COMMENT

BETTING ON BROWNFIELDS — DOES FLORIDA'S BROWNFIELDS REDEVELOPMENT ACT TRANSFORM LIABILITY INTO OPPORTUNITY?

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I. INTRODUCTION — WHAT ARE BROWNFIELDS?

In an era hardly known for bipartisan cooperation in the political arena, what kind of initiative could unite consistently opposing business and environmental camps behind a common legislative effort? It would be a program that transforms an economic liability into opportunity while simultaneously benefitting the environment, providing jobs, and stimulating the community. It appears that legislators found such a program in the brownfields redevelopment initiative.

As defined by the United States Environmental Protection Agency (EPA), brownfields are "abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination."[1] These abandoned properties, often "former gas stations and

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1. U.S. Environmental Protection Agency, *The Brownfields Action Agenda* (last modified Jan. 25, 1995) <http://www.epa.gov/swerosps/bf/ascii/action.txt> [hereinafter *Ac-*

dry cleaning facilities," are usually found in inner-city, predominantly lower-class neighborhoods.[2] Due to industrial pollutants left to decay over the years, brownfield sites not only pose health and environmental hazards to surrounding areas, but also contribute to declining property values, increased unemployment, and "lower property tax revenues" that, in turn, drain a city's "ability to provide basic services such as education."[3] Thus, problems generated by brownfields exacerbate the economic depression plaguing many American cities.

Sellers, buyers, and lenders share a general aversion to brownfields redevelopment for several reasons. Primarily, the potentially unlimited and crippling liability that can attach to both current and prior contaminated site landowners under environmental laws passed in the 1970s and 1980s.[4] Furthermore, meeting the extensive cleanup standards imposed by such laws — if those standards can indeed be ascertained — and obtaining government sign-off, which indicates the land is no longer contaminated, often involves too much government red tape to maintain potential developers' interests.[5] Thus, while brownfields typically contain only minimal contamination, such sites present extensive uncertainty in several crucial areas: the extent of that contamination, the level of cleanup required by both state and federal law, the ultimate cost of that cleanup, and the extent of potential liability.[6] Accordingly, to avoid the steep costs, bureaucratic headaches, and possibly limitless liability involved with brownfields redevelopment, businesses in-

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tion Agenda]. As explained by Professor Joel Eisen, the precise definition of brownfields is somewhat debated. *See* Joel B. Eisen, *`Brownfield of Dreams'?: Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 96 U. ILL. L. REV. 883, 890 n.20 (1996). Professor Eisen states that "brownfields are best defined as `abandoned or underutilized urban land and/or infrastructure where expansion or redevelopment is complicated, in part, because of known or potential environmental contamination.'" *Id.* at 890. Professor Eisen adopts this definition, provided by the Congressional Office of Technology Assessment, because it includes properties that are both actually and potentially contaminated, and also acknowledges that environmental contamination is not the only factor impeding brownfield redevelopment. *See id.* at 890 n.20.

2. Eisen, *supra* note 1, at 891; Interview with Miles Ballogg, Clearwater Brownfields Coordinator, City of Clearwater — Economic Development Team, in Clearwater, Fla. (Jan. 16, 1998) [hereinafter Ballogg Interview].

3. Eisen, *supra* note 1, at 894–95.

4. *See infra* Part II.A.

5. *See id*.

6. *See* Robert I. McMurry, *Brownfields*, SB06 ALI-ABA 621, 624 (1996).

stead often choose to develop "greenfields" — undeveloped, pristine land tracts.[7] As a result, spoiled and potentially dangerous inner-city properties are left abandoned while developers continue to plow tract after tract of unspoiled land for new development, resulting in a phenomenon known as "urban sprawl."[8]

The brownfields issue is a formidable problem that demands attention, evidenced by both the alarming number of these sites in cities and towns around the nation, estimated to be somewhere between 100,000 and as many as 450,000,[9] and the initial cleanup cost, estimated to total $650 million,[10] not including the "millions of dollars in unrealized tax revenues and lost wages."[11] Accordingly, elected officials on both the national and local level recognize that solving the brownfields problem — aptly described as "the anchor weighing down the ship of today's urban redevelopment movement"[12] — is essential to the successful renewal and redevelopment of our cities.[13] In 1996, the United States Conference of Mayors recognized the problem as an emergency situation,[14] and President Clinton emphasized the need for brownfields action in his State of the Union Address in both 1996[15] and 1997.[16]

Accordingly, due to increased awareness of this pressing problem, brownfields initiatives recently surfaced on both the federal and state level, and have since become the focus of considerable attention, praise, and criticism. Beginning in earnest with the United States EPA's *Brownfields Action Agenda* in 1995,[17] several states have since expanded federal efforts by enacting state-run

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7. *See* TODD S. DAVIS & KEVIN D. MARGOLIS, BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY 5 (1997).

8. *See id.* at 12.

9. *See* STAFF OF SENATE COMM. ON NATURAL RESOURCES, SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, S. 1306 & 1934, 30th Reg. Legis. Sess. (Fla. 1997).

10. *See* Ted Brown, *Brownfields: An Emerging Asset Base or Continuing Liability?,* Prepared for Florida's Growth: Critical Issues and Challenges, A Conference Exploring the Strategic Issues Facing Florida, at 5 (Nov. 18, 1997) (on file with author).

11. *Id.*

12. DAVIS & MARGOLIS, *supra* note 7, at 4.

13. *See id.* at 4–6.

14. *See id.* at 6.

15. *See id.* at 4.

16. *See* U.S. Environmental Protection Agency, *Brownfields* (last modified Oct. 12, 1997) <http://www.epa.gov/swerosps/bf>.

17. *See Action Agenda*, *supra* note 1, at 1.

brownfields projects.[18] During last year's legislative session, Florida, which has an estimated 26,540 brownfield sites,[19] joined this effort as well.[20] On May 30, 1997, Governor Lawton Chiles signed Florida's Brownfields Redevelopment Act (Florida's Act) into law.[21] The legislation, which took effect on July 1, 1997,[22] provides three million dollars for brownfields redevelopment pilot programs across the state,[23] including existing pilot programs previously established by the EPA in Clearwater, Dade County, and St. Petersburg.[24]

Florida's brownfields initiative reflects a unique partnership between developers and environmentalists to achieve a laudable dual-purpose goal; economic revitalization of depressed inner city areas and environmental clean up of hazardous sites. However, Florida's Act also signals another important trend that is crucial to inner-city redevelopment. Florida's Act, together with the wide range of state-level cleanup programs, evidences a significant shift away from the previous entrenched and unrealistic regulatory attitude that impeded past redevelopment.[25] While this modern approach to redevelopment regulations is profound, several questions remain. Primarily, will the initiatives formed under this new regulatory scheme really work? Does Florida's Act do enough to remove the daunting uncertainty regarding potentially unlimited liability and cleanup costs to induce developers back to our inner cities? And are certain incentives, which allow required cleanup standards that reflect a site's anticipated future use, inducing affected communities to trade environmental safety for increased job opportunities?

This Comment analyzes Florida's Act and its likelihood for success. Part II provides a background on the "brownfield stigma," discussing environmental laws and other sources that have inadvertently caused the brownfields problem by thwarting redevelop-

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18. *See infra* Part IV.A.

19. *See* Sig Christenson, *Bill Aids Development of Contaminated Sites,* FLA. TIMES UNION (Jacksonville), Apr. 30, 1997, at B1.

20. *See* FLA. STAT. §§ 376.77–.85 (1997).

21. *See id.*

22. *See id.*

23. *See Promise of the Brownfield Program,* TAMPA TRIB., Dec. 19, 1997, at 18.

24. Telephone Interview with Lisa Duchene, Esq., Management Review Specialist, Florida Dep't of Environmental Protection (Jan. 20, 1998) [hereinafter Duchene Interview].

25. *See* Brown, *supra* note 10, at 2, 14, 23; *see also infra* Part IV.

ment.[26] Part III provides an overview of federal level action initiated by the Clinton Administration, focusing on the EPA's *Brownfields Action Agenda*.[27] Part IV shifts the Comment's focus to Florida's Act, opening with an overview of state-run cleanup programs and then proceeding with a discussion of the Act and the methods utilized by the State Legislature.[28] Part V discusses the Act's potential trouble spots for developers, regulator concerns which may be addressed in the upcoming 1998 Legislative Session, as well as other environmental, moral, and political concerns with both Florida's initiative and state voluntary programs.[29] Part VI discusses the promise Florida's Act appears to hold in light of its application in the City of Clearwater.[30] The Comment closes with a discussion of the new law's likely success due not only to its prudent middle-road approach involving both state and local government as well as the private sector, but also its unique combination of several interests into a common goal.[31]

II. THE BROWNFIELDS STIGMA AND ROOTS OF THE PROBLEM

Reluctance to undertake brownfields redevelopment and the resulting extensive proliferation of such contaminated properties is traced to several sources, primarily environmental regulations that extensively expand liability for owners and developers as well as enforcement policies upheld in the courts that target lenders.[32] Other problems undoubtedly contributed to the brownfields problem, such as scientific ignorance of the real risk associated with a particular contaminated property in light of its actual intended use.[33] However, environmental laws and their court enforcement clearly play the largest role because of the expanded liability and

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26. *See infra* Part II.
27. *See infra* Part III.
28. *See infra* Part IV.
29. *See infra* Part V.
30. *See infra* Part VI.
31. *See infra* Part VII.
32. *See, e.g.*, Eisen, *supra* note 1, at 899.
33. *See, e.g.*, DAVIS & MARGOLIS, *supra* note 7, at 8; Brian C. Walsh, *Seeding the Brownfields: A Proposed Statute Limiting Environmental Liability for Prospective Purchasers*, 34 HARV. J. ON LEGIS. 191, 198 (1997); *see also infra* Part II.C.

daunting uncertainty engendered by their language.[34] Developers, as well as lenders, are unable to quantify the cleanup level required, the realistic final cost of that cleanup, or the extent of their liability for previous or future contamination.[35] This intimidating uncertainty plaguing contaminated property has thus resulted in a phenomenon known as the "brownfield stigma."[36]

Brownfield stigmatization by developers and lenders engenders a self-perpetuating "vicious cycle of decline," as explained by Todd Davis and Kevin Margolis in their comprehensive guide to brownfields legislation.[37] This cycle begins when a property owner is "unwilling or unable to sell contaminated property" because of potential liability that could reach back to that owner even after the sale.[38] Thus, the owner "mothballs" the property, resulting in empty, abandoned facilities that deteriorate and invite crime such as "arson, illegal dumping and vandalism."[39] While the property lays abandoned, unattended contamination may spread and thus further erode the property value, escalate the cleanup cost, and threaten neighboring properties' economic viability.[40] When faced with such problems, potential investors and developers seek opportunities elsewhere rather than undertake the uncertain cost and potentially crippling legal liabilities involved with contaminated properties.[41] Thus, this decline cycle leaves brownfield sites as "unwanted legal, regulatory, and financial burdens on the community and its taxpayers."[42]

A. The Unintended Effects of Environmental Laws

When considering whether to redevelop contaminated property, foremost among developer concerns is the potential for crippling liability under both federal and state environmental laws – primarily the Comprehensive Environmental Response, Compensation and

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34. *See, e.g.,* DAVIS & MARGOLIS, *supra* note 7, at 9; Walsh, *supra* note 33, at 198–99.
35. *See* Eisen, *supra* note 1, at 901, 911.
36. *See* DAVIS & MARGOLIS, *supra* note 7, at 6.
37. *Id.*
38. *Id.*
39. *Id.* at 6–7.
40. *See id.*
41. *See id.*
42. DAVIS & MARGOLIS, *supra* note 7, at 7.

Liability Act (CERCLA)[43] and state "mini-CERCLA's,"[44] as well as the Resource Conservation and Recovery Act (RCRA).[45] These environmental laws arose only recently, beginning in the mid-1970s;[46] however, by instigating expanded liability to govern contaminated remediation, they had a rather swift and substantial effect.[47] While enacted to create a comprehensible and effective system to remedy environmental damage and prevent such contamination in the future, these laws actually had the opposite result regarding brownfields redevelopment.[48] Thus, ironically, laws passed to enhance contaminated property remediation have inadvertently sabotaged potential brownfields redevelopment by implementing dramatically expanded liability as well as, if even provided, amorphous and often unintelligible cleanup standards.[49]

Passed in 1976, RCRA primarily regulates the generation, transport, treatment, and disposal of hazardous wastes from "cradle to grave," that is from creation until their safe disposal.[50] RCRA's requirements direct hazardous waste manufacturers to identify themselves to state and federal agencies and ensure, via a sophisticated tracking system, that their waste is deposited in licensed disposal or recycling facilities.[51] Regarding the brownfields stigma, RCRA adversely affects contaminated property redevelopment in two ways: (1) by attaching costly regulation requirements to underground storage tanks, which are commonly found on property previously used for industrial purposes; and (2) by authorizing the "government or citizens to require cleanup at sites that `may present an imminent and substantial endangerment to health or the environ-

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43. 42 U.S.C. §§ 9601–9675 (1994).

44. William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 1, 12 (1997). A majority of states have in essence adopted the federal law with some stricter or additional provisions regarding certain contaminants such as petroleum. *See* DAVIS & MARGOLIS, *supra* note 7, at 17. Florida has its own environmental laws that impose obligations and strict liability similar to the federal law. *See* FLA. STAT. §§ 376.011–.75 (1997).

45. 42 U.S.C. §§ 6901–6987 (1994).

46. *See* DAVIS & MARGOLIS, *supra* note 7, at 7.

47. *See id.* at 8.

48. *See, e.g.*, *id*. at 7–8; Brown, *supra* note 10, at 6.

49. *See* DAVIS & MARGOLIS, *supra* note 7, at 8.

50. *See id.* at 16 (citing 42 U.S.C. §§ 6901–6987 (1994)).

51. *See* Brown, *supra* note 10, at 2. The regulatory language covering these grave sites involves hundreds of pages of daunting requirements. *See* DAVIS & MARGOLIS, *supra* note 7, at 16.

ment.'"[52] Accordingly, landowners or operators who contributed to the contamination are typically held responsible for conducting the cleanup or reimbursing the government for cleanup expenses.[53]

While RCRA bears some responsibility, the primary culprit behind the brownfields stigma is CERCLA,[54] otherwise known as the federal Superfund law.[55] Passed hastily in 1980[56] in response to public outrage over the Love Canal toxic disaster,[57] "CERCLA established a federal program to identify and remediate chemical spills and abandoned hazardous waste sites believed to pose a significant threat" to the human health and environment of the neighboring community.[58] To ensure the worst sites received attention first, Congress directed the EPA to create a National Priorities List (Priorities List) reflecting the most heavily contaminated sites in the nation.[59] Accordingly, when the government cannot find private parties to finance or cleanup these priority sites, the EPA is then authorized to use federal money from a revolving "Superfund" trust, which consists largely of funds from settlements and suits against responsible parties.[60]

However, CERCLA is not limited to the most contaminated Priorities List sites or to those sites that pose an "imminent danger," but also attaches cleanup cost liability to all contaminated sites with even modest amounts of "hazardous substances."[61] Thus, unlike

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52. DAVIS & MARGOLIS, *supra* note 7, at 16 (quoting 42 U.S.C. §§ 6971(a)(1), 6973 (1994)).

53. *See id.*

54. *See, e.g.,* Eisen, *supra* note 1, at 899.

55. *See, e.g.*, Walsh, *supra* note 33, at 193 & 231 n.3.

56. *See* DAVIS & MARGOLIS, *supra* note 7, at 7.

57. *See id.*; William W. Buzbee, *Remembering Repose: Voluntary Contamination Cleanup Approvals, Incentives and the Costs of Interminable Liability*, 80 MINN. L. REV. 35, 42 (1995). In the Love Canal disaster, hazardous wastes were discovered leaking into residential basements in upstate New York. *See* DAVIS & MARGOLIS, *supra* note 7, at 15.

58. DAVIS & MARGOLIS, *supra* note 7, at 7.

59. *See, e.g., id*. at 16.

60. *See id.* at 17.

