”<sup>125</sup> However, the EPA defines environmental justice as, “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>126</sup> According to the EPA, the ultimate goal of the environmental justice movement is to create a society where, “everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.”<sup>127</sup> A chief aim of environmental justice is to create a society where no group disproportionately suffers.<sup>128</sup> To this end, achieving environmental justice for all populations requires calling attention to the perceived injustices and finding ways to rectify them.<sup>129</sup>

What became known as the “environmental justice” issue has its roots in the civil rights movement of the 1960s.<sup>130</sup> Decades later, “localized, grassroots uprisings against the sitings of landfills and other polluting industries” brought the issue into the national spotlight.<sup>131</sup> These uprisings “evolved into a national

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123. See Felten, *supra* note 61, at 681.

124. Eileen G. Jones, *Environmental Justice in the New Millennium*, <http://www.agecon.lsu.edu/ESOS-V%20Proceedings/pdf/Jones.pdf> (last visited Mar. 5, 2007).

125. Flynn, *supra* note 77, at 468 (citing CHRISTOPHER H. FOREMAN, JR., *THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE* 122 (1998)).

126. EPA, *Environmental Justice*, <http://www.epa.gov/compliance/environmentaljustice/index.html> (last visited Mar. 5, 2007).

127. *Id.*

128. See John C. Chambers, *Community Participation in Brownfield Redevelopment*, in *BROWNFIELDS: A COMPREHENSIVE GUIDE*, *supra* note 8, at 243, 247.

129. *Id.*

130. See Carolyn Graham & Jennifer B. Grills, Comment, *Environmental Justice: A Survey of Federal and State Responses*, 8 VILL. ENVTL. L.J. 237, 238-41 (1997).

131. Flynn, *supra* note 77, at 468; see also Rachel Paras, Note, *Relief at the End of a Winding Road: Using the Third Party Beneficiary Rule and Alternative Avenues to Achieve Environmental Justice*, 77 ST. JOHN'S L. REV. 157, 160 (2003). Commentators credit the 1982 uprising in Warren County, North Carolina as the impetus for the development of the environmental justice movement. *Id.* Residents of a small, predominately African-American community organized to demonstrate

campaign” as community movements became bolstered by studies.<sup>132</sup> The studies suggested that the anecdotal evidence of disproportionate exposure may be representative of actual statistical phenomena.<sup>133</sup> The studies revealed that low-income and minority communities are faced with higher rates of exposure to toxics than the general public.<sup>134</sup> Moreover, the same communities “are also most likely to bear the environmental brunt of our collective waste production, as well as spills and faulty cleanup at waste and other industrial sites.”<sup>135</sup>

The 1987 report, *Toxic Wastes and Race in the United States*, published by the United Church of Christ, is largely regarded as the seminal work in the environmental justice movement.<sup>136</sup> This influential report began the process of documenting the “race and income disparities in pollution exposure.”<sup>137</sup> Specifically, “[t]he study found that three out of five African Americans and Hispanic Americans were living in communities with uncontrolled toxic waste sites.”<sup>138</sup> The EPA reviewed the research and found that “racial minority and low income populations experience higher than average exposures to certain air pollutants, hazardous waste facilities (and by implication, hazardous waste), contaminated fish, and agricultural pesticides.”<sup>139</sup>

Achieving environmental justice involves minority and low-income individuals, communities, and populations playing a direct, meaningful role in decision making processes affecting their environment.<sup>140</sup> In fact, the EPA’s Brownfields Mission espouses the notion that community involvement is a key component to effective brownfields redevelopment.<sup>141</sup> Additionally, the administrators of Indiana’s brownfields programs acknowledge that environmental injustices must be exposed and addressed by all parties involved in the redevelopment of brownfields.<sup>142</sup>

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against the siting of a landfill to be utilized for the disposal of soils contaminated with PCBs. *Id.* These protests garnered national attention. *Id.* As a result of the protests the United States General Accounting Office (“GAO”) performed a study concerning the location of hazardous landfills in eight southern states. *Id.* at 160-61. The GAO findings confirmed that 75% of the landfills were located in or near minority communities. *Id.*

132. Flynn, *supra* note 77, at 468.

133. *Id.*

134. Uma Outka, Comment, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 211 (2005).

135. *Id.*

136. *Id.* at 212.

137. *Id.*

138. See SINGER ET AL., *supra* note 17, at 7.

139. Outka, *supra* note 134, at 213.

140. See Michael B. Gerrard, *Environmental Justice and Local Land Use Decisionmaking*, in TRENDS IN LAND USE LAW FROM A TO Z: ADULT USES TO ZONING 125, 126 (Patricia E. Salkin ed., 2001) [hereinafter TRENDS IN LAND USE LAW].

141. See EPA, *Brownfields Mission*, <http://www.epa.gov/brownfields/mission.htm> (last visited Mar. 5, 2007).

142. IND. FIN. AUTH., RESOURCE GUIDE, *supra* note 118, at 16.

*B. The Intersection of Brownfields and Environmental Justice*

Conditions creating brownfields and environmental justice concerns have similar origins.<sup>143</sup> The realities creating conditions suitable for brownfields are also the same conditions that raise environmental justice concerns.<sup>144</sup> Further, both brownfields redevelopment and environmental justice are closely associated because each targets the redevelopment of properties in communities that are traditionally underserved.<sup>145</sup>

The connection between the brownfields problem and environmental justice concerns stems from a number of social, economic, and environmental factors.<sup>146</sup> Policies that foreclose certain groups from participating in the decision-making process have contributed to environmental justice concerns and the creation of brownfields.<sup>147</sup> Thus, brownfields are inextricably linked to “issues of social inequity, racial discrimination and urban decay—specifically manifested in adverse land use decisions, housing discrimination, residential segregation, community disinvestment, infrastructure decay, lack of educational and employment opportunity, and other issues.”<sup>148</sup>

In any brownfields redevelopment project a variety of stakeholders must consider their own set of risks.<sup>149</sup> Investors, developers, or owners who redevelop brownfields and the communities where the redevelopment occurs often have diverging goals.<sup>150</sup> The objective of the potential property owner is to realize profits.<sup>151</sup> On the other hand, a primary concern of the communities targeted for the redevelopment is a safe, economically-viable living environment.<sup>152</sup> The conflicting goals could lead stakeholders concerned with profits to make decisions to achieve their goal at the expense of poor, minority, and otherwise marginalized communities.<sup>153</sup> Therefore, environmental justice concerns meet brownfields redevelopment projects in an intimate way.

