

A SMARTER PARTNERSHIP: REMOVING BARRIERS TO BROWNFIELDS CLEANUPS

HEARING BEFORE THE SUBCOMMITTEE ON ENVIRONMENT AND HAZARDOUS MATERIALS OF THE COMMITTEE ON ENERGY AND COMMERCE HOUSE OF REPRESENTATIVES

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WEDNESDAY, MARCH 7, 2001

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON ENVIRONMENT
AND HAZARDOUS MATERIALS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2123, Rayburn House Office Building, Hon. Paul Gillmor (chairman) presiding.

Members present: Representatives Gillmor, Greenwood, Largent, Ganske, Shimkus, Fossella, Ehrlich, Buyer, Bono, Walden, Terry, Tauzin (ex officio), Pallone, Towns, Brown, Green, McCarthy, Barrett, Luther, Capps, and Doyle.

Staff present: Amit Sachdev, majority counsel; Nandan Kenkeremath, majority counsel; Mark Washko, majority counsel; Jerry Couri, policy coordinator; Peter Kielty, legislative clerk; Allison Taylor, minority counsel; and Dick Frandsen, minority counsel.

Mr. GILLMOR. The subcommittee will come to order, and we will begin with opening statements. Then we will have three panels. The Governor of Delaware will be the first panel and then a second panel. Administrator Whitman was originally going to be here on the morning session but because of her schedule will not be able to do that. So we are going to reconvene after we do the first two panels at 2 o'clock this afternoon to hear from Administrator Whitman.

The Chair recognizes himself for the purpose of an opening statement. And today our subcommittee starts the House's official efforts to develop legislation to foster brownfield cleanups efforts. And while this is my maiden voyage as Chairman, the issue of Superfunds and brownfields is no stranger to this panel. I hope that our efforts from here forward will be open and constructive in nature and that we will ultimately have those efforts result in legislation that the White House can sign into law.

I want to welcome the support of the full committee chairman, Chairman Tauzin, for these efforts. And I appreciate his leadership in this area.

As we begin this effort, there are certain facts and principles I think we should recognize. First is a paramount interest is the protection of public health and safety.

Second, to unnecessarily leave thousands of brownfield areas lie unused while development goes forward is one of the most anti-en-

vironment acts which can occur. The alternative for those who are going to develop property is to develop green spaces and farmland.

Certainly in my State and I think many others farmland preservation is a major goal. Not having an effective as possible brownfields program simply means it will have concrete poured over thousands of acres of farms and green spaces.

Today we begin the journey to a legislative solution by taking a small initial step at this hearing. Brownfield reclamation efforts were popular among all groups that otherwise have concerns about reforming other parts of the Superfund law.

Brownfields are lands that because of either real or perceived environmental contamination discourage redevelopment efforts. Brownfield cleanups help people in urban areas who fear the loss of high manufacturing areas. It aids those in rural areas where there is concern that farmland will be destroyed to make way for urban sprawl. Further, while brownfields efforts are well-liked, there are minor disagreements about the way to go about it.

It might compare to the feeling people have about the all-American dessert: apple pie. Everybody likes apple pie, but some people want it with cinnamon, some like ice cream, and some like cheese on top. While each slice is different, they do make the eater feel satisfied in the end.

So this morning and later this afternoon I hope that our witnesses will help us highlight the problems that States and Federal Governments have faced in their suggestions as to how to remedy those brownfield problems. If our nation is to enjoy a partnership of economic protection coupled with economic growth, I believe it is important that we find ways to get these sites cleaned up and back into economic activity.

Economic growth and environmental protection are not mutually exclusive goals. I believe that not addressing the serious problems of liability at these sites is primarily anti-environment because the result is zero environmental rehabilitation in addition to taking the undeveloped or rural lands.

I am also personally supportive of giving States, especially those that have programs that mirror the Federal one, more flexibility in regard to voluntary cleanup and finality provisions that food developers and property owners use an expedited State-approved process for cleaning up the waste sites.

The uncertainty regarding Federal regs, extra broad Superfund liability, and needless bureaucracy have stifled brownfield cleanups for years. Some States' efforts to provide assurances on future liability and speed up remediation efforts to ensure future health and environmental security have been stymied. We need the environment of the States because the Federal Government simply doesn't have the resources to do the job alone. And while certain numbers have been thrown around to show how many brownfields our nation has, the truth is nobody knows for sure how many of these toxic sites dot our country.

But it will not be enough for all of us to say that we support brownfields cleanup and then do nothing more. We must be able to improve their effectiveness and their efficiency. And to achieve that goal, we have to remember the need to keep the goal of our efforts on this committee in clear view.

Now I want to commend the ranking member of the subcommittee, Mr. Pallone, for his cooperation and his help in putting together this hearing. And I also want to pledge my support for working together in maintaining an open line of communications between our members and our staffs. A smarter partnership in brownfields will result when we all join together to make it so.

And the Chair is now pleased to recognize the ranking member of our subcommittee, the gentleman from New Jersey, Mr. Pallone.

Mr. PALLONE. Thank you, Mr. Chairman. I want to thank you for holding this oversight hearing today on what I believe will be one of the most important issues our new subcommittee would tackle this year, and that is the brownfields redevelopment.

I also wanted to take this opportunity, as you mentioned, to thank you for the cooperation we have received so far between our staffs and you and me personally. We have talked about an agenda for this subcommittee. One of the important issues we have mentioned is safe drinking water and funding issues related to that, which I know we are going to take up in the future.

I just wanted to say that I look forward to working with you, and I think this is going to be the first of a number of successful hearings on this and other topics that we have discussed.

Brownfields, as we know, is a relatively recent, complex, and dynamic area of public policy. Government at all levels, local, State, and Federal, is grappling with liability, environmental, and cost issues posed by brownfields reclamation and is taking steps to resolve these issues.