61. *See id.* at 16. "Hazardous substance" includes an extensive array of toxins; however, it expressly excludes petroleum products. *See id*. at 16; *see also* CERCLA, 42 U.S.C. § 9601(14) (1994). Thus, CERCLA actions may not include recovery for petroleum release cleanups. *See* Rufus C. Young, Jr., *1997 Update: Beyond Superfund – Other Federal Laws Hazardous to Land Use*, SC10 ALI-ABA 547, 563 n.3 (1997). Accordingly, several state environmental laws — including Florida's — specifically regulate petroleum contamination cleanup. *See, e.g.,* Petroleum Liability and Restoration Insurance Program, FLA. STAT. § 376.3072 (1997).

RCRA, CERCLA is not a regulatory program but an elaborate and intimidating liability scheme "for the remediation of virtually *all* contaminated sites,"[62] which extends expansive liability and unpredictable cleanup costs to properties that may be only mildly contaminated.[63] Thus, while brownfields are not contaminated to the extent they are placed on the Priorities List, developers nonetheless hesitate to become involved with brownfields when confronted with CERCLA's formidable scope.[64]

Furthermore, "to ensure that private parties bear the brunt of [contamination] cleanup costs" whenever possible,[65] CERCLA operates in a "catch-all,"[66] retroactive[67] capacity by providing for expansive liability applicable to a wide number of parties who contributed to the site's contamination.[68] The law reaches not only current owners but also prior owners in control of the land when the contamination occurred,[69] which leads to sellers "mothballing" the property rather than risking the potential liability involved in selling even slightly contaminated properties to developers.[70]

Moreover, liability under CERCLA includes all costs incurred in a removal or remedial action by the federal government, a state government, and/or any other person.[71] Additionally, potential liability under CERCLA includes liability to third parties who may claim injuries caused to persons or adjoining property from the site's contamination.[72] Thus, under CERCLA's strict, joint and several

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62. DAVIS & MARGOLIS, *supra* note 7, at 16 (emphasis added).

63. *See id.*; Eisen, *supra* note 1, at 901–02.

64. *See* Eisen, *supra* note 1, at 901–02.

65. DAVIS & MARGOLIS, *supra* note 7, at 16.

66. *See* Buzbee, *supra* note 44, at 8 (describing CERCLA "as a catch-all liability scheme").

67. Although an Alabama district court initially held that CERCLA did not have a retroactive effect, the Eleventh Circuit later overruled that decision and held that CERCLA does reach back to contamination that occurred before the Superfund law's enactment. *See* Young, *supra* note 61, at 550 (citing United States v. Olin Corp., 927 F. Supp. 1502 (D. Ala. 1996), *overruled by* 107 F.3d 1506 (11th Cir. 1997)). For further discussion of the constitutional debate over CERCLA's retroactive effect, see Buzbee, *supra* note 57, at 117 n.22.

68. *See* Buzbee, *supra* note 44, at 7–8.

69. *See* CERCLA, 42 U.S.C. § 9607(a) (1994).

70. *See* DAVIS & MARGOLIS, *supra* note 7, at 6–7; *see also* discussion *supra* notes 37–42 and accompanying text.

71. *See* Walsh, *supra* note 33, at 194.

72. *See* DAVIS & MARGOLIS, *supra* note 7, at 25.

liability scheme,[73] a current "purchaser is potentially liable to [the] EPA for one hundred percent of the EPA's cleanup costs,"[74] even if the purchaser is not responsible for the original pollution.[75] Furthermore, since the federal government generally will not release any potentially responsible party from liability, as Professor William Buzbee explains, "potential liability under CERCLA is also eternal."[76]

Furthermore, the three affirmative defenses provided by CERCLA[77] are not much comfort.[78] To successfully avoid liability, a potentially responsible party must prove beyond a preponderance of the evidence that the hazardous substance release "was caused solely by an act of God, an act of war, or the actions of an unrelated third party."[79] The first two defenses are interpreted so narrowly that they provide little if any use.[80] The third "so-called innocent landowner defense" requires a rather difficult showing that the purchaser "did not know and had no reason to know that any hazardous substance" existed on the property, or that a third party outside the chain of title caused the contamination.[81] Thus, this defense is largely useless in the brownfields context since purchasers know from the outset that they are dealing with contaminated property.[82]

Accordingly, potential brownfield developers have neither been able to quantify the potential cleanup cost involved or rely on any

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73. *See* Buzbee, *supra* note 57, at 43. Professor Buzbee explains that a series of court decisions from the 1980s held that the broad liability language of CERCLA's now infamous section 9607(a) imposes such strict liability on "virtually any entity associated with a contaminated property." *Id.* at 43 & n.19 (citing United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 737–46 (8th Cir. 1986); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983)).

74. Scott H. Reisch, *Reaping "Green" Harvests from "Brownfields": Avoiding Lender Liability at Contaminated Sites*, COLO. LAW., Jan. 1997, at 3.

75. *See generally* Walsh, *supra* note 33, at 193–94 (explaining the costs included in CERCLA liability).

76. Buzbee, *supra* note 57, at 44.

77. 42 U.S.C. § 9607(b) (1994).

78. *See* Walsh, *supra* note 33, at 195.

79. *Id.*

80. The "act of God" defense is limited to "`exceptional' natural phenomena," which do not include foreseeable natural acts. 42 U.S.C. §§ 9601(1), 9607(b); *see also* Walsh, *supra* note 33, at 195–96. Similarly limited, the "act of war" defense "require[s] extraordinary government involvement in the operation of the facility" causing the contamination. Walsh, *supra* note 33, at 196.

81. Walsh, *supra* note 33, at 196–97 (quoting 42 U.S.C. § 9601(35)(A)(i)).

82. *See id.* at 197.

real affirmative defense under current environmental law for contamination liability costs.[83] Thus, prior to brownfields initiatives, developers who undertook contaminated site redevelopment were susceptible to liability that could not only exceed the property's value, but could also amount to a total financial wipe-out if contamination problems occurred after acquiring the property.[84]

B. Court Enforcement — The Reverberations of *United States v. Fleet Factors Corp.*

Since CERCLA's enactment, the federal courts have expanded the law's potential liability far beyond what appears on its face.[85] In addition to establishing that developer liability under CERCLA is strict, joint and several,[86] court interpretation of CERCLA also expand potential liability to lenders,[87] thus giving developers good reason to fear that lenders will refuse to become entangled with financing brownfield sites.[88] Lender liability swiftly became a paramount concern in 1990 with the Eleventh Circuit's ruling in the landmark case, *United States v. Fleet Factors Corp.*,[89] which interpreted CERCLA's language to impose full liability on covered parties regardless of fault and the presence of other responsible parties.[90] Accordingly, the court exacerbated the brownfield stigma by holding "that a lender could be held liable under CERCLA for cleanup if the lender participated `in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes.'"[91]

Thus, after *Fleet Factors*, regulators increasingly "adopted the view that lenders should act as [a type of] environmental police" and, accordingly, be held liable if the property in which they have a security interest causes a health or environmental problem in the

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83. *See id.* at 194–97.
84. *See id.* at 195.
85. *See id*. at 194.
86. *See* Buzbee, *supra* note 57, at 43.
87. *See* United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990).
88. *See* DAVIS & MARGOLIS, *supra* note 7, at 8.
89. 901 F.2d at 1550.
90. *See id*. at 1557.
91. DAVIS & MARGOLIS, *supra* note 7, at 8 (quoting *Fleet Factors*, 901 F.2d at 1557); *see also* Brown, *supra* note 10, at 6.

community.[92] Accordingly, as a result of aggressive litigation and unsympathetic court interpretations of CERCLA language, lenders predictably ceased funding property with even a hint of contamination.[93] The resulting lack of available capital for contaminated site redevelopment prompted rapid brownfields proliferation around the country.[94]

Fleet Factors's dramatic holding "caused a significant upheaval in the financial community," which in turn led to back peddling by the EPA and further confusion in the courts.[95] However, Congress recently remedied that concern by enacting the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996.[96] As discussed further in Part III, due to this new law, lenders who do not become involved in the day-to-day management or decisionmaking process at a contaminated site can no longer be held liable for later contamination damage coming from that site.[97]

Thus, RCRA, CERCLA, and state mini-CERCLAs form an ambitious, yet daunting and confusing federal program for remediating hazardous waste sites. CERCLA's broad reaching liability, coupled with RCRA's "imminent hazard" regulations, expose "virtually any party who had meaningful contact with the contamination site, either as an owner, operator, generator, or transporter, [to] some or all of the [cleanup costs]."[98] Specifically, liability extends to four main groups: (1) current owners;[99] with only two minor exceptions;[100]

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92. DAVIS & MARGOLIS, *supra* note 7, at 8.

93. *See* Brown, *supra* note 10, at 7.

94. *See id.* at 6–7.

95. Walsh, *supra* note 33, at 197–98; *see also* Brown, *supra* note 10, at 7. Due to the widespread adverse reaction caused by *Fleet Factors*, the EPA attempted to clarify the scope of lender liability under CERCLA by what came to be known as the "Final Rule." *See* Walsh, *supra* note 33, at 198 (citing EPA Final Rule on Lender Liability Under CERCLA, 57 Fed. Reg. 18,344 (Apr. 29, 1992)). However, the United States Court of Appeals for the District of Columbia subsequently held that the EPA did not have the authority to define liability for a class of defendants, and thus declared the Final Rule invalid. *See id.* (citing Kelly v. EPA, 15 F.3d 1100, 1107–08 (D.C. Cir. 1994)). Nonetheless, the EPA and Justice Department continued to follow the vacated rule's policy until Congress codified that policy in 1996. *See id.; see also* discussion *infra* Part III.B.

96. *See* 42 U.S.C. § 9607(n) (Supp. 1997); *see also* U.S. Environmental Protection Agency, *Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996* (last modified Nov. 5, 1997) <http://www.epa.gov/swerosps/bf/gdc.htm>.

97. *See infra* Part III.B.

98. DAVIS & MARGOLIS, *supra* note 7, at 21.

99. *See id.*

100. The only exceptions are: "(1) state and local governments that acquire a proper-

(2) sellers,[101] even if the cleanup occurs long after the sale;[102] (3) lenders,[103] in limited circumstances as established by *Fleet Factors,*[104] either as owners, by foreclosing on a contaminated property, or as operators, by participating "in the management of a facility that disposed of hazardous wastes";[105] and (4) other parties, such as generators who have produced or "otherwise arranged" for disposal at the site, or transporters.[106]

C. Other Impediments to Brownfields Redevelopment

The broad jurisdictional reach and comprehensive liability provisions of RCRA, CERCLA, and similar state programs inadvertently create formidable impediments to redevelopment of contaminated property. Deciphering both the ambiguous language of these laws and the actual consequences of court enforcement often poses a task too foreboding for potential developers and lenders. However, several other barriers impede successful brownfields redevelopment,[107] including developers' understandable frustration with and aversion to extensive red tape cleanup regulations imposed at the federal, state, and local level.[108] Acquiring government approval that a site is indeed clean commonly requires efforts too costly, time-consuming, and frustrating to warrant such an undertaking.[109] Other impediments to brownfields redevelopment include: lack of concentrated expertise as well as a persisting basic ignorance of the

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ty involuntarily, and (2) purely `innocent' landowners who have made a very thorough, good-faith investigation of the site before [the purchase believing it to be clean]." *Id.*

101. *See id.* at 22.

102. Because courts recognize that CERCLA's potential liability is "eternal, many sellers refuse to transfer their property." *Id.* While the seller may obtain an agreement from the purchaser to protect the seller from future liabilities, "courts have consistently held that an indemnification clause does not protect a covered party from liability to the government or other claimants." *Id*.

103. *See* DAVIS & MARGOLIS, *supra* note 7, at 22.

104. *See supra* notes 91–94 and accompanying text.

105. DAVIS & MARGOLIS, *supra* note 7, at 22. However, Congress codified lender liability protections in 1996. *See infra* Part III.B.

106. *See* DAVIS & MARGOLIS, *supra* note 7, at 22 (citing Resource Act, 42 U.S.C. § 6991(b)(h)(11) (1994)).

107. *See generally id.* at 7–11 (discussing several problems that prevent brownfields redevelopment).

108. *See id.* at 11.

109. *See* Robert W. Wells, Jr., *Brownfields for Beginners*, FLA. B.J., May 1997, at 74, 76; Walsh, *supra* note 33, at 199–200.

science of contamination,[110] potentially prohibitive and not readily identifiable capital costs,[111] insufficient financing,[112] "entrenched attitudes among regulators,"[113] lack of a consistent redevelopment framework and public/environmental activist opposition,[114] limited demand for redevelopment sites that is exacerbated by "competition from greenfields,"[115] crime rates,[116] and possibly racism.[117] However, despite these barriers, the sheer enormity of the brownfields problem across the country has spurred both federal and state governments into action.

III. ACTION ON THE FEDERAL LEVEL

A. EPA Efforts — *The Brownfields Action Agenda*

To tackle the brownfields problem and reverse the urban sprawl trend, the federal government has become increasingly involved in exploring possible solutions and encouraging state and local action. The Clinton Administration launched its first brownfields initiative in 1993, awarding a $200,000 pilot program grant to Cleveland, Ohio, with the hopes that the pilot would help create a redevelopment model for cities across the country.[118] According to the Clinton Administration, results from that first pilot include "$3.2 million in new private investment, a $1 million increase in the local tax base, and more than 170 jobs through the creation of several businesses on the former brownfield property."[119] Based on that success, the Clinton Administration expanded its initial efforts into a more comprehensive program, *The Brownfields Action Agenda*, run through the EPA.[120]

Announced in January 1995, the *Action Agenda* implemented

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110. *See* Brown, *supra* note 10, at 7.
111. *See* Walsh, *supra* note 33, at 199–200.
112. *See* Brown, *supra* note 10, at 7.
113. DAVIS & MARGOLIS, *supra* note 7, at 11.
114. *See id.*
115. *Id.* at 12.
116. *See* Walsh, *supra* note 33, at 198.
117. *See id.*
118. *See Action Agenda, supra* note 1, at 2.
119. Vice President Al Gore, *Preface* to DAVIS & MARGOLIS, *supra* note 7, at xx [hereinafter *Gore Preface*].
120. *See Action Agenda, supra* note 1, at 1.

four major components: additional pilot program funding,[121] clarification of liability and cleanup issues,[122] partnership and outreach,[123] and job development and training.[124] As explained by the EPA, these efforts aim to "empower [s]tates, localities, and other agents of economic redevelopment to work together in a timely manner to prevent, assess, safely clean and sustainably reuse brownfields."[125] Accordingly, the *Action Agenda* represents the introduction of "common-sense reforms to the Superfund program" necessary to remove obstacles impeding brownfields redevelopment.[126] Thus, the *Action Agenda* reflects a first step in an important shift in regulatory attitude essential to the success of brownfields initiatives.

The *Action Agenda*'s stated goals include "revers[ing] the spiral of unaddressed contamination, declining property values, and increased unemployment found in inner city industrial areas, while maintaining deterrents to future contamination and EPA's focus on assessing and cleaning up [the] `worst sites first.'"[127] In a significant step toward that goal, the EPA "de-listed," or archived, 24,000 of 40,000 sites previously included in the Superfund tracking system known as the CERCLIS database.[128] Sites removed from the database in turn receive a "no further action planned" designation.[129] This step evidences the EPA's commitment to removing the stigma associated with CERCLA sites wherever possible to clear the way for redevelopment.[130] However, while this is an important step, the

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121. *See id.* The *Action Agenda* announced EPA's plan to "fund at least fifty brownfields pilots by the end of 1996, at up to $200,000 each, to support creative two-year demonstrations of assessment activities leading to cleanup and redevelopment solutions." *Id.* at 2. After the first Cleveland pilot in 1993, the EPA awarded two more pilots late in 1994, one to Bridgeport, Connecticut, and the other to Richmond, Virginia. *See id.* In 1995, the "EPA awarded fifteen additional national pilots in July" and "eleven regional pilots in October." *Id.* Thus, with the *Action Agenda*, the EPA pledged to "award ten new national pilots in January 1996." *Id.* Among those recipients were the Clearwater, Dade County, and St. Petersburg pilots. *See* discussion *infra* Part IV.B.