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143. See SINGER ET AL. *supra* note 17, at 8.

144. See *id.*

145. See *id.*

146. See *id.* at 5.

147. See *id.*

148. NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL WASTE AND FACILITY SITING SUBCOMMITTEE, *supra* note 64, at es-ii.

149. William W. Buzbee, *A Roadmap to the Brownfields Transition—Perspectives and Goals of the Parties*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 2-1, 2-4.1. Stakeholders, in this context, “are individuals or groups that stand to gain or lose resources through the resolution of an environmental justice or brownfields issue.” SINGER ET AL., *supra* note 17, at 6.

150. See generally William W. Buzbee, *A Roadmap to the Brownfields Transition—Perspectives and Goals of the Parties*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 2-1, 2-4.1.

151. See Flynn, *supra* note 77, at 475.

152. See *id.*

153. See Felten, *supra* note 61, at 681.

## III. THE LAW

Part III focuses specifically on current laws impacting brownfields. First, this Part explains major federal brownfields legislation. Then, this Part highlights the typical components of a state brownfields program.

*A. Small Business Liability Relief and Brownfields Revitalization Act*

The brownfields problem first attracted attention from the public and private sector in the mid-1980s.<sup>154</sup> About a decade later, the EPA and state agencies began applying new policies and approaches to encourage brownfields restoration.<sup>155</sup> The need to eliminate the barriers to brownfields redevelopment became one of Congress's major agenda items.<sup>156</sup> Between 1994 and 2001, Congress attempted to pass legislation relating to brownfields; however, the legislators did not enact a single bill.<sup>157</sup> Then, on January 11, 2002, President Bush amended CERCLA when he signed the Small Business Liability Relief and Brownfields Revitalization Act (the "Act") into law.<sup>158</sup>

The purpose of the Act is "[t]o provide certain relief for small businesses from liability under [CERCLA] and . . . to promote the cleanup and reuse of brownfields, to provide financial assistance for brownfields revitalization, [and] to enhance State response programs."<sup>159</sup> The Act "expands the EPA's Brownfield Program,"<sup>160</sup> and clarifies the standard for appropriate inquiries by innocent landowners.<sup>161</sup> Additionally, the Act provides some protection for potential purchasers and contiguous property owners.<sup>162</sup> Essentially, the primary objective of the "statutory revisions is to facilitate brownfields redevelopment."<sup>163</sup>

The Act facilitates brownfields redevelopment primarily through two

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154. Schenck, *supra* note 69, at 402.

155. IND. FIN. AUTH., BROWNFIELD BASICS, *supra* note 115, at 1.

156. Wendy E. Wagner, *Overview of Federal and State Law Governing Brownfields Cleanups*, in BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 15, 27.

157. David B. Hird, *The Brownfields Revitalization and Environmental Restoration Act*, in BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at xxxv, xxxv.

158. See Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002).

159. *Id.*

160. EPA, THE NEW BROWNFIELDS LAW 1 (2002), available at <http://www.epa.gov/brownfields/pdf/bflawbrochure.pdf>; see also Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002).

161. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002); EPA, THE NEW BROWNFIELDS LAW, *supra* note 160, at 2.

162. 42 U.S.C. §§ 9601(35), 9601(40) (bona fide prospective purchaser defense), 9607(b)(3) (innocent landowner defense), 9607(q) (contiguous property owner defense) (2000 & Supp. I 2001).

163. Donald S. Berry, *Principal Cause of Brownfields Problem—Superfund Liability*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 3-1, 3-11.



mechanisms.<sup>164</sup> First, the Act provides \$200 million per fiscal year to provide grants to state and local governments for brownfields site characterization and remediation.<sup>165</sup> Second, the Act provides liability relief for persons, as defined by CERCLA, who are members of a state voluntary cleanup program.<sup>166</sup> Thus, the federal brownfields legislation created a federal enforcement bar, which in most cases, provides liability relief for sites cleaned up under a state program.<sup>167</sup> The most ubiquitous state brownfields initiative is the voluntary cleanup program.

### *B. The Anatomy of a State Brownfields Program*

State legislatures fashioned the most successful responses to the adverse impacts of CERCLA on brownfields redevelopment;<sup>168</sup> individual states developed their own “brownfield[s] programs and volunteer clean up initiatives.”<sup>169</sup> In fact, before Congress passed brownfields-specific reforms in 2001, successful legislation relating to brownfields restoration emerged solely at the state level.<sup>170</sup> Since the inception of brownfields redevelopment programs, forty-seven states have implemented some type of brownfields initiative.<sup>171</sup>

Two reasons may explain why the state efforts prove more successful than the federal programs.<sup>172</sup> First, most contaminated properties fall under state jurisdiction; the EPA focuses on NPL sites which constitute only a small percentage of brownfields.<sup>173</sup> Second, state programs are more willing to allow some residual contamination on-site following cleanup, but the EPA offers less flexible cleanup standards.<sup>174</sup> As a result, state programs lend themselves to a more efficient pace for redevelopment.<sup>175</sup>

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164. William T.D. Freeland, Note, *Environmental Justice and the Brownfields Revitalization Act of 2001: Brownfields of Dreams or a Nightmare in the Making*, 8 J. GENDER RACE & JUST. 183, 186-87 (2004).

165. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 211(b)(12)(A), 115 Stat. 2356, 2368 (2002).

166. Freeland, *supra* note 164, at 186 (explaining that, “the federal government will not commence an action to hold that ‘person’ responsible as a potentially liable party under section 107(a) of CERCLA”).

167. NATIONAL BROWNFIELD ASSOCIATION, *supra* note 13, at 1.

168. Wendy E. Wagner, *Overview of Federal and State Law Governing Brownfields Cleanups*, in BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 15, 27.

169. Schenck, *supra* note 69, at 412.

170. See David B. Hird, *The Brownfields Revitalization and Environmental Restoration Act*, in BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at xxxv, xxxv.

171. Kurt A. Frantzen & James N. Christman, *Cleanup Standards*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 22-1, 22-11.

172. Andrea Ruiz-Esquide, Comment, *The Uniform Environmental Covenants Act—An Environmental Justice Perspective*, 31 ECOLOGY L.Q. 1007, 1013 (2004).

173. *Id.*

174. *Id.*

175. *Id.*

Although each state brownfields program is unique, several key elements define a “typical” state voluntary cleanup program (“VCP”).<sup>176</sup> Elements common to most VCPs are as follows:

First, all the programs are voluntary and do not require property owners to join. Second, most states prohibit voluntary cleanup of federal NPL sites, thus emphasizing the cleanup of smaller, less contaminated sites. Third, state voluntary action statutes and programs generally streamline the cleanup approval process. Fourth, states usually establish cleanup standards that permit higher levels of contamination risk relative to the Superfund program when a site will be used for commercial or industrial rather than residential purposes. Finally, voluntary action statutes and programs typically limit a developer’s liability against state enforcement. . . .<sup>177</sup>

Based on the common VCP elements, “three advantages [to] participants interested in purchasing a brownfields site” emerge. These advantages include (1) “streamlined administrative procedures,” which reduce cost, (2) “relaxed cleanup standards,” and (3) “liability protection.”<sup>178</sup> The use of VCPs is one of the hallmarks distinguishing brownfields sites.<sup>179</sup>

In addition to the aforementioned common elements of a VCP, many state brownfields programs have public participation requirements. Public participation requirements in state brownfields programs come in many forms.<sup>180</sup> A typical notice statute requires the developer to notify the state environmental agency for approval of the plan, publish a “notice in a local newspaper of general circulation,” and “provide a copy of its plan to the local government[.]”<sup>181</sup> A small minority of states require the developer to give direct notice to contiguous property owners via mail.<sup>182</sup> Other states, like Indiana, provide for a notice and

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176. See generally *id.* at 1013-14.

177. *Id.* (footnotes omitted).

178. Kurt A. Frantzen & James N. Christman, *Cleanup Standards*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 22-1, 22-13 to -14. Tools employed to limit a developer’s liability include: “no further action letters,” “covenants not to sue,” “releases from state CERCLA liability,” and “certificates of completion.” Ruiz-Esquide, *supra* note 172, at 1014 (explaining that “no further action” letters indicate that a state probably will not pursue further enforcement based on current information about the site, covenants not to sue provide express protection from state enforcement actions, and certificates of completion indicate that a cleanup meets applicable standards).

179. Kurt A. Frantzen & James N. Christman, *Cleanup Standards*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 22-1, 22-13.

180. See Joel B. Eisen, “Brownfields of Dreams”?: Challenges and Limits of Voluntary Cleanup Programs and Incentives, 1996 U. ILL. L. REV. 883, 972-77.

181. See Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 31-1, 31-17.

182. *Id.*

comment period, “usually between [fourteen] and [thirty] days.”<sup>183</sup> “In many states with a public comment period, the lead state environmental agency must consider” the comments and revise the remediation proposal if a comment raises significant concern.<sup>184</sup> No state, however, requires rejection of proposed plans if significant opposition results.<sup>185</sup> On the other hand, several states mandate no public participation requirements at all in brownfields development projects.<sup>186</sup> Although the requirements vary, they demonstrate at least some concern for environmental justice considerations in the administration of the state brownfields programs.

#### IV. INDIANA'S BROWNFIELDS PROGRAMS

Part IV discusses Indiana's brownfields initiatives. First, this Part provides information about the Voluntary Remediation Program, including the history, purpose, and eligibility for the program. Then, this Part discusses the Indiana Brownfields Program, Indiana's program to encourage brownfields redevelopment by providing financial incentives.

##### *A. Voluntary Remediation Program*

Indiana, like many Midwestern and Northeastern states experiencing a decline in the manufacturing industry, has a brownfields problem. In response, Indiana created a brownfields program.<sup>187</sup> In 1993, “Indiana was among the first states to address the liability issues associated with” brownfields redevelopment.<sup>188</sup> Pursuant to the Voluntary Remediation of Hazardous Substances and Petroleum Act,<sup>189</sup> the Indiana Department of Environmental Management (“IDEM”) established the Voluntary Remediation Program (“VRP”).<sup>190</sup> To date, over 500 properties are either active VRP sites or have completed cleanups through the program.<sup>191</sup>

The VRP provides a mechanism where property owners or operators voluntarily enter an agreement with IDEM to cleanup a contaminated property.<sup>192</sup>

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183. See *id.*; see also, e.g., IND. CODE § 13-25-5-11 (2004).

