

BROWNFIELDS POLICIES FOR SUSTAINABLE CITIES

JOEL B. EISEN^{*}

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^{*} Associate Professor of Law and Director, Robert R. Merhige, Jr. Center of Environmental Law, University of Richmond School of Law. I thank my colleagues Michael Allan Wolf for helping me refine my thinking about brownfields policies and W. Wade Berryhill for his invaluable assistance and comments on earlier drafts of this article. Ben Boer, John Dernbach and J.B. Ruhl deserve special mention for expanding my perspective on “sustainable development.” I would also like to gratefully acknowledge the Law School for its generous financial support of my research, and thank student research assistants Sarah Rich and Robert Doherty. Last, but certainly not least, I would like to thank my editor for life, Tamar Schwartz Eisen. The ideas and opinions expressed herein are my own, and I am responsible for any errors or omissions. This article may be accessed via the World-Wide Web at <<http://www.law.duke.edu/journals/9DELPEisen>>.

I. INTRODUCTION

This special issue of the *Duke Environmental Law and Policy Forum* on sustainable development and environmental justice could hardly have better timing, as commentators are calling increasingly upon the United States to make sustainable development the basis for a new generation of environmental law.¹ This spring's National Town Meeting led by the President's Commission on Sustainable Development ("PCSD")² may well mark the beginning of a major American campaign to tap sustainable development's exceptional potential.

In this article, I explore the nexus between sustainable development and another "revolution" in environmental law: the proliferation of state and federal policies designed to combat the "brownfields" phenomenon (the existence of abandoned or underutilized urban sites that sit idle in part due to concerns over environmental contamination).³ Brownfields sites remain idle in part be-

1. See Ben Boer, *The Rise of Environmental Law in Asia*, 33 U. RICH. L. REV. (forthcoming 1999) (manuscript at 48, on file with author) [hereinafter Boer, *The Rise*] (sustainable development can lead to the next "great revolution of environmental law"); John C. Dernbach, *Sustainable Development as a Framework for National Governance* (forthcoming 1999) [hereinafter Dernbach, *Sustainable Development*]; J.B. Ruhl, *Thinking of Environmental Law as a Complex Adaptive System: How to Clean Up the Environment by Making a Mess of Environmental Law*, 34 HOUS. L. REV. 933, 992-95 (1997) [hereinafter Ruhl, *Thinking of Environmental Law*] (proposing sustainable development as a policy principle for a revolutionized environmental law, and stating, "[s]ustainable development, . . . must be a deliberate practice in today's world—a guiding principle for all social decisions.").

Other nations are creating environmental policies that incorporate sustainable development principles. See, e.g., Ben Boer, *Institutionalising Ecologically Sustainable Development: The Roles of National, State, and Local Governments in Translating Grand Strategy Into Action*, 31 WILLAMETTE L. REV. 307, 342-57 (1995) [hereinafter Boer, *Institutionalising Ecologically Sustainable Development*] (discussing strategies for implementing sustainable development in Australia).

2. The PCSD has been the locus of considerable activity on implementing sustainable development in the U.S. See Jonathan Lash, *Toward a Sustainable Future*, 12 NAT. RESOURCES & ENV'T 83, 83-84 (1997) (PCSD's co-chair describes its establishment and activities).

3. See Joel B. Eisen, *"Brownfields of Dreams"?: Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883, 890 n.20 [hereinafter Eisen, *Brownfields of Dreams*]. See also William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 1, 4 n.1 (1997) [hereinafter Buzbee, *Institutional Determinism*] (setting forth a similar definition). Brownfields literature is expanding exponentially. In one noteworthy recent piece, Michael Allan Wolf discusses the "curious and potentially dangerous intersection" between brownfields laws and policies and federal enterprise zone policies. Michael Allan Wolf, *Dangerous Crossing: State Brownfields Recycling and Federal Enterprise Zoning*, 68 FORDHAM ENVTL. L.J. (forthcoming 1999) (manuscript at 1, on file with author).

For a use of the term "revolution" with respect to brownfields, see Scott H. Reisch, *Reaping "Green" Harvests From "Brownfields": Avoiding Lender Liability At Contaminated Sites:*

cause of the threat of liability for brownfields developers under CERCLA or its state analogues.⁴ The consequences of this threat include the migration of jobs and tax revenues to suburban “greenfields” locations.⁵ Thus, states and the federal government are developing and implementing policies designed to promote the redevelopment of brownfields sites, such as voluntary cleanup programs, prospective purchaser agreements, innovative funding arrangements, and so forth.

Both foci of this special issue—sustainable development and environmental justice—are directly relevant to any discussion of brownfields. The link between brownfields and sustainability seems obvious. The Clinton Administration has recently incorporated major features of Vice President Al Gore’s “livability agenda.” In its recent high-profile announcement proposing increased devolution of environmental funds to state and local governments, this set of initiatives aimed at promoting “smart growth” authorizes \$9.5 billion for “Better America Bonds” designed for reclaiming brownfields (among other purposes).⁶ Reusing unproductive urban land instead of spoiling “greenfields” land comports with the Brundtland Report’s definition of sustainable development. In the words of the PCSD, which adopts the Brundtland formulation,⁷ “Brownfields reuse and redevelopment promotes urban revitalization and reduces the development pressures on greenfields.”⁸ *How brownfields laws and policies*

Part I, COLO. LAW., Jan. 26, 1997, at 3 (terming “the brownfields revolution” a “reaction to the harshness of [CERCLA]”).

4. See, e.g., Eisen, *Brownfields of Dreams*, *supra* note 3, at 899 n.71.

5. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 890-98; see also Buzbee, *Institutional Determinism*, *supra* note 3, at 1.

6. See E. J. Dionne Jr., “*Smart Growth*” *Politics*, WASH. POST, Jan. 15, 1999, at A29; Judith Havemann, *Gore Proposal Aims to Tame Urban Sprawl; \$10 Billion in Bonds Would Help to Finance Communities Open Spaces*, WASH. POST, Jan. 15, 1999, at A2 (The environmental initiative “is expected to be a major theme of [Gore’s] campaign for the Democratic presidential nomination”).

7. See Lash, *supra* note 2, at 84. See also William A. McDonough & Michael Allan Wolf, *Allen Chair Symposium 1996: The Future of Environmental and Land-Use Regulation: Interview: A Dialogue on Design*, 30 U. RICH. L. REV. 1071, 1079-80 (1996) (describing the PCSD’s process of defining sustainability).

8. See *President’s Council on Sustainable Development, Sustainable America: A New Consensus for Prosperity, Opportunity, and a Healthy Environment for the Future* (last modified Dec. 14, 1998) <http://www.whitehouse.gov/PCSD/publications/TF_Reports/amer-top.html> [hereinafter SUSTAINABLE AMERICA]; see also TIMOTHY BEATLEY & KRISTY MANNING, *THE ECOLOGY OF PLACE: PLANNING FOR ENVIRONMENT, ECONOMY, AND COMMUNITY* 53-54 (1997) (noting that “[i]n the sustainable community, greater attention is directed toward using those lands already committed to the urban fabric more efficiently,” and describing brownfields initiatives, but terming them “controversial and [to] be considered with caution.”).

evolved also seems important. Commentators agree that creating new domestic environmental laws and retooling existing ones is necessary for sustainability.⁹ They also find that relying on state and local actors is important.¹⁰ Surely there can be no better implementation of both principles than a set of laws that transforms CERCLA and its state analogues and creates innovative partnerships between the public and private sectors.

Governmental and private sector pronouncements of a connection between brownfields and sustainability are not hard to find. The Environmental Protection Agency seemingly cannot describe any of its brownfields policies without pairing the phrases “sustainable” and “reuse of brownfields.”¹¹ The multi-agency “Brownfields National Partnership Action Agenda” contains a list of initiatives of federal agencies and departments designed to promote “sustainable reuse”

9. In those nations where development of environmental law lags behind the U.S., Professors Ben Boer and Nicholas Robinson see implementing laws as an important first step for sustainable development. See generally Boer, *The Rise*, *supra* note 1 (discussing sustainability and the evolution of environmental laws in China, Vietnam and the Asia Pacific region); Nicholas A. Robinson, *Comparative Environmental Law: Evaluating How Legal Systems Address “Sustainable Development,”* 27 ENVTL. POL’Y & L. 338 (1997).

On the need to revisit existing environmental laws to achieve sustainability in the U.S., see, for example, J.B. Ruhl, *The Seven Degrees of Relevance: Why Should Real-World Environmental Attorneys Care Now About Sustainable Development Policy?*, 8 DUKE ENVTL. L. & POL’Y F. 273, 288 n.46 (1998) [hereinafter Ruhl, *The Seven Degrees of Relevance*].

10. See McDonough & Wolf, *supra* note 7, at 1079-80 (comment of McDonough, an architect noted for his views on sustainability, that “to paraphrase Tip O’Neal, ‘all sustainability is local.’”). See also Donald A. Brown, *Thinking Globally and Acting Locally: The Emergence of Global Environmental Problems and the Critical Need to Develop Sustainable Development Programs at State and Local Levels in the United States*, 5 DICK. J. ENVTL. L. & POL’Y 175, 203-204 (1996) (“[T]he participation and cooperation of local authorities will be a determining factor in fulfilling [Agenda 21’s] objectives.”); Ruhl, *The Seven Degrees of Relevance*, *supra* note 9, at 289 n.48 (citing the Brown article).

11. See, e.g., U.S. Environmental Protection Agency, *Brownfields Mission* (last modified Feb. 25, 1998) <<http://www.epa.gov/swerosps/bf/mission.htm>> (“EPA’s Brownfields Initiative will empower States, communities, and other stakeholders in economic development to work together in a timely manner to prevent, assess, safely cleanup and sustainably reuse brownfields”); U.S. Environmental Protection Agency, *New Revolving Loan Fund Pilots* (last modified July 31, 1998) <<http://www.epa.gov/reg3hwmd/brownfld/newloan.htm>> (“EPA’s Brownfields Cleanup Revolving Loan Fund (BCRLF) pilot program is designed to enable eligible states, cities, towns, counties, U.S. territories, and tribes to capitalize revolving loan funds to safely clean up and sustainably reuse brownfields.”); U.S. Environmental Protection Agency, *State, Local, and Tribal Projects* (last modified Mar. 16, 1999) <<http://www.epa.gov/epapages/epahome/partners.htm>> (stating *inter alia* that “this program encourages economic development and cooperation to prevent, assess, safely cleanup, and sustainably reuse brownfields.”). See also Ruhl, *The Seven Degrees of Relevance*, *supra* note 9, at 286 n.36 (citing brownfields funding as an example of sustainable development policy). For an example of a state program attempting to link the two, see Robb H. Layman and Charles J. Northrup, *Survey of Illinois Law: Environment*, 22 S. ILL. U. L.J. 879, 909 (1998).

of brownfields.¹² The PCSD's initial report (*Sustainable America*) lists a recommendation and three "action items" to spur brownfields redevelopment.¹³ The influential American Society for Testing and Materials ("ASTM") has developed a draft "Standard Guide to the Process of Sustainable Brownfields Redevelopment."¹⁴ As for environmental justice, Professor Richard Lazarus terms the EPA's brownfields policies "plainly the [EPA's] most visible effort" to respond to activists' concerns.¹⁵

But which brownfields programs will really lead to sustainable cities? Perhaps all, perhaps none; no one can say for sure. Any argument that all brownfields redevelopment is inherently sustainable is unjustified. As I demonstrate in Part II, for example, a brownfields program that deemphasizes the role of public participation is not "sustainable development". Moreover, without a hard law of sustainable development, we must be skeptical about any program's claim to sustainability. In this article, I develop a framework for thinking of brownfields policies as a cornerstone of our nascent sustainable development law. My analysis begins in Part I with a short summary of brownfields law and policy, and a description of our current understanding of "sustainable development." There is no hard and fast definition of the term, but it is increasingly more clear that a body of sustainable development "law" will take shape as the product of a host of decisions made now and in the near future.

12. See *Brownfields National Partnership Action Agenda* (last modified May 13, 1997) <<http://www.epa.gov/swerosps/bf/html-doc/97aabref.htm#sustainable>>.

13. Policy Recommendation 9 of Chapter Four of *Sustainable America* suggests the following: "Revitalize brownfields—which are contaminated, abandoned, or underused land—by making them more attractive for redevelopment by providing regulatory flexibility, removing process barriers, and assessing greenfield development to reflect necessary infrastructure costs." *President's Council on Sustainable Development, Sustainable America: A New Consensus for Prosperity, Opportunity, and a Healthy Environment for the Future, Strengthening Communities* (last modified Dec. 14, 1998) <http://www.whitehouse.gov/PCSD/publications/TF_Reports/amer-chap4.html>

14. See John M. Scagnelli, *Draft Guide Proposed on Sustainable Brownfields*, NAT'L L.J., Mar. 16, 1998, at B8 (discussing draft ASTM Standard E-50.03); *Standards Setter Weighs in on Approach to Brownfields*, THE BROWNFIELDS LETTER, Nov. 1998, at 5.

In the brownfields arena, the ASTM established credibility with its 1994 standard E-1527-94 (*Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*), which was widely used to govern the initial phase of risk-based cleanups at brownfields sites. See *id.*; see also Eisen, *Brownfields of Dreams*, *supra* note 3, at 931 n.208 (discussing the widespread adoption of the ASTM Phase I standard).

15. See Richard J. Lazarus, *Fairness in Environmental Law*, 27 ENVTL. L. 705, 716 (1997). Both the ASTM and the National Environmental Justice Advisory Council ("NEJAC") have made recommendations designed to respond to environmental justice concerns. See *infra* Part II.

The optimal way to ensure that brownfields programs mesh with this body of law—whatever it turns out to be—is to incorporate basic norms of sustainable development about which there is widespread agreement. Those agreed-upon norms are the following: brownfields programs should simultaneously consider social, economic and environmental issues; they should substantively ensure a sustainable urban future; and last but certainly not least, they should strive for and achieve “equity.” In Part II, I elaborate on these core concepts and suggest how they should be interpreted in the brownfields arena. I explain my preference for creating an expanded federal role in overseeing states’ brownfields programs, adopting state schemes to ensure the long-run protectiveness of brownfields cleanups, and facilitating broad-based public participation in the brownfields reuse and remediation process. My central premise is that proposals which I and others have made to achieve these ends can be understood (though not explicitly designed as such) as attempts to comport with core principles of sustainable development. As such, I find an independent justification for reforming brownfields programs to incorporate these principles.