122. *See Action Agenda, supra* note 1, at 1.

123. *See id.*

124. *See id.*

125. *Id.*

126. *Gore Preface*, *supra* note 119, at xx.

127. *Action Agenda*, *supra* note 1, at 1.

128. *See id*. at 3. The "CERCLIS" database refers to the Comprehensive Environmental Response, Compensation and Liability Information System. *See id*.; *see also* DAVIS & MARGOLIS, *supra* note 7, at 42.

129. *Action Agenda, supra* note 1, at 3.

130. *See id.*

EPA nonetheless reserves the right to become reinvolved should additional information indicate the site did not merit removal from CERCLIS, and thus the EPA does not completely cede its interest in de-listed sites.[131] Furthermore, as Professor Robert Wells noted, this de-listing does not amount to a determination of a developer or owner's liability, nor does it clarify whether any cleanup response action is necessary.[132]

Another important *Action Agenda* component is the Prospective-Purchaser Agreement (Purchaser Agreement), or liability waiver, in which EPA states that it will not take enforcement action against a brownfields purchaser regarding actual cleanup or cleanup cost payment.[133] Traditionally, the EPA was very reluctant to enter such covenants-not-to-sue with purchasers, "even when the prospective purchaser agreed to take action to minimize contamination on the site."[134] However, in an effort to attract private capital into clean up and redevelopment investments, the EPA issued the *Guidance on Settlement with Prospective Purchaser's of Contaminated Property* (*PPA Guidance*) in 1995.[135] Accordingly, via this *Guidance*, the EPA now offers Purchaser Agreement's to a larger number of prospective purchasers by considering such agreements that are "essential to remove Superfund liability barriers and allow the private party cleanup and productive use, reuse, or redevelopment of the site."[136] In the *PPA Guidance*, the EPA provides a model agreement and lists the following five criteria that a prospective purchaser must show for the agency to enter into such an agreement: (1) the EPA has in the past, is currently, or anticipates taking future action at the site; (2) the EPA will receive a substantial benefit — either a direct benefit from the site's cleanup or an indirect benefit in combination with a substantial community benefit; (3) continued facility operation or new site development will not aggravate or increase existing contamination or interfere with the EPA's response action; (4) continued operation or new development will not present health risks to

131. *See* Brown, *supra* note 10, at 9; *see also* Buzbee, *supra* note 57, at 80.

132. *See* Wells, *supra* note 109, at 75.

133. *See Action Agenda, supra* note 1, at 3–4.

134. DAVIS & MARGOLIS, *supra* note 7, at 25; *see also* Brown, *supra* note 10, at 10.

135. *See* Brown, *supra* note 10, at 10; U.S. Environmental Protection Agency, *Guidance on Settlements with Prospective Purchasers of Contaminated Property* (last modified May 1995) <http://www.epa.gov/swerosps/bf/gdc.htm#ap> [hereinafter *PPA Guidance*].

136. *Id.* at 2–4.

the community or those on site; and (5) the prospective purchaser is financially viable.[137]

Thus, by expanding the circumstances when it will consider abstaining from filing an enforcement action,[138] the EPA demonstrated an arguably enlightened government response to the growing purchaser demand for increased flexibility and some governmental protection.[139] However, while these agreements represent an important shift in the regulatory attitude, recognizing the need for increased flexibility regarding brownfields issues, Purchaser Agreement's "are still offered only to the purchasers of [Priorities List] sites or sites where [the EPA] has taken, or anticipates taking, a response action . . . ."[140] This limitation evidences the EPA's ongoing reluctance to completely trust market driven incentives to stimulate capital investment sufficient to fund and complete contaminated site cleanup, and this hesitancy may compromise the benefits offered by de-listing from CERCLIS.[141] Furthermore, Purchaser Agreement's do not automatically provide contribution protection from other potential plaintiffs such as previous owners, equivalent protection from RCRA suits, or liability protection that is transferrable to subsequent purchasers and lenders.[142] As discussed in Part IV, such gaps in federal protection highlight the importance of action on the state-level to address remaining concerns.[143]

An additional purchaser protection provided by the *Action Agenda* is the "comfort letter,"[144] issued by the EPA on a site-by-site basis to purchasers who successfully complete a voluntary, state-administered cleanup program.[145] Given the intimidating legal uncertainty involved with performing sufficient cleanup, these letters offer purchasers some comfort that the federal government will not pursue a Superfund enforcement action against a particular remediated site.[146] Thus, while not as effective as a covenant-not-to-sue, these letters appear to provide a "promising and flexible tool"

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137. *See id.* at 3–6.
138. *See id.* at 3.
139. *See* DAVIS & MARGOLIS, *supra* note 7, at 25.
140. *Id.* at 25–26; *see also* Brown, *supra* note 10, at 10.
141. *See* Brown, *supra* note 10, at 10.
142. *See* DAVIS & MARGOLIS, *supra* note 7, at 26.
143. *See infra* Part IV.A–B.
144. *See Action Agenda, supra* note 1, at 4–5.
145. *See* Brown, *supra* note 10, at 10.
146. *See id.* at 10–11.

for developers to grant "at least some level of assurance to potential investors."[147] Perhaps more importantly, such letters have also given guidance to states, including Florida, in forming their own brownfields legislation; thus allowing a larger number of properties to benefit from the protection provided by the comfort letter concept.[148]

Similarly, the EPA also established and expanded use of Memorandums of Agreement (MOA) with states regarding voluntary cleanups.[149] Under a MOA, the EPA "provide[s] assurance that [it] will not enforce action at sites where private parties have conducted cleanups under the state's direction or pursuant to state voluntary cleanup initiatives."[150] MOA's thus signal another important step in promoting successful brownfields redevelopment by effectively eliminating a layer of government bureaucracy, and thereby allowing a developer/owner to deal solely with state regulatory authorities without fear that the federal government will overrule state-offered protections.[151] While MOA's do not appear to offer similar protective assurances under RCRA, that limitation should not pose problems for developers or owners given RCRA's more limited focus and application.[152]

Taking another important step toward a more realistic approach to brownfields redevelopment regulation, the EPA announced in the *Action Agenda* that it will consider a property's actual future land use in determining the remediation level required for that site.[153] This step applies what has come to be known as a "risk-based analysis," that is, a common-sense approach recognizing that the strictest standards may not be necessary for a given prop-

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147. McMurry, *supra* note 6, at 632.

148. For discussion on the "No Further Action" letter made available under Florida's Act, see *infra* Part IV.D.

149. *See* U.S. Environmental Protection Agency, *Final Draft Guidance on Developing Brownfield Memoranda of Agreement* (last modified Oct. 2, 1997) <http://www.epa.gov/swerosps/bf/gdc.htm>.

150. DAVIS & MARGOLIS, *supra* note 7, at 26. Florida's brownfields law contains language directing the State's Department of Environmental Protection (FDEP) to try and enter a MOA with the EPA, and the FDEP is currently working on that agreement. *See* discussion *infra* Part V.A.

151. *See* Brown, *supra* note 10, at 11.

152. *See id.* For discussion regarding the Resource Act's primary purpose and focus, see *supra* Part II.A.

153. *See Action Agenda, supra* note 1, at 4.

erty when the site's intended use is factored into the equation.[154] Thus, risk-based analysis is designed to more effectively assess the actual risk to human health and the environment if remediation is concluded at a level less than the previously required "background level" mandated by EPA protocol.[155] Again, this willingness to reexamine just "how clean is clean" reflects a crucial shift in attitude among regulators — perhaps the most important result of the brownfields initiatives.[156]

B. Building on the *Action Agenda*

Since their inception, brownfields initiatives have received extensive attention, including the Clinton Administration's continued expansion of the initiative since the 1995 *Action Agenda*. Given the unintended result of CERCLA and related laws, the need for Superfund reform to remedy what has become an environmental "legal quagmire" is widely recognized, and recent legislation will help further brownfields initiatives. The Clinton Administration pursued significant tax credits and other incentives to make voluntary cleanup even more attractive to potential developers, resulting in the Brownfields Tax Incentives component to the Taxpayer Relief Act, signed into law by the President on August 5, 1997.[157] Furthermore, Congress has also been involved with some twenty-five to thirty separate brownfields bills in the past two sessions aimed at remedying past impediments to redevelopment.[158]

Additionally, in response to the shockwaves caused by the *Fleet Factors* decision and the resulting cessation of capital funds for brownfields redevelopment,[159] Congress enacted the Asset Conserva-

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154. *See* Brown, *supra* note 10, at 13. *See generally* Wells, *supra* note 109, at 76 (explaining risk-based analysis in greater detail and discussing how it has been successfully implemented in the two recent Florida laws addressing petroleum and drycleaning solvent contamination).

155. *See* Brown, *supra* note 10, at 13.

156. *See id.*

157. *See* U.S. Environmental Protection Agency, *New Tax Incentive to Spur the Cleanup and Redevelopment of Brownfields* (last modified Sept. 29, 1997) <http://www.epa.gov/swerosps/bf/gdc.htm>.

158. *See* Brown, *supra* note 10, at 3; Charles Bartsch & Elizabeth Collaton, *Federal Legislative Proposals to Promote Brownfield Cleanup and Redevelopment in the 105th Congress* (last modified Sept. 29, 1997) <http://www.nemw.org.brownleg.htm>.

159. *See* Brown, *supra* note 10, at 7.

tion, Lender Liability, and Deposit Insurance Protection Act[160] in 1996 to amend CERCLA and codify the EPA lender-liability rule.[161] Under the law, lenders who do not become involved in the day-to-day management or decisionmaking process at a contaminated site no longer have to fear the potentially unlimited liability to which they were previously susceptible under *Fleet Factors.*[162] Accordingly, developers should have a better chance at obtaining financing from lenders for brownfields redevelopment.[163]

In May 1997, the Clinton Administration further enhanced its brownfields efforts by providing additional funding and support with its three pronged strategy; the Brownfields National Partnership, an enhanced pilot projects program, and additional proposed brownfields incentives legislation submitted to Congress.[164] As explained by the Clinton Administration, the Partnership brings together the resources of fifteen federal agencies to provide a $300 million federal investment in brownfields cleanup and redevelopment.[165] Furthermore, the Clinton Administration projects that, with the help of this investment, the brownfields initiative should raise somewhere between $5–28 billion in investment from the private sector, provide support for up to 196,000 jobs, and protect up to 34,000 acres of undeveloped greenfield areas.[166]

Under the second prong of its enhanced brownfields initiative, the Clinton Administration enhanced pilot project funding, dedicating $20 million in additional funding to thirty-four communities nationwide for such projects.[167] Accordingly, the EPA is currently funding pilot projects around the country, providing each pilot with

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160. *See* Wells, *supra* note 109, at 77 (citing 42 U.S.C. § 9607(n) (1994)).

161. *See id.*; *see also* Brown, *supra* note 10, at 7.

162. *See* Wells, *supra* note 109, at 77.

163. *But see* discussion *infra* Part V.B (regarding recent survey data reflecting lenders' continuing hesitancy to fund redevelopment projects).

164. *See* The White House, Office of the Vice President, *Vice President Gore Announces Expansion of Brownfields Initiative* (last modified May 13, 1997) <http://library.whitehouse.gov> [hereinafter *Gore Announcement*]. For a discussion on results from legislation to Congress by the administration under the third prong of its strategy, see *supra* note 157 and accompanying text.

165. *See id.* In addition to the EPA, other federal agencies involved include: the Department of Commerce's Economic Development Administration, the Department of Housing and Urban Development, the Department of Agriculture, and the Department of Labor. *See* McMurry, *supra* note 6, at 627.

166. *See Gore Announcement, supra* note 164.

167. *See id.*

up to $200,000 for two-year demonstrations to test redevelopment methods that would both reduce regulatory barriers and address environmental concerns.[168] In Florida, this expanded program resulted in pilot funding grants for Dade County, Gainesville, Jacksonville, and Tallahassee,[169] thus bringing the total number of federally funded Florida pilots to seven, including the original EPA pilots in Clearwater, St. Petersburg, and Miami.[170] While the initial federal grants are not large, as seen with the original three Florida pilot grants, such funds often served as a springboard for further action on the state level.[171]

IV. ACTION ON THE STATE LEVEL — FLORIDA'S BROWNFIELDS REDEVELOPMENT ACT

While the EPA's increased action toward fostering redevelopment is promising, steps such as the *Action Agenda* and the *PPA Guidance* have two significant drawbacks: First, they do not have the force of law, and second, their scope is limited to sites with EPA involvement.[172] Thus, as discussed in Part III, perhaps the most important outcome of the federal brownfields initiative is the EPA's clear shift in regulatory attitude coupled with its efforts to empower and encourage the states to implement a more flexible regulatory response to contaminated or potentially contaminated properties.

Since "[n]either CERCLA nor EPA accompanying regulations specify a consistent standard for determining what constitutes a sufficient cleanup of contaminated property,"[173] states have utilized the EPA's tools to provide developers with what Professor William Buzbee argues are the two essential components to successful brownfields redevelopment: finality and repose.[174] Thus, because state and local governments have clear incentives to encourage brownfields redevelopment, such as "increased tax revenues, increased employment, increased real property values and taxes, and a physically and environmentally more attractive setting for resi-

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168. *See* McMurry, *supra* note 6, at 626.

169. Duchene Interview, *supra* note 24.

170. *See id.*

171. Ballogg Interview, *supra* note 2; *see also* Statement of Senator Latvala, *infra* Part VI.B.1 and note 207.

172. *See* Walsh, *supra* note 33, at 207.

173. *Id.* at 199.

174. *See* Buzbee, *supra* note 57, at 109.

dents and businesses," state programs likely have the greatest potential to make the brownfields goal of economic redevelopment a reality by bolstering incentives and liability protection.[175]

A. An Overview of State Cleanup Programs

Although state policies addressing the brownfields problem vary,[176] voluntary cleanup programs are the most popular approach.[177] Early in 1997, thirty-eight states had enacted some sort of voluntary cleanup or brownfields legislation, thirty-six of which were adopted in just the past five years[178] — thus showing a clear trend toward adopting this new concept.[179] These state programs share a common utilization of increased liability protection for developers and lenders, as well as clarify targeted cleanup requirements.[180] Thus, by incorporating these elements into regulatory policy that allows private party involvement in lieu of solely enforcement driven methods, these state voluntary cleanup programs present the most significant shift in environmental policy.[181]

While state voluntary cleanup programs share a modern approach to regulation, they vary considerably in the level of government involvement required in identifying, assessing, and remediating brownfield sites.[182] As explained by Professor Joel Eisen, state involvement and/or oversight of these programs can be roughly sorted into three categories which correspond with the amount of state review, as well as the level of responsibility delegated to approved environmental professionals.[183]

First, programs with the most lenient oversight levels require the state only to verify in a final review that cleanups are complete and thus eligible for liability protection.[184] Second, several pro

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175. *Id.* at 110.

176. *See* McMurry, *supra* note 6, at 628. In addition to voluntary cleanup programs, the most common state approaches to the brownfields problem are state Superfund programs, environmental liens, and property transfer laws. *See id.*

177. *See id.*; Brown, *supra* note 10, at 2.

178. *See id.*

179. *See id.*

180. *See* Eisen, *supra* note 1, at 886–87, 920.

181. *See* Brown, *supra* note 10, at 13.

182. *See* Eisen, *supra* note 1, at 965.

183. *See id.* at 967.