Despite the popular image of brownfields as an urban problem, they are found in suburbs and rural areas, too. My State of New Jersey, is a relatively small State, although I see we have Governor Minner. So maybe we are not as small as you, but we are small. We have a number of aging industrial sites, and we are obviously heavily affected by hazardous waste. Accordingly, New Jersey has taken a leadership role in developing regulatory and funding tools for cleaning up brownfields.

The ability to reuse brownfields is important to implementing New Jersey's smart growth agenda because it blunts pressures to develop untouched greenfield land and, therefore, helps contain sprawl. However, brownfields redevelopment is also important because of the public policy perspective, which is a tricky one, I have to say.

It is clear that there is no such thing as a typical brownfield site nor is there one problem common to all sites. They vary greatly in size, location, origin, marketability, and degree of contamination. For the most part, none of the sites have been inventoried or assessed. These two facts make it nearly impossible to prescribe a single solution, which provides redevelopment incentives for the wide variety of brownfield sites that currently exist.

With these concerns in mind, I believe the role for the subcommittee is to strike a balance between the desire to provide redevelopment incentives that will work for such a variety of sites while at the same time maintaining the assurance to affected citizens that these sites will no longer threaten the health of the community.

Four years ago the Democrats in the House introduced H.R. 1120, the first stand-alone brownfields bill. That was in the 105th Congress. In the 106th Congress, every Democratic member on this committee cosponsored H.R. 1750, a stand-alone brownfields bill that had received the endorsement of the EPA. In the near future, Mr. Chairman, I along with Mr. Towns and Mr. DeFazio and other Democratic colleagues will be reintroducing similar brownfields legislation.

I was pleased to hear that in her testimony last week before the Senate Environment and Public Works Committee, my former Governor, now the EPA administrator, Christie Whitman, and the Bush administration endorsed the stand-alone brownfields approach. That means addressing brownfields separate from any Superfund reform. If we are to be successful in enacting brownfields legislation, it must be targeted to the traditional brownfields issues discussed in Mrs. Whitman's testimony.

There are many different types of voluntary cleanup programs in the country. A report from the GAO found that the State programs vary significantly in their approaches to public participation, direct State oversight, and monitoring after an action has taken place. In Illinois, for an example, a new developer may decide to clean up just one of several chemicals at a site and receive a certification for that chemical alone. In my home State of New Jersey, the liable party responsible for creating the contamination is not eligible for any liability protection under our State brownfields program. In other States, the person or company who polluted the site is eligible for liability protection. There are obviously differences.

Recently there have been reports that voluntary cleanups under one State program are being performed with no public participation, minimal direct State oversight, and with a heavy emphasis on deed restrictions, fences, caps, or landscaping, rather than permanently cleaning up or removing contamination. In other State brownfields programs, deed restrictions are apparently not an allowable cleanup method. So we really have a great variation here.

With the wide array in voluntary cleanup programs, we should be very careful in placing restrictions on Federal enforcement authorities. And we must maintain a strong and effective Federal safety net. If a site may present an imminent and substantial endangerment to human health or the environment after a voluntary cleanup, it is vital that the affected citizens and communities can rely on both Federal and State authorities to protect their health and neighborhoods. There is a significant number of memorandum agreements entered into by States and the EPA concerning voluntary cleanups that follow this very practical approach and have been successful in facilitating brownfields cleanups.

I just want to thank you again, Mr. Chairman. I know we have some very good witnesses today, and I look forward to hearing them, starting with the Governor.

[The prepared statement of Hon. Frank Pallone, Jr. follows:]

PREPARED STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NEW JERSEY

Thank you, Mr. Chairman, for holding this oversight hearing today on what I believe will be one of the most important issues our new Subcommittee tackles this year—Brownfield Redevelopment. I also wanted to take this opportunity—as this is

our Subcommittees first hearing—to express my interest in this issue as well as important funding issues under the Safe Drinking Water Act in the future. I look forward to working with you, Mr. Chairman, and I believe this will be the first of a number of successful hearings.

Brownfields are a relatively recent, complex and dynamic area of public policy. Government at all levels—local, State, and federal—is grappling with liability, environmental, and cost issues posed by brownfields reclamation, and is taking steps to resolve them. Despite the popular image of brownfields as an urban problem, they are found in suburbs and rural areas, too. My state of New Jersey, a small state with widespread aging industrial sites, is heavily affected. Accordingly, New Jersey has taken a leadership role in developing regulatory and funding tools for cleaning up brownfields.

The ability to reuse brownfields is important to implementing our states smart growth agenda because it blunts pressures to develop untouched Greenfield land, and therefore helps contain sprawl. However, brownfields redevelopment is also important because of the public policy perspective a tricky one at that.

It is clear that there is no such thing as a typical brownfield site nor is there one problem common to all sites. They vary greatly in size, location, origin, marketability, and degree of contamination. For the most part, none of the sites have been inventoried or assessed. Those two facts make it nearly impossible to prescribe a single solution which provides redevelopment incentives for the wide variety of brownfield sites that currently exist.

With these concerns in mind, I believe the role for the Subcommittee is to strike a balance between the desire to provide redevelopment incentives that will work for such a variety of sites, while at the same time maintaining the assurance to affected citizens that these sites will no longer threaten the health of the community.

Four years ago this month, the Democrats in the House of Representatives introduced H.R. 1120, the first stand-alone brownfields bill. That was in the 105th Congress. In the 106th Congress, every Democratic Member on this Committee cosponsored H.R. 1750, a stand-alone brownfields bill, that had received the endorsement of the Environmental Protection Agency. In the near future, I along with Mr. Towns, and Mr. DeFazio, and other Democratic colleagues will be reintroducing similar brownfields legislation.

I was pleased to hear that in her testimony last week before the Senate Environment and Public Works Committee, EPA Administrator Whitman and the Bush Administration endorsed the stand-alone brownfields approach—that means addressing brownfields separate from any other Superfund reform. If we are to be successful in enacting brownfields legislation, it must be targeted to the traditional brownfields issues discussed in her testimony.