II. SUSTAINABLE DEVELOPMENT AND BROWNFIELDS POLICIES

Brownfields sites include abandoned industrial facilities and vacant properties, and are concentrated in older industrial cities of the Northeast and Midwest.¹⁶ A plethora of state and federal initiatives aim to spur brownfields redevelopment; one could easily say that the enthusiasm for recycling brownfields has attained the status of a “movement.”¹⁷ Though the federal government has been active, the primary initiators of change have been the states.¹⁸

16. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 890-95. See also Robert H. Abrams, *Comment: Superfund and the Evolution of Brownfields*, 21 WM. & MARY ENVTL. L. & POL’Y REV. 265, 277-80 (1997) (discussing the origins of the brownfields problem and types of brownfields sites); Buzbee, *Institutional Determinism*, *supra* note 3, at 1.

17. See Madeline June Kass et al., *Brownfields: Where The Market Makes Green*, 13 NAT. RESOURCES & ENV’T 345, 345 (1998) (“The brownfields movement is replete with a diverse assemblage of private, governmental, and community stakeholders and an equally diverse set of challenges and opportunities.”).

18. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 915 n.153. See also Buzbee, *Institutional Determinism*, *supra* note 3, at 27-46 (describing “first mover” dynamics to explain how states took the lead in brownfields law and policy).

A. *State Voluntary Cleanup Programs and Federal Initiatives*

Since 1988, almost forty states have developed voluntary cleanup programs (“VCPs”) through statutory and regulatory reforms intended to speed up the cleanup of brownfields sites.¹⁹ No two states have identical programs and most differ widely in terms of the cleanup process and its requirements,²⁰ but the VCP process, broadly speaking, is similar in most states.²¹ State programs are voluntary and usually commence with a developer’s²² expression of intent to investigate and remediate a brownfields site in the state’s program. Following an investigation to determine the level of contamination, the developer remediates the site to meet “generic”²³ or site-specific cleanup standards, or concludes the process if remediation is not necessary.²⁴ At the end of the process, the developer receives liability protection from the state²⁵ but none from the federal government, ex-

19. See Wolf, *supra* note 3, at 13.

20. See *Standards Setter Weighs in on Approach to Brownfields*, *supra* note 14, at 5 (citing consultant Michael Taylor’s comment that “state laws vary considerably”). Since I last counted the formal voluntary cleanup programs, see Eisen, *Brownfields of Dreams*, *supra* note 3, at app., several states have either amended or established programs. See, e.g., 2 BROWNFIELDS LAW AND PRACTICE (Michael Gerrard ed., 2 vols. 1998); BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY (Todd S. Davis & Kevin D. Margolis, eds. 1997) [hereinafter ABA BROWNFIELDS GUIDE] and STRUCTURING REAL ESTATE WORKOUTS: ALTERNATIVES TO FORECLOSURE (1998 supp.) for descriptions of state programs.

21. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 920 (“Despite widespread variations, there are some common features in each of the states’ programs.”). See also Buzbee, *Institutional Determinism*, *supra* note 3, at 55 n.217.

22. I use the term “developer” to refer generally to any participant in a state VCP, including the current owner of the brownfields site. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 894 n.32.

23. A “generic” cleanup standard is established on a statewide basis and allows a developer to remediate the site to a predetermined level, based on the type of contamination found at the site and the contaminated environmental medium. See, e.g., Eisen, *Brownfields of Dreams*, *supra* note 3, at 939-42. State statutes often require notice-and-comment rulemaking for decisions to establish these technical standards. See, e.g., OHIO REV. CODE ANN. § 3746.04(B)(1) (Anderson 1995) (directing the preparation of rules to establish cleanup standards).

24. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 920.

25. See *id.*, *supra* note 3, at 950-65. Liability protections range from “no action letters” (letters promising that the state will refrain from enforcement actions) to certificates of satisfactory completion of the process, releases and covenants not to sue. See, e.g., N.J. ADMIN. CODE tit. 7, § 26C-3.3, app. A § V(7) (1996) (developer may receive a “no further action statement”); ME. REV. STAT. ANN. tit. 38, § 343-E(6) (West 1996) (developer may receive a release from state liability); OHIO REV. CODE ANN. § 3746.12(A) (Anderson 1996) (covenant not to sue); CAL. HEALTH & SAFETY CODE § 25398.15(a) (West 1996) (certificate of completion for participants in the Expedited Remedial Action Program).

cept in those states with whom the EPA has agreed to refrain from pursuing enforcement actions.²⁶ This brief summary of the brownfields remediation process does not account for the many variations in individual states, some of which I discuss in Part II.

On the federal level, there is considerable activity to promote brownfields redevelopment and reuse. The EPA's "Brownfields Economic Redevelopment Initiative" features a wide array of initiatives.²⁷ These include (among others): (1) guidance designed to limit risks for property buyers through the use of prospective purchaser agreements;²⁸ (2) pilot projects pursuing strategies to "test redevelopment models; (3) special efforts directed toward removing regulatory barriers without sacrificing protectiveness; and (4) facilitation of coordinated site assessment, environmental cleanup and redevelopment efforts at the federal, state, and local levels."²⁹ Another initiative is "Brownfields Showcase Communities" which enables certain cities to serve as laboratories to "promote environmental protection, economic redevelopment and community revitalization through the assessment, cleanup and sustainable reuse of brownfields."³⁰ Congress has created a targeted tax deduction for brownfields redevelopment³¹ and reduced the risk of liability under CERCLA for lenders that become involved with brownfields sites.³² It has also unsuccess-

26. At present, only 11 states have signed agreements with EPA Regional Offices that would preclude such enforcement actions. See *infra* note 108 and accompanying text (discussing these "Superfund Memoranda of Agreement"); see also *Superfund Memoranda of Agreement* (unpublished manuscript, on file with author).

27. For discussions of federal brownfields initiatives, see Eisen, *Brownfields of Dreams*, *supra* note 3, at 979-84 and Wolf, *supra* note 3, at 15-16. See also United States Environmental Protection Agency, *Office of Solid Waste and Emergency Response, Brownfields Homepage* (last modified March 12, 1998) <<http://www.epa.gov/swerosps/bf/index.html>>.

28. See Guidance on Settlements with Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34,792 (1995).

29. See United States Environmental Protection Agency, *Office of Solid Waste and Emergency Response, Brownfields Pilots* (last modified March 12, 1999) <<http://www.epa.gov/swerosps/bf/pilot.htm>>; Eisen *Brownfields of Dreams*, *supra* note 3 at 980-82; Wolf, *supra* note 3 at 15 (discussing the pilot projects which are funded at up to \$200,000).

30. *Id.* See also Wolf, *supra* note 3, at 16.

31. The Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 941(a), 111 Stat. 882, established a tax deduction for certain "qualified environmental remediation expenditures" including some expenses that would otherwise have to be amortized over several years. See generally Andrea Wortzel, *Greening The Inner Cities: Can Federal Tax Incentives Solve The Brownfields Problem?*, 29 URB. LAW. 309 (1997).

32. The Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996, (to be codified as amended in scattered sections of 42 U.S.C.) creates an exemption from CERCLA liability for a lender that takes any of certain enumerated actions to protect its security interest in a contaminated site. See also STRUCTURING REAL ESTATE WORKOUTS:

fully attempted to craft a brownfields bill as part of a comprehensive overhaul of CERCLA or as a stand-alone bill.³³

B. *The Link to Sustainability*

Brownfields programs have achieved the '90s equivalent of legal permanence: prominent display on state and federal regulators' Web sites.³⁴ In this section, I consider how these programs should be measured against an understanding of "sustainable development" that has changed in roughly the same time span as brownfields programs have arisen.

The widely cited Brundtland Report defines sustainable development as meeting the needs of the present without adversely affecting future generations.³⁵ Obviously, this definition does not tell us

ALTERNATIVES TO FORECLOSURE (Supp. 1998) for a comprehensive discussion of the Act and cases arising after the Act's enactment. See generally Joseph M. Macchione, Comment, *Lender Liability Under CERCLA in Light of the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996: Does the Act Spell Lender Relief or Continued Heartburn?*, 16 TEMP. ENVTL. L. & TECH. J. 81 (1997).

33. One commentator counts "twenty-five to thirty separate brownfields bills [introduced] in the past two sessions [of Congress]." Tara Burns Koch, Comment, *Betting on Brownfields: Does Florida's Brownfields Redevelopment Act Transform Liability Into Opportunity?*, 28 STETSON L. REV. 171, 189 (1998). Recent CERCLA reauthorization bills have included proposals designed to address brownfields redevelopment. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 984-88 (criticizing brownfields proposals in H.R. 2500, introduced in the 104th Congress); Susan R. Poulter, *Cleanup and Restoration: Who Should Pay?*, 18 J. LAND RESOURCES & ENVTL. L. 77, 94 (1998) (a "liability limitation [for brownfields developers] has been floated at least since 1994 in a Clinton administration Superfund reauthorization bill . . ."). These bills failed to be adopted for reasons described in an excellent article in this journal. See Thomas A. Rhoads & Jason F. Shogren, *Current Issues in Superfund Amendment and Reauthorization: How is the Clinton Administration Handling Hazardous Waste?*, 8 DUKE ENVTL. L. & POL'Y F. 245 (1998). See also James E. Satterfield, *A Funny Thing Happened On The Way To The Revolution: The Environmental Record of the 104th Congress*, 27 ENVTL. L. REP. (ENVTL. L. INST.) 10,019, 10,028-30 (Jan. 1997) (describing the failure of CERCLA reauthorization proposals in the 104th Congress).

34. For a typical state brownfields homepage, see *Maryland's Voluntary Cleanup and Brownfields Incentive Program* (visited Dec. 26, 1998) <<http://www.mde.state.md.us/environment/was/brownfields.html>>.

35. See WORLD COMM'N ON ENV'T AND DEV., *OUR COMMON FUTURE* 87 (1987) [hereinafter *OUR COMMON FUTURE*]. The Brundtland Report defines sustainable development as follows:

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: (1) The concept of "needs," in particular the essential needs of the world's poor, to which overriding priority should be given; and (2) The idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.

Id. at 87. See also Dernbach, *Sustainable Development*, *supra* note 1, at 17-18 (manuscript); A. Dan Tarlock, *Symposium: Sustainable Development in Latin American Rainforests and the Role of Law: Article: Exclusive Sovereignty Versus Sustainable Development of a Shared Resource:*

much about how to translate its normative statement into law. But in the past decade, sustainable development has evolved from this concept into a detailed framework for requiring simultaneous consideration of economic, social and environmental factors in decision-making. Even though the argument over the concept and its definition still rages, a set of important core principles can be derived from the efforts to flesh out sustainable development's specifics.

1. "Sustainable Development": More Than A Mere Concept . . .

The most comprehensive effort to refine the concept of sustainable development was the 1992 United Nations Conference on Environment and Development (UNCED), which yielded two important documents: the Rio Declaration on Environment and Development,³⁶ which contains twenty-seven principles designed to advance sustainable development, and the more comprehensive "Agenda 21"³⁷ which contains a forty chapter framework of goals and objectives for sustainable development. Included in the framework of Agenda 21 are specific actions nations should take to achieve a core goal of simultaneous consideration of social, economic, and environmental factors in decision-making.³⁸ Additionally, the proposed IUCN Draft International Covenant on Environment and Development,³⁹ if adopted as

The Dilemma of Latin American Rainforest Management, 32 TEX. INT'L L.J. 37, 52 (1997) (stating that this is the "current working definition of sustainable development").

36. See *United Nations Conference on Environment and Development*, Rio Declaration on Environment and Development, U.N. DOC. A/CONF.151/5/REV. 1 (1992), reprinted in 31 I.L.M. 874 (1992).

37. UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, AGENDA 21, U.N. DOC. A/CONF. 1512/PC/100/ADD.1 (1993) [hereinafter AGENDA 21].

38. See Robert F. Blomquist, *Virtual Borders? Some Legal-Geo-Philosophical Musings on Three Globally Significant Fragile Ecosystems Under United Nations' Agenda 21*, 45 CLEV. ST. L. REV. 23, 24 (1997) ("Agenda 21 was intended by its drafters to be 'a comprehensive action plan on sustainable development."); Boer, *Institutionalising Ecologically Sustainable Development*, supra note 1, at 313; Dernbach, *Sustainable Development*, supra note 1, at 18-19, 27 (manuscript) (arguing that Agenda 21's principles are the basis for an "ambitious intergenerational social, economic, and environmental compact"); Ruhl, *The Seven Degrees of Relevance*, supra note 9, at 291 n.54 ("The greatest contribution the United Nations has made to the process of translating the international rhetoric into domestic policy is its Agenda 21 document . . ."); Tarlock, supra note 35, at 52 n.86 and sources cited therein. Professor John Dernbach has thoroughly analyzed Agenda 21 and recommended U.S. actions to implement it. See John C. Dernbach et al., *U.S. Adherence to Its Agenda 21 Commitments: A Five-Year Review*, 27 ENVTL. L. REP. (Envtl. L. Inst.) 10,504 (Oct. 1997) [hereinafter Dernbach, *Agenda 21*].

39. WORLD CONSERVATION UNION, DRAFT INTERNATIONAL COVENANT ON ENV'T AND DEV'T (1995) [hereinafter IUCN DRAFT COVENANT]; for the text of the covenant, see *New Treaty In The Making* (visited Sept. 13, 1998) <<http://www.sovereignty.net/p/sd/covenant.htm>>.

Article 1 of the draft covenant states its explicit objective is to promote sustainable development, claiming that it is necessary "to establish integrated obligations to achieve the environmental conservation and sustainable development necessary for humans to enjoy a healthy

an international treaty, would elevate sustainable development from its current soft law status to an international requirement.⁴⁰

After all this activity, sustainable development still has not been universally accepted as a blueprint for action. Critics call it a “manipulative and confusing slogan,”⁴¹ a “myth,”⁴² a utopian reformer’s fantasy,⁴³ a “meaningless post-hoc label used to justify the continuation of the status quo,”⁴⁴ or even a buzzword concealing a threat to roll back existing environmental laws.⁴⁵ Some see it as oxymoronic, arguing that if one accepts “development,” or the now out of fashion “sustainable growth,” one submits to ever-expanding consumption of scarce resources.⁴⁶ Thus, developing nations may see sustainable development as an imposition on them that allows developed nations’ wasteful policies to continue.⁴⁷ This relies on an outmoded notion of sustainability as a concept pertaining only to the

and productive life within nature.” IUCN DRAFT COVENANT, at art. 1. See also Nicholas A. Robinson, *IUCN’s Proposed Covenant on Environment & Development*, 13 PACE ENVTL. L. REV. 133 (1995) (describing the origin of the draft covenant).

40. The draft covenant, which has yet to be submitted for ratification by the U.N. General Assembly, would “convert the ‘soft-law’ recommendations of *Agenda 21* into legally binding ‘hard’ international law.” *New Treaty In The Making*, *supra* note 39, at 1.

41. See Joel B. Eisen, *Toward a Sustainable Urbanism: Lessons from Federal Regulation of Urban Stormwater Runoff*, 48 WASH. U. J. URB. & CONTEMP. L. 1, 3 n.9 (1995) [hereinafter Eisen, *Toward a Sustainable Urbanism*] (quoting William Goldfarb, *Watershed Management: Slogan or Solution*, 21 B.C. ENVTL. AFF. L. REV. 483, 483 (1994)).