184. *See id.* at 969. Professor Eisen provides Ohio's cleanup statute as the most extreme example of this lenient approach. *See id.* Under Ohio's program, a developer is

grams require a medium level of state involvement by delegating certain oversight responsibilities to certified environmental professionals.[185] These professionals then present evidence of a completed remediation to the state, which retains the power to independently review the private sector's work.[186] Finally, states with the highest level of involvement require active oversight for all stages of the cleanup process, including sight investigation, remediation, and final certification that the cleanup is complete.[187] As discussed in this section, Florida legislators essentially adopted this third approach by requiring active state and local government involvement throughout both remediation and redevelopment; thus avoiding the potential dangers inherent in delegating too much independence to participating developers.[188]

B. Florida's Initiative

1. Background

Joining the majority of states recognizing the brownfields initiative potential, Florida enacted the Brownfields Redevelopment Act in May, 1997.[189] Explained by the bill-sponsor State Senator

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permitted to independently evaluate and remediate a brownfield site – essentially unsupervised by the state EPA. *See id.* (citing OHIO REV. CODE ANN. § 3746.10 (Anderson 1995)). While the Ohio EPA reserves the right to audit cleanups, the State has essentially undercut that power by further stating that it will cap examination at 25% of participating brownfield sites. *See id.* at 969–70 (citing OHIO REV. CODE ANN. § 3746.10 (Anderson 1995)).

185. *See* Eisen, *supra* note 1, at 968.

186. *See id.* Professor Eisen provides a recently enacted Illinois statute as an example of this moderate approach. *See id.* (citing 415 ILL. COMP. STAT. ANN. § 5/58.7(b)(1) (West 1998)). Under the law, the State authorizes "Professional Licensed Engineers" to conduct investigations, prepare remediation plans and reports, and review and sign-off on the completed cleanup. *See id.* at 968–69 (citing 415 ILL. COMP. STAT. ANN. § 5/58.7(b)–(d)). The State does retain final approval authority, but it does not require direct state review of activities other than final report approval. *See id.* at 969 & n.365 (citing 415 ILL. COMP. STAT. ANN. § 5/58.7(b)(1)).

187. *See id*. at 967. Professor Eisen explains that Indiana's Department of Environmental Management's involvement — in reviewing and assessing sites, over viewing remediation, and issuing the final liability protection — demonstrates this enhanced role. *See* Eisen, *supra* note 1, at 967 (citing IND. CODE ANN. §§ 13-25-5-9 to -17 (WESTLAW through end of 1996 2d Reg. Sess.)).

188. *See* discussion *infra* Part IV.B.2.

189. FLA. STAT. §§ 376.77–.85 (1997). This Comment went to publication as the 1998 Florida Legislative Session approached conclusion. At that time, various brownfield-related bills were pending in both the House and the Senate, including the Glitch List

Jack Latvala as "the most significant legislation passed" in the 1997 session,[190] Florida's Act provides $3 million for brownfields redevelopment pilot programs across the state.[191] The state grant money, administered through the Office of Tourism, Trade, and Economic Development[192] went to twelve different grantees falling into three different categories.[193] First, pilot programs in Clearwater, Miami, and St. Petersburg, which were previously established by the EPA, each received an additional state grant of $500,000.[194] Second, pilot programs in Dade County, Gainesville, Tallahassee, and Jacksonville, which were designated by the EPA to receive federal funds in May 1997, received an additional $200,000 each in state funds.[195] Finally, five citizens that applied to the EPA, but were not selected as

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anticipated in this Comment — Senate Bill 1202, titled "Brownfields Redevelopment." *See* Florida Legislature On-Line Sunshine, *S 1202: Brownfields Redevelopment* (visited Apr. 15, 1998) <http://www.leg.state.fl.us./session/1998/senate/bills/billinfo/html/SB1202.html>; *infra* note 340. Sponsored by Senator Latvala, Senate Bill 1202 resolves certain concerns raised by the Florida Department of Environmental Protection and other regulators regarding the Brownfields Redevelopment Act. *See* Florida Legislature On-Line Sunshine, *S 1202: Brownfields Redevelopment* (visited Apr. 15, 1998) <http://www.leg. state.fl.us/session/1998/senate/bills/billinfo/html/SB1202.html>. Specifically, the bill clarifies the job-creation criteria for certain brownfield sites, defines the terms "brownfield site" and "brownfield area," and provides liability protection for properties acquired by local or state governments under certain conditions. *See id*.; *see also infra* note 217 and Part V.B. Senate Bill 1202 also extends brownfield area eligibility to closed military bases, and creates the Brownfield Areas Loan Guarantee Program to assist private developers with funding redevelopment agreements. *See id*. Senator Latvala also sponsored Senate Bill 1204, titled "Brownfield Property Ownership," to provide additional loans to assist developers in redevelopment funding. *See* Florida Legislature On-Line Sunshine, *S 1204: Brownfields Property Ownership* (visited Apr. 15, 1998) <http://www.leg.state.fl.us/session/1998/senate/bills/billinfo/html/SB1204.html>. Other introduced brownfield bills primarily addressed ensuring adequate environmental protection along with redevelopment initiatives. *See* Florida Legislature On-Line Sunshine (visited Apr. 15, 1998) <http://www. leg.state.fl.us/session/1998/senate/bills/billinfo/html>.

190. *See Promise of the Brownfield Program, supra* note 23.

191. *See id.*

192. *See* CITY OF CLEARWATER — STATE BROWNFIELDS REDEVELOPMENT WORK PLAN, at 1 (Oct. 1997) [hereinafter CLEARWATER WORK PLAN] (on file with author).

193. Duchene Interview, *supra* note 24.

194. *See id.* Previously established EPA pilots had already received $100,000 federal grants. *See id*.; *see also* CLEARWATER WORK PLAN, *supra* note 192, at 4. As evidenced by the enhanced efforts at the Clearwater pilot, the state grants which substantially augmented the original state grants have enabled these pilots to put their initial work plans into action. *See* discussion *infra* Part VI (regarding the Clearwater Pilot's effective use of its state grant funds to expand upon its initial efforts instigated with its original EPA grant).

195. Duchene Interview, *supra* note 24.

national or regional pilots, received state grants of $140,000: Ocala, Opalocka, Escambia County, Broward County, and the Seminole Tribe of Florida.[196]

As with the federal brownfields initiative, the results of existing state environmental laws spurred the Florida Legislature into action.[197] Similar to CERCLA and other federal environmental legislation, Florida's strict liability laws impose financial cleanup responsibility upon those persons causing hazardous substance contamination.[198] As explained in the State Senate Staff Analysis used in preparing Florida's brownfields bill, these laws generally "operate to hold everyone in the chain of title for a contaminated property jointly and severally responsible for the costs of cleanup and rehabilitation," resulting in costly and lengthy proceedings.[199] Prior to Florida's brownfields initiative, the State used the Water Quality Assurance Trust Fund[200] to remedy sites posing an immediate public health and environmental hazard while legal proceedings were "underway to recover costs from responsible parties."[201] However, state legislators recognized that the Trust Fund served a variety of needs and that, given the current rate of expenditures required by brownfield sites, relying on the trust fund to remediate such sites would take decades.[202]

Given Florida's rapid expansion in recent decades, Florida's Act clearly ties in with Florida's growth management policy.[203] This policy, instituted by landmark legislation passed in 1975 and 1985, reshaped the state's development regulation by putting boundaries around areas that may be developed and, thus, encouraged developers to go "back downtown."[204] Consistent with that end, Florida's Act recognized in its legislative intent that "reuse of industrial land is

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196. *See id.*

197. *See* STAFF OF SENATE COMM. ON NATURAL RESOURCES, SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, S. 1306 & 1934, 30th Reg. Legis. Sess. (Fla. 1997).

198. *See id.*; *see also* Pollutant Discharge Prevention and Removal, FLA. STAT. §§ 376.011–.75 (1997); Environmental Control, FLA. STAT. § 403 (1997).

199. STAFF OF SENATE COMM. ON NATURAL RESOURCES, SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, S. 1306 & 1934, 30th Reg. Legis. Sess. (Fla. 1997).

200. FLA. STAT. § 376.307 (1997).

201. STAFF OF SENATE COMM. ON NATURAL RESOURCES, SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, S. 1306 & 1934, 30th Reg. Legis. Sess. (Fla. 1997).

202. *See id.*

203. *See* Brown, *supra* note 10, at 8–9, 14.

204. *See* Growth Management Act, FLA. STAT. §§ 163.3161–.3244.

an important component of sound land-use policy" because it "help[s] prevent the premature development" of Florida's remaining open-spaces and pristine natural areas, as well as reduce public costs engendered by installating new infrastructure in those areas.[205] Accordingly, to promote land reuse, Florida's Act incorporates elements of the EPA's *Action Agenda* by utilizing Risk-Based Corrective Action (Corrective Action) principles,[206] liability protection, job creation, and community outreach provisions to eliminate some of the more serious obstacles to brownfields redevelopment.[207]

Prior to introducing the legislation, State Senator Jack Latvala, the Palm Harbor Republican who sponsored Bill 1306,[208] held four workshops to solicit input from all parties affected — including local government representatives, Florida's Department of Environmental Protection (FDEP), various independent representatives, attorneys, environmental organizations, and State House members.[209] The workshops focused on the three most complex issues surrounding the brownfields problem: (1) general issues regarding designation and administration; (2) cleanup standards; and (3) liability issues.[210] As a result, Florida's law contains several important provisions addressing the more perplexing issues involved in brownfields redevelopment.

2. Requirements for Eligibility

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205. Brown, *supra* note 10, at 9 (quoting FLA. STAT. § 376.78).

206. Corrective Action analysis is a more pragmatic decisionmaking process, which permits a shift in a mandated cleanup target level based on the actual risk of contamination posed by a specific site rather than on the previous, unrealistic assumption that everyone around a given site will be exposed to the site's contamination. *See* discussion *infra* Part IV.B.3.

207. *See Hearings on SB 1306 and 1934 Before the Florida Senate Natural Resources Committee*, 30th Reg. Legis. Sess. (Fla. 1997) (introductory statement of Senator Jack Latvala) [hereinafter Statement of Senator Latvala].

208. The Brownfields Redevelopment Act has its main roots in Senate Bill 1306, into which legislators incorporated provisions of a similar Senate Bill, 1934, as well as other House provisions, before passage. *See* SENATE COMM. ON NATURAL RESOURCES, STATEMENT OF SUBSTANTIVE CHANGES CONTAINED IN COMMITTEE SUBSTITUTE FOR SENATE BILLS 1306 AND 1934, 30th Reg. Legis. Sess. (Fla. 1997).

209. *See* Statement of Senator Latvala, *supra* note 207.

210. *See id.*

Unlike more lenient voluntary cleanup initiatives seen in several states, Florida's brownfields law requires more state involvement — similar to the third level discussed above.[211] While Florida's program incorporates a middle-road approach by utilizing certified environmental professionals to oversee and report on remediation,[212] the new Act differs from other voluntary cleanup initiatives that permit the purchaser to instigate and implement a brownfields cleanup with little or no government involvement in exchange for liability protection.[213] Rather, Florida's Act implements joint involvement by both the state and local government, as well as affected communities and certified professionals.[214] By applying a more moderate approach, specifically by requiring a local government to designate property for eligibility and enter into a detailed rehabilitation agreement and redevelopment plan with a purchaser or developer,[215] Florida's Act ensures a greater balance of business, government, environmental, and community interests.

Accordingly, Florida's Act provides that a local government may instigate brownfields redevelopment in two ways.[216] First, if a local government has jurisdiction over a "brownfield area"[217] that it would like to designate for redevelopment, the local government must notify the FDEP that it intends to designate that brownfield area for redevelopment.[218] Second, if a local government proposes to designate a brownfield area that is outside a previously designated pilot project or other redevelopment area, it must consider the following

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211. *See supra* Part IV.A.

212. *See* FLA. STAT. § 376.80(5)(b) (1997); *see also supra* Part IV.A.

213. Duchene Interview, *supra* note 24.

214. *See* FLA. STAT. § 376.80.

215. *See id.*

216. *See id*. § 376.80(1)–(2).

217. The Florida brownfields law uses both the terms "brownfield area" and "brownfield site," which has caused some confusion. *See* discussion *infra* Part V.B. Adopting in essence the EPA's brownfield definition, Florida's Act defines "brownfield sites" as "generally abandoned, idled, or under-used industrial and commercial properties where expansion or redevelopment is complicated by actual or perceived environmental contamination." FLA. STAT. § 376.79(3) (1997). However, "brownfield area" is defined as "a contiguous area of one or more brownfield sites, some of which may or may not be contaminated, and which has been designated by a local government by resolution." *Id*. § 376.79(4). Further, the Act states that brownfield areas may include "all or portions of community redevelopment areas, enterprise zones, empowerment zones, other such designated economically deprived communities and areas, and [EPA]-designated brownfield pilot projects." *Id.*

218. *See* FLA. STAT. § 376.80(1) (1997).

criteria: Whether the proposed area "warrants economic development" and "has a reasonable potential" for economic activity; whether it represents a reasonably targeted area; whether it has "the potential to interest the private sector in participating" in remediation and redevelopment; and whether it "contains sites or parts of sites suitable for limited recreational open space, cultural, or historical preservation purposes."[219] Moreover, since the state cannot provide assurance that the EPA will not require an owner to perform additional cleanup, Florida's Act seeks to preempt such problems by excluding sites targeted by the EPA from eligibility in the state program.[220]

Furthermore, in addition to several environmental and economic requirements that a given site must meet to acquire eligibility, Florida's Act requires that a local government enter into a detailed Brownfield Site Rehabilitation Agreement (Rehabilitation Agreement) with a qualified person.[221] The Act lists several detailed components that the Rehabilitation Agreement must include,[222] beginning with a brownfield site rehabilitation schedule that includes "milestones for completion of site rehabilitation tasks and submittal of technical reports and rehabilitation plans" to the FDEP as agreed on by the parties.[223] The Rehabilitation Agreement must also establish time-lines for the FDEPs review of those technical reports and rehabilitation plans submitted in accordance with the agreement.[224]

As discussed, the Rehabilitation Agreement must also include a commitment to conduct site rehabilitation activities "under the observation of professional engineers or geologists" who are registered in accordance with Florida law.[225] Such professionals must certify that both materials submitted during cleanup as well as the final

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219. *Id*. § 376.80(2).

220. *Id*. § 376.82(a).

221. *See id*. § 376.80(5).

222. *See id*. § 376.80(5)(a)–(i).

223. *Id*. § 376.80(5)(a).

224. *See* FLA. STAT. § 376.80(5)(e) (1997). However, Florida's Act qualifies those timelines by stating that the FDEP "shall make every effort to adhere to established agency goals for reasonable review of such documents," thus providing the FDEP with some wiggle room here if those Rehabilitation Agreement deadlines are not met. *Id.* But, Florida's Act also provides that a Brownfields Representative can proceed at his or her own risk when confronted with bureaucratic delays in order to keep site rehabilitation and development effectively on schedule. *See id*. § 376.80(9).

225. *Id*. § 376.80(5)(b).

cleanup itself contain truthful reports of activities completed in substantial conformance with the approved plan and FDEP rules.[226] The Rehabilitation Agreement must also contain several other commitments by the person responsible for brownfield site rehabilitation (Brownfields Representative), including: to conduct site rehabilitation in accordance with an approved FDEP "quality assurance plan,"[227] with local, state, and federal laws,[228] and also with the cleanup criteria — including any applicable requirements for risk-based corrective action — included in Florida's Act itself;[229] to secure site access for FDEP or approved local program representatives for all brownfield sites;[230] and "to consider appropriate pollution prevention measures and to implement those that the person determines are reasonable and cost-effective, taking into account the ultimate use" of the site.[231]

To be eligible for a Rehabilitation Agreement with the local government, the Brownfields Representative must also personally meet certain standards. Among the most significant requirements, a Brownfields Representative must not have caused or contributed to the site's contamination.[232] Additionally, a Brownfields Representative who proposes an area for brownfield designation must provide "reasonable assurance" that he or she has "sufficient financial resources to implement and complete" the brownfield site rehabilitation agreement and redevelopment plan.[233] Further, the proposed site itself cannot currently be involved in any corrective action or enforcement by the EPA, and the site's eligibility will be revoked should the site ever become involved in future enforcement action.[234]

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226. *See id*.

227. *See id*. § 376.80(5)(c).

228. *See* FLA. STAT. § 376.80(5)(d) (1997).

229. *See id*.

230. *See id*. § 376.80(5)(f).

