

Environmental Racism, Site Cleanup and Inner City Jobs: Indiana's Urban In-fill Incentives

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In the last two decades, manufacturers have moved away from the inner city, taking valuable job opportunities and leaving behind environmentally hazardous sites. These sites are expensive to clean up when abandoned, and the lenders may be held liable as a last resort. This situation has created a large disincentive for remediating these sites, preventing poor inner-city communities from realizing meaningful economic opportunities. Mr. O'Reilly contends that current federal remediation procedures fraught with uncertainty and high cost are the primary cause of this barrier to inner-city economic rejuvenation. In a "report from the field," Mr. O'Reilly examines Indiana's most recent effort to overcome this barrier and facilitate inner-city site cleanup. This unique Indiana program allows developers and manufacturers, through voluntary remediation agreements, to clean up potentially productive inner-city sites without the specter of liability. Mr. O'Reilly concludes that Indiana's program is necessary for renewed inner-city job growth and should serve as a model for the rest of the country.

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Introduction

This nation's siting policy for environmentally hazardous facilities has long targeted the areas inhabited by poor and usually minority residents. Government and private waste haulers have chosen these neighborhoods because of the low cost and the communities' perceived political weakness. Recent thoughtful essays have challenged this "environmental racism" and have correlated health effects with lower economic status.¹ Policy makers have begun to realize that racial and economic disadvantage have been exacerbated by decades of

1. It has been suggested that the disparate impact of environmental pollution on communities of color has also adversely affected the residents' health status. Unfortunately, this effect has not yet been quantified thoroughly, though there is much anecdotal evidence to support this assertion. See Marianne Lavelle, *An Industrial Legacy*, NAT'L L.J., Sept. 21, 1992, at S3 (discussing health impact of pollution on the African-American community in Chicago's South Side).

insensitive siting and zoning choices.² There is, however, another problem besetting these communities, a problem less racially motivated on its face, but no less injurious in its effect.³

In this country, polluted sites are geographically distributed near the residences of the disadvantaged members of society; consequently the disadvantaged bear the brunt of the detrimental economic and health consequences of past environmental neglect.⁴ These sites are polluted not merely because of dumping, but because of previous, economically beneficial manufacturing activity that has since left the inner city. These sites sit empty today because of the enormous expense of remediating a "dirty" site.

This Article posits that current environmental remediation (cleanup) policy has produced this no-win situation; the failure of these remediation policies has thus become a barrier to the advancement of the inner-city resident. Costly environmental cleanup procedures and fears of belated liability encouraged many banks to adopt environmentally selective commercial lending policies.⁵ Fear of liability encourages banks to withhold loans and opportunities for business development in inner cities. While such banking decisions may be justified as economically efficient, their consequences are equally pernicious to inner city communities as are the more traditional forms of environmental racism allegedly occurring in siting decisions.

Several studies have principally focused on alleviating the adverse effects on lower income communities caused by the dumping of society's waste;⁶ this Article, however, does not address this problem. What must be addressed are the cumulative results of previous hazardous industrial processes and the barriers to cleaning up the sites where such activity took place. Cleaning these otherwise productive sites, however, is often prohibitively expensive. As a result, the less powerful communities are prevented from realizing meaningful economic opportunities.⁷ Moreover, the long list of sites awaiting waste site

2. See, e.g., U.S. ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL EQUITY-REDUCING RISK FOR ALL COMMUNITIES (1992); U.S. GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983). Environmental racism has been categorized as a "newly recognized form of racial discrimination." Rachel D. Godsil, Note, *Remediating Environmental Racism*, 90 MICH. L. REV. 394, 394 (1991). Religious groups first gave attention to this phenomenon. See Marianne Lavelle & Marcia Coyle, *Unequal Protection*, NAT'L L.J., Sept. 21, 1992, at S1, S4.

3. Lavelle & Coyle, *supra* note 2, at S1.

4. "People of color are much more likely to have hazardous waste sites in their backyards than are whites." John Heritage, *Environmental Protection-Has it Been Fair?*, EPA J., Mar./Apr. 1992 (letter from the editor).

5. See, e.g., Dennis Melamed, *Courts: Lenders Must Pay Cleanup*, CHRISTIAN SCI. MONITOR, June 25, 1990, at 9.

6. Lavelle, *supra* note 1 (discussing assertions that illness rates among persons in Chicago neighborhoods hosting waste facilities exceed those in other areas).

7. See, e.g., Edward Patrick Boyle, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937 (1993); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993); Naikang Tsao, Note, *Ameliorating Environmental*

cleanup priority under the federal law⁸ seems to have delayed the amelioration of health problems in poorer communities.⁹ Any solution to this unfairness must be creative and empowering.¹⁰ It must stimulate the creation of new job opportunities, bringing higher wage jobs to inner-city residents through environmental policy shifts. Creative change can nurture job opportunity in those disadvantaged areas where today few private sector manufacturing jobs are available for the current residents.

This Article addresses one possible solution to this problem of "almost environmental racism": the Indiana Urban In-fill Incentive Program. Indiana, by offering prospective developers a shield from liability if they carry out a supervised cleanup of a site, eases the worries of lenders and other sources of necessary capital. As a result, development and job growth essential for the inner city is made possible. Part I begins with a discussion of current federal environmental regulation and how it acts as a barrier to the redevelopment of polluted inner-city sites, focusing on the problem of lender liability under these regulations. Part II analyzes Indiana's recent experiment with environmental remediation procedures and these procedures' potential for mitigating lender liability for environmental cleanup. I conclude that, with the additional state support of inner-city cleanup and redevelopment described in Part III, implementation of Indiana-like plans across the nation can be an important part of resuscitating our cities.

I. The Current Situation

A. *The Value of an Inner-city Manufacturing Base*

The best private sector wages in our economy available to non-college graduates are typically found in manufacturing positions.¹¹ The route to success for the less-skilled person has traditionally been a manufacturing job with a well-understood path of progression to the middle class. A person capable of performing semi-skilled tasks such as assembly and casting can develop a work ethic that will enable that individual to advance and ultimately

Racism: A Citizens' Guide to Combatting the Discriminatory Siting of Toxic Waste Dumps, 67 N.Y.U. L. REV. 366 (1992); Godsil, Note, *supra* note 2, at 394 (1991); Luke W. Cole, Correspondence, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 991 (1992); Stephen C. Jones, *EPA Targets 'Environmental Racism'*, NAT'L L.J., Aug. 9, 1993, at 28.

8. Section 9605 of Title 42 of the United States Code authorizes the listing process, which has slowly grown to more than a thousand sites that may be subjected to cleanup under CERCLA. 56 Fed. Reg. 35,840 (1991) (to be codified at 40 C.F.R. pt. 300). By 1989, the listing process alone had taken 43 months. See generally ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 363-68 (1992).

9. Lavelle, *supra* note 1.

10. Marcia Coyle, *When Movements Coalesce*, NAT'L L.J., Sept. 21, 1992, at S10.

11. Manufacturing wages and hours worked consistently exceed those of the service sector. U.S. DEP'T. OF COMMERCE, BUSINESS STATISTICS, 1963-1991, at 51 (1993).

represent a productivity gain for an employer. A worker can earn higher wage positions within a manufacturing facility (quality control inspector, team leader, foreman, and ultimately manager) after developing a successful work record. These positions are not only valuable to the individual, but have a multiplier effect: they are the building blocks upon which all other professions in an economy gain an opportunity to provide services to the wage earners. Although total manufacturing jobs have declined,¹² their continuing availability in the inner city sustains higher income opportunities for working people and the surrounding community.

American urban history depicts waves of European immigrants in urban coastal cities climbing the social ladder by obtaining the higher-paying manufacturing jobs that urban core industrial sites offered. Persons of color came to Northern industrial settings in search of the same ladder of success, and some found the jobs that rural America did not offer. Hundreds of thousands of brick and concrete buildings in inner cities are memorials to this hope. With the buildings, manufacturing brought opportunities to community residents—these sites where the workers' labor created goods for export, for both the war effort during several conflicts and for the startup entrepreneurs who built small garages into larger and larger facilities. Carnegie Libraries would not exist without steel workers, nor would the Ford Foundation without auto assemblers, nor television networks without armies of vacuum tube assemblers in the radio and early television factories of urban America.

Steady attendance, solid performance, willingness to work and incentives to produce are the desired attributes of a manufacturing work force. Inner-city workers can offer all of these. Highway access, well developed infrastructure, power and water lines, easy access to rail tracks and to other modes of transport are all desirable features of existing city sites. In past decades, these features encouraged the active recycling of older, abandoned business sites.¹³

The sites and the buildings remain, but the recycling has stopped. Manufacturing jobs have not stayed in the inner city. The social isolation of city neighborhoods, cited by critics of environmental racism, deepened as neighborhood jobs departed. The disconnection of inner-city residents from these relocated sites was amplified by underfunded urban transportation systems. Mass transit is less adaptable for use in more remote sites.¹⁴

12. David R. Howell & Edward N. Wolff, *Trends in the Growth and Distribution of Skills in the U.S. Workplace, 1960-1985*, 44 *INDUS. & LAB. REL. REV.* 486 (1991).