42. See, e.g., Ronnie D. Lipschutz, *Wasn’t the Future Wonderful? Resources, Environment, and the Emerging Myth of Global Sustainable Development*, 2 COLO. J. INT’L. ENVTL. L. & POL’Y 35, 36 (1991).

43. See, e.g., Wolf, *supra* note 3, at 48 (terming the goal of sustainable development “lofty (perhaps utopian)”).

44. See Tarlock, *supra* note 35, at 52 (noting that implementation of sustainable development can either advance its goals or amount to nothing).

45. See Ruhl, *The Seven Degrees of Relevance*, *supra* note 9, at 280 n.13 and sources cited therein.

46. Earlier definitions of sustainable development, including the Brundtland formulation, tended to attract this criticism. See, e.g., Boer, *Institutionalising Ecologically Sustainable Development*, *supra* note 1, at 317 (criticizing the Brundtland definition “because it invites narrow interpretations such as ‘sustainable economic development,’ without explicitly requiring concern for or focus on the continued viability of ecosystems”); Susan L. Smith, *Ecologically Sustainable Development: Integrating Economics, Ecology, and Law*, 31 WILLAMETTE L. REV. 261, 277 (1995) (reaching a similar conclusion).

47. See, e.g., PHILIP SHABECOFF, *A FIERCE GREEN FIRE* 200 (1993) (“Some leaders of developing countries still fear that an international environmental compact would be a new strategy by the industrialized world to keep them in economic subjugation and to erode their hard-won sovereignty.”); Tarlock, *supra* note 35, at 52-53. Developing nations lodged the same criticism against the draft “Earth Charter” prepared as a follow-up to the Rio Declaration and Agenda 21. See H. Edwin Anderson, III, *The Benchmark Draft of the Earth Charter: International Environmental Law at the Grassroots*, 11 TUL. ENVTL. L. J. 109, 112 (1997).

maintenance of resource stocks⁴⁸ which ignores both the normative force of simultaneous consideration of social, economic, and environmental factors and the importance of the equity component.⁴⁹ The criticism would have more bite if we had termed it “sustainable *environment*” or “sustainable *economy*,” as we “would have opened up a rehash of the old preservationism versus resourcism debate that paralyzed environmental law for decades.”⁵⁰

Critics also deplore the vague definition of “sustainable development.” No one would doubt there is considerable confusion on this point.⁵¹ One scholar has discovered at least *seventy* different definitions, none of which offer much in the way of precision.⁵² It does not help to say that Agenda 21’s forty chapters “define” sustainable development; resolving the ambiguities in its hundreds of pages of specific proposals is “a bit like being told to follow through on the Bible.”⁵³ However, the definitional imprecision may not matter in the end. Professor J. B. Ruhl argues forcefully that we should treat “sustainable development” as we do “democracy”⁵⁴ by refusing to

48. See, e.g., Eisen, *Toward a Sustainable Urbanism*, *supra* note 41, at 3-4. Of course, problems related to resource depletion, overconsumption of resources, and pollution are integral to discussions of sustainable development. See, e.g., Boer, *Institutionalising Ecologically Sustainable Development*, *supra* note 1, at 316-17 (quoting JEREMY CAREW-REID ET AL, STRATEGIES FOR NATIONAL SUSTAINABLE DEVELOPMENT: A HANDBOOK FOR THEIR PLANNING AND IMPLEMENTATION 17 (1994)).

49. See Ruhl, *The Seven Degrees of Relevance*, *supra* note 9, at 279-80.

50. *Id.* at 279.

51. See, e.g., Boer, *Institutionalising Ecologically Sustainable Development*, *supra* note 1, at 317-318 (discussing the definitions advanced in *The Future of Environmental Regulation: Our Common Future*, *Caring For The Earth*, and by the Australian government); Gerald Torres, *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J.L. & COM. 597, 618 (1996) (“Sustainable development is a complicated area in which there is still considerable dispute over the basic terms of the debate, including the definition of the concept of sustainability itself.”).

52. See generally Smith, *supra* note 46 (setting forth and discussing various definitions, and proposing a preferred definition). For an American example, see UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Region 10, Sustainable Communities Mission, Definitions for Sustainability* (visited July 8, 1998) <www.epa.gov/r10earth/offices/oi/definit.htm> (setting forth ten definitions, including those of the Brundtland Report and the PCSD).

53. Daniel C. Esty, *Stepping Up to the Global Environmental Challenge*, 8 FORDHAM ENVTL. L.J. 103, 111 (1996). See also Sir Geoffrey Palmer, *The Earth Summit: What Went Wrong at Rio?*, 70 WASH. U. L.Q. 1005, 1017 (1992) (stating that in 1992 “the legal and policy ambiguities raised by the issue of sustainable development were not adequately discussed, much less resolved”).

54. Professor Ruhl argues, “[W]e do not demand detailed ‘definitions’ of democracy and justice in order to agree that they are useful concepts that should be expressed as international, national, provincial, and local goals for addressing those social problems.” Ruhl, *Thinking of Environmental Law*, *supra* note 1, at 995.

allow definitional vagueness to prevent translating a broadly understood concept into hard law.⁵⁵

2. . . . But Still Less Than Hard Law

Despite the lingering criticism, sustainable development is an idea with staying power.⁵⁶ In a previous issue of this journal, Professor Ruhl sizes up the current status of sustainable development law in the U.S. He argues that any policy idea travels through seven “degrees of relevance” on its way toward becoming hard law; at the seventh degree, policy is enshrined in law.⁵⁷ In this taxonomy of transformation, sustainable development has at best reached the stage where “important governmental authorities establish the norm as an explicit policy goal.”⁵⁸

A recent book claims a comprehensive approach to sustainable development would operate on three dimensions, featuring varying *scales*, with an “equal concern” for sustainability at local, regional, and national levels;⁵⁹ multiple *sectoral* foci, with policies that address different sectors of the economy such as transportation and housing; and actions designed to take effect in different *spheres of influence* (e.g., public and private sectors).⁶⁰ There is no such comprehensive approach to sustainable development in the U.S.. Professor John Dernbach concludes that Agenda 21 “has had little discernible effect on U.S. law and policy.”⁶¹ The PCSD’s reports, for example, have had little concrete impact on lawmakers.⁶²

55. See *id.* See also Ruhl, *The Seven Degrees of Relevance*, *supra* note 9, at 276 (“[T]he relevance of an idea in the real-world sense can become entrenched, and the development of its law inevitable, well before there are clear technical measurements and a coherent body of law to apply.”).

56. See Eisen, *Toward a Sustainable Urbanism*, *supra* note 41, at 4. See also Dernbach, *Sustainable Development*, *supra* note 1, at 29; Nicholas A. Robinson, *Attaining Systems for Sustainability through Environmental Law*, 12 NAT. RESOURCES & ENV’T 86, 86 (1997) [hereinafter Robinson, *Attaining Systems For Sustainability*] (noting that despite the “‘hype’”, there is substantial evidence of measurable progress toward the objective of ‘sustainable development’”); Tarlock, *supra* note 35, at 53 (noting that “despite its flaws, sustainable development has displayed ‘legs’”).

57. See generally Ruhl, *The Seven Degrees of Relevance*, *supra* note 9.

58. *Id.* at 284-87.

59. BEATLEY & MANNING, *supra* note 8, at 23.

60. See *id.*

61. Dernbach, *Agenda 21*, *supra* note 38, at 10507-8.

62. While the PCSD’s reports have not yielded hard law, and few of their recommendations have been followed, they have had some impact at the federal level. See, e.g., Ruhl, *The Seven Degrees of Relevance*, *supra* note 9, at 286-87 (detailing PCSD’s *Sustainable America’s* impact on a variety of federal agencies).

No state or federal agency has anything resembling a sustainability strategy.⁶³ The general impression one gets of the atmosphere surrounding sustainable development efforts is of the energy and uncertainty of . . . the early years of personal computing.⁶⁴ State and federal regulators use “sustainable” and “sustainable development” as if everyone understands what they mean, which is hardly the case. Surf any agency’s Web site⁶⁵ and observe that “sustainability” encompasses a wide-ranging assortment of new and existing programs: a notice of a \$5,000 grant to a local urban forestry unit, a request for comments on a complicated energy deregulation package, or, perhaps, a description of a state’s brownfields program. The Web site of the EPA’s Office of Sustainable Ecosystems and Communities (OSEC)⁶⁶ lists programs and initiatives under the heading “Integrated Approaches,” including case studies of community sustainability programs, projects on climate change issues, and efforts to develop sustainable community indicators, to name just a few.⁶⁷ While that is a commendable list of projects, there is no consistent effort to link sustainability and the EPA’s regulatory programs.⁶⁸

On occasion, a governmental program appears to be a more conscious effort to incorporate the substance of sustainable develop-

63. Some states have begun to develop statewide sustainability strategies. A Virginia General Assembly resolution of 1993 paved the way for the development of a *Blueprint for Sustainable Development of Virginia*, which “provides a state-wide vision for protecting the Commonwealth’s resources.” *Sustainable Development Explored in Virginia* (last modified Oct. 29, 1998) <<http://www.eli.org/archive/planstat.htm>>.

64. I am old enough to remember when the Atari personal computer was touted as the way of the future. See Chris LaMorte, *Game Over*, DENVER WESTWORD, Oct. 10, 1996 (mourning the passing of “the last remaining exclusive Atari dealer in Colorado,” and stating “[h]is beloved [computer] has joined the ranks of the eight-track and the Betamax”).

65. The Internet is an important forum for discussions about sustainability. Besides official regulatory pronouncements, there is considerable activity online by individuals, non-profit groups and others sharing information and describing projects. For example, “E-Design Online” (an electronic online magazine) maintains *Surfing Your Way to Sustainability*, its list of 13 “super sites” for sustainability information. *Surfing Your Way to Sustainability* (last modified Mar. 9, 1998) <<http://www.fcn.state.fl.us/fdi/e-design/online/9712/reviews/susweb1.htm>>.

A comprehensive source of online information is the U.S. Department of Energy’s *Center of Excellence for Sustainable Development*. *Center of Excellence for Sustainable Development* (last modified May 9, 1997) <<http://www.sustainable.doe.gov/>>.

66. The OSEC “mission is to foster the implementation of integrated, geographical approaches to environmental protection with an emphasis on ecological integrity, economic sustainability, and quality of life – otherwise known as Community-Based Environmental Protection (CBEP).” *Sustainable Ecosystems and Communities* (last modified May 9, 1997) <<http://www.epa.gov/oppe/osec/osecbak/>>.

67. See *id.*

68. For example, there is no discussion of brownfields law or policy; one needs to consult the EPA’s brownfields page. See *id.*

ment.⁶⁹ Some notable examples are the EPA's grant programs aiming to spur creation of innovative frameworks to guide urban development. The EPA's "Sustainable Development Challenge Grant" program funds projects "to promote long-term investment in sustainable development" in such areas as developing "regional governance processes for better management of urban development."⁷⁰ The brownfields analogues are the EPA-funded pilot projects,⁷¹ some of which seem to have been designed with sustainability objectives in mind. For example, the Portland, Oregon project has set out to involve a broad spectrum of community members in brownfields decisions.⁷²

It is important, however, to differentiate between a governmental program that advances *components* of the sustainable development agenda and one that reflects "a conscious effort to craft an integrated sustainable development approach."⁷³ The pilot projects, unfortunately, fall into the former category. Though many have yielded promising ways to conduct site assessments and remediation planning, the \$200,000 funding ceiling ensures each project rarely does more than create a mechanism for governing remediation activities at a demonstration site.⁷⁴ These and other EPA sustainability

69. Professor Ruhl notes this trend with respect to certain recently enacted federal environmental laws. See Ruhl, *The Seven Degrees of Relevance*, *supra* note 9, at 288 n.46.

70. The SDCG program objectives include "partnering among community members, business and governmental entities to work cooperatively to develop flexible, locally-oriented approaches that link place-based environmental management and quality of life activities with sustainable development and revitalization." *Financial and Technical Resources: 1998 SDCG Federal Register Notice - Solicitation of Proposals* (last modified Nov. 9, 1998) <<http://yosemite.epa.gov/osec/osechome.nsf/all/g-sdcg.html>>. Brownfields-related projects are eligible for grants. See *id.* See also Matthew W. Ward et al., *National Incentives for Smart Growth Communities*, 13 NAT. RESOURCES & ENV'T 325, 327 (1998).

71. See also Ward et al., *supra* note 70, at 327 (discussing the Sustainable Development Challenge Grant program and the Brownfields Action Agenda pilot projects).

72. See *Portland Brownfields Initiative: Community Strategies to Recycle Land* (last modified Nov. 23, 1998) <<http://www.brownfield.org/>>. See also Wolf, *supra* note 3 at 23 n.92 (noting that recent solicitations for brownfields pilot proposals call *inter alia* for "applications that demonstrate the integration or linking of . . . pilots with . . . local sustainable development . . . programs").

73. Ruhl, *The Seven Degrees of Relevance*, *supra* note 9, at 288 n.46.

74. See, e.g., *Region 3 Brownsfields Pilots: Richmond, VA* (last modified July 27, 1998) <<http://www.epa.gov/swerosps/bf/html-doc/richmond.htm>> (describing the efforts of Richmond, Virginia, one of the first three pilot project cities, to "[d]evelop[] a site specific property recycling strategy in partnership with current/future site owners and users, government regulatory agencies, and the City's development staff").

programs are simply not comprehensive enough to amount to an organized effort to implement Agenda 21.⁷⁵

3. A Prudent, “Adaptive” Approach To Attaining Sustainability

Without sustainable development “law,” there are no adverse consequences to employing nominal means for bringing sustainability about, or even maintaining a certain fuzziness about the definition of sustainability. At the “fifth degree of relevance,” the idea of sustainability may have pervaded the collective governmental consciousness, but it is still just that—an idea. Consequently, there is still a wide range of perspectives on sustainability programs. To sympathetic commentators, they are embryonic formulations of strategies and goals. To critics, they are slapdash uses of the “sustainable” label or even cynical *post hoc* justifications of existing programs.

Where do we go from here? Professor Ruhl’s article provides milestones for assessing our progress toward the “hard law” stage, but he observes quite correctly that “it is far too early to predict the outcome in terms of the finished product”⁷⁶ We are in a phase of “extreme nonlinearity” where “we must choose between alternate policy paths, none of which appear indisputably superior . . . and all of which involve high levels of uncertainty.”⁷⁷ By contrast, brownfields has made it to the seventh degree of relevance, with its cornucopia of state and federal law. We thus find ourselves at a crossroads of sorts. Do we need to agree about sustainable development’s particulars before we can proceed to remediate brownfields? That is, should an idea at a higher degree of relevance pause and let a less defined idea “catch up”?