There are many different types of voluntary cleanup programs in the country. A report from the GAO found that the state programs vary significantly in their approaches to public participation, direct state oversight, and monitoring after an action has been taken. In Illinois, a new developer may decide to cleanup just one of several chemicals at a site and receive a certification for that chemical alone. In my home state, New Jersey, the liable party responsible for creating the contamination is not eligible for any liability protection under the Brownfields program. In other states, the person or company who polluted the site is eligible for liability protection.

Recently, there have been disturbing reports that voluntary cleanups under one state program are being performed with no public participation, minimal direct state oversight, and with a heavy emphasis on deed restrictions, fences, caps, or landscaping rather than permanently cleaning up or removing contamination. In other state brownfields programs, deed restrictions are apparently not an allowable cleanup method.

With the wide array in voluntary cleanup programs, we should be very careful in placing restrictions on Federal enforcement authorities and we must maintain a strong and effective Federal safety net. If a site may present an imminent and substantial endangerment to human health or the environment after a voluntary cleanup, it is vital that the affected citizens and communities can rely on both Federal and State authorities to protect their health and neighborhoods. There are a significant number of memorandum of agreements entered into by states and the EPA concerning voluntary cleanups that follow this practical approach and have been successful in facilitating brownfields cleanups.

Thank you. I look forward to hearing from the witnesses today.

Mr. GILLMOR. The gentleman from Louisiana, the chairman of the full committee.

Chairman TAUZIN. Thank you, Mr. Chairman. Let me first congratulate you and Ranking Member Pallone for the cooperative way in which you have begun this very important 2-year period in which your committee will focus on some extraordinarily important environmental concerns of our country.

For the audience's sake, let me advise you that in structuring our committee this year, we obviously put clean air into the Energy Committee because of its extraordinary closeness with both mobile and stationary source of energy consumption issues. Outside of that, we broke the mold of the previous administration of this committee in putting the other environmental issues that are under the jurisdiction of this committee into a single subcommittee without any other focus. No longer will the Environmental committee be also interested in the questions of financial services, for example, or the Environmental Committee be interested in the extraordinary issues of Medicare and Medicaid and patients' bill of rights and prescription drug issues, but it will be literally discussed here in this subcommittee and hopefully shepherded to the full committee and to the floor in due order because we are focusing this subcommittee's work strictly on our environmental jurisdiction.

And I want to commend you for making brownfields your first inquiry in the subcommittee's first hearing. Indeed, I am also pleased that the administrator of EPA, Governor Whitman, will make her first appearance in the U.S. House of Representatives here today. I am also especially pleased that Governor Minner is here from the great State of Delaware to bring the perspective of the States to this issue.

Obviously one of the things we hope to do—and I know that Governor Whitman has already spoken of it—is to establish a better partnership between the EPA and the States in terms of this important issue and to hopefully remove the barriers of the Federal Government and to establish a more flexible program that respects the State's decisions in these areas. That is going to be I hope the work and the focus of this committee on this important issue.

Important to this consideration is also the way in which we work with the States. Governor Whitman and President Bush have indicated that it is time we extend a helping hand, an open hand, rather than the back of our hand, to the States as they struggle to make these important decisions.

We don't know how many brownfield sites there are, Mr. Chairman. You correctly said that. They could be hundreds of thousands. Getting them cleaned up and back into productive use in a way that both protects the environment and aids the economy of our local communities is a worthwhile goal.

Indeed, the Bush administration has announced that it wants to work for a brownfields bill that it can support and that this committee can support. We have pledged to Governor Whitman a new relationship of cooperation and partnership in this and other environmental areas under the committee's jurisdiction.

Let me also compliment Governor Whitman on a statement she made that she supports principles that are based upon good scientific analysis. The quote that I want to refer to is that she said that "Neither policy nor politics should drive scientific results." I endorse that comment. I hope this committee does.

And I hope that the extraordinary cooperation we have already seen between the chairman of this committee, Mr. Gillmor, and the ranking member, Mr. Pallone, will continue as we strive to make science the driver of the decisions that will literally be made to make sure that these brownfields are eventually put back into good productive use for the good of our economy and our environment.

Finally, I wanted to not only welcome Governor Minner but to compliment her and all the Governors—there is a bunch of Governors in town today—for their efforts to stay in touch with us and to give us their perspective on how these Federal programs work in the States. We too often have neglected this kind of close and cooperative relationship.

We are going to stress it at this committee level. We are going to seek your help, your guidance on the energy policy we write, on the environmental policy this committee develops, and on every issue that is important not only to the Federal system but intricately to the State systems that you folks manage.

I deeply appreciate your coming, as I do Governor Whitman. Mr. Chairman, this is your first real venture out as a subcommittee. You and Mr. Pallone are to be congratulated on making this the important topic of discussion. You will have the full support of the chairman and the staff in this endeavor. And anything we can do to help you in this inquiry and to build the bipartisan bill that we are going to have to build out of this committee you have in abundance. And I ask you please to call upon me on either side when you require it.

Thank you, Mr. Chairman. I yield back the balance of my time.
[The prepared statement of Hon. W.J. "Billy" Tauzin follows:]

PREPARED STATEMENT OF HON. W.J. "BILLY" TAUZIN, CHAIRMAN, COMMITTEE ON
ENERGY AND COMMERCE

Thank you, Mr. Chairman, I commend you for holding this hearing. I am particularly pleased that Governor Whitman's first appearance in the U.S. House of Representatives, as Administrator of EPA, is before our Subcommittee. I am happy to join the Chairman in welcoming today's panel of witnesses, especially Governor Minner from Delaware, and the representatives from New Jersey and Wisconsin's state environmental agencies that have joined us to discuss the important topic of removing barriers to brownfields cleanups.