13. See JOHN BLAIR, *INDUSTRIAL POLARIZATION AND THE LOCATION OF NEW MANUFACTURING FIRMS: AN EMPIRICAL APPLICATION* (1976).

14. Keith R. Ihlanfeldt & David L. Sjoquist, *The Effect of Job Access on Black and White Youth Employment: A Cross-Sectional Analysis*, 28 *J. URB. STUD.* 255 (1991). Access to mass transit is particularly important in job decline and replacement trends. See Samuel H. Ehrenhalt, *Some Perspectives on the New York Economy in a Time of Change*, in *NEW YORK CITY'S CHANGING ECONOMIC BASE 18* (Benjamin J. Klebaner ed., 1981).

Manufacturing shift workers and those who want overtime incentive pay find it difficult to use public transportation to get to distant sites at unusual hours. The price of automobile transportation increased very significantly during the 1970s and 1980s, outpacing the income growth for the manufacturing worker.¹⁵ Insurance and fuel expenses, as well as the number of vehicles, are likely to increase further in the 1990s. Therefore inner-city residents are less likely to be able to travel out to distant job sites via personal automobiles.¹⁶

Municipal and urban school budgets lost revenues from manufacturing facility taxes as plants moved. Taxes increased on inner-city real property held by the remaining local manufacturers. In the suburbs and outlying counties, taxes became relatively lower, creating another incentive for manufacturers to leave the city to buy fields untouched by past development.¹⁷ As municipal revenues declined, so did city services such as transportation. Urban school systems' funding for job training, adult education, and vocational education suffered from declining budgets and were not sufficiently enhanced by federal funds to make up the shortfall.¹⁸ The restoration of hope for inner-city residents is difficult, but certainly achievable, if the opportunities for local jobs can be restored.

Why have willing workers in inner-city urban areas not benefitted from ready sites available in their neighborhood? Why has there been so little of the past turnover, re-use, and infill of new construction between the existing inner-city industrial sites? Environmental barriers to economic rehabilitation of inner-city industry have played a large role in squashing these opportunities. Unless change occurs, the hope for high-value, high-reward jobs as a vehicle for advancement among inner-city residents is doomed.¹⁹

15. The average number of weeks of median family income needed to equal an average new car expenditure rose from 18.7 weeks of income in 1970 to 24.5 weeks in 1990. The average annual costs of owning a car rose from \$1,831 in 1975 to \$4,100 in 1990, and the average new car purchase price rose from \$3,542 in 1970 to \$16,012 in 1990. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1992, at 613 (1993).

16. Of course, workers who commute by single-occupant vehicles, as opposed to the short bus or subway ride of the past, increase net environmental pollution for a metropolitan area. In order to reduce net pollution of cities from passenger car use, mandates or incentives for reducing single-passenger vehicle trips will be imposed as part of transportation control plans resulting from 1990 amendments to the federal Clean Air Act, Pub. L. No. 101-549, § 101(f)(2), 104 Stat. 2410 (1990).

17. Urban development officials confront the problem of tax rate differences as an additional disincentive to urban location and relocation. See THE RETENTION AND EXPANSION OF EXISTING BUSINESSES (George W. Morse ed., 1990).

18. Federal aid for job training in school district budgets declined from \$1.26 billion in 1988 to \$1.038 billion in 1991. U.S. DEP'T OF COMMERCE, *supra* note 15, at 282.

19. Fewer manufacturing jobs will be available, but workers holding those jobs will have greater responsibility and must have higher skill and more technical knowledge. NATIONAL RESEARCH COUNCIL, TOWARD A NEW ERA IN U.S. MANUFACTURING 7 (1986); see also William Sander & Peter V. Schaeffer, *Schooling and Urban Employment Growth*, 43 J. ECON. & BUS. 69 (1991).

B. *The Cost and Uncertainty of Federal Law*

Today's environmental cleanup programs were intended to expedite the cleanup process and prepare sites for redevelopment. Instead, these programs are fraught with uncertainties that erect barriers to recycling manufacturing sites in the inner city. This Article posits that the cost and uncertainty inherent in environmental cleanup procedures have contributed to the decline of urban industrial manufacturing facilities as active employers in the inner city. The Resource Conservation and Recovery Act (RCRA),²⁰ and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, also known as "Superfund")²¹ are the principal federal statutes relating to the remediation of past contamination at industrial sites. State legislatures have adopted their own versions of the cleanup legislation to complement the federal requirements.²² Each of the laws aims to restore sites to "clean" status through requirements for remediation. These laws, however, are terribly unclear on many issues—including how clean an industrial facility must become, at what remedial cost, and within what period—and lead to nothing more than delay.

1. *RCRA*

If activity such as manufacturing or warehousing is underway at a site, discovery of past contamination problems on the property need not foreclose continued use of the site while cleanup occurs. Active sites are cleaned up under the supervision of the U.S. Environmental Protection Agency (EPA) or states acting under the authority of RCRA.²³ RCRA focuses on active sites and their gradual restoration to the level of soil, water, or air conditions found in the "background levels" of that local area.²⁴ A typical example is a factory, still in operation, that finds petroleum distillates on its site during a routine EPA inspection. This site would be issued RCRA corrective action orders which command the operator to dig up the storage yard and remove subsurface contaminants.²⁵ The private operator or owner of the site conducts the cleanup to a level of "clean" soil—for instance, only the slight residual presence of undesired chemicals—that is acceptable to the EPA and the state environmental

20. 42 U.S.C. §§ 6901-6992 (1988).

21. *Id.* §§ 9601-9675.

22. Because creation of parallel state programs is a prerequisite to state implementation of hazardous waste site licensing under RCRA, the majority of states have adopted such laws. *Id.* § 6929.

23. *Id.* § 6924(u).

24. Because modern analytical chemistry is capable of detecting small amounts of virtually every contaminant on a site, environmental cleanup plans examine the nearby soil as a background and compare it to the soil of the site where the spill or other contamination occurred.

25. 40 C.F.R. § 264.101 (1992) (authorizing corrective action orders).

agencies.²⁶ In some cases, continued industrial operations render a site an imminent and substantial endangerment to health. If so, the EPA usually brings court actions to force rapid removal of wastes in order to reduce the public threat created by contamination of groundwater, air, or other resources.²⁷

Delay and details of a RCRA cleanup are so cumbersome,²⁸ and the law's requirements so complex and detailed, that few participants can understand and avoid liability under the regulations.²⁹ The definition of "hazardous waste" alone is an indecipherable mess.³⁰ Criminal and civil penalties make RCRA a veritable minefield for the novice facility owner and attorney.³¹

2. CERCLA

In addition to the many active sites where past spills or releases have occurred over years or decades, there are thousands of inactive sites. Those sites which no longer have active manufacturing, solvent collection, or production are considered to be abandoned. At a typical inactive property (often forfeited for nonpayment of property tax), CERCLA cleanup can be performed with federal money. The central element of CERCLA is the Superfund, a source of special cleanup funds that can be used by the EPA.³² The Superfund is the financing mechanism for the environmental cleanup of the abandoned sites.³³ Federal dollars are used only if the private sector's "potentially responsible parties" are not available to pay, or decline to pay. If a potentially responsible party is known or can be found, however, that party can be held jointly and

26. 42 U.S.C. § 6924(u) (1988). Unlike the voluntary programs described later in this Article, under RCRA, the standard of clean is determined by the enforcement agency whose work plans set levels for removal of wastes and contaminants through site specific determinations.

27. Imminent hazard contamination cases are challenged through court ordered remediation actions. 42 U.S.C. § 6973 (1988); see *United States v. Reilly Tar & Chem. Co.*, 546 F. Supp. 1100 (D. Minn. 1982); see also Joel Mintz, *Abandoned Hazardous Waste Sites and the RCRA Imminent Hazard Provisions*, 11 HARV. ENVTL. L. REV. 247 (1987).

28. At a recent regional seminar on environmental business issues, an expert consulting firm presented with pride its success story of taking a client's active site from the start of the RCRA process to a stage of investigation, in only seven years. The estimate for completion of the entire process was ten to fifteen years. The consultant duly advised the attendees that by searching for waste conditions on site, they increased their responsibility for reporting, planning, and cleanup. James Determann, Address at the Manufacturers Environmental Symposium (Mar. 11, 1993).

29. 40 C.F.R. §§ 261-264 (1992).

30. See, e.g., PERCIVAL ET AL., *supra* note 8, at 241 (explaining 40 C.F.R. § 261).

31. 42 U.S.C. §§ 6972-73 (1988); see also ROBERT E. STEINBERG & ROBIN K. WEINER, *RCRA COMPLIANCE AND ENFORCEMENT MANUAL* (1993).