Professor Ruhl believes that we do not need to define sustainable development in consummate detail before proceeding. That view is, however, not universally accepted. Professor Dernbach, for example, claims sustainable development is so revolutionary that it literally requires us to reformulate our entire structure of governance.⁷⁸ In his view, if we seek to build a sustainable society, we need to reinvent our current laws, beginning with a commitment by governmental entities at all levels to develop omnibus sustainability

75. See Dernbach, *Agenda 21*, *supra* note 38, at 10,508. Besides their limited scope, few EPA sustainability initiatives “have the force of law.” See Koch, *supra* note 33, at 190.

76. See Ruhl, *The Seven Degrees of Relevance*, *supra* note 9, at 293.

77. See *id.*

78. See generally Dernbach, *Sustainable Development*, *supra* note 1.

strategies.⁷⁹ This “total makeover” approach would address the lack of consistency among laws so frequently decried by commentators.⁸⁰ Those who want to “reinvent” regulation⁸¹ could agree to start over with sustainable development as an organizing principle.

However, this policy path is an unlikely one. Historically, environmental law has shown a propensity to evolve in a nonlinear fashion that defies our attempts to impose order. Likewise, sustainable development law surely will develop through a similar process of evolution and experimentation. As one commentator observes, the “framework of a new paradigm of [sustainable development] law cannot be built in the proverbial ‘day.’”⁸² Two of our foremost environmental law scholars have called upon other disciplines to explain this dynamic: Professor William Rodgers invokes the metaphors of evolutionary biology,⁸³ and Professor Ruhl relies on the “complex adaptive systems” theory to illustrate environmental law’s intricacies.⁸⁴ Professor Ruhl endorses an experimental approach to sustain-

79. See *id.* at 33.

80. See, e.g., CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 93-94 (1990) (observing that “failures of coordination” lead to “inconsistency and incoherence in the law”).

81. See *id.* at 84-102 (for a comprehensive discussion of the many criticisms of governmental regulation (including environmental statutes and regulations)); see also Ruhl, *Thinking of Environmental Law*, *supra* note 1, at 980-91 (discussing “a plan for the revolution” of environmental law that focuses on a number of perceived and actual shortcomings of the present regulatory structure).

For discussions of regulatory reform initiatives, see generally Bradford C. Mank, *The Environmental Protection Agency’s Project XL and Other Regulatory Reform Initiatives: The Need for Legislative Authorization*, 25 *ECOLOGY L.Q.* 1 (1998); Robert V. Percival, *Responding to Environmental Risk: A Pluralist Perspective*, 14 *PACE ENVTL. L. REV.* 513, 526-27 (1997); Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 *HARV. ENVTL. L. REV.* 103 (1998). See also Ruhl, *Thinking of Environmental Law*, *supra* note 1, at 986-87.

82. Robinson, *Attaining Systems For Sustainability*, *supra* note 56, at 140-41.

83. See William H. Rodgers, Jr., *Deception, Self-Deception, and Mythology: The Law of Salmon in the Pacific Northwest*, 26 *PAC. L.J.* 821 (1995); William H. Rodgers, Jr., *Where Environmental Law and Biology Meet: Of Pandas’ Thumbs, Statutory Sleepers, and Effective Law*, 65 *U. COLO. L. REV.* 25 (1993); William H. Rodgers, Jr., *The Lessons of the Red Squirrel: Consensus and Betrayal in the Environmental Statutes*, 5 *J. CONTEMP. HEALTH L. & POL’Y* 161 (1989); William H. Rodgers, Jr., *The Lesson of the Owl and the Crows: The Role of Deception in the Evolution of the Environmental Statutes*, 4 *FLA. J. LAND USE & ENVTL. L.* 377 (1989).

84. Professor Ruhl’s scholarship focuses on “complex adaptive systems” theory: the “body of literature and research devoted to ‘the study of the behavior of macroscopic collections of [interacting] units that are endowed with the potential to evolve in time.’” Ruhl, *Thinking of Environmental Law*, *supra* note 1, at 936 n.8 (quoting PETER COVENEY & ROGER HIGHFIELD, *FRONTIERS OF COMPLEXITY* 7 (1995)). Complexity theory aims to understand how complex systems—including legal systems—behave. See *id.* at 938. By definition, a complex system is dynamic and non-linear. See *id.* at 936.

ability programs, championing “adaptive management”—“the concept of experimentation to the design and implementation of natural-resource and environmental policies”⁸⁵—as the process for attaining sustainability. Ruhl comments that, “we do not really know how to get to either a sustainable economy or sustainable development. Failure to experiment, in other words, would be folly.”⁸⁶ Others might call this a path toward achieving a solution for a “second-best” world.⁸⁷

Brownfields proponents are quick to argue that this is exactly what they are doing: experimenting and reinventing law in the states’ “laboratory of ideas.”⁸⁸ But, it is important that this reinvention incorporates the core principles of sustainable development. Experiments in the brownfields arena will only crystallize into a body of sustainable development law if these core principles are included and followed.⁸⁹ To argue otherwise is to run the risk of negative consequences stemming from the failure to adopt sustainable development as an organizing principle. We may disagree about the details of sustainable development, but “[w]ithout some clarity and social consensus about the characteristics of [sustainable] places, it will be difficult to achieve a more positive result . . . [Sustainable development] is a

Professor Ruhl’s insights are elaborated further in J.B. Ruhl & Harold J. Ruhl, Jr., *The Arrow of the Law in Modern Administrative States: Using Complexity Theory to Reveal the Diminishing Returns and Increasing Risks the Burgeoning of Law Poses to Society*, 30 U.C. DAVIS L. REV. 405 (1997); J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849 (1996); J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407 (1996).

85. Ruhl, *Thinking of Environmental Law*, *supra* note 1, at 996 (quoting KAI N. LEE, COMPASS AND GYROSCOPE 53 (1993)).

86. *Id.*

87. For a provocative discussion of “second-best” theory, see John J. Donohue III, *Symposium on Second-Best Theory and Law & Economics: Some Thoughts on Law and Economics and the General Theory of Second Best*, 73 CHI.-KENT. L. REV. 257 (1998) (introducing symposium on the theory and articles on pollution taxes and public utility regulation).

88. This usage stems from an insight by Justice Brandeis. See *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting) (stating that, “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”). See also Robert R. Kuehn, *The Limits of Developing Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373, 2383 (1996) (observing that, “Rare is the proponent of devolution [of environmental policy-making to the states] who does not refer to Justice Brandeis’s observation that one of the benefits of federalism is that it allows states to serve as laboratories of democracy for novel social and economic experiments”).

89. See Ruhl, *The Seven Degrees of Relevance*, *supra* note 9, at 293-94.

better model for planning and managing in the future, and [a] vast improvement over our current way of thinking about communities.”⁹⁰

Unfortunately, we do not have the benefit of hindsight from future decades, when there may well be a fully developed body of sustainable development law. For all we know, any of today’s experiments could be a precursor to a more evolved understanding of sustainable development, a false start or even a detour from the correct policy path. Many earnest attempts to provide guidance follow an Agenda 21-like strategy, articulating an all-things-to-all-people list of prerequisites for sustainability. But other scholars have done an outstanding job of distilling the mandate of sustainable development down to three prerequisites for any program claiming to be a foundation of sustainable development law. The first prerequisite builds upon the notion that regulators must make a “concerted effort to progressively integrate governmental decisionmaking [sic] on environmental, social, and economic issues”⁹¹ The second prerequisite reflects the reality that governments must ensure that policy decisions actually further sustainable development goals. The final prerequisite recognizes that programs must be designed to achieve “equity,” the third element of the sustainable development agenda. In Part III, I deal with each of these elements in turn.

III. BROWNFIELDS AND SUSTAINABILITY: THE PROCESS OF EXPERIMENTATION

In this Part, I discuss the brownfields initiatives designed to lessen the fear of liability under state and federal environmental laws. This body of law is hardly monolithic.⁹² Indeed, variations are so significant that one cannot claim all brownfields policies are equally consistent with sustainable development principles. Thus, the inquiry begun in Part I is squarely in focus: what sustainable development principles matter, and how should the evolving hard law of brownfields reflect them? One thing is clear. If we continue to follow the status quo, the consequences may be serious. Under existing brownfields policies, thousands of sites may be remediated in state VCPs in a manner dangerous to urban residents.

90. BEATLEY & MANNING, *supra* note 8, at 39.

91. Dernbach, *Agenda 21*, *supra* note 38, at 10507.

92. Of course, the same could be said of other brownfields initiatives. *See, e.g.*, EDITH M. PEPPER, LESSONS FROM THE FIELD: UNLOCKING ECONOMIC POTENTIAL WITH AN ENVIRONMENTAL KEY 20-30 (1997) (listing ten types of public sector financing for brownfields projects).

A. *Brownfields Programs Require Procedures Designed To Integrate Simultaneous Consideration Of Economic, Environmental, and Equity Goals ("Procedural Integration")*

The first core principle emanates from Chapter 8 of Agenda 21, "one of the more important sections of the document in terms of legal implementation of sustainable development, . . ." ⁹³ Chapter 8 calls upon governments to: integrate environment and development at the policy, planning and management levels; adopt a national strategy for sustainable development; provide an effective legal and regulatory framework; make effective use of economic instruments in market and other incentives; [and] establish systems for integrated environmental and economic accounting. ⁹⁴

Like most of Agenda 21, this principle is vague. What governmental policies count, and how do they "integrate environment and development"? Doesn't much of modern American environmental law implement this mandate, i.e., the environmental impact statement requirement of the National Environmental Policy Act ("NEPA") serving to "[i]ntegrate environment and development," ⁹⁵ the Clean Air Act emissions trading system incorporating market incentives, ⁹⁶ and so forth?

Interpreting Chapter 8, Professor Dernbach reaches a different conclusion. He calls upon governments at all levels to foster "procedural integration" by creating processes for simultaneous and coordinated consideration of social, environmental, and economic goals. ⁹⁷ A key feature of this is curbing regulatory tunnel vision. In this view, governments have fundamental responsibilities to ensure

93. Boer, *Institutionalising Ecologically Sustainable Development*, *supra* note 1, at 323.

94. *See id.* at 324.

95. Several commentators have termed NEPA a precursor to an American sustainable development ideal. *See* Dernbach, *Agenda 21*, *supra* note 38, at 10520 (NEPA is "part of the legal and policy foundation necessary to build [a U.S. sustainable development] strategy."); Ruhl, *The Seven Degrees of Relevance*, *supra* note 9, at 278 n.10 ("NEPA may play an important role in rediscovering a pre-existing national commitment to . . . sustainable development.").

96. Title IV of the Clean Air Act (codified as amended at 42 U.S.C. §§ 7651-7671 (1996)) created the market-based system for trading sulfur dioxide allowances. *See generally*, James E. Krier, *Marketable Pollution Allowances*, 25 U. TOL. L. REV. 449 (1994); Henry E. Mazurek, Jr., *The Future of Clean Air: The Application of Futures Markets to Title IV of the 1990 Amendments to the Clean Air Act*, 13 TEMP. ENVTL. L. & TECH. J. 1 (1994).

97. Dernbach, *Sustainable Development*, *supra* note 1, at 47; *compare* Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 50 n. 214 (1997) (calling for integrated decision-making with respect to hazardous waste disposal site locations).

consideration of all environmental costs and benefits from a project's inception, in order to avoid making unsound and irreversible decisions at an early stage.⁹⁸ Integrated procedures also require coordination of decision-making authority to prevent a government's right hand from not knowing what the left hand is doing, as is the case, for example, when a national agriculture ministry subsidizes wasteful practices and leaves it up to the environment ministry to clean up the damage.⁹⁹ As Professor Dernbach demonstrates masterfully, many American environmental laws do not fully measure up to the standards of procedural integration.¹⁰⁰

In considering "procedural integration" in the brownfields setting, I examine three significant steps: how states administer brownfields cleanups; how, with federal oversight, states determine cleanups' sufficiency; and how, if at all, localities review projects.

1. The EPA's Failed Attempt to Insist on Uniform VCP Procedures

When the brownfields remediation process begins, developers have already calculated project benefits and costs.¹⁰¹ States are not usually required to second-guess these assessments, confining their involvement with developers' applications to a completeness review. Often, there is also little meaningful review during the remediation process itself. Some states require developers to enter into enforceable consent agreements; others involve the state extensively in approving work plans and supervising the cleanup process. These states

98. See *id.*; see also BEATLEY & MANNING, *supra* note 8, at 38 ("Sustainable Places Reflect and Promote a Full-Cost Accounting of the Social and Environmental Costs of Public and Private Decisions."); Tarlock, *supra* note 35, at 53 ("[T]he major challenge posed by the theory of sustainable development has been to systematically and permanently incorporate the full environmental consequences of resource use into the modern economic concepts that help to structure the politics of resource allocation.").

99. See Dernbach, *Sustainable Development*, *supra* note 1, at 46. But see Torres, *supra* note 51, at 616 (discussing the 1994 Executive Order on environmental justice and contending that "the requirement of inter-agency cooperation in data gathering and in the formulation of the problems that the agencies must address . . . will help prevent the development of agency myopia [and] help illuminate how particular decisions of one agency or another produce environmental consequences . . .") (footnote omitted).

100. See Dernbach, *Sustainable Development*, *supra* note 1, at 47-51. NEPA is an excellent example of this failure of procedural integration. Given NEPA's lack of substantive bite, Professor Caldwell is justified in his observation that "the principles and goals declared by NEPA will need reinforcement to work toward the goal of attaining a sustainable future." Lynton K. Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 207 (1998).

101. Several leading texts on brownfields redevelopment provide extensive advice on estimating the costs of brownfields projects. See, e.g., ABA BROWNFIELDS GUIDE, *supra* note 20.

are in the minority. Most allow the developer to operate more or less independently with little or no state oversight beyond a review of documentation submitted at the end of remediation activities.¹⁰²

The typical process thus falls far short of the procedural integration ideal. Throughout the life of the project, states delegate responsibility for making significant decisions about environmental, economic, and equity issues to developers. With the state's role being minimized or deferred to the end of the project, the process fails to consider costs and benefits *ab initio* or conduct full environmental accounting throughout the process.¹⁰³

No single governmental agency engages in the searching project review required under Agenda 21. Of course, that is exactly what states want. They traffic in the late-90s lexicon of lightening governmental burdens: VCPs are designed to "streamline" redevelopment¹⁰⁴ or "reduc[e] process barriers."¹⁰⁵ Elaborate procedures would only hamper the goal of returning brownfields sites to commerce.

Given the states' resistance to integrated procedures, the federal government is the only actor capable, by invoking its mandate under CERCLA, of ensuring that brownfields redevelopment achieves sustainable development's procedural objectives.¹⁰⁶ But federal involvement in overseeing brownfields cleanups is anathema to the states,¹⁰⁷ as shown perhaps most vividly by a recent debacle involving an EPA policy proposal.