184. See Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 31-1, 31-17 to -18; see also, e.g., IND. CODE § 13-25-5-11(c) (2004).

185. See Eisen, *supra* note 180, at 975-76.

186. See Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 31-1, 31-21.

187. See IND. CODE § 13-25-5-1 (2004); see also IND. FIN. AUTH., BROWNFIELDS BASICS, *supra* note 115, at 2.

188. IND. FIN. AUTH., BROWNFIELDS BASICS, *supra* note 115, at 2.

189. IND. CODE § 13-25-5-1 (2004).

190. *Id.*

191. Ind. Fin. Auth., *Indiana Brownfields Program*, <http://www.in.gov/ifa/brownfields/> (last visited Mar. 5, 2007).

192. See IND. CODE § 13-25-5-1 (2004).

Almost any site is potentially eligible for the program.<sup>193</sup> Once a party enters the VRP by submitting a fee and receiving approval of the Remedial Work Plan, remediation work begins.<sup>194</sup> Additionally, public involvement is an essential component of the VRP; the Remedial Work Plan is subject to a 30-day public notice and comment period.<sup>195</sup>

In response to potential liability, which is often cited as the most daunting impediment to brownfields redevelopment,<sup>196</sup> the VRP offers liability protection at the successful conclusion of a project.<sup>197</sup> After cleanup, IDEM offers liability protection by issuing a "Certificate of Completion," and the Governor's office will issue a "Covenant Not to Sue" to the cleaned up property.<sup>198</sup> These documents provide assurance that the remediated areas will not become subject to a future IDEM enforcement action.<sup>199</sup> Moreover, IDEM has signed a Memorandum of Agreement ("MOA") with the EPA pertaining to Indiana's VRP.<sup>200</sup> The MOA provides that when IDEM issues a Certificate of Completion for the site, the EPA will not pursue action under CERCLA.<sup>201</sup>

Thus far, the flexibility of Indiana's VRP is its greatest asset.<sup>202</sup> A site owner may decide when or *if* it will enter the program, and may decide to deal selectively with concerns at a site.<sup>203</sup> An owner or operator may choose, for example, to remediate only those sites he or she used.<sup>204</sup> Furthermore, IDEM's program also allows participants flexibility in developing remedial solutions.<sup>205</sup> The VRP benefits owners, developers, and real estate purchases because it

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193. *See id.* § 13-25-5-5. An application may be rejected if (1) a pending state or federal enforcement action concerning the proposed cleanup exists; or (2) a federal grant compels IDEM to take enforcement action; or (3) conditions at the site pose a substantial and imminent threat to human health. *Id.*

194. *See id.* § 13-25-5-13.

195. *Id.* § 13-25-5-11; *see infra* Part V.A.

196. *See supra* Part I.A.

197. *See* IND. CODE § 13-25-5-18 (2004). The cleanup criteria for sites within the VRP are based on quantitative standards. *See id.* § 13-25-5-8.5. The remediation objective must be based on either background levels or an assessment of the risks posed by the contamination. *Id.*

198. *Id.* § 13-25-5-18.

199. *See id.*

200. *See* Ann Slaughter Andrew & Sharon A. Hilmes, *Indiana*, in *BROWNFIELDS: A COMPREHENSIVE GUIDE*, *supra* note 8, at 578, 579.

201. *Id.* The EPA will only consider a CERCLA action in exceptional circumstances if "the site poses an imminent and substantial threat to human health or the environment." *Id.* Also, the MOA does not apply to properties listed on the NPL or sites currently under enforcement actions under CERCLA. *Id.*

202. *See* Lewis Beckwith, *Indiana*, in *BROWNFIELDS LAW AND PRACTICE*, *supra* note 18, at IN-1, IN-2.

203. *Id.*

204. *Id.*

205. *See id.*

provides a flexible solution for liability protection.<sup>206</sup> At the same time, the VRP benefits the environment and the public through identification and cleanup of contaminated properties.

### *B. Financing Programs*

In 1997, Indiana passed legislation creating a brownfields program.<sup>207</sup> The program encouraged municipalities to convert brownfields to productive uses by providing financial incentives.<sup>208</sup> In many instances, costly procedures must occur in order to embark on a brownfields redevelopment project.<sup>209</sup> Passed in 2005, Indiana's current brownfields financial assistance legislation created the Indiana Brownfields Program ("Program").<sup>210</sup> The Program represents a change from the original form. The ultimate goal, however, remains the same: to "[r]ecycle a property with existing infrastructure and buildings back into the community as a viable and competitive commercial, industrial, retail or public property."<sup>211</sup>

Pursuant to Indiana Code section 13-19-5-2, the Indiana Brownfields Program is established as a revolving loan program.<sup>212</sup> The Program merged the financial and environmental technical review components under the umbrella of the Indiana Finance Authority ("IFA").<sup>213</sup> Under the IFA, the Program "offers educational, financial, technical and legal assistance to eligible entities involved in brownfields redevelopment."<sup>214</sup> The Program provides grants, loans, forgivable loans, or other financial assistance to political subdivisions.<sup>215</sup> Projects that have community support and for which there is a demonstrated need receive preference under the Program through the use of a priority ranking system.<sup>216</sup>

## V. ANALYSIS OF THE ENVIRONMENTAL JUSTICE CONSIDERATIONS IN INDIANA'S BROWNFIELDS PROGRAMS

Part V provides an analysis of the environmental justice considerations in the

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206. *See generally id.*

207. *See Ann Slaughter Andrew & Sharon A. Hilmes, Indiana, in BROWNFIELDS: A COMPREHENSIVE GUIDE, supra note 8, at 578, 580.*

208. CHARLES BARTSCH & RACHEL DEANE, BROWNFIELDS STATE OF THE STATES: AN END-OF-SESSION REVIEW OF INITIATIVES AND PROGRAM IMPACTS IN THE 50 STATES 29 (2002), [http://www.nemw.org/brown\\_stateof.pdf](http://www.nemw.org/brown_stateof.pdf).