231. *Id*. § 376.80(5)(h). By using this language — which requires pollution control, but in a manner that realistically takes into account the cost and land use involved — the Legislature again reflects its intention to effectively balance competing business, environmental, and community concerns.

232. *See id*. § 376.82(1).

233. *Id*. § 376.80(2)(b)(5).

234. *See* FLA. STAT. § 376.82(1)(a) (1997). However, Florida's brownfields law does not clearly state to what extent it permits a site already subject to either Florida's petroleum or drycleaning solvent cleanup programs to be eligible for the state's brownfields initiative. *See* discussion *infra* Part V.B. *See generally* FLA. STAT. § 376.82(2) (outlining protection from liability for the successful execution and completion of

To maintain eligibility once designated, the site must produce at least ten new jobs[235] that are not related to the actual, physical redevelopment of the site.[236]

Moreover, to ensure community involvement in the creation and use of brownfield areas, legislators followed the EPA's lead by amending the bill to require a local government or Brownfields Representative to establish an "Advisory Committee" to improve public participation and receive public comments regarding a proposed brownfield area.[237] Additionally, the Brownfields Representative must provide reasonable and timely notice to neighboring residents or property owners in two different instances: (1) when a certain brownfield area is initially being proposed for rehabilitation, thereby providing affected residents with a sufficient opportunity to submit comments and suggestions about the proposed rehabilitation;[238] and (2) when cleanup compliance is altered or a contamination level is temporarily allowed to exceed target levels.[239]

Furthermore, recognizing the importance of promoting environmental justice[240] along with redevelopment, Florida's Act aims to ensure that the completed cleanup meets necessary standards by

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brownfields redevelopment).

235. However, the full/part-time requirement regarding these jobs is not clear due to differing language throughout the law. *See infra* Part V.B.

236. *See* FLA. STAT. § 376.80(2)(b)(2). The original bill initially called for those ten jobs to qualify as "WAGES" jobs, that is, to incorporate Florida's welfare-to-work initiative. *See* SENATE COMM. ON NATURAL RESOURCES, STATEMENT OF SUBSTANTIVE CHANGES CONTAINED IN COMMITTEE SUBSTITUTE FOR SENATE BILLS 1306 AND 1934, 30th Reg. Legis. Sess. (Fla. 1997). However, the enacted bill does not contain that provision. *See* FLA. STAT. §§ 376.77–.85; Ballogg Interview, *supra* note 2.

237. *See* FLA. STAT. § 376.80(4). Despite the Advisory Committee requirement, critics express concerns that the provision does not adequately ensure true community involvement. *See* Katherine Bouma, *Some Fear Law Will Hurt Inner Cities More Than Help – Environmentalists Say the Law, Which Encourages Businesses to Build on Abandoned and Unused Urban Land, Virtually Legalizes Pollution*, ORLANDO SENTINEL, June 29, 1997, at B3. Specifically, critics fear that, even with the notice and Advisory Committee criteria, residents of blighted areas will not be able to attend public meetings or be adequately equipped to understand the complex technical information involved in the debate. *See id.*

238. *See* FLA. STAT. § 376.80(2)(b)(4) (1997).

239. *See id*. § 376.81(1)(b). *But see* discussion *infra* Part V.B (regarding FDEP concern over the ambiguity of this provision).

240. The Florida brownfields law defines "Environmental Justice" as the "fair treatment of all people of all races, cultures, and incomes with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." FLA. STAT. § 376.79(8).

requiring the Rehabilitation Agreement to include several commitments, as discussed above.[241] Thus, the detailed language addressing eligibility requirements, applying to local governments, Brownfields Representative's, and actual sites, reflects the Legislature's attempt to balance competing business, environmental, and community interests.

3. Cleanup Standards and Criteria

Concerned that required site rehabilitation levels consider the actual risk that contamination may pose rather than generalized and often unrealistically lofty cleanup standards, legislators amended Florida's Act before passage to utilize the concept of "risk-based corrective action."[242] As discussed in Part III, Corrective Action analysis is a more realistic and reasonable decisionmaking process that permits a shift in the mandated cleanup target level.[243] This shift is based on the actual risk of exposure to contamination for a specific site, thereby moving away from the past, often unrealistic assumption that everyone around a given site will be exposed to the site's contamination.[244] The Act's Corrective Action criteria are substantively similar to those used in two recently enacted Florida laws, the Petroleum Contamination Cleanup Program and the Drycleaning Solvent Cleanup Program.[245] These laws successfully utilize liability protection and Corrective Action modified cleanup requirements.[246]

Specifically, Florida's brownfields law allows the FDEP to alter cleanup target levels based on an applicant's demonstration, "using site-specific modeling and risk assessment studies," that human health, public safety, and the environment are protected.[247] This language generated debate prior to passage, with some critics arguing that such criteria would provide a permanent exemption to com-

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241. *See supra* Part III.B.2.

242. SENATE COMM. ON NATURAL RESOURCES, STATEMENT OF SUBSTANTIVE CHANGES CONTAINED IN COMMITTEE SUBSTITUTE FOR SENATE BILLS 1306 AND 1934, 30th Reg. Legis. Sess. (Fla. 1997).

243. *See* Wells, *supra* note 109, at 76.

244. *See id.*

245. *See* FLA. STAT. §§ 376.3072, .3078 (1997).

246. *See* Wells, *supra* note 109, at 76 (discussing FLA. STAT. §§ 376.3072, .3078).

247. FLA. STAT. § 376.81(3).

pliance with state water quality and soil standards.[248] However, as discussed in Part V, without the use of Corrective Action's the law would lose much of its effectiveness.[249] Accordingly, the Act's retention of Corrective Action analysis reflects an important shift in the regulatory attitude and, by making the cleanup requirements more predictable, attainable and cost-effective, provides promise that Florida's brownfields initiative may be able to provide the necessary inducement to developers to undertake the economic risk associated with contaminated property remediation.

4. Developer Incentives and Liability Protection

Florida's Act offers a lengthy list of financial, regulatory, and technical incentives.[250] However, among the most important is enhanced liability protection, which is provided to developers to encourage redevelopment of blighted lands in lieu of plowing new grounds.[251] Florida's Act appears to provide attractive liability protection, stating that a party who "executes and implements to successful completion a brownfield site rehabilitation agreement shall be relieved of further liability" in two important respects:[252] first, "for remediation of the contaminated site or sites to the state and to third parties,"[253] and second, for "contribution to any other party who has or may incur cleanup liability for the contaminated site or sites."[254]

Furthermore, lawmakers realized that such liability protection must address previous developer concerns regarding the extensive bureaucratic red tape associated with determining what the cleanup process actually requires,[255] the daunting and often unrealistic level of cleanup required for a given site,[256] and the apparently impossible

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248. *See* FLORIDA IMPACT, PLEASE SUPPORT AMENDMENTS FROM SENATORS HARGRETT AND FORMAN ON 1306 AND 1934 (1997).

249. *See* discussion *infra* Part V.C.2.

250. *See* FLA. STAT. § 376.84(1)–(3) (1997).

251. *See id*. § 376.82(2).

252. *Id*. § 376.82(2)(a).

253. *Id.*

254. *Id.*

255. *See generally* Buzbee, *supra* note 57, at 47; Eisen, *supra* note 1, at 901, 906–07; Wells, *supra* note 109, at 76 (discussing developers frustration with uncertainty regarding what cleanup levels are actually required by law).

256. *See, e.g.*, Eisen, *supra* note 1, at 901; Wells, *supra* note 109, at 76.

task of obtaining final government approval indicating that contamination cleanup is complete and requires "No Further Action".[257] Accordingly, following the EPA model, the Legislature amended the bill to allow the FDEP to issue a "No Further Action" letter indicating a Brownfields Representative has completed its remediation obligations.[258] Thus, Florida's Act allows the FDEP to give a clean bill of health to land that may still contain some contamination, but only after the FDEP or approved local control group is satisfied that designated alternative cleanup measures are met or when the Brownfields Representative can demonstrate that the cleanup target level is unattainable with the technology available.[259] However, the "No Further Action" clause is also subject to a "Reopeners" provision, under which the FDEP reserves the right to require additional site rehabilitation in certain circumstances, such as discovery of a previously unidentified area of contamination.[260]

To further reduce red tape concerns Florida's Act streamlines the review process for brownfield site assessment and remediation by requiring a Rehabilitation Agreement to include project completion time-lines for the Brownfields Representative as well as the local government and the FDEP,[261] and by allowing the Brownfields Representative to proceed at their own risk when review is not performed by the government according to the Rehabilitation Agreement's time line.[262] Thus, a developer can opt to proceed rather than face interminable delay, which will further inflate expenses, when bureaucratic hold-ups stall the review process.[263]

Furthermore, Florida's Act provides additional liability protection for lenders as well.[264] Recognizing the importance of encouraging financing for property transactions involving brownfield site

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257. *See, e.g.,* Eisen, *supra* note 1, at 910–11; Wells, *supra* note 109, at 76.

258. *See* FLA. STAT. § 376.82(2)(e) (1997); SENATE COMM. ON NATURAL RESOURCES, STATEMENT OF SUBSTANTIVE CHANGES CONTAINED IN COMMITTEE SUBSTITUTE FOR SENATE BILLS 1306 AND 1934, 30th Reg. Legis. Sess. (Fla. 1997).

259. *See* FLA. STAT. § 376.81(i).

260. *See id*. § 376.82(3); *see also* discussion *infra* Part V.A (regarding "Reopeners" language).

261. *See* FLA. STAT. § 376.80(5)(a), (e).

262. *See id*. § 376.80(9).

263. The City of Clearwater highlights this incentive on its brownfields web page as part of its proposal to attract developers. *See* City of Clearwater, Office of Economic Development, *Brownfields in Clearwater* (last modified Nov. 6, 1997) <http://public.lib.ci.clearwater.fl.us/econdev/brown.html> [hereinafter *Brownfields in Clearwater*].

264. *See* FLA. STAT. § 376.82(4) (1997).

rehabilitation plans, Florida's Act extends liability protection to lenders provided that they "have not caused or contributed to a release of a contaminant" at a given brownfield site.[265] Moreover, consistent with EPA policy,[266] a lender will not be liable for a developer's failure to comply with a brownfields agreement if the lender is not directly involved with the management or decisionmaking control of the property beyond those required to protect its financial security interest.[267] Should a lender become the property owner through foreclosure, the lender remains protected from liability as long as it makes a good faith effort to sell as soon as reasonably possible and does not further contribute to contamination release.[268] Finally, while lenders do receive comparable liability protection, they do not receive the economic incentives extended to developers.[269]

Recognizing that any successful brownfields law must offer substantial incentives to offset the economic costs inevitably involved with contaminated site redevelopment, Florida's Act offers numerous other incentives to developers that are financial, regulatory, and technical.[270] Among the incentives offered are "tax increment financing through community redevelopment agencies,"[271] "low-interest revolving loans and zero interest loan pools,"[272] municipal public service tax exemption,[273] pledged revenues to secure bonds,[274] waived impact and permit fees,[275] flexibility in parking requirements,[276] and "one-stop permitting and streamlined development permitting" processes.[277] The Act also encourages local governments to make use of the full range of tax and economic incentives

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265. *Id*. § 376.82(4)(a).

266. For a discussion regarding the 1996 law codifying this lender liability protection see *supra* Part III.B and accompanying text.

267. *See* FLA. STAT. § 376.82(4)(b).

268. *See id.*

269. *See id.* § 376.82(4)(c). If a lender becomes the property owner through foreclosure, the economic incentives are temporarily abated, and then transferred and reinstated upon the sale of the brownfield. *See id.*

270. *See id*. § 376.84(1)–(3).

271. *Id*. § 376.84(1)(a).

272. FLA. STAT. § 376.84(1)(l) (1997).

273. *See id*. § 376.84(1)(b)–(i).

274. *See id*. § 376.84(1)(k).

275. *See id*. § 376.84(2)(e).

276. *See id*. § 376.84(2)(g).

277. *Id*. § 376.84(2)(l).

available to promote and facilitate brownfields rehabilitation.[278] As Professor Wells explains, the success or failure of brownfields initiatives such as Florida's in essence rests on this last point — specifically, whether local governments will act to utilize the full range of incentives available to encourage developers to take on rehabilitation and redevelopment commitments.[279]

Florida's Act allows for a Brownfield Redevelopment Bonus Refund, specifically providing that a $2500 refund will be granted to any "qualified target industry business for each new Florida job created in a brownfield," which that business claims on its annual tax refund claim.[280] To be eligible for the Bonus Refund, a "qualified target industry business" must designate a site as a brownfield and ensure that the site will: (1) create at least ten new permanent, full-time jobs that are not "associated with the implementation of a brownfield site agreement";[281] (2) "diversify and strengthen the economy of the area surrounding the site"; and (3) "promote capital investment in the area beyond that contemplated for the rehabilitation of the site."[282]

Accordingly, Florida's Act utilizes all possible resources by applying both the guidance provided by the EPA as well as introducing its own innovative state-level ideas. Thus, Florida's Act builds upon the federal initiative by incorporating some of the more promising tools such as the "No Further Action" letter, and further enhances those tools with new ideas, such as the Bonus Refund, to create an extensive and attractive list of incentives and protections for developers, as well as lenders, and increasing brownfields' ability to compete with greenfields.

V. POTENTIAL TROUBLE SPOTS — CONCERNS FOR

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278. *See* FLA. STAT. § 376.80(12) (1997); *see also* Wells, *supra* note 109, at 77.

279. *See* Wells, *supra* note 109, at 77. For discussion regarding the promise demonstrated by the Clearwater pilot's active use of local incentives available, see also *infra* Part VI.

280. FLA. STAT. § 288.107(2). Funds for this incentive will be taken from the Economic Development Trust Fund, appropriated by the legislature to the Office of Tourism, Trade and Economic Development. *See id*. § 288.095.

281. *Id.* § 288.107(3)(a). This requirement differs from the general eligibility requirement allowing the ten jobs created to be either full or part time. *See infra* Part IV.B.2; *see also infra* Part V.B (regarding FDEP concern for confusion over these conflicting requirements).

282. FLA. STAT. § 288.107(3)(b), (c).

DEVELOPERS, REGULATORS, AND ENVIRONMENTAL JUSTICE ADVOCATES

A. Concerns for Developers

So, are the incentives and protection offered by Florida's Act *enough* to transform a liability into an opportunity for developers? While Florida's Act implements several common sense components to address obstacles to development, critics such as Professor Robert Wells argue that even with the tax and economic incentives, the reduced purchase price, and the relaxed liability and cleanup requirements, Florida's Act still lacks adequate incentives for developers.[283] Even without uncertainty regarding cleanup cost and liability, the greenfield competition problem remains. Since no cleanup costs are obviously preferable to any cleanup costs, even though lessened, developers will likely continue to opt for greenfields over brownfields unless they are given some powerful reasons to do otherwise.[284] As Professor Wells argues, even with the reduced purchase price, "the unknown, albeit reduced, cost of the Corrective Action cleanup will inhibit developers from voluntarily undertaking cleanup without more incentive."[285]

Accordingly, Professor Wells explains that a brownfields initiative requires four main incentives to successfully induce developers to undertake remediation and redevelopment: (1) clean up requirements utilizing Corrective Actions; (2) lender liability protection; (3) risk of third party liability at a "tolerably and realistically predictable level"; and (4) "economic and social incentives to offset the money spent" in voluntarily choosing and cleaning up the site.[286] Expanding on those requirements, other commentators note that a successful voluntary cleanup program must be "clear, specific, final, and speedy."[287]

Applying these criteria to Florida's initiative, Florida's Act ade-

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283. *See* Wells, *supra* note 109, at 77.

284. *See id.*

285. *Id.* Wells further argues this point by explaining that Corrective Actions will likely include "institutional controls enforced by recorded deed restrictions that will [be permanently] associated with the property" and thus will likely affect the value or future use of the property. *Id.*

286. *Id.* at 76.