Brownfields are those abandoned or under utilized properties often found in urban areas that are typically less contaminated than the toxic waste sites on the Superfund list. There are literally hundreds of thousands of these sites across the country and it makes perfect sense to me that this Subcommittee should focus its efforts on looking at ways to redevelop, revitalize and put these sites back into productive use.

Governor Whitman has already identified principles that are designed to promote a smarter partnership for environmental programs, and EPA has my assurance today that the Energy and Commerce Committee will work with the Bush Administration on these important changes.

Governor Whitman has also identified the need for more flexibility in Federal laws and more respect for state decisions. These are the fundamental elements of today's brownfields hearing. Uncertainty over federal overfiling, overly broad Superfund liability, and needless Federal bureaucracy have stifled brownfields cleanups for decades. Federal law and federal programs should encourage the redevelopment of brownfields, rather than impose barriers and disincentives to cleanups. We must change federal programs so they are a helping hand for states and local governments, not a heavy hand that gets in the way.

I also applaud Governor Whitman for her support for the principle that scientific analysis should drive public policy, and that "neither policy nor politics should drive scientific results." While not a specific topic at this hearing, rest assured, that the

Energy and Commerce Committee supports sound science as a driver for environmental programs and improvements.

Honesty and trust are cornerstones for a smarter partnership in environmental programs. Over my years of public service, I have seen firsthand the damage that groups which rely on rhetoric and fear-mongering have inflicted on reasonable and bipartisan efforts to make progress in the environmental arena. I want to assure you Mr. Chairman, that I am committed to confronting these obstacles head-on in order to promote environmental improvements that foster more cleanups, faster cleanups and better cleanups.

Over the past several years the Committee's relationship with EPA has been often times rocky and partisan. I look forward to working constructively with an EPA that works diligently and directly with this Committee to minimize rhetoric, and to focus on the task of eliminating barriers and disincentives to cleaning up America's toxic waste sites and putting brownfields back into productive use.

With a new direction and a smarter partnership: between the Federal and state governments, between EPA and Congress, and between the regulators and industry, I hope we can have a serious evaluation of the problems facing current cleanup programs, and that we share a common objective: to make those federal and state programs better, more effective, and more efficient. I look forward to the testimony of today's witnesses, and I encourage my colleagues, federal and state regulators and other stakeholders to working with us in making brownfields reform a reality.

Thank you Mr. Chairman, I yield back the balance of my time.

Mr. GILLMOR. Thank you very much, Mr. Chairman. And I might say as Chairman of the Environment and Hazardous Materials Committee, we plan to take very good care of all the trees and trash.

The Chair recognizes the gentleman from Ohio, Mr. Brown.

Mr. BROWN. Thank you, Mr. Chairman.

Mr. Chairman, I represent neighboring districts in northeast Ohio. Lorain County is split between our two districts. And we both know northeast Ohio's proud history as a center for manufacturing. We also share a concern about the down side of that legacy: contamination from previous commercial or industrial activities or concerns about possible contamination that prevent the productive use of many urban sites. By cleaning up these sites, we can create jobs and preserve farmland and green space.

I strongly support legislation that provides increased funding to local governments and redevelopment authorities for site assessment grants and revolving loan funds. In addition, I believe there is virtual consensus on providing liability protection for innocent landowners, for owners of contiguous property, and for new developers who were not responsible for creating the contamination. Enacting these provisions would encourage brownfield cleanups because anyone who qualifies as an innocent landowner or a new developer or purchaser would have liability protection under Superfund.

In other cases, specific persons or companies will be responsible and potentially liable for cleaning up toxic pollution at brownfield sites. In these circumstances, as Ranking Member Pallone said, a strong and effective Federal safety net is essential to protect citizens from health risks or from toxic contamination of their neighborhoods. For example, in the chairman's and my State of Ohio, citizens and environmental groups throughout the State believe that the voluntary cleanup program Ohio has undermines environmental protection in our State. Ohio is the only State in Region 5 without a signed memorandum of understanding for brownfields with EPA.

A recent comprehensive evaluation of the Ohio voluntary cleanup program raises serious questions about the wisdom of any restrictions on Federal enforcement authority. Let me briefly cite a few of the findings.

The current voluntary action program does not meet U.S. EPA requirements for brownfields cleanup programs in the area of government oversight, of public participation, and of enforcement.

Of the 88 Ohio States reviewed, none contained evidence of any notification or interaction with residents in surrounding communities during any phase of the assessment and cleanup process.

Deed restrictions on land use or groundwater use, the most common institutional control, were adopted by only 55 out of 111 sites, not quite half the sites.

Fifty-seven Ohio sites received covenants not to sue, but only 30 percent of these sites physically removed contaminated dirt or other contaminated substances. The other 70 percent of these sites relied on institutional or engineering controls to limit human exposure to these hazards, rather than actual removal of contaminants, a pretty sorry state of affairs when you look at all of those findings.

These are troubling findings. As we move forward, I hope the subcommittee will recognize that the State voluntary cleanup programs that, unfortunately, my State the last several years has put together, that those differ significantly from where we should be.

Mr. Chairman, I look forward to working with you on this issue. I welcome the new Governor of Delaware to us today. And I look forward to working on other issues of importance to northeast Ohio and to our nation. And I thank the chairman.

Mr. GILLMOR. The Chair recognizes the gentleman from Indiana for 3 minutes.

Mr. BUYER. Thank you, Mr. Chairman.

Governor, over the years I sat at that table where you are right now testifying on Superfund reform issues. Now I have the opportunity as a new member of this committee to be fully engaged in the issues, not only on Superfund but interstate waste and brownfields. So I look forward to your testimony on behalf of the Governors' Association today.

I appreciate, Mr. Chairman, you not only holding this hearing today to examine the brownfields program but also your continued interest and dedication in ensuring a clean environment. Cleaning up our nation's contaminated sites is important, not only to redevelop economically viable properties but to also ensure a safe and healthy environment for our children to grow and play. We will look at the effectiveness of a program and its funding, the barriers to cleanup, what flexibility you as Governors need in all of the States, and the roles and responsibilities of all entities involved in the process.