209. *See Koch, supra note 78, at 183.*

210. *See IND. CODE § 13-19-5-2 (Supp. 2007).*

211. IND. FIN. AUTH., RESOURCE GUIDE, *supra* note 118, at 12.

212. IND. CODE § 13-19-5-2 (Supp. 2007).

213. IND. FIN. AUTH., BROWNFIELDS BULLETIN SPECIAL EDITION: NEW INDIANA BROWNFIELDS PROGRAM OFFERS NEW AND IMPROVED FINANCIAL INCENTIVES 1 (2006), <http://www.in.gov/ifa/brownfields/bulletinspecialedition.pdf>.

214. Ind. Fin. Auth., *Indiana Brownfields Program*, *supra* note 191.

215. IND. CODE § 13-19-5-2 (Supp. 2007).

216. *See id.* § 13-19-5-8; *see also infra* Part VI.B.1-2.

VRP and the Indiana Brownfields Program. First, environmental justice considerations are analyzed for the VRP. Next, environmental justice considerations are analyzed for the Indiana Brownfields Program. Specifically, the Indiana Brownfields Program section provides an analysis of guidelines for the Assessment Grants and the Low-Interest Loan program. Finally, this Part concludes that though Indiana's brownfields programs incorporate elements of environmental justice, they do not go as far as they might to advance the goals.

*A. The Voluntary Remediation Program*

The Voluntary Remediation Act requires the opportunity for public input before IDEM approves or rejects a remediation proposal.<sup>217</sup> Though not explicitly stated as such, Indiana's VRP allows for environmental justice considerations through a public comment period.<sup>218</sup> In fact, IDEM regards public involvement as an essential component of the VRP.<sup>219</sup> Specifically, the statute requires a plan for "[c]ommunity relations and community comment in planning, cleanup objectives, and implementation processes."<sup>220</sup>

To provide additional guidance for the community relations plan requirement, IDEM adopted a nonrule policy. The plan seeks to ensure that affected parties are informed of the VRP's site remediation activities prior to their completion. Notwithstanding the non-binding nature of the guidance, the basic components of the VRP community relations plan take a proactive approach. However, the community relations plan document is intended solely for guidance and does not have the effect of law or an IDEM final action.

Additionally, the VRP requires that sites in the program are subject to a thirty-day public notice and comment period.<sup>221</sup> During this notice and comment period, IDEM will place a copy of the site's remediation plan in a local repository and invite interested parties to comment.<sup>222</sup> IDEM *may* also hold a public hearing if at least one request is received during the period.<sup>223</sup> Thus, holding a public hearing is completely discretionary; providing a forum for public testimony is not required. Although the IDEM commissioner is required to consider all comments and written testimony, the Act does not require that IDEM prepare any response to the comments upon approving a plan.<sup>224</sup>

The requirements listed above reveal that the VRP does not explicitly require consideration of environmental justice in its statutory language. Nevertheless, the program does incorporate environmental justice concerns. The VRP requires a

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217. *See* IND. CODE § 13-25-5-11 (2004).

218. *See id.*

219. IND. DEP'T OF ENVTL. MGMT., VOLUNTARY REMEDIATION PROGRAM 5, <http://www.in.gov/idem/catalog/documents/land/vrpbooklet.pdf>.

220. IND. CODE § 13-25-5-7 (2004).

221. *Id.* § 13-25-5-11.

222. *Id.*

223. *Id.*

224. *See id.*

public participation process.<sup>225</sup> The statutory requirements for the public notice and comment period does not, however, amount to substantive community participation. "The traditional view that community participation is satisfied by a mere opportunity to review and comment . . . is defunct."<sup>226</sup> Therefore, this skeletal requirement for notice and comment underscores the lack of more substantive requirements for community support. Unfortunately, it is difficult to stipulate what specific standards would be most effective to ensure public participation through a substantive requirement. However, merely including the minimal requirement in the statute without more substantive requirements should be the starting point, not the final requirement.

As previously mentioned, environmental justice seeks to call attention to perceived environmental injustices and find ways to rectify them. Further, achieving environmental justice requires that communities live in clean, healthy, and sustainable communities. Thus, returning brownfields to productive uses can help to reach this goal. Once a party is confident that liability concerns are addressed prior to remediation, developers subsequently perform the remediation or sell the property. Following the redevelopment, an environmental hazard is removed, and the community is healthier for it. Additionally, aesthetic improvement and heightened community morale follow redevelopment.

The administration of Indiana's VRP tangentially takes environmental justice considerations to heart; it encourages brownfields redevelopment in communities where environmental justice is a concern. However, strengthening the level of community participation would acknowledge that community involvement in brownfields redevelopment is worth pursuing to more fully address environmental justice goals. A notice and comment period after the submission of a remediation plan is of little consequence. Such a participation requirement does not allow the community to have an ongoing or even an influential role in the decision-making process that directly affects their living environment.

#### *B. The Indiana Brownfields Program*

Similar to the VRP, the Indiana Brownfields Program ("Program") seeks to facilitate brownfields redevelopment.<sup>227</sup> The "Program offers financial assistance in the forms of grants and low-interest loans."<sup>228</sup> This financial assistance is offered to help with "site assessment, remediation, and demolition."<sup>229</sup> Additionally, Indiana matches grants for those sites receiving brownfields funding from the EPA and offers tax incentives at qualified brownfields sites.<sup>230</sup>

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225. *See id.*

226. John C. Chambers, *Community Participation in Brownfields Redevelopment*, in *BROWNFIELDS: A COMPREHENSIVE GUIDE*, *supra* note 8, at 243, 251.