287. Walsh, *supra* note 33, at 211.

quately utilizes Corrective Action requirements[288] and lender liability protection.[289] Further, Florida's Act also provides pilot funding to enable local governments to assist developers in offsetting the cost of site remediation and redevelopment.[290] Moreover, regarding specificity, Florida's Act also clearly defines sites eligible for the program.[291] The Act also meets finality concerns by utilizing tools such as the "No Further Action" letter.[292] Speed is also addressed by the Act's implementation of deadlines to promote timely Rehabilitation Agreement completion.[293] Nevertheless, despite these provisions, concerns remain regarding third party liability protection, the adequacy of offered incentives, the specific cleanup requirements involved, and a possible lack of finality due to the Reopeners provision.

Similar to the federal *Action Agenda* and Florida's petroleum and drycleaning cleanup laws,[294] Florida's Act does not provide third party liability protection from personal or property damages of adjoining property owners.[295] Specifically, Florida's Act states that the liability protection provided for developers "shall not be construed as a limitation on the right of a third party other than the state to pursue an action for damages to property or person."[296] However, as argued by the FDEP, because the Legislature can only address liability protection associated with cleanup expenses, Florida's Act does provide as much liability protection as the Legislature is able to give.[297] The Act can and does protect an owner/developer from liability for further cleanup costs or actual cleanup once the Rehabilitation Agreement is fulfilled,[298] but Florida's Act cannot take away the rights of third parties to sue for damages incurred due to later contamination releases.[299] Thus, lack of third party liability protection

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288. *See* FLA. STAT. § 376.81 (1997).
289. *See id*. § 376.82(2).
290. *See* Florida's Brownfields Redevelopment Act, ch. 97-277, § 12, 1997 Fla. Laws 3261, 3276; *see also* FLA. STAT. § 376.84 note b.
291. *See id*. § 376.81.
292. *See id*. § 376.82(2)(e).
293. *See id*. § 376.80(5)(e).
294. *See* Wells, *supra* note 109, at 77.
295. *See* FLA. STAT. § 376.82(2)(b) (1997).
296. *Id.*
297. Duchene Interview, *supra* note 24.
298. *See* FLA. STAT. § 376.82(2)(a).
299. Duchene Interview, *supra* note 24.

will remain a constant factor in the brownfields initiatives of Florida and other states, and, accordingly, will always be a concern for developers.

However, in the Act's defense, the FDEP emphasizes that the Department will not issue a "No Further Action" letter until it is satisfied that the chance of such additional liability is essentially eradicated because cleanup requirements have been met.[300] Accordingly, if a developer agrees to cleanup a brownfield site and complies with the required target levels, its third party liability concerns should disappear upon completion of the cleanup.[301] While this concept sounds logical in theory, potential purchasers/developers must be aware that, like the federal initiative, Florida's Act still does not address who will be responsible if the hazardous materials permitted to remain underground on a given site unexpectedly leak next door and cause injury or other damage.[302]

Similarly, if a developer agrees to remediate a rather expansive brownfields and, in its initial assessment, overlooks some contamination on a corner of the property that later causes damage, the FDEP retains the right to reenter the situation and require additional cleanup under the Act's Reopeners provision.[303] Thus, the Reopeners provision, and its numerous and rather ambiguous exceptions, may provide unforeseen "wiggle room" for regulators, and consequently raise another potential concern for developers. Under the Reopeners provision, the FDEP can impose additional cleanup requirements upon an indication of any of the following: (1) fraud was committed in representing completion of requirements;[304] (2) "new information confirms the existence" of a previously unknown contaminated area;[305] (3) rehabilitation fails to achieve stated requirements;[306] (4) the risk level later increases beyond acceptable levels from "substantial changes in exposure conditions, such as a change in land use from nonresidential to residential";[307] or (5) a

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300. *Id.*

301. *Id.*

302. *See generally* Wells*, supra* note 109, at 77 (discussing concern regarding the Florida brownfields law's lack of third party liability protection).

303. *See* FLA. STAT. § 376.82(3) (1997).

304. *See id*. § 376.82(3)(a).

305. *Id*. § 376.82(3)(b).

306. *See id*. § 376.82(3)(c).

307. *Id*. § 376.82(3)(d).

new contamination release occurs at the site after its "determination of eligibility for participation" in the program.[308] Accordingly, developers must be aware that any such discoveries will trigger FDEP reinvolvement and likely result in additional cleanup costs.

Thus, both the liability protection and Reopeners provisions provide interesting grey areas in the new legislation, and accordingly call into question whether developers receive adequate protection under the Act's liability protection provision. In response to this concern, the FDEP points out that the liability protection and Reopeners provisions work together to ensure that, while developers receive protection, cleanup adequate for the surrounding community's safety is achieved.[309] Nonetheless, given this ambiguity, a developer must thoroughly investigate and evaluate a contaminated site's potential impact on neighboring properties and/or residents before committing to that site's remediation and redevelopment.[310] As Professor Wells argues, as a consequence of this lack of third party liability protection, "[a]ll that is gained through the Brownfields incentives could easily be lost in a property damage or personal injury suit based on real or perceived injury arising from the site contamination."[311]

Furthermore, while Florida's Act may appear to ensure liability protection, both developers and lenders must consider that, because states do not have the authority to provide contribution protection, obtaining protection from CERCLA liability requires EPA involvement.[312] While the EPA's model Purchaser Agreement typically provides contribution protection barring third party claims,[313] Purchaser Agreement's also apply solely to sites in which the EPA is involved.[314] Accordingly, since the EPA is only involved in sites listed on the Priorities List or with an acknowledged federal interest,[315] provisions providing contribution protection — such as those in Florida's Act — will not apply to the large number of brownfield

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308. *Id*. § 376.82(3)(e).
309. Duchene Interview, *supra* note 24.
310. *See* Wells, *supra* note 109, at 77.
311. *Id.*
312. *See* Reisch, *supra* note 74, at 7–8.
313. *See id.* at 7.
314. *See PPA Guidance, supra* note 135, at 10–11.
315. *See id*.; *see also* discussion *supra* Part III.A.

sites where the EPA is not involved.[316] However, as noted by Professor Buzbee, the EPA generally displays reluctance "to devote administrative and cleanup resources to sites already" under state scrutiny.[317]

Nonetheless, the Florida Legislature recognized its own limitations in addressing cleanup liability under federal environmental programs.[318] Accordingly, legislators amended the Florida brownfields bill to direct the FDEP to attempt to negotiate a MOA with the EPA, "whereby the EPA agrees to forego enforcement of federal corrective action authority at brownfield sites that have received a site rehabilitation completion or `no further action' determination" from the FDEP or are in the process of implementing an approved Corrective Action remediation timetable.[319]

Such MOA's generally include an agreement by the EPA to defer to the state regarding site contamination cleanup unless some "unaddressed, imminent, and substantial endangerment" becomes apparent.[320] Thus, following the legislature's directive contained in Florida's Act, the FDEP is currently working on an MOA with the EPA.[321] EPA Region IV, which includes Florida, recently issued a model MOA intended to apply to all Region IV states.[322] However, that MOA is broadly worded to apply generally to voluntary cleanup programs, and thus the FDEP is currently working to tailor that language into a MOA which applies to Florida's narrower brownfields initiative.[323]

As developers consider whether to undertake a redevelopment

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316. *See* Reisch, *supra* note 74, at 7–8.

317. Buzbee, *supra* note 44, at 15–16.

318. *See* STAFF OF SENATE COMM. ON NATURAL RESOURCES, SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, S. 1306 & 1934, 30th Reg. Legis. Sess. (Fla. 1997). However, sites which involve petroleum or drycleaning solvents are exempt from CERCLA "hazardous substance" inclusion and regulated by state law, thus leaving developers free from lingering CERCLA liability concerns in such circumstances. Ballogg Interview, *supra* note 2. Since a majority of the brownfield sites that the Clearwater site seeks to redevelop fall into this CERCLA exemption, Clearwater can offer a stronger package to potential developers as seen in their pending deal with a software company. *Id.; see also* discussion *infra* Part V.C.

319. STAFF OF SENATE COMM. ON NATURAL RESOURCES, SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, S. 1306 & 1934, 30th Reg. Legis. Sess. (Fla. 1997).

320. Duchene Interview, *supra* note 24.

321. *Id.*

322. *Id.*

323. *Id.; see also* discussion *supra* Part III.A–B.

project, they also need to assess whether a given brownfield site has a "clean" value that merits committing to its remediation, that is, once a given site is cleared of contamination, it has a viable underlying real estate value.[324] Accordingly, in implementing the state plan, local governments need to ensure a potential brownfield site has an underlying market value that the private sector will demand.[325] And Florida's Act does direct local governments to consider these factors in designating brownfield area eligibility, via direction to consider whether a given area has the potential to attract private sector interest and "warrants economic development."[326] Nonetheless, developers should also independently assess whether the property's projected underlying value, when "clean," warrants committing to its remediation in the first place.[327]

Finally, despite action on both the federal and state level to remove lender concerns and restore capital funding for brownfields redevelopment, an additional concern for developers apparently still remains regarding lender cooperation and willingness to provide redevelopment funds.[328] A recent survey conducted by the Banker's Roundtable shows that seventy percent of the 125 largest United States banking companies continue to exercise increased caution for redevelopment lending, particularly in inner-city areas where environmental concerns are presumed likely.[329] Additionally, forty percent of the lenders surveyed indicated that "they automatically designate areas near Superfund sites as suspect."[330] Furthermore, an alarming forty-one percent responded that they were unaware of any brownfields initiatives reducing their potential liability.[331] Moreover, this survey does not address whether or not a lender will even "accept a brownfield as collateral for a loan."[332]

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324. *See* Brown, *supra* note 10, at 21. In his analysis, Attorney Ted Brown argues that determining whether a site has a "clean" value is actually the first and foremost concern for developers, since "[i]f a site has no viable residual real estate value, no amount of environmental clean up will redeem it." *Id.*

325. *See id*. at 22.

326. FLA. STAT. § 376.80(2)(a) (1997).

327. *See* Brown, *supra* note 10, at 21–22.

328. *See id.* at 17.

329. *See id.* at 17–18.

330. *Id.*

331. *See id.* at 18.

332. *Id.* at 19.

However, both federal[333] and Florida[334] laws protect lenders who foreclose on property from liability if the lenders resell the property at the earliest practicable time, and thus such protection should, if made known, alleviate that problem.[335] Accordingly, while such federal action as removing sites from the CERCLIS database[336] and the 1996 law clarifying lender liability protection[337] should deter lenders' trepidation regarding redevelopment, lenders will likely continue to stigmatize these properties unless the word on such programs is more effectively promoted in a clearly comprehensible manner.

B. FDEP/Regulator Concerns and the Anticipated "Glitch Bill"

Since the Brownfield Redevelopment Act's passage, several problems have surfaced as both regulators and pilot project participants attempt to interpret and implement the law.[338] Thus, to address such problems and to further bolster incentives offered to developers, additional legislation, currently referred to as the "Glitch Bill," is expected to be passed during the 1998 Legislative Session.[339]

Interpretation and implementation of Florida's brownfields initiative highlights a good deal of concern regarding lack of clarity in Florida's Act's language. Specifically, regulators find a considerable amount of confusion arising from Florida's Act's interchanging use of the terms "brownfield site" and "brownfield area,"[340] how a site is designated a "brownfield area,"[341] and the criteria required to acquire that designation.[342] Further, in a related problem, Florida's Act appears to require that a Brownfields Representative already be identified at the time a local government passes the required resolution designating a brownfield area.[343] However, the FDEP believes

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333. *See* 42 U.S.C. § 9607(n) (Supp. 1997).
334. *See* FLA. STAT. § 376.82(4) (1997).
335. *See* Brown, *supra* note 10, at 20.
336. *See* discussion *supra* Part III.A.
337. *See* discussion *supra* Part III.B.
338. Duchene Interview, *supra* note 24; Ballogg Interview, *supra* note 2.
339. Duchene Interview, *supra* note 24.
340. *See* Memorandum from Lisa Duchene on Glitches in Current Brownfields Law to Tara B. Koch (Jan. 20, 1998) (on file with author) [hereinafter Glitch List]; *see also* definitions *supra* note 217.
341. *See* Glitch List, *supra* note 340, at 1.
342. *See id.*
343. *See id.*

the Legislature actually intended to permit local governments to designate areas on their own by resolution before having any Brownfields Representative identified and ready to undertake the cleanup and redevelopment.[344]

Another ambiguous area in Florida's Act is the section addressing the Advisory Committee, which the local government or Brownfields Representative is required to form in conjunction with designating a brownfield area for cleanup.[345] Specifically, Florida's Act requires the Advisory Committee to review a proposed brownfield site rehabilitation agreement and provide recommendations to the local government board.[346] The FDEP is unsure about this provision in two respects: first, what the Advisory Committee is required to make recommendations on, and second, to whom such recommendations are to be directed.[347] Furthermore, the language also appears to require that the Advisory Committee have some role in reviewing the redevelopment agreement as it is negotiated.[348] However, pursuant to Florida Statutes section 376.80(5)(i), the redevelopment agreement is technically part of the rehabilitation agreement as it is negotiated.[349] Thus, the FDEP believes Florida's Act should clarify that the Committee role is to comment solely on the redevelopment agreement, not the rehabilitation agreement which involves technical cleanup requirements and schedules.[350] The FDEP explains this recommendation would both maintain the intent behind requiring Advisory Committee involvement, that is, to ensure community involvement in determining the use of redeveloped land, as well as help streamline the implementation of cleanup initiatives.[351]

The Act's requirement that the redevelopment agreement be included in the initial brownfield site rehabilitation agreement has also caused confusion beyond the Advisory Committee problem.[352] This requirement complicates Florida's Act's implementation, spe-

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344. *See id.*
345. *See* FLA. STAT. § 376.80(4) (1997).
346. *See id.*
347. *See* Glitch List, *supra* note 340, at 2.
348. *See* FLA. STAT. § 376.80(4).
349. *See* Glitch List, *supra* note 340, at 2 (referring to the review of the proposed Brownfield Site Rehabilitation Agreement).
350. *See id.*
351. *See id*.
352. *See id*.

cifically raising the question of when the FDEP is authorized to issue a "No Further Action" letter.[353] If the redevelopment plan is incorporated into, and thus made a legally binding component of the brownfield site rehabilitation agreement, then is the FDEP permitted to issue the "No Further Action" letter after the site is rehabilitated, or must it wait until the redevelopment plan is completed?[354]

The provisions mandating a Brownfields Representative to create ten new jobs to obtain eligibility for Florida's Act's benefits also needs clarification, specifically regarding whether, when, and if both full and part-time jobs will meet this requirement.[355] As the brownfields bill took shape, whether to require these jobs to be full or part-time engendered debate among legislators.[356] However, as noted by the FDEP, Florida's Act as passed allows for full or part-time jobs in some areas, but requires full time jobs in others which results in confusion over the exact criteria required.[357] As it stands, Florida's Act appears to generally allow the initial ten jobs to be either full or part-time,[358] but then mandates ten full-time jobs to be eligible for the Refund Bonus.[359] However, the separate Refund Bonus criteria is thus unclear as to whether ten full-time jobs *in addition* to the original ten full or part-time jobs are required, or if the original ten jobs will suffice as long as they are full-time. Given this confusion, and heeding the importance of specificity as a vital component in brownfields initiatives,[360] the Legislature should clarify its intent in the upcoming session.

Another murky area in the new Act involves it's application in conjunction with Florida's previously enacted legislation addressing petroleum and drycleaning cleanups.[361] The Act states that petroleum and drycleaning contamination sites cannot receive funding under both the previous laws and the new brownfields initiative.[362]

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353. *See id*.; *see also* FLA. STAT. § 376.80(4) (1997).

354. *See* Glitch List, *supra* note 340, at 2.

355. *See id.* at 4.

356. *See* SENATE COMM. ON NATURAL RESOURCES, STATEMENT OF SUBSTANTIVE CHANGES CONTAINED IN COMMITTEE SUBSTITUTE FOR SENATE BILLS 1306 AND 1934, 30th Reg. Legis. Sess. (Fla. 1997).

357. *See* Glitch List, *supra* note 340, at 4.

358. *See* FLA. STAT. § 376.80(2)(b)(2) (1997).