In September 1997, the EPA promulgated a draft guidance

102. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 965-70 (discussing three levels of state involvement in VCPs, and contrasting procedures adopted in "high" involvement states to those of "low" involvement states where developers act essentially independently); *but cf.* Koch, *supra* note 33, at 196 (the new Florida statute "differs from other voluntary cleanup initiatives that permit the purchaser to instigate and implement a brownfields cleanup with little or no government involvement . . .").

103. See Dernbach, *Sustainable Development*, *supra* note 1 at 47-48.

104. See Douglas A. McWilliams, *Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization*, 21 *ECOLOGY L.Q.* 705, 707 (1994).

105. See SUSTAINABLE AMERICA, *supra* note 8, at 20.

106. See Buzbee, *Institutional Determinism*, *supra* note 3, at 61 ("[I]f a national goal of protection from hazardous substances remains, limited federal oversight of Brownfields and state cleanup initiatives is appropriate.").

107. See, e.g., Mark D. Anderson, *The Limits of Innovative Cleanup Laws: A State Update*, ENVTL. COMPLIANCE & LITIG. STRATEGY, Mar. 1997, at 5 ("Involving the federal authorities (and an additional layer of bureaucracy) is, however, an unattractive option for a cleanup being conducted under state authority.").

document¹⁰⁸ specifying conditions under which it would enter into an amended “Superfund Memorandum of Agreement” (“SMOA”) beyond those already in place with eleven states.¹⁰⁹ A SMOA delineates the nature of federal-state relations with respect to cleanups of sites on the National Priorities List (“NPL”).¹¹⁰ In SMOA amendments, the EPA provides protection against federal liability for VCP participants by agreeing to refrain from pursuing enforcement actions at certain brownfields sites successfully addressed in VCPs.¹¹¹

The EPA received 78 comments on the draft, many calling for its withdrawal. One former state official stated bluntly, “[i]f the bureaucrats in EPA have a lick of common sense they will rescind this guidance.”¹¹² He was not alone. Other commenters termed the draft

108. See Final Draft Guidance for Developing Superfund Memoranda of Agreement (SMOA) Language Concerning State Voluntary Cleanup Programs, 62 Fed. Reg. 47,495 (1997) (hereinafter *EPA Draft SMOA Guidance*).

109. See *id.* at 47498-500. The existing SMOA amendments follow a structure similar to that of the SMOAs themselves, clarifying state and federal agencies’ responsibilities at VCP sites. For example, the SMOA addendum entered into between the Minnesota Pollution Control Agency (MPCA) and EPA Region V designates the MPCA as the lead agency for cleanups taking place under the authority of Minnesota’s VCP, the Voluntary Investigation and Cleanup (VIC) program. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 964 n.348 (discussing the adoption of the Minnesota SMOA addendum).

110. See *EPA Draft SMOA Guidance*, *supra* note 108, at 47497. See generally HAROLD C. BARNETT, TOXIC DEBTS AND THE SUPERFUND DILEMMA 96-99 (1994) (describing states’ responsibilities for such activities as identifying candidate sites for the NPL and taking lead roles in certain cleanups). The NPL is “the list, compiled by EPA pursuant to CERCLA section 105 [42 U.S.C. § 9605 (1998)], of uncontrolled hazardous substance releases in the United States that are priorities for long-term remedial evaluation and response.” *EPA Draft SMOA Guidance*, *supra* note 108, at 47497. A SMOA “is not a site-specific document,” but “attachments may address specific sites.” *Id.* See generally 40 C.F.R. § 300.505 (1998) (SMOA regulations).

111. The language proposed for each SMOA amendment regarding liability protection was the following: “EPA does not generally anticipate taking removal or remedial action at sites involved in State Voluntary Cleanup Programs addressed by a signed EPA/State Superfund Memorandum of Agreement.” *EPA Draft SMOA Guidance*, *supra* note 108, at 47497.

Commenters criticized the promise to “generally” refrain from enforcement action as vague and amounting to an unenforceable “policy statement.” See, e.g., *id.* at 47498 (public comment of Richard W. Collins, Director, Waste Management Administration, State of Maryland, Department of the Environment, MOA-2-43, at 2); see also Anderson, *supra* note 107, at 4 (“Unfortunately, then, the typical SMOA does not commit the EPA in any way to honor a cleanup in a state VCP”). This limitation on liability was expressly made subject to four “reopeners,” which commenters termed so broad that the EPA could act virtually whenever it considered it necessary. See, e.g., Jean Koeninger, Manager, Superfund Branch, Hazardous Waste Division, Arkansas Department of Pollution Control and Ecology, Comment on *EPA Draft SMOA Guidance*, EPA Docket MOA-2-70) (describing the EPA’s “implied threat”).

112. Clinton W. Willer, Former Director, Division of Superfund, State of Tennessee Author, Comment on *EPA Draft SMOA Guidance*, Oct. 10, 1997, EPA Docket MOA-2-6, at 2 [hereinafter Willer Comment] (copy on file with author).

guidance a “disastrous mistake”¹¹³ that would do “severe damage to state brownfield initiatives”¹¹⁴ and “create further obstacles to achieving brownfields redevelopment.”¹¹⁵

The first area of controversy was the EPA proposal to limit its approval to lower-risk brownfields sites. The guidance featured a multi-step “screening process” for states to use to distinguish between higher-risk “Tier I” sites and lower-risk “Tier II” sites; only the latter would be eligible for liability protection.¹¹⁶ The EPA also stated, “[i]f the EPA subsequently determines that a site was improperly classified as ‘Tier II’, the [liability protection] do[es] not apply.”¹¹⁷ This proposal drew strong criticism from many commenters who feared it would empower the EPA to substitute its judgments about environmental costs and benefits for those of the states.¹¹⁸ The EPA proposed to make its judgments in a manner consistent with its CERCLA mandate, intending to differentiate sites with “greater potential to require long-term or emergency cleanup work under the Federal Superfund program”¹¹⁹ from those earning its sign-off. This is

113. *See id.* at 1.

114. Alan C. Williams, Ass’t Atty. Gen., Minnesota, on behalf of eight state attorneys general, Comment on *EPA Draft SMOA Guidance*, Oct. 24, 1997, EPA Docket MOA-2-27 at 5 [hereinafter State Attorneys General Comment].

115. Mark D. Anderson, Counsel, The Greenfields Group, Comment on *EPA Draft SMOA Guidance*, October 9, 1997, EPA Docket MOA-2-7. The influential Environmental Council of the States (ECOS) called upon the EPA to “withdraw the Guidance in its current form,” terming it “an unprecedented federal intrusion into the conduct of state cleanup programs which serves to undermine effective state initiatives to address the reuse and redevelopment of contaminated properties.” *Id.* at 3 (public comment of Robert E. Roberts, Executive Director, Environmental Council of the States, MOA-2-4). ECOS, whose members consist of 51 state and territorial environmental commissioners, was formed in 1993 to promote an increased state role in environmental policy-making. *See* Tom Arrandale, *Pollution Control Has Been Steadily Propelled Away From Washington to the States*, GOVERNING, Oct. 1997, at 36.

116. *See EPA Draft SMOA Guidance*, *supra* note 108, at 47496 (discussing the qualification on the liability limit); *id.* at 47502 (the screening process “consists of multiple steps in which each successive step involves more detailed information about a site and its environs”); *id.* at 47502-06 (outlining the screening process). *See also* Anderson, *supra* note 107, at 4 (EPA Region 4 had suggested a site screening process to Kentucky during SMOA negotiations).

117. *EPA Draft SMOA Guidance*, *supra* note 108, at 47498.

118. The U.S. Conference of Mayors, for example, commented it was “fundamentally opposed to any up front tiering of sites.” J. Thomas Cochran, Executive Director, U.S. Conference of Mayors, Comment on *EPA Draft SMOA Guidance*, October 24, 1997, EPA Docket MOA-2-23 at 3 [hereinafter U.S. Conference of Mayors Comment]. *See* Robert J. Eaton, Chairman, Detroit Renaissance, Comment on *EPA Draft SMOA Guidance*, September 30, 1997, EPA Docket MOA-2-25 at 1 (claiming the EPA could pursue an enforcement action at every brownfields site) [hereinafter Detroit Renaissance Comment].

119. *EPA Draft SMOA Guidance*, *supra* note 108, at 47501. States criticized the Tier I definition for taking into account such factors as a site’s proximity to a day care center. *See id.*

an important analysis that would have allowed for consideration of all environmental impacts of brownfields projects.

Recognizing the extensive differences in VCPs, the EPA had also agreed to sign off only on sites remediated in approved programs which contained six specified features.¹²⁰ This drew heavy fire from commenters, one of whom observed that the federal baseline would “give[] EPA veto power over state laws.”¹²¹ The EPA planned to approve a VCP only if it “provide[d] opportunities for meaningful community involvement . . . responsive to the risk posed by the site contamination and the level of public interest,” including notice and other requirements.¹²² The EPA’s proposal recognized that many VCPs require notice or a brief notice-and-comment period, while others require no public outreach efforts whatsoever.¹²³ Thus decisions on site uses and cleanup standards are often precluded from community scrutiny, the first issue having been decided by developers and the second often determined by a generic cleanup standard.¹²⁴ The EPA’s attempt to bring community members into the process was overwhelmingly rejected as tending to “indirectly impose cost and procedural impediments on brownfields developers.”¹²⁵

Other criteria called on states to “provide adequate oversight to ensure that voluntary response actions . . . are conducted in such a manner to assure protection of human health, welfare and the envi-

at 47502 (factors leading to designation as a Tier I site); State Attorneys General Comment, *supra* note 114, at 3.

120. See *EPA Draft SMOA Guidance*, *supra* note 108, at 47497 (“This guidance is intended to be flexible enough to accommodate variability among State voluntary cleanup programs; however, the guidance does describe a minimum set of criteria that a State voluntary cleanup program should meet before EPA signs an MOA with the State concerning its voluntary cleanup program.”). The draft guidance also recognized that brownfields policies are constantly changing, providing for periodic EPA reviews of its approval and for a review if a state made “significant changes” to its VCP. *Id.* at 47498-99.

121. Gov. E. Benjamin Nelson, Chair, Comm. on Nat. Res. and Gov. Mark Racicot, Vice Chair, Comm. on Nat. Res., Nat’l Governor’s Ass’n, Comment on *EPA Draft SMOA Guidance*, Oct. 3, 1997, EPA Docket MOA-2-22 at 1.

122. See *EPA Draft SMOA Guidance*, *supra* note 108 at 47499. Ten methods of public involvement were deemed acceptable. *Id.*

123. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 972-77 (discussing public participation provisions in VCPs). See generally BROWNFIELDS LAW AND PRACTICE, *supra* note 20 (discussing state VCP public participation requirements and comparing them to those of CERCLA).

124. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 998-1020.

125. Detroit Renaissance Comment, *supra* note 118, at 2. While most commenters objected to requiring public participation, not all did so. See U.S. Conference of Mayors Comment, *supra* note 118 at 4 (the minimal requirement of notice gave localities flexibility); Mary Beth Tuohy, Ass’t Comm’r., Indiana Dep’t of Envtl. Mgmt., Comment on *EPA Draft SMOA Guidance*, Oct. 24, 1997, EPA Docket MOA-2-52 at 2.

ronment . . .” by, among other means, incorporating the CERCLA preference for permanent cleanups, and including “a requirement that the State program receives progress reports on site conditions, or [reserves] the State program’s right to conduct site inspections.”¹²⁶ The states rejected these proposals. Once again, they resisted any EPA role in deciding whether a brownfields cleanup protects human health and the environment.¹²⁷ As I demonstrate more fully in the next section, the EPA proposal responded to an important procedural shortcoming of state programs, namely, the lack of consistent and effective means to guarantee that cleanups remain protective over time.¹²⁸

Bowing to the inevitable, the EPA withdrew the draft in January 1998.¹²⁹ Though no one recognized it as such, this experience can be reconceptualized as an early battle to stake out positions in the evolution of sustainable development law. One could easily recast the EPA’s proposals on major areas of disagreement as attempts to bring “procedural integration” to the brownfields process, and states’ responses as demonstrating strong resistance. After this debacle, there is no consistent “procedural integration” in brownfields policies, nor can most developers have the protection from CERCLA liability they desire.

To break this logjam, some change along the substantive lines of the failed guidance is necessary. The brownfields process need not be federalized.¹³⁰ Instead, Congress could either amend CERCLA to

126. *EPA Draft SMOA Guidance*, *supra* note 108, at 47,500.

127. *See, e.g.*, David B. Struhs, Comm’r., Executive Office of Env’tl. Affairs, Mass. Dept. of Env’tl. Protection, Comment on *EPA Draft SMOA Guidance*, Oct. 23, 1997, EPA Docket MOA-2-16 at 5 (calling the EPA’s attempt to impose these criteria “condescending”).

128. *See infra* notes 145-169 and accompanying text (discussing the importance of ensuring protectiveness of brownfields cleanups in the future).

129. *See* Withdrawal of Proposal: Final Draft Guidance for Developing Superfund Memoranda of Agreement Concerning State Voluntary Cleanup Programs, Memorandum From Timothy Fields, Jr., Acting Ass’t Adm’r., EPA Ofc. Of Solid Waste and Emerg. Response, and Steven A. Herman, Ass’t Adm’r., EPA Ofc. Of Enforcement and Compliance Assurance, to EPA Regional Administrators, Regions 1-10, Nov. 26, 1997 (on file with author).

130. Professor Buzbee has proposed a “Cleanup Approval Process,” a federally-sanctioned method of remediating brownfields sites that would parallel the structure of other federal environmental laws. *See* William W. Buzbee, *Remembering Repose: Voluntary Contamination Cleanup Approvals, Incentives, and the Costs of Interminable Liability*, 80 MINN. L. REV. 35, 100-04 (1995) [hereinafter Buzbee, *Remembering Repose*].

As Professor Buzbee later observed, “[c]ritical to rehabilitating Brownfields are questions about which levels or units of government should be involved in such efforts.” Buzbee, *Institutional Determinism*, *supra* note 3, at 1. Evolving notions of environmental federalism probably require a split of responsibility between federal and state governments in this area. *See* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 613 (1996) (noting that

empower the EPA to approve states' VCPs and extend liability protection to developers at sites in those states or adopt Professor Robert Abrams' proposals designed to minimize federal involvement at brownfields sites.¹³¹ Unfortunately, recent legislative proposals aim to reduce the federal role in brownfields policy,¹³² so this type of legislative action is unlikely. Congress is moving in the wrong direction for consistency with sustainable development's "procedural integration" principle.