227. *See* IND. CODE § 13-19-5-1 (Supp. 2007).

228. Ind. Fin. Auth., *Financial Assistance*, [http://www.in.gov/ifa/brownfields/financial\\_assistance.htm](http://www.in.gov/ifa/brownfields/financial_assistance.htm) (last visited Feb. 26, 2007).

229. *Id.*

230. *Id.*

Stipulated Assessment Grants, Stipulated Remediation Grants, and Brownfields Low-Interest Loans are among the principal financing programs offered by the Indiana Brownfields Program.<sup>231</sup> Each program contains guidelines that are used to evaluate grant applicants.

1. *The Stipulated Site Assessment Grant Provides for Environmental Justice Considerations.*—The Stipulated Assessment Grants (“Assessment Grants”) allow Indiana political subdivisions to apply for funds from the Indiana Brownfields Program to finance environmental site assessment costs for a brownfield within its jurisdiction.<sup>232</sup> The application sets forth the criteria used to rank each applicant.<sup>233</sup> Then, based on the criteria, the Assessment Grants are awarded to the highest ranking applicants.<sup>234</sup>

Like the Brownfields Revitalization Act, which has mechanisms in place to ensure that the \$200 million distributed by the EPA is congruent with the tenants of environmental justice,<sup>235</sup> so too does the Assessment Grant.<sup>236</sup> The Brownfields Revitalization Act requires the EPA use a ranking to determine which sites receive funding.<sup>237</sup> The criteria includes, “[t]he extent to which a grant would address or facilitate the identification and reduction of threats to the health or welfare of children, pregnant women, minority or low-income communities, or other sensitive populations.”<sup>238</sup> The EPA has additional criteria for selecting grant recipients, including the inability of the community to find other funding and the potential for stimulation of economic development in the area.<sup>239</sup>

Similarly, the Indiana Brownfields Program outlines the criteria used for selecting recipients for the Assessment Grants.<sup>240</sup> The stipulations include requiring that applicants demonstrate a certain level of investment in their sites within a two-year period following the grant.<sup>241</sup> The level of investment is based on the applicant’s population and median household income.<sup>242</sup> Additionally,

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231. *Id.*

232. IND. FIN. AUTH., INDIANA BROWNFIELDS PROGRAM, STIPULATED REMEDIATION GRANT GUIDELINES 1 (2007), <http://www.in.gov/ifa/brownfields/pdf/files/SAGGuides0307.pdf> [hereinafter IND. FIN. AUTH., REMEDIATION GRANT GUIDELINES].

233. *Id.* at 4-6.

234. *Id.*

235. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356, 2362-68 (2002).

236. *See generally* IND. FIN. AUTH., REMEDIATION GRANT GUIDELINES, *supra* note 232.

237. *See* Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 31-1, 31-16.

238. 42 U.S.C. § 9604(K)(5)(C)(x) (2000 & Supp. IV 2004).

239. *Id.* § 9604(K)(3)(C)(ii).

240. The Stipulated Remediation Grants have very similar scoring criteria to the Stipulated Assessment Grants; therefore, the analysis supplied for the Assessments Grants can be used for the Stipulated Remediation Grants.

241. IND. FIN. AUTH., REMEDIATION GRANT GUIDELINES, *supra* note 232, at 4.

242. *Id.* (the level of required investment increases as the median household income increases).



points are assigned to various criteria used to evaluate the projects.<sup>243</sup> Demographic factors, which include the poverty rate, along with local support for the project, are heavily weighted.<sup>244</sup>

Several criteria for ranking applicants are based on principles of environmental justice. This is an encouraging note because brownfields revitalization and environmental justice considerations are inextricably linked.<sup>245</sup> When the Indiana Brownfields Program assigns substantial weight to the poverty rate, whether the site is located in certain designated brownfields revitalization zones or slums and blighted areas, IFA officials are undoubtedly concerned with using the selection criteria to address environmental justice concerns.<sup>246</sup>

Moreover, encouraging developers to revitalize brownfields in an area where widespread blight and poverty are prevalent ameliorates many negative factors associated with brownfields.<sup>247</sup> Once redevelopment occurs, the cycle of decline that characterized most brownfields is halted. The site is no longer an eyesore, a haven for crime, and has the potential to increase the tax revenue for the area, among other advantages.

In addition to allocating heavy weight to demographic factors when selecting projects for the Assessment Grants, the Program gives preference to projects that demonstrate high levels of local support for the project. Local support for a project is paramount. One commentator suggests that "states must allow for effective public participation by making affected communities [sic] partners throughout the decision-making process and bolstering each community's ability to evaluate project risks and compare them to project benefits."<sup>248</sup> A program applicant who understands the community and the distribution of the benefits and burdens will be best suited to respond to environmental justice concerns.<sup>249</sup> Thus, achieving environmental justice involves minority and low-income individuals, communities, and populations playing a direct, meaningful role in decision-making processes affecting their environment.<sup>250</sup>

The Assessment Grant requires evaluating the strength of local support for a project through public comment and local coordinated efforts to assess brownfields issues.<sup>251</sup> The community support component places an emphasis on proactive involvement from the community. It even goes as far as assigning points for applicants who follow up with negative comments.<sup>252</sup> However,

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243. *Id.* at 4-6.

244. *Id.* at 4-5.

245. *See supra* Part II.

246. *See* IND. FIN. AUTH., REMEDIATION GRANT GUIDELINES, *supra* note 232, at 6.

247. *See supra* Part I.

248. Eisen, *supra* note 180, at 889.

249. *See* Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 31-1, 31-6.