359. *See id*. § 288.107(3)(a).

360. *See supra* Part V.A.

361. *See* Glitch List, *supra* note 340, at 3.

362. *See* FLA. STAT. § 376.82(1)(d).

However, this provision does not clearly explain whether a petroleum or drycleaning site that ever received state funds under the previous laws is now ineligible for inclusion in a brownfield area and the accompanying benefits, such as the Bonus Refund, or if such a site can forego future funding under those programs and opt to receive funds available under the brownfields initiative.[363] Moreover, if a site is permitted to, and does, opt to forfeit previous program funding, Florida's Act does not state whether the site also surrenders the corresponding benefits, such as liability protection, offered under those previously established programs as well, or, further, if the site may reenter into either of those previous programs.[364]

Finally, in response to concerns that the Act's incentives still do not contain the necessary strength to make brownfields a real opportunity for developers, the Glitch Bill will likely clarify funding sources for Florida's Act's listed incentives, such as the Bonus Refund. Additionally, it may also include additional incentives,[365] and will thereby further ensure that Florida's initiative includes the components necessary to succeed — finality, specificity, and speed.

C. Environmental, Moral, and Political Concerns

Although Florida's Act and similar state brownfields initiatives enjoy united support from government, business, and environmental representatives, such initiatives still have their critics. Concerns regarding state voluntary cleanup programs basically fall into three categories. First, environmental concerns that such sites will not be adequately alleviated of dangerous contamination. Second and closely related, "environmental justice" concerns that reduced cleanup standards raise serious moral questions by trading jobs for health risks and delegating those living in urban areas to a second class environmental status. Finally, concerns that lack of federal oversight will result in lax regulation and enforcement by state and local officials.

1. Environmental Concerns

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363. *See* Glitch List, *supra* note 340, at 3.

364. *See id.; see also* Florida Petroleum Liability and Restoration Insurance Program, FLA. STAT. § 376.3072 (1997); Drycleaning Facility Restoration Act, FLA. STAT. § 376.3078.

365. Ballogg Interview, *supra* note 2.

Environmental concerns were foremost among the fairly limited opposition to Florida's brownfields initiative as it made its way through the Legislature last spring.[366] Specifically, environmental activists expressed concern that Florida's Act has potential for abuse since, upon issuance of a "No Further Action" letter, Florida's Act does not require a Brownfields Representative to continue with cleanup or take additional steps after the immediate threat is alleviated.[367] However, such concerns fail to fully consider the rights reserved by both the state and local government, under the Reopeners provision, as well as by the EPA to become involved if a new threat arises.[368]

Environmentalists also argue that the impetus for Florida's Act came from the "polluting sector," which saw the legislation as an opportunity for economic revitalization and job creation, and thus to "fundamentally weaken the environmental system as we know it and basically to avoid accountability for pollution they had caused."[369] However, as recognized by Senator Jack Latvala, while industry and business sectors were actively involved with the legislation, the original idea for Florida's brownfields initiative came from Clearwater's efforts to rebuild its inner-city in conjunction with the EPA pilot.[370] Furthermore, as evidenced by the extensive brownfields proliferation both in Florida and around the country, Senator Latvala has a strong argument that the "purist approach has gotten nothing done."[371] Indeed, the brownfields initiative has instigated action — in areas where there previously was none — that should provide tangible benefits on both the environmental and economic fronts.

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366. Most news reports on the brownfields legislation both during and after the 1997 Legislative Session reported widespread praise, while concerns regarding environmental impact were generally the sole opposing view. *See, e.g.,* Bouma, *supra* note 237, at B1; Christenson, *supra* note 19, at B1; Diane Hirth, *Common Ground Sought for `Brownfields'*, FT. LAUDERDALE SUN SENTINEL, Apr. 4, 1997, at B6; David K. Rogers, *City's `Brownfield' May Sprout Jobs*, ST. PETERSBURG TIMES, Aug. 5, 1997, at B1, B4.

367. *See* Bouma, *supra* note 237, at B1; *see also supra* note 292 and accompanying text.

368. *See* FLA. STAT. § 376.82(3); *see also supra* Part IV.B.3, V.A.

369. Bouma, *supra* note 237, at B1.

370. The estimated number of brownfields in this country ranges from 100,000 to as many as 450,000. *See* discussion *supra* Part I and note 9.

371. *Id.*

2. Moral or "Environmental Justice" Concerns

Because revised cleanup standards for contaminated properties most often affect sites in urban, lower class areas, state cleanup initiatives utilizing such concepts raise environmental justice concerns that these programs in effect legalize pollution and fail to provide enough protection to safeguard the surrounding communities.[372] Addressing the general concept of state voluntary cleanup programs, Professor Georgette Poindexter argues that permitting reduced cleanup requirements to promote economic redevelopment presents a fundamental moral concern.[373] By permitting cleanup standards that account for the future use of a contaminated site, Professor Poindexter asserts that such voluntary cleanup programs "create a duality of environmental protection that will consign the cities to permanent second class environmental status."[374]

According to this view, by allowing reduced cleanup standards to promote redevelopment, such initiatives present a "short term fix for a long term problem."[375] To illustrate her argument, Professor Poindexter presents the analogy of a dying cancer patient faced with a choice between two drugs.[376] She can only be cured by Drug One, which she cannot afford.[377] However, while she can afford Drug Two, taking it will only temporarily abate her disease and, furthermore, it is cross-resistant to Drug One and thus will forever foreclose her ability to be cured.[378] Hence, the ailing patient must decide whether to opt for the short term alleviation or the long term cure — much like, Professor Poindexter argues, the dilemma America's brownfield sites face regarding their own cancer of "economic desolation of [their] burgeoning underclass," reflected by the symptoms of illegal drugs, homelessness and crime.[379]

While Professor Poindexter's analogy presents an interesting argument, one is left to wonder what action should be taken to remedy urban plight if Drug One either does not exist or will never be

372. *See* Bouma, *supra* note 237, at B1.

373. *See* Georgette C. Poindexter, *Separate and Unequal: A Comment on the Urban Development Aspect of Brownfields Programs,* 24 FORDHAM URB. L.J. 1, 1 (1996).

374. *Id.*

375. *Id.*

376. *See id.*

377. *See id.*

378. *See id.* at 1–2.

379. Poindexter, *supra* note 373, at 2.

attainable. Further, the extensive proliferation of brownfields in recent years indicates that Drug One indeed may not be a realistic concept.[380] Is it not equally morally questionable to cling to what Senator Latvala aptly termed as the "purist approach"?[381] Furthermore, as Professor Poindexter recognizes, the cure to this cancer ailing our cities is "eradication of this economic isolation through urban development"[382] and thus brownfields programs arguably have a good chance of actually being the equivalent of Drug One.

Professor Poindexter also argues voluntary cleanup programs raise a second moral — whether such programs in effect trade "increased" health risks for employment and greenfield preservation.[383] Professor Joel Eisen echoes this concern.[384] Professor Eisen recognizes that brownfields programs have a "laudable" goal, since "few would contend that it is desirable to let a brownfield site remain abandoned."[385] However, by trading "increased" health risks of the affected community for jobs and higher tax revenues, Professor Eisen argues that the resulting shift of risks to the affected community raises moral concerns about "the democratic nature of the process."[386] Specifically, Professor Eisen emphasizes concern for the affected community's ability to participate in deciding whether such risks may permissibly shift onto them.[387]

The moral concerns raised by Professors Poindexter and Eisen warrant discussion on several points. First, instituting brownfields programs to stimulate redevelopment will not *increase* health risks, as both contend.[388] Rather, the health risks such programs address are *already present* on contaminated sites, and these programs take a pragmatic approach to quantifying and either eliminating or substantially reducing those risks.

Second, the solutions offered by Professors Poindexter and

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380. *See* discussion *supra* note 377 and accompanying text.

381. *See* discussion *supra* note 370.

382. Poindexter, *supra* note 373, at 2.

383. *See* Georgette C. Poindexter, *Addressing Morality in Urban Brownfield Redevelopment: Using Stakeholder Theory to Craft Legal Process,* 15 VA. ENVTL. L.J. 37, 37–38 (1995).

384. *See* Eisen, *supra* note 1, at 887.

385. *Id.* at 886 (citing Johnine J. Brown, *Brownfield Reform: Steering the Boat Without Any Oars*, ILL. LEGAL TIMES, Nov. 1995, at 14).

386. *Id.* at 887.

387. *See id.*

388. *See* Eisen, *supra* note 1, at 887; Poindexter, *supra* note 383, at 37–38.

Eisen are arguably offered by Florida's Act to the extent that a state can implement such solutions. To reconcile the conflicting goals of environmental equity and job creation/greenfield preservation, Professor Poindexter recommends a decisionmaking model based on the "Stakeholder Theory."[389] As Professor Poindexter explains, the Stakeholder Theory requires a decisionmaker to consider "the views of all constituents with a stake in the process, without giving a priority to the interests and benefits of any particular constituency."[390] Accordingly, in evaluating brownfields problems, a decisionmaker should consider not only the benefit of increased job creation, but also the importance of community and local environmental concerns.[391] Thus, Professor Poindexter concludes that, to implement a successful brownfields program, a "triangular" decisionmaking process should be applied that requires a consensus among the three parties involved: "mainstream" environmentalists representing "environmental quality for the masses"; environmental justice advocates representing "concern for equal protection from environmental risk among those of different economic and/or racial groups"; and economic proponents "in pursuit of increased employment and inner-city economic development."[392]

Similarly, Professor Eisen argues that adequate community input is necessary to bolster the public legitimacy of brownfields initiatives.[393] As Professor Eisen explains, permitting states to link cleanup standards to the anticipated future use of contaminated sites shifts the risk, and thus "may add to the cumulative risks borne by urban communities."[394] Accordingly, brownfields programs utilizing this concept are morally troublesome "unless the affected community voluntarily approves" of such a program.[395] Thus, similar to Professor Poindexter's triangular decisionmaking proposal,[396] Professor Eisen argues that states must provide for meaningful public participation[397] by making the affected community a partner

389. *See* Poindexter, *supra* note 383, at 38.
390. *Id.*
391. *See id.*
392. *Id.* at 57.
393. *See* Eisen, *supra* note 1, at 887.
394. *Id.*
395. *Id.*
396. *See* Poindexter, *supra* note 383, at 57.
397. *See* Eisen, *supra* note 1, at 889.

throughout the decisionmaking process and by increasing the affected community's ability to understand, evaluate, and compare potential project risks and benefits.[398]

Professor Eisen presents valid arguments and realistic solutions: first, on the federal level, reform CERCLA to allow the EPA to substantively evaluate and approve or deny state cleanup programs;[399] and second, on the state level, clarify community input in approving brownfields programs.[400] However, applying Professors Eisen and Poindexter's comments to Florida's Act actually strengthens its proponents, because the Florida Legislature did take action to address concerns on behalf of both the affected community and environmental justice advocates.[401] Specifically, as discussed in Part IV,[402] Florida's Act requires the local government or Brownfields Representative to form an Advisory Committee "for the purpose of improving public participation and receiving public comments on rehabilitation and redevelopment of the brownfield area, future land use, local employment opportunities, community safety, and environmental justice."[403] Further, Florida's Act requires the Advisory Committee to include residents, business people, and others deemed appropriate from the affected community.[404] Finally, Florida's Act mandates that the Advisory Committee "must review and provide recommendations to the board of the local government with jurisdiction" over the proposed Rehabilitation Agreement.[405]

However, as discussed in Part V, the FDEP indicates that the role of the Advisory Committee needs clarification — specifically regarding whether its role involves both the remediation and redevelopment plans.[406] Local regulators also note that further provisions for job training should be addressed since community members will not be able to reap the economic benefits of an invigorated economy unless they have the tools to obtain positions created by such redevelopment.[407] However, by addressing environmental justice and

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398. *See id.*
399. *See id.*
400. *See id.*
401. *See generally* FLA. STAT. § 376.80 (1997).
402. *See* discussion *supra* Part IV.B.2.
403. FLA. STAT. § 376.80(4).
404. *See id.*
405. *Id.*
406. *See* Glitch List, *supra* note 340, at 2; *see also* discussion *supra* Part V.B.
407. Ballogg Interview, *supra* note 2.

community participation issues, Florida's Act takes a significant step in recognizing and alleviating these concerns. With further clarification by the Glitch Bill, ensuring the community not only has a voice but also a vote in approving a proposed redevelopment plan, Florida can further address this valid concern.

Taking a different approach in response to such environmental justice concerns, some commentators argue that brownfields initiatives can be successful *without* lessening the required cleanup standards.[408] In Brian Walsh's article proposing a statutory scheme for a model voluntary cleanup program, he argues that the success of Minnesota's Voluntary Cleanup program indicates that purchasers and lenders are willing to proceed with redevelopment without the added element of cleanups based on anticipated land use.[409] Accordingly, removing the uncertainties that engender the brownfield stigma, that is, clarifying the level of cleanup required, the cost involved, and the extent of liability, is enough to foster brownfields redevelopment.[410] Walsh's argument in essence rests on what Professor Eisen termed the "Brownfield of Dreams" argument,[411] that is, if you remove these uncertainties, the developers will come.[412] Specifically, this view asserts that additional incentives provided by reduced cleanup standards are not required to make brownfields competitive with greenfields.[413]

Admittedly, after cost, cleanup and liability uncertainties are removed, brownfields do have significant advantages over greenfields, including: (1) access to markets for labor, material, and final product output; (2) access to transportation facilities; (3) existing infrastructure, such as roads, water, sewer, and electric power; and (4) existing structures.[414] However, assuming that these advantages alone are enough to ensure developer involvement, one fails to consider the other significant disadvantages associated with

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408. *See, e.g.,* Walsh, *supra* note 33, at 213–14.

409. *See id.*

410. *See* Walsh, *supra* note 33, at 211–14.

411. *See* Eisen, *supra* note 1, at 1030 (citing National Environmental Policy Institute, *Beyond Brownfields: Idle Land, Suburban Sprawl, and the Law,* Proceedings of the Reinventing Urban Environmentalism: Brownfields Policy Forum (1995) (quoting the statement of Charles Bartsch, Senior Policy Analyst, Northeast-Midwest Institute)).

412. *See id*. at 1030.

413. *See id.*

414. *See* McMurry, *supra* note 6, at 631.

brownfields, such as high crime rates.[415] Furthermore, greenfields retain two crucial advantages over brownfields: no cleanup costs and no contamination liability.[416] As discussed,[417] states cannot fully eliminate the uncertainty of environmental liability involved in brownfields redevelopment; only federal action amending CERCLA's liability provisions can do so.[418] Thus, as reflected by Florida's Act, incentives in the form of cleanup requirements consistent with the proposed future use of the site form an essential component of any successful brownfields initiative.[419]

3. Political Concerns Regarding State Oversight

A final issue regarding state brownfields initiatives, argued by both Professors Eisen and Buzbee, involves concern for the states' ability to successfully regulate brownfields programs without established federal oversight.[420] Specifically, because the political and economic benefits of such cleanups are felt locally, state and local government officials have greater incentive to facilitate such programs.[421] However, as Professor Buzbee warns, with that added incentive comes the danger that local officials will be more easily prone to approve lax cleanups.[422] Furthermore, Professor Eisen argues that the image of cooperation in cleanups could cause problems if affected communities perceive that officials are under the undue influence of developers.[423] Applying these concerns to Florida's initiative, however, reveals that Florida's Act alleviates many of these potential problems by instituting a stricter program that requires a higher level of state involvement than the common volun-

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415. *See* Eisen, *supra* note 1, at 888–95.

416. *See* Wells, *supra* note 109, at 77.

417. *See* discussion *supra* Part V.A.

418. State inability to fully eliminate environmental liability under CERCLA thus further supports Professor Eisen's argument that CERCLA must also be amended at the federal level to ensure the success of state brownfields initiatives. *See* Eisen, *supra* note 1, at 1026–27.

419. *See, e.g.*, McMurry, *supra* note 6, at 633 (citing R. Michael Sweeney, *Brownfields Restoration and Voluntary Cleanup Legislation*, 2 ENVTL. LAW. 101, 157 (1995)); Wells, *supra* note 109, at 75; Brown, *supra* note 10, at 2, 13.