2. Addressing Shortcomings of Localities' Site-Specific Approaches

A second procedural problem stems from the fact that to each stakeholder, the question about issues such as cleanup standards and liability is the same: what is the impact of *this* project, on *this* neighborhood, on *this* site?¹³³ The potential consequences of a site-specific inquiry are serious. If a number of brownfields are located close together in an inner-city neighborhood, the parcel-by-parcel approach ignores the potential synergistic effect of multiple sources of contamination in proximity to each other.¹³⁴ Some would argue that

"every regulatory decision represents a conglomeration of various policy activities, some of which will benefit from decentralized processes and others of which will be optimized under a centralized regime").

131. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 1028-30; Abrams, *supra* note 16, at 289-90.

132. The most recent CERCLA reauthorization bill, S. 8, the "Superfund Cleanup Acceleration Act of 1997," would have prevented the EPA from disapproving state VCPs. Once a site was "subject to a state remedial action plan or . . . the state has provided certification or similar documentation that response action has been completed under a state remedial action plan," federal civil and criminal actions would be barred. S. 8, 105th Cong., §103 (proposing to add CERCLA section 129). The EPA could only evaluate state VCPs for the limited purpose of deciding whether to award a state a grant from \$25,000,000 in new funding authorized under the statute. *Id.* at § 102 (proposing to add CERCLA section 128); see also Eric D. Madden, *Comment, The Voluntary Cleanup and Property Redevelopment Act-The Limits of the Kansas Brownfields Law*, 46 KAN. L. REV. 593, 607-08 (1998). See generally Rhoads & Shogren, *supra* note 33 (discussing brownfields provisions of S. 8 and S. 18, a stand-alone brownfields bill, and noting administration opposition to the proposed role for the EPA).

133. See, e.g., Paul Stanton Kibel, *The Urban Nexus: Open Space, Brownfields, and Justice*, 25 B.C. ENVTL. AFF. L. REV. 589, 617-18 (1998) (" [D]ecisions regarding cleanup standards and liability [should be] dealt with from a community-based, rather than a parcel-by-parcel, perspective.").

134. For an excellent analysis criticizing Oregon's brownfields statute on these grounds, see Alexander H. Tynberg, *Comment, Oregon's New Cleanup Law: Short-Term Thinking at the Expense of Long-Term Environmental and Economic Prosperity*, 12 J. ENVTL. L. & LITIG. 471 nn. 128 - 30 (1997) ("The law must not assume that the particular site under analysis is the only source detrimentally affecting human health and the environment. Nevertheless, that is what the new cleanup law does."); see also Eisen, *Brownfields of Dreams*, *supra* note 3, at 909 n.123 and sources cited therein (criticizing CERCLA risk assessments on these grounds).

zoning frameworks ensure citywide analyses of brownfields projects. As my former student Patrick Skelley has demonstrated, however, rezoning is not necessary for most brownfields projects.¹³⁵

The site-specific inquiry is antithetical to the community-wide approach of evaluating environmental impacts that sustainable development requires.¹³⁶ As one brownfields proponent observes, “You can’t address one isolated brownfield and expect it to survive alone.”¹³⁷ In a recent article, my colleague Michael Allan Wolf recognizes the need for a citywide approach to evaluating the impacts of brownfields reuse and redevelopment. He proposes a “Protective Land-Use Scheme,” the “heart” of which is a new zoning classification, the “Brownfield Investment Zone” (BIZ), to “create a uniform method for assuring a zone of comfort around certain brownfields.”¹³⁸ The BIZ proposal uses regulatory tools already in place and could govern today’s brownfields experiments. The same cannot be said of citywide sustainability planning processes which are underway in only a few cities (besides Chattanooga, notable examples include Seattle and San Francisco).¹³⁹ The BIZ proposal also uses a process which, despite its well-known drawbacks,¹⁴⁰ is oriented to contemplation of

Of course, there is widespread concern that current environmental laws fail to take account of problems posed by the interaction of multiple chemicals and the presence of multiple sources of contamination. See, e.g., Frances H. Irwin, *An Integrated Framework For Preventing Pollution and Protecting the Environment*, 22 ENVTL. L. 1, 15 (1992) (“[T]he present [environmental law] approach often fails to account for multiple sources of exposure.”); Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103, 121 (risk assessment policies “rarely take synergism into account”); William D. Ruckelshaus, *Twentieth Anniversary Commemorative: The Role of the Environmental Protection Agency*, 19 B.C. ENVTL. AFF. L. REV. 725, 725 (1992) (statement by a former EPA Administrator that “[w]e know very little about the additive and synergistic effects of diverse contaminants in our environment”).

135. See generally Patrick J. Skelley II, *Public Participation in Brownfield Remediation Systems*, 8 FORDHAM ENVTL. L.J. 389 (1997). Florida’s brownfields statute is relatively unusual in that it explicitly requires that a brownfields developer demonstrate that “redevelopment of the proposed brownfield site is consistent with the local comprehensive plan and is a permissible use under the applicable local land development regulations” FLA. STAT. ch. 376.80(2)(b) (1998). As Skelley observes, the latter burden would not be difficult to meet in most cases.

136. See generally Dernbach, *Sustainable Development*, *supra* note 1; Eisen, *Brownfields of Dreams*, *supra* note 1. But see Eisen, *Toward a Sustainable Urbanism*, *supra* note 41, at 82-83 (“[at] the project design stage [] we must respond in a ‘bottom up’ fashion, ensuring that development takes place with sensitivity to the urban ecosystem.”) (footnotes omitted).

137. Pepper, *supra* note 92, at 26.

138. Wolf, *supra* note 7, at 40, 41.

139. See *Sustainable Seattle* (last modified Feb. 1, 1999) <<http://www.scn.org/sustainable/susthome.html>>; *Sustainable City* (last modified Mar. 28, 1999) <<http://www.sustainable-city.org/>> (setting forth a “5-year Sustainability Plan for the City of San Francisco”).

140. As Professor Wolf observes, “zoning classifications are by no means chiseled in stone;

citywide impacts in a forum that allows for public input.¹⁴¹ Thus, the BIZ idea should receive further consideration as a practical alternative to the parcel-by-parcel approach to brownfields redevelopment.¹⁴²

B. Brownfields Programs Require Procedures Designed To Ensure Sustainable Urban Futures ("Substantive Integration")

Professor Dernbach defines the second core concept of sustainable development law—the mandate to ensure a sustainable future—as the requirement of “substantive integration.”¹⁴³ The challenge is “developing principles for determining appropriate trade-offs among goals in specific decisions,” or ensuring that “the sum of many decisions ought to further [social, economic, and environmental] goals.”¹⁴⁴ In the brownfields setting, as Professor Wolf recognizes, this means “accommodat[ing] the deep desire for economic growth in the inner city and the need to protect human health and assure a cleaner urban environment for current and future generations.”¹⁴⁵

Is this balance being struck appropriately? Consider a hypothetical buyer of a brownfields site (“Purchaser”) who wishes to buy a brownfields site successfully remediated under an “industrial” cleanup standard, raze the buildings on the site, and construct condominiums. Many states require a higher degree of cleanup for this residential use. Therefore, the state must guarantee that Purchaser will do any additional cleanup necessary. My point is a simple one that is often overlooked or trivialized: brownfields remediation is not

a public use restriction placed on an industrial brownfield is only as permanent as the predilection of a majority of the local legislature.” Wolf, *supra* note 7, at 39.

141. See, e.g., Skelley, *supra* note 135.

142. The new Florida brownfields statute comes close to this approach, requiring a local government to adopt a resolution designating a “brownfield area,” “a contiguous area of one or more brownfield sites, some of which may not be contaminated, and which has been designated by a local government by resolution,” before redevelopment may proceed. FLA. STAT. ch. 376.79(4) (1998). The statute adopts the EPA’s definition of “brownfield sites”: “generally abandoned, idled, or underused industrial and commercial properties where expansion or redevelopment is complicated by actual or perceived environmental contamination.” FLA. STAT. ch. 376.79(3) (1998).

143. See Dernbach, *Sustainable Development*, *supra* note 1 at 51.

144. *Id.* at 52.

145. Wolf, *supra* note 7, at 23. This formula reflects the ubiquitous phrase “intergenerational equity” and its preference for avoiding deferring environmental damage to the future. See generally EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1989); Edith Brown Weiss, *Sustainable Development Symposium: A Reply to Barresi’s “Beyond Fairness to Future Generations,”* 11 TUL. ENVTL. L.J. 89 (1997) (defending the role of intergenerational equity in sustainable development policies).

sustainable development unless it ensures that urban residents will enjoy a safe and healthy environment in the future.

To brownfields boosters, though, dealing with the past is what matters. Their view of the remediation process looks primarily to the past: cleaning up contamination at abandoned sites to spur their redevelopment and working around real or perceived barriers. This is not to say that the future is completely irrelevant. State VCPs that use generic cleanup standards make the future use of each site a consideration.¹⁴⁶ Beyond this, however, the future is of little import, as little attention is paid to the condition of brownfields sites after initial cleanups.

There are three primary concerns about the post-remediation future of a brownfields site. The first and perhaps the only one which is adequately addressed in current programs is the likelihood that the initial cleanup will fail. In virtually every VCP statute, there is a re-opener clause designed to guard against remedy failures by allowing the state to vacate liability protection extended to a developer if the remedy fails or if previously undiscovered contamination is found at the site.¹⁴⁷ At this early stage, there is limited hard evidence suggesting states will diligently police brownfields sites with remedies in place. It seems more likely that states' attention and limited enforcement resources will be diverted to more serious problems than sites thought to be successfully remediated. States already tout their track records in getting sites back into commerce, but rarely mention the steps taken to combat backsliding.¹⁴⁸

The second concern is that the initial cleanup may not be sufficient for a subsequent property use, as in my example involving Purchaser.¹⁴⁹ Many states rely on the common law of property, providing

146. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 941 n.247 (citing the examples of Ohio, Rhode Island, and Michigan); Wolf, *supra* note 7, at 35 n.125 (citing Ohio's regulations, OHIO ADMIN. CODE § 3745-300-08(B)(3)(c)-(d) (1998), which promulgate different soil cleanup standards for residential and commercial land uses).

147. See, e.g., FLA. STAT. ch. 376.82(3)(b)-(c) (1998).

148. See, e.g., PENN. DEP'T. OF ENVTL. PROTECTION, LAND RECYCLING PROGRAM, OLD SITES, NEW OPPORTUNITIES 1-6 (1998) (listing program achievements in the annual report but not mentioning steps taken to protect against remedy failures).

149. See Tynberg, *supra* note 134, at 488 (criticizing the view that "so long as the remedy is protective of health and the environment for all current exposure scenarios and for all exposure scenarios that are reasonably likely to occur in the foreseeable future, there is absolutely no valid reason why society should demand more" on the basis that "[i]ncorporating future use into remedy selection is practically impossible because there is so much uncertainty involved [and] [o]ne cannot ensure that any industrial area is 'reasonably anticipated' to remain industrial in fifty years.").

that a limitation of the property to specified uses will be recorded with the deed and run with the land.¹⁵⁰ Professor Wolf and I argue this servitude-based approach might not allow adjoining residents to prevent undesirable impacts.¹⁵¹ In the failed SMOA guidance, the EPA also found the use of common law tools insufficient. It suggested that states should reserve “authority to remove the cleanup certification under certain circumstances, such as a change in the site’s use, a failure of institutional controls, or the discovery of additional contamination.”¹⁵² Some statutes, such as Florida’s new brownfields statute, do include reopeners of this sort.¹⁵³

The third important question is whether brownfields cleanups will result in reduced urban pollution. Experience to date shows industrial redevelopment is common at brownfields sites, raising the possibility of “repollution.”¹⁵⁴ *Lessons From the Field’s* case studies demonstrate that industrial users are prized for jobs and tax revenues they provide.¹⁵⁵ Yet no developer need prove it will not contaminate a site. As one might imagine, the typical reopener clause does give the state authority to pursue an enforcement action against a repolluter.¹⁵⁶ Assuming the state was inclined to flex its regulatory muscle at a brownfields site, which, as noted above, is not necessarily a good assumption, it would face significant hurdles, including the problem of distinguishing between historical and post-cleanup contamination. This determination would be particularly difficult if the nature of the development on the site was such that it obscured the contamination.¹⁵⁷

150. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 949; Wolf, *supra* note 3, at 38.

151. Professor Wolf explains:

[A]s every first-year, property law student schooled in the intricacies of common-law servitudes could testify, the most common form of use restriction found in private law—the real covenant—is an eminently unwieldy and unreliable mechanism to bind subsequent purchasers of the brownfield parcel to the promises made by the original redeveloper.

Wolf, *supra* note 3, at 39.

152. EPA Draft SMOA Guidance, *supra* note 108, at 47500.

153. See FLA. STAT. ch. 376.82(3)(d)-(e) (1998); see also Koch, *supra* note 33, at 207.

154. See, e.g., Wolf, *supra* note 3, at 22 n.90 (citing Eisen, *Brownfields of Dreams*, *supra* note 3, at 1004 n.552).

155. In eight case studies, the designated use of the site after remediation was “industrial”; in several others, part of the site was dedicated to industrial uses. See Pepper, *supra* note 92, at 5-6.

156. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 963 n.341 and statutes cited therein; see also FLA. STAT. ch. 376.82(3)(e) (1998) (state can require additional cleanup upon the release of new contaminants at a site).

157. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 1025 n. 675 and sources cited

Marginalizing concern for the future in these ways mortgages the sustainability of cities in favor of short-term gains. Fortunately, one commentator proposes a comprehensive solution to this problem. Professor Wolf's PLUS scheme contains a set of six features designed to complement the zoning designation and ensure the protection of brownfields cleanups.¹⁵⁸ For example, to ensure that improper use is not made of a parcel remediated to a use-specific cleanup level, he proposes a "devastation easement," a new form of conservation easement in which "any inherent 'right' to develop or use the BIZ parcel for anything other than industrial purposes will be transferred . . . from the landowner to a governmental unit, preferably the state, with local neighborhood organizations as co-owners."¹⁵⁹ To combat the potential for repollution at brownfields sites, he proposes that each developer post a performance bond that "could 'roll over' into a 'perpetual maintenance' policy, . . ."¹⁶⁰

These are excellent ideas directly oriented to achieving "substantive integration" objectives. I would add another: states and localities must develop measurable indicators of progress to ensure that brownfields initiatives are evaluated and updated in a meaningful way.¹⁶¹ Professor Ruhl sees this as critical to an adaptive approach to attaining sustainability, observing:

therein.

158. The goals of PLUS are to "(1) protect[] local residents from the increased risks attributable to brownfields remediation at lower-than-CERCLA levels, and (2) guarantee[] that only industrial uses will be permitted on the reused site." The complete set of features includes the following:

- (1) "devastation easements,"
- (2) CIS-enhanced brownfields inventories;
- (3) a "Megan's Law" for brownfields, even formerly contaminated, reused sites;
- (4) easements or set-asides in fee to create buffer zones;
- (5) pre-construction bonds to guarantee remediation completion and to fund perpetual maintenance; and
- (6) environmental awareness and safety programs.