250. *See* Michael B. Gerrard, *Environmental Justice and Local Land Use Decisionmaking*, in TRENDS IN LAND USE LAW, *supra* note 140, at 125-26.

251. *See* IND. FIN. AUTH., REMEDIATION GRANT GUIDELINES, *supra* note 232, at 5.

252. *Id.*

because community groups or local citizens often lack the technical expertise to effectively evaluate various aspects of a proposed project, their participation alone may not be the answer.<sup>253</sup> To ensure that the community plays a “meaningful role” in the decision-making process, technical assistance grants or criteria evaluating technical assistance could facilitate this process.<sup>254</sup> Although no single formula to effective community participation is applicable to all situations,<sup>255</sup> the Assessment Grant provides one method. The Assessment Grant has mechanisms in place that seek to take environmental justice considerations into account that go further than the bare minimum.

2. *Low-Interest Loan Program Addresses Environmental Justice Considerations.*—The Program provides Low-Interest Loans as well.<sup>256</sup> A political subdivision may apply for a low-interest loan to finance costs associated with the various phases of brownfields redevelopment.<sup>257</sup> In addition to the criteria used for project selection for the grants mentioned *supra*, the IFA requires additional criteria to determine the priority for a loan application. Priority will be given to a former gas station site or a site where underground storage tanks have been used to store petroleum, hazardous substances, hazardous wastes, or other product(s); or a site “located within one-half mile (0.5) of any of the following: [a] child care center[;] [a] child care home[;] [a] child caring institution[;] [a] school age child care program[;] [a]n elementary or a secondary school attended by students in kindergarten or grades [one] through [twelve].”<sup>258</sup> The priority considerations given to sites located within one-half mile of institutions concerned with children, reveal IFA officials’ concern for vulnerable populations.

Providing consideration for vulnerable populations can be viewed in several ways. Some may argue in favor of brownfields redevelopment projects in areas where children frequent. Proponents believe that the environmental risks for most brownfields redevelopment projects are exaggerated, and the economic benefits outweigh the risks.<sup>259</sup> On the other hand, some are concerned that there are too many health risks and not enough benefits to brownfields redevelopment.<sup>260</sup> In many cases, redevelopment in accordance with a state voluntary cleanup program allows for lower cleanup standards than required by

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253. See Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 31-1, 31-27.

254. See *infra* Part V.A.

255. IND. FIN. AUTH., REMEDIATION GRANT GUIDELINES, *supra* note 232, at 4-6.

256. IND. CODE § 13-19-5-1 (Supp. 2007).

257. *Id.*

258. IND. FIN. AUTH., INDIANA BROWNFIELDS PROGRAM, LOW-INTEREST LOAN GUIDELINES, at A-4 (2007), <http://www.in.gov/ifa/brownfields/pdf/BFLoanGuides0307.pdf> (citations omitted) [hereinafter IND. FIN. AUTH., LOW-INTEREST LOAN GUIDELINES].

259. See Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 31-1, 31-51.

260. See *id.* at 31-49.

the EPA in efforts to attract industry.<sup>261</sup> Brownfields detractors would argue that standards in areas frequented by vulnerable populations should be higher for these projects, not lower.<sup>262</sup>

Considering both arguments, giving priority to areas near children will attract applicants who are interested in redeveloping the site. Even with a lower cleanup standard, it is all but certain that redevelopment will result in an overall improvement of the site. Therefore, the emphasis that the Low-Interest Loan program places on sites near children for priority consideration highlights the Program's concern with such populations. Viewed in isolation, this highly specific priority consideration is promising. Yet, on balance, the Low-Interest Loan program suffers from the same substantive public participation deficiencies as the other programs.<sup>263</sup>

The Program boasts noble goals focusing on the rehabilitation, reuse, and redevelopment of brownfields.<sup>264</sup> However, legislation governing the Program is devoid of language requiring environmental justice considerations to be taken into account when selecting recipients for financial assistance.<sup>265</sup> The statute contains permissive, not mandatory language as guidance when selecting sites to award loans and other financial assistance for brownfields redevelopment.<sup>266</sup>

The legislation providing for the creation of the VRP and the Indiana Brownfields Program contains no explicit provisions for environmental justice. Yet, both the Indiana Brownfields Program and the VRP take environmental justice considerations into account. However, more substantive public participation mechanisms would help strengthen the consideration of environmental justice concepts in these programs. After all, "[s]ubstantive community participation can be achieved only when the community is properly educated and given an active role in the actual planning and decision-making process."<sup>267</sup>

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261. *Id.*

262. *See id.* at 31-50.

263. *See* IND. FIN. AUTH., LOW-INTEREST LOAN GUIDELINES, *supra* note 258, at A-3 to -4 (listing the criteria for priority selection which otherwise mirrors the Stipulation Assessment Grants, analyzed earlier in this section).

264. *See* IND. CODE § 13-19-5-1 (Supp. 2007).

265. *See id.* § 13-19-5-8.

266. *See id.* The statute states:

The authority *may* use a priority ranking system in making loans and providing other financial assistance under this chapter based on the following: (1) Socioeconomic distress in an area, as determined by the poverty level and unemployment rate in the area . . . [and] other factors the authority determines will assist in the implementation of this chapter.

*Id.* (emphasis added).

267. John C. Chambers, *Community Participation in Brownfields Redevelopment*, in BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 243, 252.

## VI. SUBSTANTIVE PUBLIC PARTICIPATION

Part VI argues that Indiana's brownfields programs require stronger mechanisms to ensure substantive public participation as a way to pursue environmental justice. First, this Part explores the benefits of offering technical assistance grants to facilitate substantive public participation. Next, this Part discusses community working groups as a more effective method for decision-making and policy planning than a bare bones notice and comment requirement.