In my congressional district in Indiana, is the largest Superfund site in EPA's Region 5. It is called the Continental Steel site in Kokomo, Indiana. The site has been on the national priority list since 1988 and presently includes the main plant of about 68 acres, a lagoon area of about 53 acres, and 20 acres of quarry area. Approximately 1,600 people obtain drinking water from private wells within 3 miles of the site.

This site does not suffer from any of the difficulties other sites suffer, whether it is liability or costly court cases, as it is an orphan site. Instead, it suffers because of the vast size and extremely costly price tag to clean up with estimates well above \$100 million.

While the State of Indiana has taken great initiative and recently demolished the buildings, the hardest and most costly portions, though, are left. The funding route for the site has been diverted. Why? You can never get a straight answer. It was very disappointing throughout the 1990's that the ability of regional directors to prioritize sites was removed from them and it was held in Washington, D.C. I think that was wrong. I am interested to learn if similar problems exist in the brownfields program.

I also want to comment that I do not believe we should have a stand-alone brownfields bill. If you do that, you will never get Superfund reform. Now, I can understand why some of my Democrat colleagues want to say: Well, let us just move a brownfields bill. Let us just focus on that for which we can agree. If you do that, you will never focus on your differences. So I am hopeful that we do Superfund reform with brownfield together. It is like jelly in a peanut butter sandwich.

I yield back the balance of my time.

Mr. GILLMOR. The gentleman yields back. And the Chair would announce that any members who wish to submit records to be entered in the record, that will be done. The gentleman Mr. Luther?

Mr. LUTHER. Thank you, Mr. Chairman. And thanks for holding this hearing.

Mr. Chairman, my home State of Minnesota has been a pioneer in creating State voluntary assessment and cleanup programs for brownfields sites. In speaking with State and local officials in Minnesota, it is clear to me that improvements can be made in our Federal brownfields program.

There is just one point that I wanted to raise this morning before the testimony begins because I think it is a point that deserves mention. And that is that I hope that our committee will deliberate on designating Federal funds for converting brownfields into green space.

I come from a largely suburban district. Many of my constituents would rather convert their brownfields into parks, bike trails, or the like, rather than another office building. And, as you know, the emphasis under current laws tends to be on commercial development to the exclusion of other forms of development.

As such, I believe that we ought to consider in this committee providing our local communities with the option to use brownfields grant and loan money for commercial, residential, or recreational use, whichever best serves the interests of the people of the local community.

I look forward, Mr. Chairman, to working with you and other members of the committee on this important issue. And I look forward to hearing the testimony. Thank you.

Mr. GILLMOR. The gentleman from Pennsylvania, Mr. Greenwood.

Mr. GREENWOOD. Thank you, Mr. Chairman. I want to also thank you for convening the hearing today.

We want to welcome all of the witnesses, including Governor Minner. We will be finished with all of this fodder pretty soon. Also I look forward to Governor Whitman's, EPA Director Whitman's, testifying later today. I am especially pleased that President Bush has identified the issue of brownfields as a priority for his administration.

I think we all recognize that the Superfund law frequently impedes, rather than encourages, cleanup of brownfield sites. I am hopeful that today's hearing will offer important evidence about the barriers to cleanup and also help us understand what innovative approaches States such as my home State of Pennsylvania have used to overcome such barriers.

My district has nearly 4 square miles of brownfield sites, deserted gas stations, small industrial buildings, empty factories, located in the southern portion of Bucks County. It is for this reason that since coming to Congress one of my top priorities has been to craft legislation that allows the States to turn these large areas of abandoned or under-utilized, once prime commercial real estate back to America's original Fields of Dreams. And that is why in the last session I introduced the Land Recycling Act, which was H.R. 2580.

Returning these Fields of Dreams to active use is key to economic development and, as we all know, economic development leads to job creation, a drop in welfare rolls, a reduction in crime, and safer, healthier neighborhoods. In fact, economic development is a vital component of the fulfillment of the American Dream: self-sufficiency and opportunity. As long as these properties lie vacant, the dream will remain unfulfilled for many Americans who live and struggle to survive in these blighted areas.

The brownfields problems have many sources. Foremost among them is the Federal law itself. Under Superfund, parties who currently own or operate a facility can be held 100 percent liable for any cleanup costs, regardless of whether they were in any way at fault. The imposition of this liability has led to tragic consequences, including the rejection by potential developers of any site with a history of industrial activity. It is simply not worth dealing with the environmental exposure when they have the alternative of developing in pristine greenfields where there is no potential for liability.

Pennsylvania, like many other States, has made significant strides in the cleanup and reuse of contaminated and abandoned industrial sites. Pennsylvania's award-winning Land Recycling Program is a national model for voluntary cleanup programs. Nearly 770 sites have been addressed under its program since inception in 1995, with over 20,000 people now employed at those sites.

Despite Pennsylvania's success, States, businesses, and other experts have testified that they could be far more effective if participation in a State voluntary cleanup program also included a release from Federal liability. It remains imperative that we reform Superfund so that it includes a strong brownfields provision.

Once again, Mr. Chairman, thank you for holding this hearing today. I look forward to working with the committee in crafting legislation that will ensure a clean and safe environment for ourselves, for our children, and for generations to come.

Mr. GILLMOR. Thank you.

Mr. Doyle?

Mr. DOYLE. Mr. Chairman, thank you for scheduling this timely hearing to examine Federal and State efforts to promote the clean-up, redevelopment, and reuse of brownfields properties.

Federal brownfields policy is of great concern to my communities in southwestern Pennsylvania, which comprise much of the region referred to as the Rust Belt. As you can imagine, these are numerous old, defunct industrial sites in these communities, which stand to benefit from our efforts to improve the effectiveness of the brownfields program and to identify and remedy barriers and disincentives to brownfields cleanups.