32. 57 Fed. Reg. 34,742 (1992) (to be codified at 40 C.F.R. §§ 300, 308) (proposing rule on computing cleanup costs later assessed against potentially responsible parties).

33. RICHARD H. MAYS, *CERCLA LITIGATION, ENFORCEMENT, AND COMPLIANCE* § 12.03 (1993).

severally liable for the cleanup expenses,³⁴ with reimbursements paid later to the Superfund.³⁵

CERCLA requires that the governmental agency, usually the EPA, consider a site's past uses, the current state of its groundwater, surface water, and soil, for example, and determine whether to list the particular site for a future cleanup.³⁶ Even if listed on the National Priority List,³⁷ the particular site's federal cleanup is likely to occur only after higher-priority sites have been completed, a sequence which may take years or decades. In the interim, emergency measures might be taken to remove the most hazardous materials from the site.³⁸ More typically, however, the site will remain unremediated for years as private companies responsible for the contamination negotiate with the EPA on a privately-funded remediation. Negotiated CERCLA settlements are lengthy processes with great complexity for the multiple parties involved.³⁹ For example, an Indiana site, the former Seymour Recycling Company, consumed millions of dollars and took years to remediate a toxic waste contamination problem.⁴⁰

The CERCLA system of abandoned site remediation began as a massive financial reallocation scheme premised on retroactive redefinition of each firm's past waste deposits at the site. CERCLA helped government officials trace the contributors for a site, and then allocated the costs of selecting and implementing a remedy.⁴¹ Costs can often be considerable.⁴² The system has evolved to the point today that private responsible parties, rather than the government, expend the major effort to obtain payment of shares of the total cleanup expenses from each contributor, disposer, or person who arranged for disposal.⁴³ CERCLA attempts the reallocation of those costs to private sector entities which had themselves, or through predecessor entities, deposited wastes at the now-abandoned sites.⁴⁴

Delay is so widely recognized as a flaw of these remedial programs that advocates of inner-city rehabilitation are likely to be skeptical when told that

34. *Id.*

35. *Id.*; see also *Outlook Good for Regional Implementation of Administrative Fixes Package*, *Staff Says*, 24 *Env't. Rep.* (BNA) 510, 511 (July 23, 1993) (stating that fewer cleanups began in 1992-93 because of low Superfund resources).

36. MAYS, *supra* note 33, § 7.07.

37. In 1993, of 30,000 suspect sites in the data base, 1500 were on this list. *Id.* intro. at 5.

38. 42 U.S.C. § 9607 (1988).

39. MAYS, *supra* note 33, § 5.19.

40. *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334 (S.D. Ind. 1982).

41. 42 U.S.C. § 9607 (1988); see also *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1041 (2d Cir. 1985).

42. See, e.g., *O'Neil v. Picillo*, 883 F.2d 176, 178 (1st Cir. 1989) (involving \$5,800,000 reimbursement settlement to clean up pig farm used as waste disposal site).

43. MAYS, *supra* note 33, § 7.07; see also 42 U.S.C. § 9607 (1988); PERCIVAL ET AL., *supra* note 8, at 209.

44. Andrew H. Perellis & Mary E. Doohan, *Superfund Litigation: The Elements and Scope of Liability*, in *ENVIRONMENTAL LITIGATION* 1, 14 (Janet S. Kole & Larry O. Espel eds., 1991).

waiting for cleanup under government mandates will suffice. The tremendous financial effort expended on CERCLA has produced relatively few clean sites, a fact much criticized in Congress.⁴⁵ Action funded by private capital with government approval serves as an alternative to the endless waiting that accompanies a government cleanup. Unfortunately, CERCLA has created a third alternative, placing lenders whose past borrowers had defaulted in the role of a deep pocket for the cleanup costs.⁴⁶

3. *Effects of Federal Law*

Unfortunately, well-intended federal remediation legislation has not led to efficient cleanup of inner-city sites. Instead, RCRA and CERCLA have infused the cleanup process with uncertainty and high cost in several ways. First, a site owner who looks for soil contaminants will probably find some detectable level of lead or other airborne contaminants. How much greater the contaminant levels are, compared to background levels, is difficult to determine. Discovery of soil contamination could compel mandatory notification to the government, and the law gives government the incentive to react harshly.⁴⁷ Second, owners cannot make reliable estimates of site cleanup costs. That uncertainty arises because the federal programs based on CERCLA⁴⁸ and RCRA⁴⁹ are arcane and still-evolving corrective action programs.⁵⁰ Third, and most important for the purposes of this Article, these unsettled issues of who must pay for cleanup have frightened lending institutions, the traditional sources of capital for factory rehabilitation and renovation for startup companies.⁵¹ This fear was inevitable, since lenders' liability for cleanup costs is unclear in the statutes and is still debated extensively in the courts.⁵²

45. See, e.g., *Subcommittee Threatens to Withhold Funding Without Financial Management Improvements*, 24 Env't. Rep. (BNA) 550 (July 30, 1993).

46. See National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA, 57 Fed. Reg. 18,344 (1992) (to be codified at 40 C.F.R. pt. 300). The EPA's rule sets forth a security interest exemption from liability for lenders whose indicia of ownership are held primarily to protect a security interest, provided that they do not participate in management of the facility. Although some courts have absolved lenders of liability because they did not have overall decision making powers over a facility, these courts have left much room under the rule for lenders to be liable. See, e.g., *Waterville Indus. v. Finance Auth. of Maine*, 984 F.2d 549 (1st Cir. 1993); *Kelley v. Tiscornia*, 810 F. Supp. 901 (W.D. Mich. 1993); see also Melamed, *supra* note 5, at 9.

47. An industrial site with a RCRA generator permit has a continuing obligation to notify federal officials of discovery of hazardous chemicals at sites covered by the permit. 42 U.S.C. §§ 6922(a)(6), 6924(u) (1988).

48. *Id.* §§ 9601-9675.

49. *Id.* §§ 6901-6992.

50. See, e.g., 42 U.S.C. § 6924(u) (1988); 40 C.F.R. § 264.101 (1992).

51. See Patricia R. Healy & John J. Healy, Jr., *Lenders' Perspectives on Environmental Issues*, 60 APPRAISAL J. 394 (1992).

52. *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 752 (1991); see also William R. Mitchell, *CERCLA: The Problem of Lender Liability*, 7 J. LAND USE & ENVTL. L. 101 (1991); Philip J. Schworer & Catherine M. White, *Environmental Problems and Their Effect on Lending Institutions*, 18 N. KY. L. REV. 175 (1991); Note, *Cleaning Up the Debris After Fleet Factors*:

C. *Lender Liability and Greenlining*

This nascent environmental awareness among those who controlled the funding for industrial expansion and relocation altered the historical pattern for inner-city business development.⁵³ Traditionally, an expanding urban manufacturing company could grow most easily by adding space within the same neighborhood, and would get a loan to finance the expansion. As the market price of inner-city industrial properties declined in the 1970s and 1980s, the savings generated by their re-use should have attracted entrepreneurs who needed access to low cost buildings, willing workers, and an established infrastructure.⁵⁴ However, bank lending officers and their superiors learned with regret that lenders could be held liable for environmental cleanup costs as owners of past industrial sites.⁵⁵ Past practices of back-door ditch disposal and side-yard rusty drum storage cast a liability shadow on the solid, still serviceable urban properties. Banks, as well as particular bankers, feared the failure of the new tenant, not only for the usual economic reasons, but also because of the risk of environmental challenges to the defaulted site's lender.⁵⁶ This shroud of uncertainty created by past environmental practices made the prospective site users virtually unable to obtain financing.

Certainly, one cannot say that all older urban manufacturing sites have environmental pollution problems or that the environmental issue alone retards bank credit for urban site salvaging. The slow recession in the latter half of the 1980s worsened the plight of many financial institutions, affecting investment decisions about real property development.⁵⁷ Failures of industrial manufacturers, relative to the performance of their foreign competitors, reflected an increasingly cost-driven global marketplace which pressed hard against American manufacturers' profit margins. Yet it is clear that uncertainty about the costs of past urban environmental harms contributed significantly to these failures by inhibiting bank investment in existing inner-city industrial areas.⁵⁸

Lender Liability and CERCLA's Security Interest Exemption, 104 HARV. L. REV. 1249 (1991).

53. Healy & Healy, *supra* note 51, at 396-97; *Turning Green-With Worry*, ECONOMIST, June 23, 1990, at 84 [hereinafter *Turning Green*]. This fear of environmental losses came at a time when the number of banks with "problem" status rose from 217 in 1980 to 1,575 in 1987 and remained at 1,069 by 1991, with more than one-quarter of the problem banks located in the heavily industrial Northeastern region. U.S. DEP'T OF COMMERCE, *supra* note 15, at 496, 498.

54. Ehrenhalt, *supra* note 14, at 6, 18.

55. *Turning Green*, *supra* note 53; Melamed, *supra* note 5, at 9.