See Wolf, *supra* note 3 at 42, 44-47. But see Eisen, *Brownfields of Dreams*, *supra* note 3, at 1023-24 (calling for enhanced risk communication programs, similar to the sixth element of the PLUS scheme).

159. Wolf, *supra* note 3 at 44.

160. *Id.* at 47. The ASTM's "Standard Guide to the Process of Sustainable Brownfields Redevelopment" encourages developers to maintain environmental insurance for this purpose. See *Standard Setter Weighs*, *supra* note 14, at 6.

161. I am hardly alone in calling for the development of appropriate sustainability indicators. See, e.g., Dernbach, *Sustainable Development*, *supra* note 1 at; Ruhl, *Thinking of Environmental Law*, *supra* note 1, at 997-98. Indicators allow for an evolutionary approach to sustainability policies:

By establishing numerical goals and indicators for topics such as economic viability or environmental quality, a state or city can contrast current development conditions with desired performance, show trends over time, allow comparisons between different regions, judge the sustainability of current practices, and develop new indicators if necessary.

As Professor James Salzman has posited, . . . valuations of 'nature's services' can be used to create indices of ecosystem sustainability, which, when combined with improved economic and social sustainability indices, can be used the same way Wall Street uses stock performance indices to make adaptive decisions.¹⁶²

Developing "indices of ecosystem sustainability" is obviously not something accomplished overnight.¹⁶³ The type of indicators needed is radically different from any information currently available in the brownfields arena, which suffers from the "'bean counter' mentality" often used to evaluate the performance of environmental laws.¹⁶⁴ States measure success by such indicia as the number of applications to take part in a VCP and the number of sites remediated.¹⁶⁵ This is the wrong benchmark for an adaptive policy approach because it does not value "nature's services."¹⁶⁶

C. *The Link Between Brownfields Policies And Environmental Justice Is Still Tenuous ("Equity")*

Finally, a commitment to sustainable development is incomplete without attention to the "equity" component of sustainable development.¹⁶⁷ Environmental justice advocates tend to perceive brownfields programs in a manner that differs from the view taken by the adamant supporters of those programs. Adamant supporters see

Sustainable Development Explored In Virginia, *supra* note 63, at 1. See also Ruhl, *Thinking of Environmental Law*, *supra* note 1, at 997 (terming indicators indispensable to an adaptive approach); Elizabeth Kline, *Why Sustainable Community Indicators?: People Need A Reality Check* (last modified November 13, 1998) <<http://www.sustainable.doe.gov/articles/whysust.htm>> ([I]ndicators "ensure that incremental steps are moving in desired directions and . . . hold . . . [people] accountable for choices . . .").

162. Ruhl, *Thinking of Environmental Law*, *supra* note 1, at 999 (citing James Salzman, *Valuing Ecosystem Services*, 24 *ECOLOGY L.Q.* (forthcoming)).

163. See, e.g., Tarlock, *supra* note 35, at 52 n.89 (discussing the "difficulties of developing criteria to measure sustainable development" and citing PETER BARTELMUS, *ENVIRONMENT, GROWTH AND DEVELOPMENT: THE CONCEPTS AND STRATEGIES OF SUSTAINABILITY* (1994)); see also Lash, *supra* note 2, at 84.

An interesting information source about indicators is *Indicators of Sustainability* (visited July 8, 1998) <<http://www.subjectmatters.com/indicators/HTMLSrc/Indicators.html>>.

164. See Ruhl, *Thinking of Environmental Law*, *supra* note 1, at 997.

165. See, e.g., PENN. DEPT. OF ENVTL. PROTECTION, *supra* note 148, at 1-2 (setting forth the number of remediated sites and program applications in Pennsylvania's Land Recycling Program); see also *New Jersey Brownfields Law Wins Muted Praise*, *THE BROWNFIELDS LETTER*, Nov. 1998, at 3 (citing a "potential increase in [brownfields] development," based on a comment of legislative analyst Terri Smith that the New Jersey DEP "signed 1,342 memorandums of agreement, . . . up from 1,112 in the same period of 1997").

166. See Ruhl, *Thinking of Environmental Law*, *supra* note 1, at 999.

167. See Ruhl, *The Seven Degrees of Relevance*, *supra* note 9, at 290 n.52 ("social equity is the important third leg of sustainable development policy").

economic opportunity in the “distressed property market,” promoting the “3R’s” for success: remove barriers, redevelop, and reap the rewards.¹⁶⁸ To environmental justice advocates, the core question is very different. They ask “will brownfields reclamation provide tangible benefits, in terms of economic development or environmental quality, for the communities where brownfields are located, or will reclamation mostly benefit investors from outside the communities?”¹⁶⁹

Community activists are in a “double bind”¹⁷⁰ because they must decide whether brownfields programs will provide hope and opportunity to distressed neighborhoods, or exacerbate environmental contamination (with cleanup standards lower than CERCLA’s¹⁷¹) and make investors wealthy at the expense of urban residents. Brownfields has become big business, yielding lots of “green” to an entire cottage industry of investors, lawyers, engineers, financial analysts, and consultants¹⁷² that reaps profits from brownfields remediation. Profits are often more important to brownfields entrepreneurs than

168. See Kibel, *supra* note 133, at 612. Even the PCSD’s summary of brownfields programs’ *raison d’être* concentrates on eliminating barriers to redevelopment; neither the recommendation, the action items, nor the report text mentions “equity” or “environmental justice.” See SUSTAINABLE AMERICA, *supra* note 8.

Applying the 3R’s standard, some brownfields boosters remain unsatisfied with the incentives packages, liability limits, and relaxed cleanup standards of VCPs. See, e.g., Koch, *supra* note 33, at 205 (noting that critics such as Robert Wells believe “Florida’s Act still lacks adequate incentives for developers.”); *New Jersey brownfields law*, *supra* note 165, at 4 (describing large industrial companies as “unimpressed” by New Jersey’s brownfields program).

169. Kibel, *supra* note 133, at 605-06. For other discussions of advocates’ concerns, see Eisen, *Brownfields of Dreams*, *supra* note 3, at 1000-20; Anne L. Kelly, *Reinvention in the Name of Environmental Justice: A View From State Government*, 14 VA. ENVTL. L.J. 769 (1995); Georgette C. Poindexter, *Separate and Unequal: A Comment on the Urban Redevelopment Aspect of Brownfields Programs*, 24 FORDHAM URB. L.J. 1 (1996); Wolf, *supra* note 3, at 21-26.

170. See Wolf, *supra* note 3, at 21-26 (discussing the clash in philosophies that creates an environmental justice “double bind” in brownfields policies); see also Kibel, *supra* note 133, at 607-08 (“[o]n the one hand, brownfields reclamation provided an opportunity to clean up and improve economic and environmental conditions in many poor and minority neighborhoods. On the other hand, brownfields reclamation also called for less stringent cleanup standards and shielding banks and investors from remediation liability.”).

171. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 936-49 for an analysis of “risk-based” cleanup standards that allow brownfields sites to be remediated to levels less than those required by § 121 of CERCLA and its state analogues; see also Wolf, *supra* note 3, at 32. As one observer puts it, “[i]nterest in brownfields redevelopment . . . is moving cleanup standard policy in a new direction,” that being the substitution of “risk-based” approaches for those conservative standards based on “worst-case scenarios.” Kass et al., *supra* note 17, at 348.

172. See, e.g., *Standards Setter Weighs*, *supra* note 14, at 5 (terming Michael Taylor, the chair of the ASTM committee drafting the brownfields standard, a “brownfields development consultant”).

community concerns about fast-track project approvals or reduced cleanup standards.¹⁷³ As one resident of a San Francisco neighborhood put it:

As far as I'm concerned, a brownfield is just a Superfund site. African-Americans bore the brunt of the poison and pollution when they were Superfund sites, but now they are not going to be a part of cleanup and redevelopment. From my neighborhood's perspective, brownfields redevelopment means that African-Americans are being passed over and moved out.¹⁷⁴

I have observed that "environmental justice advocates who view streamlined and lenient cleanup processes as adding to the community's environmental burden may be on a 'collision course' with brownfield redevelopment proponents."¹⁷⁵ However, as another commentator observes, the two camps are not at "opposite ends on a spectrum of good and evil."¹⁷⁶ Communities often need private sector capital to make projects work and investors need community approval to make some projects viable.

Closing the gap between these groups by requiring states to address legitimate community concerns might satisfy environmental justice advocates. But would it achieve "equity" in the sustainable development context? The best answer is a qualified "yes, for now." In his article for this special issue, Professor Ruhl discusses the relationship between environmental justice and sustainable development's "equity" component.¹⁷⁷ This is a welcome development. To date, those scholars who have discussed the relationship between the two

173. A presenter at the EPA's "Brownfields '97" conference summed up the situation as follows:

[T]here are profits to be made for shrewd real estate investors who can envision the market value of the property after cleanup, buy it very low at a stigmatized price, implement project cleanup, obtain agency sign offs, and then sell the property at only a small reduction in sales price or value.

Kass et al., *supra* note 17, at 346. In this respect, brownfields investors resemble stock market speculators who "flip" stocks by buying and selling them quickly, with little regard for a company's welfare. See, e.g., Kibel, *supra* note 133, at 612. For these investors, community support or lack thereof may be a factor in the profit calculus, but not something to dwell upon. *Id.* ("In the pages of [the] Brownfield News [newsletter], one is not likely to find discussion of economic equity, public participation, or environmental racism. These issues simply fall outside the investment scope of the publication.").

174. See Kibel, *supra* note 133, at 609.

175. Eisen, *Brownfields of Dreams*, *supra* note 3, at 1003.

176. Kibel, *supra* note 133, at 612.

177. See J. B. Ruhl, *The Co-Evolution of Sustainable Development and Environmental Justice: Cooperation, then Competition, then Conflict* 9 DUKE ENV'T'L L. & POL'Y F. 161 (1999) (hereinafter Ruhl, *Co-Evolution*).

have done little more than note common themes¹⁷⁸ or assume a link without much analysis.¹⁷⁹

“Equity” and “environmental justice” overlap in significant ways. In a democratic society, protecting the environment for future generations cannot be done without attention to legitimate distributional concerns.¹⁸⁰ However, as Professor Ruhl demonstrates ably, there are differences between the two.¹⁸¹ The former was originally grounded in the tension between developed and developing nations¹⁸² and in the evolving concept of intergenerational equity.¹⁸³ The latter began as a piercing response to inequities in siting of hazardous waste facilities and similar concerns.¹⁸⁴ Both Professors Ruhl and Dernbach conclude that “equity” is broader than the set of concerns advanced by the American environmental justice movement.¹⁸⁵ “It is quite possible,” Ruhl says, “that the law of sustainable development will eventually catch up with and then subsume the law of environmental justice.”¹⁸⁶ In this issue, he examines how that may occur.¹⁸⁷

For now, I address environmental justice advocates’ concerns about brownfields policies, recognizing that achieving “equity” will

178. See, e.g., Torres, *supra* note 51, at 618-20.

179. See, e.g., Robin Morris Collin & Robert Collin, *Where Did All the Blue Skies Go? Sustainability and Equity: The New Paradigm*, 9 J. ENVTL. L. & LITIG. 399, 445 (1994) (arguing that environmental justice is an indispensable component in the quest for urban sustainability). For a contrary perspective, see Kent E. Portney, *Environmental Justice and Sustainability: Is There a Critical Nexus in the Case of Waste Disposal or Treatment Facility Siting?*, 21 FORDHAM URB. L.J. 827, 827 (“[T]he pursuit of environmental justice may, at least conceptually, undermine goals of sustainability.”)

180. See Torres, *supra* note 51, at 618-19.

181. See Ruhl, *Co-Evolution*, *supra* note 177, at 182-85.

182. See Dernbach, *Sustainable Development*, *supra* note 1, at 16; Eisen, *Toward a Sustainable Urbanism*, *supra* note 41, at 3 (sustainable development can “address equity concerns, such as achieving a just distribution of resources between developed and developing nations.”); SHABECOFF, *supra* note 47, at 198-199; Tarlock, *supra* note 35, at 52-53 (noting that “sustainable development has been adopted . . . in an effort to bridge the North-South or rich-poor environmental gap . . .”).

183. See, e.g., Torres, *supra* note 51, at 620.

184. See generally Torres, *Id.* at 51 (discussing the history and evolution of the environmental justice movement). There is considerable literature on the environmental justice movement and its goals and objectives. See, e.g., Eisen, *Brownfields of Dreams*, *supra* note 3, at 1002 n.540 and sources cited therein.

185. See Dernbach, *Agenda 21*, *supra* note 38, at 10510; Ruhl, *Co-Evolution*, note 177, at 15. A recent book on the “ecology of place” states that “community sustainability,” a movement in its infancy, “may offer a useful and unifying framework . . . in which the health of the larger community is what becomes most important.” See BEATLEY & MANNING, *supra* note 8, at 34-36. This political vision would transcend the concerns of one individual or group.

186. Ruhl, *The Seven Degrees of Relevance*, *supra* note 9, at 290 n.52.

187. See generally Ruhl, *Co-Evolution*, *supra* note 177.

require even more attention. One policy path to this goal might be to apply current laws to brownfields programs. There is no well-defined body of “environmental justice law” *per se*, but rather a scattered set of pronouncements that reinterprets existing laws, such as Title VI of the Civil Rights Act, to address environmental justice issues.¹⁸⁸ As Professor Ruhl observes, it is still far too soon to predict the eventual shape of environmental justice law,¹⁸⁹ and adopting its current legal proxies would require us to deal with all the uncertainties about the effectiveness of laws not designed specifically to address environmental justice concerns.¹⁹⁰ We would be better off enumerating specific core principles, incorporating them in brownfields programs, and revisiting them if necessary.

Perhaps the most important core principle is broad-based public participation in brownfields remediation efforts, which is both consistent with Agenda 21¹⁹¹ and important for a VCP’s success. Professor Wolf notes: “[t]here is . . . strong sentiment that public participation is the public policy component that most efficiently addresses environmental justice concerns” at brownfields sites.¹⁹² The National Environmental Justice Advisory Council’s report on environmental justice and brownfields policies calls for expanded public participation,¹⁹³

188. See Ruhl, *The Seven Degrees of Relevance*, *supra* note 9, at 290 n.50 (discussing the EPA’s regulations and the lower court’s decision in *Chester v. Seif*; see also *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), judgment vacated as moot, *Chester Residents Concerned for Quality Living v. Seif*, 119 S.Ct. 22 (1998). For a forceful criticism of the EPA Title VI policy, see Henry Payne, *Green Redlining: How Rules Against “Environmental Racism” Hurt Poor Minorities Most of All*, REASON, Oct. 1998, at 26.