Without question, the brownfields program has spurred serious public discussion about the link between environmental restoration and economic development and has proven to be a valuable resource that neighborhoods all across the country have accessed to help make their redevelopment ideas a reality. In communities where tax bases took a major hit, where heavy industries crumpled in the early 1980's, redevelopment of brownfield sites often plays a critical role in accelerating the rate at which their economic climate is rejuvenated.

The end result of an unimpeded brownfields cleanup is that the condition of our residents' public health and private pocketbooks both are improved and not at the cost of busting the local tax base but actually growing it.

In Pennsylvania alone, as my colleague has stated, the brownfields program has supported 654 cleanups on 583 properties covering 9,000 acres and creating over 17,000 jobs. It is also important to keep in mind that Pennsylvania has been nationally recognized as having an outstanding State-run program.

That being said, I believe there is much more that we can do to better tailor the brownfields program to meet the most pressing needs of our communities. The most frequently cited impediments to redevelopment are: a lack of cleanup funds, liability concerns, the need for additional environmental assessment support, and permanent tax credits. The question is: Are we going to proceed in crafting meaningful responses to these very real impediments?

And I always make a practice to approach whatever matter is at hand with an eye toward building consensus. It has been my experience that by fostering communication and greater understanding, the best solutions can be found to even our toughest problems.

With this principle in mind, it is my hope that we will take seriously and thoroughly consider all concerns brought before this subcommittee. Throughout reaching and building partnerships among State and local governments, environmental groups, and the business sector, we lay the cornerstones of what makes brownfields programs so successful. We must not lose sight of this necessary dynamic when moving forward with any new legislative measure such that we ensure the brownfields program continues to make improvements in meeting currently unmet needs and offering hope for a cleaner environment, new jobs, a stronger tax base, and economic recovery.

Thank you, Mr. Chairman.

Mr. GILLMOR. Thank you.

The Chair would announce that we have a vote on. It would be the Chair's hope that we can continue the hearing without recessing for the vote. The vice chairman of the committee is over voting and will be coming back while I vote. And for those members waiting for recognition, if you want to go vote, we will keep your place in the order of testimony.

Gentleman from Maryland, Mr. Ehrlich.

Mr. EHRlich. I will be brief, Mr. Chairman. I will forego a prepared statement.

Governor, if you are getting the idea this is a pretty important and relevant subject to every member here, you are right. And I know it is for you, too. So welcome.

Second, Mr. Chairman, good luck. You are not going to need it. And congratulations. That is from classmate to classmate, I guess.

Third, Mr. Chairman, I really do know you believe in this issue. And I think this should be the priority item with respect to the 107th Congress.

With regard to my colleague's comments from Indiana, I agree, but I want to add a caveat. I would love to move a Superfund bill, as you know, but I think it is imperative, I think it is very important this committee move a bill this session because the need I know we are going to hear in a second is dramatic and timely.

Last point. With regard to the issue of consensus, that is a subjective term, particularly in this town. I hope we do not do what some States have done, which is move consensus bills and, as a result of a consensus, nobody takes advantage of bills moved in those particular States because those statutes did not handle the difficult issues, particularly with respect to liability.

I think it is important that this committee move not only a viable bill but a bill that deals with the real philosophical differences that exist on this issue, particularly with respect to liability relief.

As someone who practiced law in this area, Mr. Chairman, we look forward to working with you. I look forward to taking this subcommittee to Baltimore, Maryland to see an awful lot of brownfield sites. And hopefully we can by the end of this Congress when we revisit the 108th Congress see far less brownfield sites.

And I yield back.

Mr. GILLMOR. Gentleman yields back his time. Gentlewoman from California.

Ms. CAPPS. Thank you, Mr. Chairman, for holding this important hearing today. And I want to add my welcome to the honorable Governor of Delaware as you are speaking here on behalf of all of the Governors.

Over the past couple of years, we have come to a bipartisan consensus on the need to move forward with brownfields legislation. Not only that, but I believe we are actually very close to consensus on the parameters of such legislation. I hope that this year this subcommittee can produce such legislation and we can give support to an innovative set of programs at the EPA and at the States. We should work hard at this because the redevelopment of brownfields is a critical issue not only for our big cities but smaller cities and towns across this nation.

Encouraging this redevelopment means reducing the threat of urban sprawl and the strains on our transportation systems. It

means taking advantage of the infrastructure already in place in many urban or older industrial areas. It means creating jobs and economic opportunity for neighborhoods often neglected. And I know because I have seen this in my district. The redevelopment of the brownfields in the small Town of Goleta near Santa Barbara, California is a good example of a small and growing community recapturing some valuable property and improving the local economy and enhancing the quality of life there.

Last year I was a cosponsor of Mr. Towns' brownfields bill, H.R. 1750. I believe that bill both encourages the redevelopment of brownfields and continues to ensure that the public health is always safeguarded. And so I hope the subcommittee will consider this bill as an excellent starting point for our discussions this year.

The liability protections in the bill for prospective purchasers of brownfields, innocent landlords and contiguous property owners, are particularly important. They offer much needed assurances to developers and property owners who are trying to do the right thing by revitalizing brownfields.

I know that much of the debate will focus on the Federal interaction with State plans and what is termed as "finality." It is my understanding that there is a wide variation in State voluntary cleanup programs in terms of who is eligible, the opportunity for public participation, and the level of direct State oversight. It is because of this wide variation that we must have a strong Federal safety net to ensure the public health and safety of all citizens and their neighborhoods with Federal support if necessary.

Clearly we want to ensure finality for those involved in cleanups, but we also want some finality in the reduction of threats to public health and safety imposed by brownfields. And only effective cleanup will do that. And so I hope that this subcommittee can move quickly on the legislation to address this critical need.

Thank you. I yield back the balance of my time.

Mr. SHIMKUS [presiding]. I thank the gentlewoman, and I recognize the gentleman from Nebraska, Mr. Terry.

Mr. TERRY. Thank you, Mr. Acting Chairman.