56. *United States v. Fleet Factors Corp.*, 901 F.2d at 1550; *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986); see also *Superfund Lender Liability Explored During Senate Hearing*, PESTICIDE & TOXIC CHEMICAL NEWS, July 25, 1990, at 19.

57. Indices of bank stability dropped sharply in the late 1980s. See U.S. DEP'T OF COMMERCE, *supra* note 15, at 496, 498.

58. Melamed, *supra* note 5, at 9.

A recent study in New Jersey, one of the few examinations of these conditions,⁵⁹ confirms that a climate of fear and uncertainty among lenders may have deterred site rehabilitation.⁶⁰ In a banking survey, more than seventy percent of banks that made loans secured by real property insisted upon environmental site evaluations.⁶¹ Bankers became skittish and their small business clients became potentially vulnerable to lender reluctance because of environmental factors. For example, a machine shop wanted to move to a larger facility in order to compete for an aircraft manufacturing subcontract but found that banks were less likely to loan money for a new urban site where a plastics processor had been fabricating plastic bottles and might have improperly handled its waste chemicals.⁶²

This economic uncertainty stemmed from the legal system's uncertainty about how to deal with the residues from past environmental practices. Development of the sites and their potential to create jobs for local residents were hampered by doubt that past environmental effects could be overcome, in a timely and reasonably predictable way, so as to reassure lenders. This Article contends that this doubt is a direct result of ineffective federal remediation procedures. The confusion is especially severe because particular industrial properties, like factories with storage tanks, had been given no clear standards by environmental regulators.⁶³ The development of Superfund case law during the 1980s identified new risks and problems for the lender, especially joint and several liability.⁶⁴ Regulatory agency pronouncements about CERCLA were somewhat reassuring, but did not offer easy and predictable solutions.⁶⁵ Unfunded contingent liabilities for such environmental cleanups became a threat to a banker's individual career, as well as to a bank's stability.⁶⁶

As a result, lenders decided to exclude older industrial properties from their portfolio of expansion and relocation loans. Just as "redlining" selected out the racially transitional neighborhoods in the 1970s, "greenlining" has selected out those environmentally risky areas where lenders will no longer tread.⁶⁷

59. See Michael Greenberg et al., *TOADS Go to New Jersey: Implications for Land Use and Public Health in Mid-Sized and Large U.S. Cities*, 29 J. URB. STUD. 117 (1992).

60. Melamed, *supra* note 5, at 9.

61. Healy & Healy, *supra* note 51, at 396.

62. Melamed, *supra* note 5, at 9.

63. Brooks J. Bowen, *Liability for LUSTS: An Exercise in Confusion*, 83 AM. BANKERS ASS'N J. 28 (1991).

64. See *United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1988); MAYS, *supra* note 33, § 7.07.

65. National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA, 57 Fed. Reg. 18,344 (1992); EPA rule vacated and remanded, *Kelly v. EPA*, No. 92-1312, 1994 U.S. App. LEXIS 1715 (D.C. Cir. Feb. 4, 1994).

66. See, e.g., Melamed, *supra* note 5, at 9.

67. Greenlining is analogous to redlining, the racially discriminatory practice of denying loans to home purchasers in certain residential neighborhoods. For a discussion of redlining, see *Conference of Fed. Sav. & Loan Ass'ns v. Stein*, 604 F.2d 1256, 1258-59 (9th Cir. 1979).

Sociologists and economists can debate the wisdom of banks' collective decisions to greenline environmentally risky—and usually, minority—areas, but the debate is futile. Financial institutions will continue to communicate to real estate interests the message that this economic and environmental uncertainty makes it commercially infeasible to offer loans for new occupants of these inner-city sites.⁶⁸ Greenlined inner-city industrial sites and the communities they used to support are, as a result, unable to transform into vibrant manufacturing locations as they did during past changes of occupancy.

D. *The Response of Developers: Flight*

The would-be industrial employer desires an available site, near customers, upon which a facility can be rapidly constructed, staffed, and equipped. Urban sites can be ideal, but the slow and encumbered federal site remediation process offers a poor response to these needs of a competitive employer.

The expense and delay of an environmental site remediation deters beneficial use of the industrial sites formerly inhabited by prior generations of employers. The pragmatic developer fears that by the time an environmental agency can become satisfied that no further RCRA and CERCLA remediation duties exist for an industrial location, the manufacturer will no longer sustain interest in that manufacturing site.

There are also inherent disincentives to taking risks with potentially tainted sites: criminal action for violating the complex waste laws⁶⁹ and legal costs for hasty or incorrect action.⁷⁰ These potential drawbacks make the option of site cleanup a high risk activity for the entrepreneur. A legal assurance of non-liability has been impossible to obtain. And, as discussed in the previous section, these developers face a lack of available credit because federal environmental law places lenders in a precarious position.

Manufacturing employers, confronting these facts, have moved to the virgin farmland of rural and suburban communities.⁷¹ Lack of credit availability to rehabilitate the inner-city site has deterred the manufacturing employer from doing a local, short-distance relocation into a larger building while retaining its existing cohort of workers. Environmentally risk-averse financing officers have recommended flight onto virgin land in a distant suburb, resulting in job losses for urban communities. Photos on the lobby walls of the new plants show the once-busy, solid brick building of the old site with a neighborhood surrounding it. The old plants, visible from the elevated subways of Boston, Chicago, New York, and from the elevated highways of dozens of

68. See Melamed, *supra* note 5, at 9.

69. 42 U.S.C. §§ 6928(d)-(f) (1988).

70. See generally MAYS, *supra* note 33; STEINBERG & WEINER, *supra* note 31.

71. William Tucker, *Superfund Sparks Industrial Flight*, INSIGHT, Nov. 29, 1993, at 7.

other inner cities, are wraiths of inner-city industry that no longer resemble the nostalgic photographs.

Flight of capital and jobs was not a collective choice premised upon environmental racism, so much as it was a response to environmental uncertainty. Uncertain standards and norms of environmental protection, imposed on industrial site owners and lenders, encouraged flight to virgin properties outside the cities, thereby deepening the inner-city resident's isolation. But each departure widened social separation and placed the less affluent entry-level worker at a severe disadvantage. An employer's quest for financially viable, environmentally pristine sites usually meant a loss of inner-city employment,⁷² as well as a diminution of the rural ecosystem. Federal cleanup mechanisms have not adequately addressed the need for industrial job opportunities in the inner city. Virgin farmland will continue to be converted to industrial use, while the inner-city site's environmental problems sit idly, as do inner-city residents, awaiting a system that works for both environment and employment.

II. Indiana's New Remediation Program

The inner-city job displacement problem that mirrors the environmental racism problem has damaging consequences for poor, minority communities in the inner city. The federal cleanup command system, a litigation-centered process, imposes both cost and uncertainty that exacerbate the displacement problem. In light of this uncertainty and risk, there needs to be a means by which urban jobs can be preserved or created while we improve the environmental condition of urban areas. Responsiveness to markets, urban resident workers, and environmental needs should be deemed compatible. Though greenlining and developer uncertainty are just two of many barriers to inner-city residents' employment in higher wage positions, the means to remove this barrier are at hand.⁷³

Indiana recently established a program meeting these important criteria. The program features a voluntary, less bureaucratic mechanism for inner-city site remediation.⁷⁴ Indiana's voluntary cleanup program has great logical appeal and offers inner-city workers something they have not had for a long

72. Urban core areas have a decreased share of new plant activity and a decline in business activity in existing plants. See BLAIR, *supra* note 13. Cost is a significant element in job movement out of core areas. See Keith R. Ihlanfeldt & David L. Sjoquist, *The Role of Space in Determining the Occupations of Black and White Workers*, 21 REGIONAL SCI. & URB. ECON. 295 (1991); James Cook, *Exodus*, FORBES, Sept. 16, 1991, at 56.

73. Additional barriers include education and skill deficiencies that may be attributed to urban school inadequacies. See Howell & Wolff, *supra* note 12, at 486; see also NATIONAL RESEARCH COUNCIL, *supra* note 19, at 65. It is possible that enhanced tax bases may improve revenue streams for urban schools.

74. IND. CODE ANN. § 13-7-8.9 (Burns Supp. 1993).

time—hope. The Indiana program increases certainty and lowers cost. A voluntary agreement between the government and the developer introduces certainty into the siting system. This agreement ensures that a prospective cleanup will have a defined objective and a finite goal, while maintaining government supervision as well as public accountability. Lenders are reassured that the site passes government standards and can be used profitably. The economic stimulus of profitable land salvaging is harnessed, preserving urban employment. Smarter, faster use of environmental remediation agreements slows or reverses the exodus of high-value, high-wage jobs to the suburbs or other countries.