189. See Ruhl, *The Seven Degrees of Relevance*, *supra* note 9, at 290. In 1998, the Supreme Court could have offered welcome clarification, but eventually did not do so. It accepted the case of *Chester v. Seif*, which would have explicitly tested the limits of Title VI in environmental justice cases; however, the Court subsequently dismissed the case as moot. See *Chester*, *supra* Note 188, at 22.

190. See, e.g., *id.* at 290 n.51 (questioning whether the disparate impact or discriminatory intent standard of Title VI will be applied in environmental justice cases).

191. See Dernbach, *Agenda 21*, *supra* note 38, at n.52 (citing paragraph 23.2 of Agenda 21) (“One of the fundamental prerequisites for achievement of sustainable development is broad public participation in decision-making.”). But see Kal Raustiala, Note, *The “Participatory Revolution” in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537, 566 (The “Rio Declaration states that ‘[E]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level.’”).

192. Wolf, *supra* note 3, at 27.

193. National Environmental Justice Advisory Council, Waste and Facility Siting Subcommittee, *Environmental Justice, Urban Revitalization, and Brownfields: The Search for Authentic Signs of Hope* (last modified Sept. 3, 1997) <<http://www.epa.gov/swerosps/ej/pdf/nejacpdf.htm>>. The NEJAC is the EPA’s “formal advisory committee to assist the agency in the furtherance of its environmental justice objectives,” and “is composed of representatives from grass root environmental justice organizations, industry, non-governmental organizations, state, local, and

as does the draft ASTM standard.¹⁹⁴ Three years ago, I called upon states to provide “meaningful input by the surrounding community” in the two areas typically of most concern to them: “decisions on site uses and cleanup activities.”¹⁹⁵ At the time, public participation was not widely accepted because public outreach efforts could threaten to delay a project interminably, perhaps even causing a developer to abandon it. Many perceived it as incompatible with the streamlining spirit of VCPs.¹⁹⁶ As noted earlier, many state brownfields statutes reflected this attitude, providing few if any public input opportunities.

However, there has been a sea change in opinion. Proponents have now come to believe public participation is essential for projects to succeed. In a recent article, a team of policy analysts concludes, “Community relations can make or break a brownfields project.”¹⁹⁷ *Lessons From The Field* demonstrates the importance of public participation, stating that,

In almost every case study analyzed, carefully orchestrated public outreach and involvement plans were implemented from the outset. Without this critical community buy-in, many project participants note, their efforts could easily have fallen apart.¹⁹⁸

There is still a lag between reality and law, however, in that most state statutes still require little more than nominal public participation, and most public outreach efforts are done through *ad hoc* groups or task forces convened for particular projects.¹⁹⁹ Where developers undertake public outreach efforts without a framework to constrain their activities, one person’s “carefully orchestrated” outreach can easily become another’s “illegitimate process.”

tribal governments, and academia.” See Torres, *supra* note 51, at 617. See also Wolf, *supra* note 3, at 27 (discussing the NEJAC’s activities).

194. See *Standards Setter Weighs*, *supra* note 14, at 5.

195. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 1000 n.525 and sources cited therein. See also Kass et al., *supra* note 17, at 347 (identifying different opinions about future site uses and cleanup standards as two of “three recurring areas of tension” in brownfields projects between developers and communities).

196. Eisen, *Brownfields of Dreams*, *supra* note 3, at 1003-04; Wolf, *supra* note 3, at 28.

197. Kass et al., *supra* note 17, at 347. See also *Standards Setter Weighs*, *supra* note 14, at 5 (citing comments of consultant Michael Taylor that “[a]lthough developers often have little patience for broad community discussion of cleanup and redevelopment plans, . . . large corporations . . . trying to extricate themselves from environmental liability . . . understand the need for community participation . . .”).

198. See PEPPER, *supra* note 92, at 18.

199. See *id.* (citing the example of the redevelopment of a site in Minneapolis where a task force provided public support).

The obvious response to this problem would be to incorporate meaningful public participation requirements in state statutes. Florida's brownfields statute, adopted in 1997, is noteworthy for aiming to do just that.²⁰⁰ Under that statute, environmental justice advocates have opportunities for input in the public hearing supporting a locality's designation of a "brownfield area" for redevelopment (when a hearing is necessary),²⁰¹ and the deliberations of an "advisory committee" established to make recommendations about the cleanup of an individual site.²⁰²

I have proposed "Community Working Groups" for brownfields redevelopment,²⁰³ so one might expect me to endorse Florida's advisory committee concept. However, Florida's approach has significant shortcomings. There is no requirement that governmental officials respond to community members' concerns about future site uses and cleanup standards. The advisory committee has no role in approving redevelopment plans²⁰⁴ or setting cleanup standards.²⁰⁵ The latter is

200. See, e.g., FLA. STAT. ch. 376.79(8) (1998) (defining "[e]nvironmental 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"); *id.* ch. 376.78(7) (expressing legislative intent that "[e]nvironmental justice considerations should be inherent in meaningful public participation elements of a brownfields redevelopment program."); *id.* ch. 376.80(4) (establishing an advisory committee process to, *inter alia*, "receiv[e] public comments . . . on environmental justice").

In her Comment, Tara Burns Koch argues the Florida statute effectively responds to my environmental justice concerns and those of Professor Georgette Poindexter. Koch, *supra* note 34, at 218. There is no question that the Florida statute is a "significant step in recognizing and alleviating these concerns," as Ms. Koch claims. *Id.* at 219. However, as I discuss in the text, it lacks certain key features that would lead me to agree completely with her.

201. The designation of a "brownfield area" is a prerequisite to the statutory process for redevelopment and a public hearing on this designation is necessary if "a local government proposes to designate a brownfield area that is outside community redevelopment areas, enterprise zones, empowerment zones, closed military bases, or designated brownfield pilot project areas, . . ." FLA. STAT. ch. 376.80(2)(a) (1998).

202. See FLA. STAT. ch. 376.80(4) (1998). The relevant portion of the statute states:

Local governments or persons responsible for rehabilitation and redevelopment of brownfield areas must establish 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. Such advisory committee should include residents within or adjacent to the brownfield area, businesses operating within the brownfield area, and others deemed appropriate. The advisory committee must review and provide recommendations to the board of the local government with jurisdiction on the proposed site rehabilitation agreement provided in subsection (5).

203. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 1017-20. The CWG would "provide input on actions taken at all stages of the voluntary cleanup process . . ." *Id.* at 1017.

204. Ms. Koch recognizes this shortcoming, calling for legislative change to "ensur[e] the community not only has a voice but also a vote in approving a proposed redevelopment plan." Koch, *supra* note 33, at 219.

particularly unfortunate because Florida eschewed generic cleanup standards in favor of setting the cleanup standard anew at each site.²⁰⁶ Because the local government establishes the committee's membership, it could put politics before participation. There is no guarantee the committee's input will be respected nor is there a requirement to consider the committee's recommendations or modify the site cleanup agreement if the comments suggest inadequacies. The committee is reduced to employing whatever ability for political persuasion it has available.

As I have noted, in order for environmental justice concerns to be fully incorporated in the brownfields redevelopment process, the affected community must be a partner, not a mere sounding board.²⁰⁷ While states such as Florida have made good starts in this direction, their efforts are insufficient.

There are two indispensable elements for meaningful public participation. First, rather than deferring to brownfields developers' judgments, states should enshrine broad-based frameworks that involve community members as full participants in every stage of the redevelopment process. Paul Kibel has suggested one intriguing model that resembles my "Community Working Group" proposal: "Restoration Advisory Boards" ("RABs") designed to provide community input on environmental issues in the military's base closure process.²⁰⁸ Unlike *ad hoc* task forces or advisory committees, the RABs are directed by statute to involve community members throughout the process.²⁰⁹

205. See FLA. STAT. ch. 376.81 (1998).

206. See Koch, *supra* note 33, at 222. As Ms. Koch recognizes, this does obviate my concern regarding the political legitimacy of setting generic cleanup standards on a statewide basis, at least in Florida.

207. See Eisen, *Brownfields of Dreams*, *supra* note 3, at 1000-20; Poindexter, *supra* note 171, at 1 (advocating a "stakeholder theory" approach to brownfields redevelopment). See also Kibel, *supra* note 133, at 617; McWilliams, *supra* note 104, at 773-77; Skelley, *supra* note 135, at 392-93. But see Gauna, *supra* note 97, at 50 (calling for reinvention of public participation mechanisms to promote environmental justice).

208. See Kibel, *supra* note 133, at 617-18. See also Major Stuart W. Risch, *The National Environmental Committee: A Proposal to Relieve Regulatory Gridlock at Federal Facility Superfund Sites*, 151 MIL. L. REV. 1, 100 (1996) (calling a failed CERCLA bill of the 104th Congress from which I derived the CWG concept an attempt to "establish[] CWGs, local panels that would replace entities like the Restoration Advisory Boards (RAB) previously used by the DOD.>").

209. See 10 U.S.C. § 2705(d)-(f) (1998) (describing the establishment of RABs and their functions). A RAB must be consulted on a wide range of issues, including:

- (1) Identifying environmental restoration activities and projects at the installation or installations.
- (2) Monitoring progress on these activities and projects.

Second, the scope of current public participation efforts often puts the cart before the horse. These efforts should be structured to define redevelopment plans for entire cities as well as for individual brownfields sites. Unfortunately, as I noted earlier, many brownfields projects do not come to fruition under the umbrella of a community-wide scheme for growth.

The brownfields redevelopment process is beginning to resemble earlier high-profile urban redevelopment efforts such as urban renewal and enterprise zoning.²¹⁰ At the outset, proponents claim to involve stakeholders in community-based efforts to decide the fate of each city. Nevertheless, the process becomes politicized.²¹¹ *Lessons From The Field*, the recent report by the nonprofit Northeast Midwest Institute about 20 case studies of brownfields redevelopment, identifies “critical ingredients for success” that include the city becoming a “‘brownfields broker,’ essentially helping interested buyers acquire [sites]”; providing financing to make projects viable; and establishing private-public sector partnerships.²¹² The report suggests, without any trace of irony, that “partnerships between project participants and politicians” are important.²¹³ As one early commentator on brownfields policies feared, corporations and developers are making deals with local politicians that effectively shut out public input.²¹⁴

(3) Collecting information regarding restoration priorities for the installation or installations.

(4) Addressing land use, level of restoration, acceptable risk, and waste management and technology development issues related to environmental restoration at the installation or installations.

(5) Developing environmental restoration strategies for the installation or installations.

Id. at § 2705(f). See also Major David A. Wallace et al, *Contract Law Developments of 1997—The Year In Review*, 1998 ARMY LAW. 10, 84 (describing revised regulations regarding provision of technical assistance to RABs).

210. See Kibel, *supra* note 133, at 608 (Environmental justice advocates’ “[s]kepticism about brownfields reclamation was based on . . . the negative experiences of many communities with urban renewal policies . . . aimed at improving housing and economic development in inner cities [that] failed to achieve their goals.”).

211. Professor Wolf describes how “politics as usual” has come to pervade the process of selecting U.S. cities for Empowerment Zones, which he terms a “sweepstakes.” See Wolf, *supra* note 3, at 29-30.

212. Pepper, *supra* note 92, at 15-17.

213. *Id.* at 17.

214. See McWilliams, *supra* note 104, at 771. See also Kibel, *supra* note 133, at 612 (“[T]here is concern that the brownfields issue is being economically and politically hijacked by interests that have no connection with, or true concern about, the communities they claim to be helping.”).

Sustainable development requires us to reject this *ad hoc*, politicized approach to urban redevelopment. *Lessons From The Field* notes, "brownfield initiatives should dovetail with a community's 'vision' for growth."²¹⁵ The process of articulating that vision should feature public input. An example of a more inclusive sustainability planning process is that of Chattanooga, where "[t]he city has achieved economic prosperity, greater social equity, and a higher quality environment by using a broad-based citizen involvement process to set and achieve goals."²¹⁶ However, while broad-based public participation processes are important, we must heed Professor Wolf's caution about relying on public outreach efforts as a "panacea." The other reforms discussed in this Article are important as well.

Consider this example of Pfizer Inc.'s 1998 announcement that it would build a research facility in Connecticut: "Before announcing it would build a facility in New London, Pfizer worked out a wide-ranging deal with the state and local officials covering financial incentives, community development and liability." *Pfizer provides return on cleanup investment*, THE BROWNFIELDS LETTER, Nov. 1998, at 1. The state recruited Pfizer, extending it incentives totaling almost \$75 million, including \$9 million for complete remediation of the site under the state's brownfields program. *Id.* See also Tom Condon, *Sweet Smell of Success Drifting Into New London*, HARTFORD COURANT, Sept. 1, 1998, at A3; Robert A. Hamilton, *In the Region/Connecticut; Pfizer Reaches Across the Thames for More Space*, N.Y. TIMES, Feb. 22, 1998, § 11 at 7 (explaining the Pfizer deal).

It is hard to dispute the positive impact of a facility bringing 1,500-2,000 jobs to a city with a moribund economy. See Tom Condon, *Football? No, This Is 'Folly' Ball*, HARTFORD COURANT, Dec. 15, 1998, at A3 (contrasting the Pfizer deal with the proposal to expend state funds to build a stadium in Hartford to lure a pro football team) ("I support the state's \$65 million investment in New London, because it will bring 2,000 high-paying Pfizer biotech jobs, great spinoff potential and a new state park The stadium isn't anywhere near as good a deal.") See also Tina Cassidy, *Conn. OK's Patriots Stadium*, BOSTON GLOBE, Dec. 16, 1998, at A1 (describing the stadium deal).

Because the Pfizer project was effectively a "done deal" before its announcement, however, there was little real opportunity to examine its environmental impacts in local fora. That precludes us from terming even a project as meritorious as Pfizer's "sustainable development."

215. PEPPER, *supra* note 92, at 18.

216. Dernbach, *Agenda 21*, *supra* note 38, at 10508.

IV. CONCLUSION

As Professor Ben Boer has noted, “[t]he question of sustainability will continue to be high on the political agenda in coming years.”²¹⁷ The only real remaining question of any significance is how to manage the discussion’s end game.

For now, the link between brownfields and sustainability must be more than something built on assumptions. Attaining the societal goal of sustainable development requires institutions at all levels of government to implement strategies to ensure that economic development, social goals, and environmental regulation go hand in hand. The failure of state VCPs and federal policies to reach this level is readily apparent when one evaluates these laws and policies under the three core principles for implementing sustainability.

The upcoming National Town Meeting provides an excellent opportunity to recognize a strong connection between brownfields policies and sustainable development by declaring a goal of making these core principles part of the foundation of every state VCP and federal brownfields program. To those who would respond that “sustainable development” is too vague or the specifics of implementing it in the brownfields arena elude definition or agreement, my response is simple: follow my reform proposals and those advocated by commentators Wolf, Buzbee, Abrams, Kibel, and Poindexter, and the rest may well take care of itself.

217. Boer, *Institutionalising Ecologically Sustainable Development*, *supra* note 1, at 358.