A little bit of historical perspective to kind of set my framework. I spent 8 years on the Omaha City Council. In those 8 years, there was one issue that left deep and penetrating scars on my back. And that was a brownfields cleanup, where we wanted to take river-front property that was an old industrial site and turn it into a nice city park that people could go back to the river. I have never been involved in a more bloody battle than that.

You know, we hear across this board bipartisan desires for brownfield cleanup, but my experience in the field is that it is everything but bipartisan. I was sued for my vote to go forward with this as a city park. It was a feeding frenzy of environmental groups that came in and said removing 4 to 6 feet of dirt wasn't enough.

And so I just want to state that I have been through some of these wars before and I have a kind of a very skewed view of the current process and a strong desire for reform here which recognizes certain realities.

And so, Governor, I don't know if you have had similar type experiences in dealing with some of these extremist groups in these types of cleanups that say that they are in favor of the environ-

ment but take actions that from my standpoint are not logical if your conclusion or your desire is to clean up and create green space.

We need to look at reforms in regard to how the EPA can sign off on certain projects without having to take them over as a Superfund site. We need to empower the States to make sure that they have the confidence in their own voluntary cleanup when the State departments sign off.

We also need to make sure that if someone takes title, that they have some assurances that they won't be on the hook. Those are all areas that I think we need to look into. And while we have the voiced spirit of bipartisanship, there is a lot of heavy lifting that is involved in those three tenets.

So I look forward to your testimony in regard to some of your personal experiences in Delaware. Thank you.

Mr. SHIMKUS. Thank you, Mr. Terry. And I want to thank you, Governor, for being here. In fact, I was going to recommend to my colleague from Nebraska that I am the chairman now because I am in the chair. I am not acting.

We do this to try to keep things moving so that we don't have to recess and waste time. I will give my 5-minute opening statement. Maybe a few more of my colleagues will come back and want to give theirs. And I think counsel is telling me that we will recess for your opening statements if I don't filibuster long enough to allow people to get back.

Superfund reform, in this aspect brownfields, in an exciting issue now I think in this upcoming Congress. There is optimism on a lot of sides that we can move and address some of the problems that I think you will give testimony to, and we are very pleased with having you here.

You talk about sprawl, which is a cliché that we are somewhat concerned about. Superfund reform and getting some of these old sites back in productive use could help address the entire sprawl debate. We think we are now in a position to pass some legislation which is environmentally sound and will help move our nation forward and get these areas back in productivity.

Another aspect, the prerogative of the Chair and a prerogative of members to bring up other issues, that we are going to have other people testify on in this long list of people in different panels is small business liability from the Superfund relief, which I know we probably have some staffers from the EPA out there.

It is no mystery or secret that I have been fighting for these small businesses who have been caught in this battle. And I am looking forward to the new administrator helping push not only brownfields reform but also small business liability relief protection. And I think there is an opportunity to do both of those.

So it is an exciting time for those of us who serve on some of these committees that people wonder why we get on a committee that wants to address Superfund reform or brownfields. It is not very sexy, but I think for the growth and, really, the living conditions and the environment of some of our major metropolitan areas, it can be a great benefit in the future.

So, with that, I am going to end my opening statement and check with counsel.

Folks, we are going to take a short recess. And the recess is not going to have a time limit. So as soon as we get the other members back and find out they are going to do an opening statement, then we will call the committee back into session. So it is kind of like in the Army when they say, "One foot in place. Rest." One foot in place, we will recess subject to the call of the Chair.

[Brief recess.]

Mr. GILLMOR. The subcommittee will come to order. I apologize to Governor Minner for this break, but I also know that she is a former legislator and knows that sometimes these things are beyond our control.

We will recognize the gentle lady from New Jersey, Ms. McCarthy, for an opening statement.

Ms. MCCARTHY. I thank you, Mr. Chairman. And as a former legislator, I appreciate your understanding in needing to just spend a moment, first of all, to thank you for being here and to thank the chairman for holding this hearing and welcoming the opportunity to have a dialog on how we can develop a smarter partnership for the brownfields cleanup and Superfund sites that we all care so greatly about in our States. I have long been an advocate of both initiatives, both at the State legislative level and now at the Federal level.

My State of Missouri has some pretty good success stories. Particularly my district, greater Kansas City, has been designated a showcase community by the Region 7 Environmental Protection Agency. And we got an award, the Phoenix Award, which is a national honor. It recognized our excellence in brownfields development work. And we have had some real good results.

So I thought today what I would do is share with you some of the things that I think worked well in Missouri that might need to be expanded to other States. For example, we created in Missouri a remediation tax credit for up to 100 percent of remediation costs if it works through the voluntary cleanup program. We might think about that as becoming a similar Federal program for all States to use because it has been very, very successful.

Initially the Federal brownfields tax credits could be implemented as demonstration pilot within the 28 brownfield showcase communities across the country on a 3-year basis. This has been very successful. The pilot proves its success as a showcase. And I think it would be good to expand it and roll it out as a national program that we could get behind.

Historically many U.S. industrial sites which later became brownfields are located close to waterways. With their flood control, engineering, environmental, and project management expertise, the Corps of Engineers is uniquely positioned to assist in the national brownfields initiative. And I think we should consider at the Federal level incorporating the U.S. Army Corps of Engineers Water Resources Development Act into Section 7 of the brownfields revitalization program and make that partnership and teamwork national.

Last, the brownfields funding for petroleum and lead-based paint and asbestos sites needs to be considered and addressed because I think legislation is needed to move beyond CERCLA limits that

prevent assistance for worthy brownfield projects that involve petroleum, lead-based paint, and asbestos contamination.

Due to the exclusion and limitations of CERCLA, most of the EPA assessments and remediation loan funding tools for brownfields cannot be used on these sites. But in urban areas such as mine, these are real sites people are interested in and if revitalized could continue to provide that economic development, local jobs, and restoration of our central cities.