A. *Creation*

Indiana built its program on the experiences of a few other states⁷⁵ but carried its programs further with respect to post-cleanup exoneration, employing a governor's covenant not to sue. Formulating the specific terms of Indiana's voluntary plan to satisfy all of the relevant parties was a critical task. The process in Indiana began with preliminary meetings among representatives of environmental groups, business interests, and financial interests. These meetings revealed a common goal in the voluntary cleanup program.⁷⁶ The group then prepared a legislative package. Senator Simpson sponsored the legislation, which the Indiana legislature passed overwhelmingly in 1992.⁷⁷

Other states interested in instituting a voluntary remediation program should be aware that the strength of this process will have a determinative effect on the outcome.⁷⁸ Participants in Indiana found that the process of preliminary meetings worked well. "It's best to find the needs of each group up front. Absent that, we'd find ourselves doing battle after the fact."⁷⁹ All the participants in the discussions understood the cost issues. "In these days of much competition and demand for limited capital, we are all looking for other approaches that can provide more bang for the buck, and the voluntary program won support because it made actual cleanup of sites more likely to occur."⁸⁰ The interaction of the planning process resulted in positive coverage by the press and support from the environmental and industrial communities.

75. See, e.g., MICH. COMP. LAWS § 299.614 (Supp. 1993); OR. REV. STAT. § 465.285 (1991).

76. Telephone Interview with Greta Hawvermale, Indiana Department of Environmental Management (Sept. 14, 1993) [hereinafter Hawvermale].

77. 1992 Ind. Legis. Serv. P.L. 87-1992 (S.E.A. 392) (West).

78. Hawvermale, *supra* note 76.

79. *Id.*

80. *Id.*

According to state officials, lenders' willingness to fund the rehabilitation of property was a major impetus behind the Indiana program.⁸¹ Inner-city locations were a primary focus of early discussions about the law.⁸² The new law provided the stimulus of inspiring voluntary self-examination of property, replacing the former "out of sight, out of mind" approach.⁸³ Those involved in formulating this unique legislation, however, recognized the need for future improvements in the law. According to some business commentators, these improvements would have to include specific definitions of the level of cleanup that would be acceptable under the program.⁸⁴

B. *Fruition*

1. *The Covenant Not to Sue*

Indiana's program for the voluntary remediation of sites became effective in July 1993, and it squarely addresses the problem of certainty concerning a polluted site's environmental status.⁸⁵ No property owner is forced to participate. If the owner cooperates in a voluntary program, the state can supervise the cleanup of the site and then declare the property environmentally acceptable. The Governor of Indiana will then personally sign a covenant not to sue the entity for the disclosed environmental conditions that have been remediated.⁸⁶

This covenant is the linchpin of Indiana's remediation program. In our litigious society there are few assurances that a business deal will not be subject to a lawsuit. Indiana's system seeks certainty by offering such an assurance. The governor's signed covenant not to sue the property's developer will bar both state and private suits under Indiana's hazardous waste laws.⁸⁷ A state governor's covenant not to sue is a prize that is not awarded lightly.

Many readers will likely flag a potential problem: states cannot prevent federal authorities from bringing suit against owners of polluted sites. Although the state cannot stop federal agencies from acting, the holder of a state covenant

81. Alan Julian, *Businesses Can Come Clean . . . For Free*, EVANSVILLE COURIER, May 18, 1993, at C6.

82. *Businesses Concerned About State's New Environmental Program*, PRINCETON (Indiana) DAILY CLARION, June 9, 1993, at C2.

83. Laura Paul-Hatcher, *Program Invites Cleanups*, GARY POST-TRIBUNE, June 18, 1993, at C6.

84. *Businesses Concerned About State's New Environmental Program*, *supra* note 82, at C2. Ohio addressed this issue when it considered its own version of the Indiana program, requiring state officials to create "separate numerical standards based upon the intended use of properties after the completion of voluntary actions" so that the level of cleanup would be more closely defined earlier in the process of voluntary remediation negotiations. S.B. 221, 120th Gen. Assembly, Regular Sess. (1993).

85. IND. CODE ANN. § 13-7-8.9 (Burns Supp. 1993).

86. *Id.* § 13-7-8.9-18.

87. *Id.* The statute also protects the successful applicant against actions under state law by private parties seeking contribution for costs of the voluntary site cleanup.

has an implicit shield against the threat of federal cleanup action suits. The shield is based upon the principle of federal comity. The core of RCRA and CERCLA is an accommodation between federal and state agencies, under which they cooperate and integrate their enforcement resources. In a state with full authority to implement the RCRA program, state agency approval of a site cleanup minimizes or eliminates federal involvement.

Though the state covenant does not automatically prevent potential federal actions, cleanup of a site makes federal action unlikely.⁸⁸ A state covenant also makes federal action unlikely because a site is documented to be environmentally clean. Thus, already limited federal dollars are not needed for cleanup suits involving state-approved sites. It is realistic to assume that federal environmental officials will not target a site where a state supervised cleanup was completed, checked, reported upon, and had achieved the governor's covenant. With hundreds of sites on the pending list for possible action, no reason exists for a federal agency to sue in order to further clean up a site already inspected by public officials and deemed clean. Federal EPA Regional Offices customarily work with and respect the judgment of state environmental regulators. CERCLA would not be invoked to list the site on the National Priority List⁸⁹ since the remediation would be complete. Furthermore, RCRA remedies would not be applied since state-supervised corrective action would have been accomplished.⁹⁰

Indiana officials are pleased that federal environmental officials have given a cautious and informal favorable review to the state's voluntary program.⁹¹ Because the federal agencies have traditionally enjoyed considerable prosecutorial discretion to select enforcement targets,⁹² the best guarantee that the covenant will forestall litigation is the mutual desire of federal and state regulators to get sites back into normal use rapidly, and to use the limited enforcement resources against those whose recalcitrance warrants enforcement actions.

Under Indiana's program, no site that is subject to a pending federal or state enforcement action can belatedly insist on performing a voluntary site cleanup. Once the problem site is subjected to enforcement agency charges or orders, it may be too late to ask for voluntary cleanups.⁹³ The state may, if it chooses, declare ineligible any site that is already under a federal or state remediation or pre-remediation action, or that is required to be subject to

88. *Id.*

89. See 42 U.S.C. § 9605(a) (1988).

90. *Id.* §§ 6924(u), 6928(h).

91. Hawvermale, *supra* note 76. Their interest increased in light of several pending proposals to adopt a federal equivalent to the Indiana voluntary program. *Id.*; see also S. 773, 103d Cong., 1st Sess. (1993).

92. See *Chaney v. Heckler*, 470 U.S. 821 (1985) (holding that agency discretion to enforce is unreviewable when court lacks meaningful standard for judging agency discretion).

93. IND. CODE ANN. § 13-7-8.9-10 (Burns Supp. 1993); see also Hawvermale, *supra* note 76.

enforcement action.⁹⁴ The administrators of the voluntary program also will reject sites that pose an imminent and substantial threat to human health or the environment.⁹⁵ These are high-priority health risk situations that really warrant extensive government involvement. Public protection justifies a stronger response for these sites, and the state agency can refuse to accept belated private remedial efforts.

Other claims that fall outside the governor's covenant are common law actions for past exposures. Although Indiana's law cannot prevent such lawsuits, these suits for past conduct are not likely to be brought against a redeveloper who has remediated the site. No common law cause of action appears likely to achieve a faster or more complete remediation. Indiana's statutory preclusion of private actions under waste statutes,⁹⁶ and its delivery of improved property conditions, greatly reduce the propensity for plaintiffs to litigate over sites that have won the covenant from the governor. The result has been described by Indiana Commissioner of Environmental Management Kathy Prosser as "the ultimate win/win situation," allowing financial institutions, community residents, environmental organizations and site owners to each benefit from the agreements.⁹⁷

2. *Preliminary Mechanisms*

Voluntary environmental cleanup projects must be addressed seriously by developers, lending institutions, and the implementing government agencies. The remedial costs can be significant and the public, especially the local residents, will not tolerate a developer's claim of completed site cleanup that cannot be documented and approved by public agencies. Indiana encourages potential applicants to consider the program carefully with their consultants and counsel before applying.⁹⁸

Under the program, a prospective applicant or its consultant begins by gathering data about the site, its environmental condition, pollution releases, and hazardous exposures.⁹⁹ Frequently, a bank has already evaluated the environmental conditions of a foreclosed property.¹⁰⁰ Prudent firms will conduct an exhaustive study, thereby increasing the chances that their

94. IND. CODE ANN. § 13-7-8.9-10 (Burns Supp. 1993).

95. *Id.* § 13-7-8.9-10(a)(3).

96. *Id.* § 13-7-8.9-18(e).

97. Commissioner Kathy Prosser, Address at the Manufacturers Environmental Symposium (Mar. 11, 1993) [hereinafter Prosser].