420. *See* Buzbee, *supra* note 57, at 110–11; Eisen, *supra* note 1, at 887–88, 1020.

421. *See* Buzbee, *supra* note 57, at 100, 110.

422. *See id.* at 100.

423. *See* Eisen, *supra* note 1, at 888, 1020.

tary cleanup law.[424] For example, Professor Eisen argues that voluntary cleanup programs often involve state substitution of statewide solutions, formed with industry input, for local, site-specific development.[425] Under such programs, developers have the opportunity to pressure state regulators to ignore or reject community input or opposition to such decisions.[426] Or, in other voluntary programs that allow developers to initiate and undertake cleanups with little or no state oversight, developers may provide less than full disclosure regarding discovered contaminants, and states are basically left to rubber-stamp the cleanup.[427]

While such concerns have merit, Florida avoided these potential trouble spots by opting for a program with substantial involvement by the local government as well as the state FDEP.[428] Accordingly, this required local government involvement removes concerns associated with little or no state oversight of developer cleanup. For example, the local government's mandated role in performing, either independently or with a developer party to a Rehabilitation Agreement, the initial environmental assessment of the contaminated site[429] removes concerns that a developer will bury the extent of actual contamination. Further, Florida's use of Corrective Action analysis to determine cleanup required on a site-specific basis[430] alleviates concerns that generalized or lax standards will be pushed through under the influence of developers.

Although Florida's more structured cleanup initiative addresses many voluntary cleanup program concerns, arising from the states' unique self-interest in promoting such redevelopment, further federal action is undoubtedly a necessary additional step to successful brownfields redevelopment. Particularly, amending CERCLA in two key areas is crucial to removing the uncertainty stigma. First, federal law must provide clear, comprehensible cleanup levels required for legal compliance.[431] And second, federal law must release developers from federal liability if they cleanup brownfield sites under an

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424. *See supra* Parts IV.A and IV.B.2.
425. *See* Eisen, *supra* note 1, at 1020.
426. *See id.*
427. *See id.* at 1021–22.
428. *See supra* Part IV.
429. *See generally* FLA. STAT. § 376.80 (1997).
430. *See generally id*. § 376.81(1).
431. *See* Eisen, *supra* note 1, at 1027–28.

approved voluntary state cleanup program.[432]

Furthermore, formalized federal oversight of state voluntary cleanup programs is a wise and necessary component to successful brownfields redevelopment. One possible method, offered by Professor Buzbee, provides that states should be given the authority to institute a Cleanup Approval Process,[433] which would be subject to a threshold review by the federal government and, if necessary, federal appellate review of those state cleanup approvals that come under dispute.[434] However, until federal action crystallizes beyond mere guidance into law, Florida's Act is a sound step in the right direction because it brings the private sector into redevelopment while maintaining the necessary involvement of not only local and state government but also community residents and environmental justice advocates.

VI. APPLYING THE NEW ACT ON THE LOCAL LEVEL – THE PROMISE OF THE CLEARWATER PILOT PROJECT

Despite lingering concerns regarding the brownfields concept, the Clearwater Pilot Project provides strong evidence that Florida's state-level initiative is an important boost to the initial federal efforts.[435] Specifically, due to an expanded local program made possible with funds from Florida's Act, Clearwater officials are poised to close a substantial real estate deal that would provide the state of Florida with its first major brownfields redevelopment project.[436] Moreover, the Clearwater Pilot Project's encouraging progress thus far shows the potential the brownfields redevelopment initiative may hold for businesses, the environment, and communities throughout Florida.

Clearwater's targeted area consists of approximately one hundred potentially contaminated sites, including small commercial, industrial, and mixed enterprises and residences.[437] Termed the

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432. *See id.*

433. *See* Buzbee, *supra* note 57, at 100–04.

434. *See id.* at 115–16.

435. Ballogg Interview, *supra* note 2.

436. *See id.*; *see also* Anita Kumar, *IMR Wants Annex Site for Headquarters*, ST. PETERSBURG TIMES, Jan. 6, 1998, at 1.

437. *See Brownfields in Clearwater*, *supra* note 263.

"Collective Brownfields Area" (CBA),[438] these sites are built on a former lake, filled in during an urban development project forty years ago.[439] The CBA subsequently became abandoned due to previously-instituted state environmental regulations that mandated property set-asides for storm water attenuation.[440] While the CBA contains less than thirty percent of Clearwater's population, as of 1996 it accounted for an alarming seventy-five percent of the city's crime.[441] Furthermore, over twenty percent of the CBA's residents live below the poverty level, and low-to-moderate income residents comprise over fifty percent of the CBA population.[442]

The Clearwater Project began in June 1996, when the EPA solicited grant applications for brownfields pilot projects.[443] As a result of Clearwater's CBA redevelopment proposal, EPA Region 4 selected Clearwater as a Regional Brownfields Pilot Project.[444] The $100,000 federal grant enabled Clearwater to begin with the first phase of its Redevelopment Plan,[445] and served as the impetus for the ensuing $500,000 state grant under Florida's Act.[446]

In response to funds received under Florida's new law, Clearwater expanded its initial plan into a detailed and comprehensive Brownfields Redevelopment Work Plan.[447] Accordingly, the State grant will allow the City to complete site assessments that it began under the federal grant.[448] However, the state funds will also enable Clearwater to proceed much further — to remediate contaminated sites, offer economic incentives to private developers who undertake site remediation in the CBA, and perform data collection, research and professional services within the CBA.[449] According to the Clearwater Work Plan, these activities will "serve as a catalyst to economic development," which will in turn help the City achieve its goals of sustainable redevelopment, removal of blighted areas, pro-

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438. *See* CLEARWATER WORK PLAN, *supra* note 192, at Attachment A, 4.
439. *See id.*
440. *See id.*
441. *See id.* at Attachment A, 4–6.
442. *See id.*
443. *See* CLEARWATER WORK PLAN, *supra* note 192, at 1.
444. *See id.*
445. See *id.* at 4.
446. See *id.* at 1; Ballogg Interview, *supra* note 2.
447. *See* CLEARWATER WORK PLAN, *supra* note 192, at 1.
448. *See id.*
449. *See id.*; Ballogg Interview, *supra* note 2.

motion of public health/safety standards, job creation, and environmental justice implementation within the CBA.[450]

The Plan's budget, pending City Commission approval, will accordingly be distributed to four main areas.[451] First, Clearwater will use twenty percent to complete the two phases of Environmental Site Assessments (Assessments).[452] The Assessments will help remove the uncertainty previously looming over redevelopment by quantifying, in advance, a given site's contamination level as well as the potential public health and safety issues associated with any identified environmental contaminants.[453] The Assessments will also utilize Corrective Action analysis, and thus should reduce the number of unproductive sites by identifying those properties with little or no contamination that are ready for reuse.[454] The cost of the required Assessments can be substantial, and therefore Assessments are one of several obstacles facing prospective purchasers, particularly when a Phase II assessment is found necessary.[455] Thus, by committing grant funds to held reduce purchaser costs, Clearwater takes an important step toward enabling and enticing developers to proceed with redevelopment.

Second, Clearwater will commit twenty percent of the state grant to the Brownfield Redevelopment Economic Incentive Stabilization Fund.[456] This fund will perform the essential role of providing money for the incentives listed in Florida's Act.[457] Accordingly, by identifying a set source of funding for the many incentives provided by the State Legislature, Clearwater takes another crucial step toward selling investors that the new Act indeed offers tangible opportunity.

Third, Clearwater will use approximately forty percent of the

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450. CLEARWATER WORK PLAN, *supra* note 192, at 1.

451. *See id.* at 4–5.

452. *See id.* at 5.

453. *See id.*

454. *See id.*

455. A Phase I ESA, which is the initial environmental audit, can cost anywhere between $500 and $5000, and furthermore may reveal the need for a Phase II ESA and additional expenditures. *See* Walsh, *supra* note 33, at 199 (citing *Superfund Program: Hearings on H.R. 3800 Before the Subcomm. on Transp. and Hazardous Materials of the House Comm. On Energy and Commerce,* 103d Cong. pt. 3, at 621–22 (prepared statement of Am. Bankers Assoc.)).

456. *See* CLEARWATER WORK PLAN, *supra* note 192, at 6.

457. *See id.*

state funds to provide loan guarantees for remedial activities.[458] These loan guarantees will allow the City to leverage its state grant money with funding from local lending institutions, and thereby provide a consistent source of needed cleanup funding.[459] The EPA does not currently provide federal funding for contamination later discovered in environmental site assessments,[460] and thus this crucial component addresses a significant gap in the federal initiative. Accordingly, by providing this loan guarantee, Clearwater intends to "normalize lending for contamination cleanup making financing for [cleanup] more accessible."[461] Furthermore, to ensure benefits to the community, the guarantee program will consider job creation potential in providing these funds.[462]

Finally, Clearwater will use the remaining twenty percent of the state funds to create the Brownfield Data Collection and Research Professional Services Fund.[463] The City will use this fund to provide the necessary market research data needed to determine if a specific site is worthy of investment.[464] Thus, by establishing this fund, Clearwater addresses the concern that local governments focus on "viable brownfields" with actual "clean" real estate value to potential developers.[465]

Thus, Clearwater's detailed work plan maximizes state and federal funds to provide tangible, locally implemented redevelopment assistance to developers. And the City's extensive effort to effectively utilize the opportunity provided by the brownfields movement appears ready to provide substantial returns to the community, as evidenced by the City's proximity to closing Florida's first major brownfields redevelopment deal.[466] The potential purchaser/developer is Information Management Resources (IMR), a software consulting company, which has expressed interest in moving its international headquarters to a City-owned fourteen-acre site.[467] If closed, the deal would amount to a $13 million capital in-

458. *See id.*
459. *See id.*
460. *See id.*
461. *Id.*
462. *See* CLEARWATER WORK PLAN, *supra* note 192, at 6.
463. *See id.* at 7.
464. *See id.*
465. *See supra* Part V.A; *see also* Brown, *supra* note 10, at 21–22.
466. Ballogg Interview, *supra* note 2.
467. *See* Kumar, *supra* note 436, at 1. The "Annex Site" refers to the property

vestment in the area.[468] Further, the deal would bring to the area an estimated 560 new software-oriented jobs with an average yearly salary of $42,000.[469]

Clearwater officials are optimistic that the IMR developers feel adequately protected by Florida's Act,[470] particularly since the site under consideration has petroleum contamination, which is not covered by CERCLA and thus is unaffected by concerns that a Memorandum of Agreement has not been signed with the EPA.[471] However, Project Coordinator Miles Ballogg expressed some concerns that certain incentives, such as the Brownfield Refund Bonus, still need a permanent funding source.[472] As evidenced by the potential $1.4 million tax credit such bonus would provide IMR, uncertainty regarding a guaranteed funding source of this incentive could be a deal-breaker.[473]

Furthermore, applying Florida's brownfields initiative on a local level, Clearwater finds Florida's Act needs improvement in areas other than the Bonus Refund.[474] As discussed with regard to developer concerns,[475] the City believes its own liability protection needs clarification.[476] Specifically, the City is concerned that the liability protection provided to municipalities that receive contaminated properties through default as a result of unpaid property taxes does not provide strong enough protection.[477] Furthermore, while CERCLA provides a "third party" defense to government entities that voluntarily acquire contaminated property via eminent domain,[478] CERCLA does not apply to a majority of the petroleum or drycleaning contaminated brownfield sites in Clearwater;[479] thus warranting the enhanced concern expressed by Clearwater regula-

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where the former City Hall annex was located. *See id.*

468. Ballogg Interview, *supra* note 2.

469. *Id.*

470. *Id.*

471. *Id.*; *see also supra* Part V.A.

472. Ballogg Interview, *supra* note 2.

473. *Id.*

474. *Id.*

475. *See supra* Part V.A.

476. Ballogg Interview, *supra* note 2.

477. *Id.*

478. *See* McMurry, *supra* note 6, at 632.

479. Ballogg Interview, *supra* note 2. CERCLA does not apply to sites contaminated by petroleum or drycleaning solvents. *See supra* note 62.

tors regarding their liability protections. Moreover, the City also hopes the Legislature will bolster job training resources and incentives in the coming session.[480] As evidenced by the potential IMR deal, should the software jobs become available, components need to be included to ensure brownfield area residents have access to training for such jobs.[481]

Nonetheless, Clearwater's Pilot Project shows the real promise Florida's Act can provide if, as advocated by Professor Wells,[482] local governments take the necessary initiative to utilize the opportunity provided by the state to implement creative and effective incentives to encourage brownfields redevelopment. Due to Clearwater's plan, the IMR deal could provide substantial benefits to a previously blighted area.[483] Further, should the IMR deal ultimately not solidify, IMR was one of five companies that submitted proposals in response to the City's solicitation for interest in purchasing the Annex site.[484] Accordingly, this optimistic response provides solid evidence that the City's brownfields redevelopment effort has attracted extensive developer interest and has a optimistic future ahead.

VII. CONCLUSION

Florida's Act appears quite promising because of its extensive incentives and bolstered liability protection, which represent key steps toward removing barriers that have repelled both businesses and lenders in the past. However, while Florida's Act implements many essential and forward-looking concepts such as Corrective Action analysis, the effect of the Florida legislation remains to be seen.

In light of the new Act, a potential developer still must consider whether the added incentives are enough to make committing to the cleanup realistically worth it, particularly in light of the lingering potential liability for later, unanticipated contamination leaks and/or damage. As explained by Professor Wells, the new brownfields legislation's success rests with the results of a cost-ben-

480. Ballogg Interview, *supra* note 2.
481. *Id.*
482. *See* discussion *supra* Part IV.B.4.
483. Ballogg Interview, *supra* note 2; *see also* Kumar, *supra* note 436, at 1.
484. *See* Kumar, *supra* note 436, at 1.

efit balance that a potential developer must perform.[485] To determine the possible benefits a developer could acquire via these economic incentives and reduced purchase price, a developer will also need to take into account the projected cost of the Corrective Action cleanup as well as the economic impact of any institutional controls that may be required to achieve the necessary "No Further Action" status from the EPA or FDEP.[486]

Furthermore, even with extensive incentives and lessened liability, brownfields nonetheless face tough competition with greenfields. As recognized by Clearwater Brownfields Coordinator Miles Ballogg, to really compete, brownfields must offer a *more* attractive deal than greenfields.[487] To promote the unique advantages brownfields have over greenfields — particularly downtown location and existing infrastructure — such initiatives must both utilize Corrective Action analysis and include an extensive incentives package. And Florida's Act is successful to a great extent on both fronts. However, the lingering uncertainty regarding liability needs further clarification, as does the funding sources for such enticing offers as the Refund Bonus.

Nonetheless, Florida's brownfields initiative appears to encompass the key components necessary for success. For both developers and lenders, Florida's Act alleviates uncertainty, prohibitive costs, and crippling potential liability by clarifying flexible cleanup standards consistent with a site's proposed future use and instituting warranted liability protection. Further, reflecting concern for the residents and environment of an affected community, Florida's Act ensures quality cleanup and community involvement by requiring continued government involvement, oversight by certified environmental professionals, and formation and input from a community Advisory Committee. Thus, as recently recognized by the *Tampa Tribune*, Florida's Act neither results in "ham-fisted regulators making businesses do back flips," nor "an indulgent government allowing companies to foul the environment and ruin a neighborhood."[488] Rather, the initiative strikes an important balance between business and environmental interests, and thus unites government, business,

485. *See* Wells, *supra* note 109, at 77.
486. *See id.*
487. *See* Ballogg Interview, *supra* note 2.
488. *Promise of the Brownfield Program, supra* note 23, at 18.

environmental advocates, and community residents in a common, simultaneous effort to cleanup the environment, stimulate the local economy, and both protect and reinvigorate the community. Accordingly, if the Legislature effectively addresses lingering concerns in this year's Session, Florida's Act may indeed succeed in transforming liability into opportunity for Florida developers, while in turn cleaning up the environment and reinvigorating ailing communities.