*A. Technical Assistance Grants*

Technical assistance grants ("TAGs") are one mechanism that Indiana's brownfields programs should employ to achieve more substantive community participation. Brownfields projects often involve highly technical issues ranging from environmental risk assessments to future economic impacts. Thus, community groups or local citizens often lack the technical expertise to evaluate cleanup plans at contaminated sites. Consequently, even with community participation and adequate information access, the citizens may not be in the best position to deliberate effectively. TAGs could be used to hire technical advisors, to help a community disseminate information to the general public, and other information efforts concerning the site.

For example, Massachusetts uses TAGs to help individuals or groups who challenge a prospective purchaser's plans to redevelop contaminated sites.<sup>268</sup> The purpose of the Massachusetts TAGs is to assist citizens in obtaining an understanding of the technical aspects of a waste site assessment and proposed cleanup options.<sup>269</sup> Unlike the federal TAG program, which is often criticized for its complexity and red tape,<sup>270</sup> a TAG program authorized by Indiana's legislature could be more effective. IFA and IDEM are in an excellent position to effectively administer a TAG program because they express a commitment towards achieving environmental justice and have closer geographic ties. Such a program would assist communities in achieving the requisite amount of knowledge to facilitate truly meaningful public participation.

*B. Community Working Groups*

Working in tandem with the requirement for notice and comment, community working groups ("CWG") are vehicles for meaningful public participation in environmental justice situations.<sup>271</sup> A CWG is a group of representatives selected primarily from the community who comment on remedial plans for sites.

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268. See generally Toxics Action Ctr., *A Citizen's Guide to Massachusetts Technical Assistance Grants*, <http://www.toxicsaction.org/taggrants.html> (last visited Mar. 4, 2007).

269. *Id.*

270. Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, in BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 31-1, 31-28.

271. See generally Sara Pirk, *Expanding Public Participation in Environmental Justice: Methods, Legislation, Litigation, and Beyond*, 17 J. ENVTL. L. & LITIG. 207, 235-37 (2002).

Individuals in the community are the stakeholders directly at risk; therefore, community members comprise the CWG's primary constituency. For example, the Clinton Administration proposed forming a CWG composed of representatives including: "adjacent residents; those persons directly . . . affected by the facility; . . . resident citizen groups; . . . members of the local business community; and groups that received [TAGs]"<sup>272</sup> to comment on future uses of NPL sites.<sup>273</sup>

Indiana should require the formation of a CWG when either a threshold number or percentage of the population requests its formation.<sup>274</sup> Additionally, a CWG should form when the State deems it necessary.<sup>275</sup> The CWG should also be active at each stage of a brownfields redevelopment project. First, the CWG should provide notice to the rest of the community about the status of the site at all stages of a project. Second, the group should give its opinion on issues associated with the site, such as acceptable cleanup standards. Therefore, it is the community who has a direct role in deciding the acceptable level of risks. When community members are engaged, as with a CWG, they are more likely to seek out the information and gain a better understanding of the risks involved. This informed opinion helps all stakeholders involved in the project.

The formation of a CWG addresses the environmental justice concern of allowing the affected community to play an active and vital role in the entire decision-making process. Thus, the community would have a real voice in the decision-making process. A CWG builds on the statutory requirement of notice and comment. However, it is a more flexible and efficient tool because the CWG formation occurs at the beginning of a project, and it is not an afterthought.

When a community knows its voice is heard and its opinions are seriously considered, it will develop a sense of hope in the public participation model. CWG encourages ongoing education of not only its members, but also the community as a whole. Instead of residents, with minimal knowledge of the complex issues involved, having a small window of opportunity to comment on a proposal, the CWG offers a more comprehensive alternative. A CWG is involved in each major step of a remediation plan. Furthermore, the notice and comment requirement involves reacting to a proposal after a developer or owner has already allocated resources toward a certain solution. At this stage, parties are inclined to defend their proposal, and not listen to alternatives from the community.

Moreover, the CWG forms if certain statutory conditions are met. This marks an improvement from the discretionary request for a hearing that the current notice and comment period requires. Under the current requirements, even if a public hearing is held, a room full of potentially hostile, largely uninformed residents facing off against project proponents is not the most conducive

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272. See Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, in *BROWNFIELDS LAW AND PRACTICE*, *supra* note 18, at 31-1, 31-23 to -24.

273. *Id.*

274. See generally Eisen, *supra* note 180, at 1017.

275. *Id.*

atmosphere for resolving issues. Though the CWG process can be time-consuming, it offers a flexible solution to facilitate more substantive public participation in Indiana's brownfields initiatives in order to achieve environmental justice.

#### CONCLUSION

Indiana has a brownfields problem. Abandoned and underutilized contaminated properties burden many communities throughout the State. As a result, Indiana has implemented brownfields initiatives to encourage redevelopment of these sites. Additionally, recent amendments to CERCLA have further reduced the barriers to redevelopment. The subsequent brownfields redevelopment is a positive outcome to these legislative efforts. Yet, environmental justice considerations remain a concern because brownfields are oftentimes located in predominately minority and low-income communities.

Indiana's brownfields initiatives and policies reflect a desire to promote environmental justice. Indiana employs a public notice and comment period for the VRP; and the Indiana Brownfields Program utilizes a priority ranking system. However, a true pursuit of environmental justice requires moving past the minimal requirements and towards a more substantive solution. Indiana was among the first states to encourage brownfields redevelopment through the use of statutes. In like manner, Indiana should lead the way by crafting its brownfields programs to more fully consider environmental justice concerns. Indiana's brownfields programs should include technical assistance grants and community working groups in its toolbox for achieving environmental justice. Then, Indiana's brownfields initiatives will be vehicles fueled for the pursuit of environmental justice.