98. Hawvermale, *supra* note 76.

99. IND. CODE ANN. § 13-7-8.9-7 (Burns Supp. 1993).

100. Healy & Healy, *supra* note 51, at 396.

applications will be accepted.¹⁰¹ Since future critics may have incentives to discover omissions from the coverage of the covenant, caution is warranted.¹⁰²

The applicant then files a form application and pays a \$1,000 fee to cover initial costs.¹⁰³ A staff member applies a checklist to ensure that the site is eligible for consideration.¹⁰⁴ The Indiana Department of Environmental Management then sends the applicant its initial eligibility determination. If the applicant is found ineligible, the portion of the fee not consumed by staff efforts is returned. This aspect of the application process—that the advocate of the cleanup reimburses the costs incurred by the state agency in reviewing the application—is essential for the health of this program.¹⁰⁵

Only when the project meets eligibility criteria does the application begin to receive closer attention. Eligible applicants are notified that they can submit a work plan.¹⁰⁶ The statute requires that the site work plan include details of the site's proposed remediation steps, schedules for the phases of remediation, quality assurance, and community relations information.¹⁰⁷ Although this multi-volume task is less formidable than some of the mandated RCRA tasks for corrective actions,¹⁰⁸ a sound presentation will be worth the effort to make the project well understood by state officials. The work plan is the heart of the program for both parties. It explains what will be done, by whom, and when cleanup will be completed. It shapes the issues that will be covered by a covenant not to sue.¹⁰⁹

The developer who wants to use the site has a strong incentive to put its best efforts into presenting the work plan. The state has an interest in letting the public know that the plans are sufficient to protect health and to restore a sound environmental condition to the site. Moreover, because the community has an interest in securing an environmentally safe neighbor that offers job opportunities for its residents, the press and community representatives will likely use the work plan to evaluate the adequacy of the state's supervision of the project.

The Voluntary Remediation Agreements are designed to avoid and resolve conflicts without an adversarial process. Creative use of dispute resolution tools is a feature of the Voluntary Remediation Agreement.¹¹⁰ Schedules for

101. Hawvermale, *supra* note 76.

102. The exclusion of causes of action under the covenant not to sue does not extend to causes of action that were not known to the state when the remedial program was reviewed and approved. IND. CODE ANN. § 13-7-8.9-18 (Burns Supp. 1993).

103. *Id.* § 13-7-8.9-9.

104. Hawvermale, *supra* note 76.

105. *Id.*

106. IND. CODE ANN. § 13-7-8.9-12 (Burns Supp. 1993).

107. *Id.*

108. See 42 U.S.C. § 6924(u) (1988).

109. IND. CODE ANN. § 13-7-8.9-18 (Burns Supp. 1993).

110. *Id.* § 13-7-8.9-13.

submissions, coordination of activities, estimated costs, and a timetable for state officials' actions are included in the Agreement.¹¹¹ Because the state is reimbursed for the steps it must take, the program can be expected to have a more cooperative and task-oriented approach than many other environmental remediation order proceedings.¹¹² Unexpended portions of the private fees can be refunded if the pre-agreement negotiations break down.

3. *Incentives*

Both regulator and developer have incentives to make the site cleanup successful. Regulators will not want to risk embarrassment and news media challenges by having their elected leader, the governor, sign a covenant that forestalls future enforcement actions against a company whose continued site problems should have been detected and halted. The private entity has an incentive to complete the negotiations because the data presented to the state could make the site vulnerable to mandatory cleanup orders in the future. If the negotiations fail, the site may be assigned to a state environmental compliance officer who would consider whether to initiate an enforcement action. Although the state wants to make this program a model of its successful flexibility in environmental cleanup, if the terms of the agreement are not kept by the developer, the state retains all its regulatory options under current law. The community's incentive is once again to have a safe and active employer.

Residents near a dormant industrial site may fear any revival of activity and potential pollution from the site.¹¹³ Prior to any binding decision, the Indiana Department of Environmental Management gives notice to neighboring residents about a proposed plan and accepts comments. The cleanup work plan contains sufficient detail for residents to determine the advantages and disadvantages to their community. If the state proposes to accept a particular site's remediation plan, strong community opinion—pro and con—can be voiced at a hearing following a 30-day public notice period.¹¹⁴

Hazardous waste cleanup projects are usually controversial. In a site redevelopment situation, the prospective developer's community relations function is primarily educational. The owner must describe the site cleanup to neighbors and explain why the remedial plan is faster and less costly than a future mandatory cleanup. Furthermore, the new owner bears the burden of explaining that the benefits under its plan might include attracting new business

111. *Id.*

112. *Id.*

113. The case law documents numerous instances where adverse effects were discovered only after the polluter's departure, leaving residents with little more than a long-shot toxic torts lawsuit. Although available, such suits are costly to develop and rarely successful. See *generally* TOXIC TORTS PRACTICE GUIDE (James T. O'Reilly ed., 1992).

114. IND. CODE ANN. § 13-7-8.9-15 (Burns Supp. 1993).

and new local tax revenue. An astute developer will also recruit support among the facility's former workers who may seek new employment at the site after its cleanup and rehabilitation.

4. Costs

Costs of the cleanup are not borne by taxpayers. An important aspect of the Indiana plan is that any costs to the state are reimbursed by those who hope to profit from the site, usually the industrial site owner or developer.¹¹⁵ A fee of \$1,000 is paid at the start of the process, but according to state officials, the fee has not been a deterrent to the early filings.¹¹⁶ Both large and small sites, from steel mills to gas stations, are eligible to apply, so the smaller town bank and its few parcels of former industrial or commercial sites can use the program with relatively small entry costs.¹¹⁷

While remediation as a process remains expensive, the governmental oversight costs charged by Indiana officials under that state's new program¹¹⁸ are likely to be a small fraction of the costs that a bank or developer would incur if it were to defend a judicial or civil administrative action for a mandated cleanup.¹¹⁹ The Indiana voluntary cleanup agreement is a one-to-one transaction between a state agency and the private developer, reducing the excessive transaction costs for which multi-party Superfund site cleanups have become famous.¹²⁰ The voluntary action also follows a model of simplicity, thus eliminating the multiple levels of approval that have inhibited progress on many large site environmental cleanup projects.¹²¹ To the extent that cost is important, as it invariably is for a manufacturing entrepreneur, the voluntary system is preferable to a mandatory and more bureaucratic system.

115. *Id.* §§ 13-7-8.9-13(a)(1)(B), 13-7-8.9-21(e)(1). These provisions provide for recoupment of every cost of the state officials who review the application and oversee the cleanup. *See also* Hawvermale, *supra* note 76.

116. Hawvermale, *supra* note 76.

117. Those larger sites with long-standing pollution problems are likely to have been already subjected to mandatory cleanup orders. *See* 42 U.S.C. § 6928 (1988).

118. IND. CODE ANN. § 13-7-8.9-21(d)(1) (Burns Supp. 1993).

119. The legal and administrative overhead costs of CERCLA are so high that economists studying the program doubt its effectiveness. *See, e.g.*, ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 77 (Michael S. Greve & Fred L. Smith eds., 1992).

120. The fact that legal fees are greater, by about ten percent, than cleanup costs has been a source of real alarm for companies affected by CERCLA. Marianne Lavelle, *Environment Vise: Law, Compliance*, NAT'L L.J., Aug. 30, 1993, at S8.

121. MAYS, *supra* note 33, § 5.19.

5. *Post-Approval Mechanisms*

Once the plan is approved, a state agency manager or technical contractor hired by the state will supervise the corrective action.¹²² All federal and state requirements for the actual cleanup must be satisfied and documented to the state's satisfaction. The state will employ the same cleanup standards for both voluntary and mandatory cleanup programs, so that public protection is unaffected.

At this stage, the voluntary program sometimes exceeds the anticipated costs. The community outreach can be particularly expensive. Nevertheless, total costs under a voluntary cleanup are still less than those of a mandated RCRA corrective action program. In addition, while the corrective action's might be slow, progress under the voluntary agreement will avoid the delays implicated in adversarial proceeding.¹²³

The end products of the cleanup will be a site ready for employment and two documents. A certificate of completion will be recorded with the deed to the property, so that future lenders or buyers have the benefit of the state's decision.¹²⁴ Second, the governor will sign a covenant not to sue for any liability that results from the disclosures that formed the basis of the agreement.¹²⁵ The governor's document binds the state and provides a valuable assurance to the property owner, who can then proceed with the development and bear no more than the normal commercial risks of business development activity at the site.¹²⁶

C. *Preliminary Impressions, Preliminary Results*

In the summer of 1993, state environmental officials unveiled the new voluntary program at public meetings held all over Indiana. The press was very supportive because of the plan's potential impact on the local economy.¹²⁷ State officials received more than two hundred inquiries and six site proposals in the three months following the unveiling.¹²⁸ Although state officials expected the first proposals to be simple remedial projects, three of the earliest

122. *Id.*

123. Delay has been endemic in the corrective action system for waste site remediation. *See* STEINBERG & WIENER, *supra* note 31, § 2.22.

124. IND. CODE ANN. § 13-7-8,9-17 (Burns Supp. 1993).

125. *Id.* § 13-7-8,9-18.

126. As previously discussed, the state's covenant will preclude actions under state law, and serve as an implicit shield against suits by federal environmental officials for site cleanup. *See supra* text accompanying notes 85-97.

127. Hawvermale, *supra* note 76.

128. *Id.*

projects involved groundwater contaminant cleanup, one of the most challenging environmental remedies.¹²⁹

Because an Indiana site's voluntary remediation results in reopening or redevelopment of a site, financial institutions will be more willing to provide capital for projects on the rehabilitated site.¹³⁰ In addition, community involvement in the process may reduce local hostility toward the new operator of the site, and improve relations between the old site operator and government cleanup agencies. Even without these psychological benefits, the news media can at least report a break in the gridlock of environmental cleanups in that area. That in itself is newsworthy.

The real test of the program, however, will come when an urban factory is selected for the program and the voluntary remediation agreement clears the hurdles of a public hearing and agency acceptance, and results in true cleanup. The reopened factory should possess a competitive advantage over its rivals because of the benefits of location, a skilled work force, and an in-place infrastructure for transportation and services. So long as comparable cleanup standards are applied, developers can also rely on the support of local environmental organizations.

D. *Inherent Precautions*

Despite the obvious positive results of the program, we must keep in mind that these results are tentative. Indiana's model of voluntary remediation is still too new for us to identify its potential shortcomings; however, they appear to be few. First, a regulatory definition of how much remediation makes a site clean is necessary.¹³¹ Second, the health effects of any new use for the site should be considered during remedial planning.¹³² Third, a thorough check of an applicant must be conducted in order to avoid embarrassing mistakes when choosing a developer. Moreover, additional staff will need to be hired in order to process applications before the cash flow from applicant-paid fees is large enough to make the program self-sustaining; a short-term resource drain will occur. Finally, the education and outreach employees of the environmental agency will have to work harder to dispel myths about the program and to facilitate meetings to introduce the particular work plan.

129. *Id.*

130. Results from a 1990 survey of lenders suggest this covenant would greatly facilitate the lending decision. Healy & Healy, *supra* note 51, at 397-98.

131. An excellent recap of the "how clean is clean" debate is found in PERCIVAL ET AL., *supra* note 8, at 373-77 (explaining 42 U.S.C. § 9621(a) and 40 C.F.R. § 300.430).

132. The federal experience suggests this approach. *See* 42 U.S.C. § 9621(a) (1988). Ultimately, as in any voluntary program, the credibility of the cleanup will be tested by whether the community representatives accept the proposed standard of cleanup as sufficient to protect the health of the site's neighbors.

Community relations specialists will be an important part of the team in any state that adopts such a program. As public officials with a public constituency, they will need to keep local resident groups aware of the process and encourage comments on the work plan. Because manufacturing jobs are a major goal of this program, state labor officials will also have to work hard to assure the public that the necessary job training programs and school vocational educational courses will be tailored to the needs of the new entrepreneurs.

This ambitious Indiana program might not generate the expected changes, or the recessionary economic climate might force developers to increase the delay between cleanup and job commencement. The state officials responsible are aware that their efforts will be overseen and measured by their results.¹³³ If the Indiana program fails, and many dormant sites are not remediated, or worse, sites are remediated but not reused, the program might be viewed as a failed experiment in the use of environmental cooperation rather than confrontation. Should that occur, the net costs to society will be no different than present costs: taxes not earned by local government, career and family benefits not received by potential site workers, and the continuing financial and environmental costs of maintaining and later remediating the site.¹³⁴

E. *Necessary Refinements*

Indiana's system promotes voluntary remediation agreements and avoids the mandate-bound swamps of existing federal programs, and it should serve as a model worth serious consideration by the other forty-nine states. States considering the Indiana program, however, should also consider several potential modifications to the Indiana model. State covenants are not capable of awarding total freedom from allegations of harm. Since common law tort remedies are still available despite the pre-emption of state statutory actions,¹³⁵ statutory protection of the new site developer may need to be expanded. The Indiana statute cuts off the citizen suit option under state law,¹³⁶ but additional clarity would be helpful. Citizens and citizen groups could be convinced that preventing tort suits is in their interest, as the state voluntary agreement plan will hold the promise of a quick cleanup. Nuisance and other common law actions for site challenges can still be brought against those responsible for past releases, but these have less likelihood of success because of the corrective measures that have been taken at the site.

133. Hawvermale, *supra* note 76.

134. The voluntary program's reimbursement feature protects the state from incurring costs for its part of the operation. *See supra* text accompanying notes 115-21. Overall, the private sector developer and the lending institution have many incentives to avoid that failure and to make the Indiana system succeed.

135. IND. CODE ANN. § 13-7-8.9-18 (Burns Supp. 1993).

136. *Id.* § 13-7-8.9-17.

The federal government should also tinker with its system so as to encourage Indiana-like programs. Federal legislation might be adopted to exclude suits against certain voluntarily remediated sites under federal RCRA and CERCLA.¹³⁷ Though the EPA's cooperation with states is imperfect and needs improvement,¹³⁸ during the early days of the Indiana program, regional EPA officials were cautiously supportive.¹³⁹ Post-covenant citizen suits under federal law could be precluded by statutory changes at the federal level. Even without changes, a covenant may satisfy the statutory conditions under which such private citizen suits are precluded.¹⁴⁰

III. Refinements, Future Improvements, and External Necessities

While Indiana's program is an excellent response to the needs of site owners who are capable and willing to recapture property values for specific parcels, more is needed to stimulate job creation and overcome the obstacles to urban employment. There must first be initiatives that change the traditional way that regulators deal with those they regulate, as well as their colleagues. Moreover, rust belt states with inner-city industrial areas larger than Indiana's can encourage voluntary site salvagers to develop manufacturing employment opportunities through the adoption of Indiana-like programs. For instance, states will need to go much further by providing subsidies for redevelopment efforts. Some states may need to be a lender of last resort when cleaned sites cannot attract sufficient capital. These states can use Indiana's model, coupled with state redevelopment seed money grants for evaluation of the site, to give developers an extra incentive to start working on applications for voluntary remediation agreements.

A. *Potential Regulatory Initiatives*

1. *Bank Regulators*

The bank regulatory regime¹⁴¹ has been virtually untouched by the public clamor for environmental remediation. Making a loan for environmentally vulnerable properties is risky.¹⁴² In the face of tighter loan portfolio exam-

137. See *supra* text accompanying notes 69-70.

138. U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, *THE NATION'S HAZARDOUS WASTE PROGRAM AT A CROSSROADS* (1990).

139. Hawvermale, *supra* note 76.

140. 42 U.S.C. § 6972 (1988).

141. The loan practices of federally regulated institutions are subject to audits by federal officials. See 12 C.F.R. §§ 3, 227 (1993).

142. Healy & Healy, *supra* note 51, at 396-97.

ination, such a loan might place a bank officer's career at risk.¹⁴³ No incentive exists for lenders to risk federal overseers' wrath and alter their informal, greenlining policy described earlier in this Article.¹⁴⁴

State and federal financial regulators need reassurance about environmental costs, as well as other encouragement, in order for them to loosen those lending restrictions which prevent recycling of industrial sites and loans for infill construction around existing plant sites. Bank regulators are particularly sensitive to loans that become non-producing because of environmental bad news.¹⁴⁵ Assuaging this fear must be a new role for environmental agencies. Moreover, bank regulators must be made to see that their fears will have a significant long-term impact on levels of investment in the inner city.

Thus, as a first step, bank regulators need to be informed of the impact of environmental regulation on their own practices. Environmental regulators should meet with their bank regulator counterparts and outline new legislative initiatives, like the Indiana program, that can facilitate site salvage while reducing the specter of lender liability. Environmental agencies and nongovernmental organizations must also emphasize that freeing up capital for such projects has not only obvious environmental benefits, but can provide social and economic stability for the affected inner-city communities.

2. *Environmental Regulators*

Public sector employees within environmental agencies are experienced at saying "no" and have no incentive to do otherwise. The RCRA and CERCLA systems¹⁴⁶ impose on regulators many disincentives to acquiring the enlightened attitude that voluntary remediation will need to succeed. Congress writes laws with such majesty and inscrutability that the recipient, a state or regional EPA employee of perhaps three years' experience, is vested with tremendous discretionary power. In hearing after hearing, congressional and state legislative committees have "exposed," "denounced," "revealed," and otherwise degraded the errors by regulators.¹⁴⁷ Thus, environmental agency employees can be forgiven for keeping their heads down, going through the motions, and safely saying "no." A permit writer, site coordinator, or case manager does not advance her career by taking up the cause of creating jobs.

Environmental regulators, who are often underpaid and underappreciated, may need incentives to make such a private site-salvage system work. First,

143. See *Turning Green*, *supra* note 53, at 84 (describing lender fear of liability for pollution).

144. See *supra* text accompanying notes 51-53.

145. Melamed, *supra* note 5, at 9.

146. 42 U.S.C. §§ 6901-6992, 9601-9675 (1988).

147. Political oversight of chemical engineering decisions on the detailed listings of hazardous chemicals is an occupational hazard for the expert administrative agencies. See, e.g., *Metam Sodium Should be Listed as Hazardous*, Rep. Boxer Says, PESTICIDE & TOXIC CHEMICAL NEWS, Aug. 7, 1991, at 6.

a program champion within the agency, to encourage and shepherd a qualified applicant through the program, should be appointed. Second, state regulatory agencies should give incentives to their employees who participate constructively in industrial site salvage. Managers who score their employees on the number of penalty cases filed or the difficulty of pre-licensing questions asked should reward employees to produce creative outcomes at inner-city sites. There is a need for cooperative, voluntary, and results-oriented programs like the Indiana voluntary remediation program. Positive feelings about a program that creates instead of destroys can be very helpful to morale within a state agency.

The incentives to be offered to individual employees are not new money or instant promotions for the employee who approves an applicant's work plan. The incentives should include praise for creativity, support for not being obstinately rigid, applause for getting a negotiated cleanup at modest cost, and promotion without having to display scalps of wounded regulated companies. Recognition works wonders at the individual level, without much expense. A covenant-signing ceremony in the governor's office, at which the state's team is praised for work well done, may be all that it takes. A little press attention would help; the novelty of the press praising the bureaucracy for caring enough to help create private sector manufacturing jobs would be truly gratifying.

B. *Legislative Action*

More substantive measures, however, are needed. The federal government and the states need to do more than merely encourage their employees to promote redevelopment of environmentally hazardous sites. States that want to build upon the Indiana law, as well as the federal government, should debate the voluntary remediation program and the tiers of potential fiscal assistance at the same time. Coordinated funding, loan guarantees, and development assistance already exist for most states to launch new industrial sites. The state enabling legislation for this program should link the remediation program, the covenant not to sue, and the development and tax incentive packages to maximize the inducement for developers to create new inner-city employment opportunities.

Legislators must actively create interest in these sites among prospective developers in several ways. First, seed money grants for serious applicants should be made available. Second, a tax incentive, comparable to that formerly available for historic redevelopment, might be made available for properties that achieve cleanup and comply with site covenants. Third, costs of site remediation by a company that has been accepted into the program, when work is done in a good faith effort to obtain a covenant, might receive special short-

term tax credits from state government. Finally, future federal amortization benefits for the writeoff of these expenses could be an incentive.

Developers, though, will still require capital from commercial lending institutions for their projects. Consequently, any package of reform must also include incentives for financial institutions to invest in these projects.¹⁴⁸ An express statutory incentive in federal banking reform legislation, perhaps in the form of special corporate tax recognition of the gains received on environmental loan portfolios, would help. Another express incentive for providing loans to the covenant-covered properties could involve direct state subsidies for banks that make targeted loans. One indirect, but no less effective, incentive could be to have state treasurers limit the depository institutions that receive the state's business to those that actively finance industrial site salvage projects.

C. *Neighborhood Group Action*

Action to promote private sector jobs can build from the same experiences. Inner-city America could benefit from more loans, more accessible jobs, and a profitable manufacturing base. These nontraditional policy objectives for social advocacy organizations could be achieved with the same amount of lobbying effort by the same activist lobbying groups. The skill of these organizations in obtaining legislative support could very well be used in support of voluntary industrial site remediation.¹⁴⁹ Their skepticism toward developers' intentions could be assuaged by the public hearings on the detailed site work plan,¹⁵⁰ and by the political sensitivity officials to avoid embarrassing the governor with a covenant that did not reflect the actual conditions of the site.

Not all sites will attract immediate attention, of course. Some sites will lack a champion, a persistent, environmentally astute developer with the vision of profitable remediation and the ability to start-up or lease to new manufacturing ventures. For sites in need of a push, neighborhood development corporations could become the developer, using state development department field offices as their shepherds. A state development department that becomes the interface with state environmental officials could do much of the preliminary work to attract site developers, who in turn will carry through

148. It is ironic that environmental action groups have ignored the connection between lending practices and domestic environmental matters. Several U.S. environmental organizations actively lobby the World Bank, a multinational economic institution, to place environmental quality concerns into each World Bank consideration of a developing nation loan. This pressure has received enhanced attention from the World Bank. *See, e.g.,* JAMES A. LEE, *THE ENVIRONMENT, PUBLIC HEALTH, AND HUMAN ECOLOGY: CONSIDERATIONS FOR ECONOMIC DEVELOPMENT* (1985).

149. The groups actively participated in shaping the Indiana legislation as part of a state-sponsored discussion group. Hawvermale, *supra* note 76.

150. IND. CODE ANN. 13-7-8.9-15 (Burns Supp. 1993).

projects to the stage at which an employer can move in and create jobs. Tax incentives and consortium-building incentives can be implemented as well.

D. *Current Federal Developments*

1. *Executive*

The Clinton Administration is currently considering adverse environmental effects on poor communities. A small effort to encourage the remediation of industrial sites may come from a draft Executive Order on environmental justice.¹⁵¹ Under this Executive Order, agencies that make decisions under any enabling statute must take into account the adverse environmental effects of their decisions upon "minority and low income communities."¹⁵² These adverse impacts must be explained and fully considered as the agency moves forward.

One goal of the Executive Order is to reduce traditional environmental racism: the siting of new waste emitting facilities in locations that disproportionately harm the health of minority and low income persons. Another goal, however, is precisely that which has been addressed in this Article: removing barriers that keep out of poor communities those job opportunities that an environmentally sound, clean site can bring. The order requires federal agencies to analyze the impact of their credit, development funding, and lending decisions that affect redevelopment of inner-city employment.¹⁵³ Such programmatic changes in the way that agencies apply their efforts to the inner city will complement the voluntary remediation agreements that achieve a related goal within the same neighborhood.

2. *Legislative*

Several bills proposed in the 103rd Congress would ameliorate environmental racism in siting and cleanup decisions through the use of impact statements and agency planning.¹⁵⁴ The concept of avoiding adverse health impact through legislative direction of siting and, through, by the mitigation provisions in the Executive Order, is laudable.

151. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994); *Federal Agencies Would Have to Address Environmental Equity Under Draft Order*, 24 Env't. Rep. (BNA) 620 (Aug. 13, 1993).

152. *Id.*

153. *Id.*

154. An overview of these bills is given in Ronald Begley & Elisabeth Kirschner, *The Demand for Environmental Justice*, CHEMICAL WK., Sept. 15, 1993, at 27.

Voluntary site remediation programs have also been the subject of a recently proposed bill in Congress.¹⁵⁵ The states would be provided with federal funds to oversee voluntary programs similar to the one in Indiana. Under these bills, the federal government would become a lender of low-interest loans, subsidizing voluntary cleanup and redevelopment programs of local entities.

In this era of budgetary austerity, however, Congress is less likely to enact these bills than the reporting and planning requirements of environmental equity legislation. Funds for domestic discretionary programs such as urban renewal are not as readily available as they were in the past. Even if the loan programs were adopted, the available funding is likely to be rapidly depleted, as sites now untouched and unacceptable to private lenders are salvaged with federal funds. The federal interest in urban industrial job creation supports the argument that both sites and employment patterns of the past could be restored to productive use.

Conclusion

A drive through inner-city neighborhoods, so close to downtown and so close to urban university campuses, may spur a wishful fantasy that large financial institutions would willingly volunteer to salvage the abandoned factories along the route and recycle them into job-creating entrepreneurial havens. But wishing will not make this happen. Without a remediation program, these sites will remain only potential job opportunities and potential sources of vital local tax revenue.

Environmental cleanup uncertainties have choked off inner-city industrial redevelopment by taking away the essential financing without which investors and entrepreneurs cannot hope to succeed. Certificates of environmental cleanup and covenants not to sue have the potential to break this urban gridlock. Regulators do not lightly give such precious documents. The Indiana program, built on experiences in other states, has the potential to revitalize inner-city properties, while still fulfilling the public's demand for a cleaner environment.

There are many reasons for an apathetic status quo. By attempting change, banks risk losing money, environmentalists risk looking like allies of their frequent opponents in the real estate development field, and regulators appear to be softer than necessary when dealing with the past mistakes of manufacturers. Paradigm shifts are not easy.

Perhaps the new Indiana paradigm of voluntary cleanup will bring cities like Gary, Terre Haute, and Indianapolis enough certifiably clean startup

155. S. 773, 102d Cong., 1st Sess. (1993); see also *Legislation to Clean Up Low Priority Sites, Stimulate Economy, Praised by Diverse Groups*, 24 *Env't. Rep.* (BNA) 345 (June 25, 1993).

manufacturing sites that loans will again flow to entrepreneurs. If that occurs, and jobs follow, the streetcorner despair of the inner city might be replaced by streetcorner industrial workshops and infill construction of small factories, employing inner-city residents and encouraging their participation in the private sector. That, in the words of Commissioner Prosser of Indiana, would be “the ultimate win/win situation.”¹⁵⁶

156. Prosser, *supra* note 97.