So, Mr. Chairman, I think this is a very apropos hearing that you have called today. I look forward to working with you to address some refinements to the law we created. It is a good law. It is working. It is helping. And we can make it even better if we work together. Thank you very much.

Mr. GILLMOR. Thank you very much.

Are there other members desiring to make an opening statement? Gentleman from Wisconsin.

Mr. BARRETT. Thank you very much, Mr. Chairman. I appreciate your holding this hearing today.

I will be brief in my comments. I am pleased that we are here today. I am especially pleased that George Meyer from the State of Wisconsin is joining us to testify before the subcommittee. He has a long and distinguished history in Wisconsin of public service and, really, for many, many years, led a nonpartisan Department of Natural Resources in our State. And it is something that you can be proud of. And I thank you for the work that you have done in our State.

In the past in this Congress and in this committee, unfortunately, this issue has been, from my viewpoint at least, a lost leader in trying to move Superfund legislation. I say a lost leader because I think that brownfields cleanup is an issue that has widespread bipartisan support. Particularly in some of the Midwestern, Northeastern cities, many of us feel very strongly that we could have moved legislation independent of the Superfund overhaul, which inevitably got bogged down into debates over who should pay.

So I am especially pleased this session that the leadership of this committee has taken a different approach and has now willing to look at stand-alone legislation. I think that this dramatically increases the chance that we will be able to move forward on this very important issue.

So, again, Mr. Chairman, I thank you and would yield back the balance of my time.

Mr. GILLMOR. The gentleman yields back.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF MICHIGAN

Mr. Chairman, I thank you for conducting this oversight hearing on brownfields. This subject is important to me, and to many of the Members of this Subcommittee. In the Detroit metropolitan area alone—home to much of our country's industrial strength for over 100 years—brownfields cover tens of thousands of acres of land once occupied by mighty manufacturing facilities and thriving communities. Today, many of these properties are abandoned by their once-prosperous owners. They have become an eyesore and, in some instances, a threat to the livelihood and health of the citizens who live around them. This situation is not unique to the Detroit area, nor to urban areas generally.

For years now, we have enjoyed bipartisan agreement that brownfields legislation is needed. Yet, we have not seen brownfields legislation become public law. Some years ago, lender liability relief was enacted into law because we achieved consensus among stakeholders, the Administration, and Members on both sides of the aisle. That consensus produced one of the few amendments to any environmental law in recent memory. Consensus should be the model by which we proceed.

By contrast, many controversial provisions to amend the Superfund statute have never come close to becoming public law—and they have held hostage consensus provisions such as prospective purchaser and innocent landowner relief. As these consensus provisions languish, some Members in this body cannot resist the temptation to tinker, thus sparking controversy where there was none.

Having listened to my constituents over the years, I am aware that environmental laws did not create brownfields. I am aware that there are numerous challenges to the redevelopment of brownfields including financing and infrastructure needs. I am aware that it is often difficult to evaluate the economic condition of an area in which a brownfield is located: its crime record and potential to attract business. Environmental issues are often the most easily predictable of those a developer encounters when deciding whether to invest.

That being said, I am pleased to report that brownfields redevelopment is occurring. Local governments, developers and citizens are finding creative ways to build their own consensus and to re-build their communities. My colleagues on the other side of the aisle once promoted appropriations riders that prohibited the use of Federal money for seeding brownfields revolving loan programs. But those programs are now up and running and gathering acclaim from the recipients of much-needed funding.

We can build upon our communities' success. I was pleased to hear that Administrator Whitman supports moving brownfields legislation separate from other Superfund reform efforts. While I am not very familiar with the details of the Senate bill she recently endorsed, I am aware that the scope of that bill is in keeping with what I have long encouraged this Committee to focus upon: funding, prospective purchaser relief, innocent landowner liability clarification, and promotion of state voluntary cleanup programs. I encourage my colleagues to identify and adhere to areas of *consensus*, fix only what is truly broken, and listen to the needs of our communities.

I thank you, Mr. Chairman.

PREPARED STATEMENT OF HON. GENE GREEN, A REPRESENTATIVE IN CONGRESS FROM
THE STATE OF TEXAS

Thank you, Mr. Chairman, for holding this important hearing. I appreciate the opportunity to explore the issue of brownfields, which is of great importance to my constituents and people across the nation.

Brownfields are a problem that impacts all of us. They range in size from abandoned truck or bus storage lots to large warehouses or manufacturing sites. Usually, they are concentrated in economically distressed areas.

However, brownfields pose a significant roadblock to redevelopment. Not polluted enough to qualify as a Superfund site, they are avoided by many developers due to cleanup costs and potential liability, and can thus stall efforts to bring in new economic development to whole areas of a community.

The program, thus far, has seen some successes. My hometown of Houston is involved in the redevelopment of over 550 acres of brownfields, whose remediation costs total over \$460 million. These cleanups are creating almost 2,400 new jobs and returning almost \$2 million in taxes to the city, county, and school districts.

The program has also helped to reduce eyesores in the community, improve neighborhood-quality-of-life, and spur different types of redevelopment, such as a new baseball stadium, a new performing arts center, and almost 1,000 units of new housing.

In the 29th Congressional District, two projects in particular stand out. The state of Texas took the lead on the first by investing in what became the Central City Industrial Park.

Located in the heart of Houston's Hispanic East End, this former heavy industrial site was redeveloped as office space for state agencies and for light industry.

Over 1,500 new jobs were created, many of which went to residents in the surrounding area. Completed in 1997, the complex currently has an occupancy rate of 96%.

The second project, also in the East End neighborhood, was a former trucking company staging area that was redeveloped into housing for seniors. The Latino

Learning Center, Inc. invested in a brownfield that had been vacant for 17 years and had become a neighborhood dump.

These days, though, it is home to a beautiful new, 64-unit housing complex for senior citizens, a Seniors' Day and Health Care Center, and a 5,500-sq. ft. community center.

The redevelopment of this site also featured access to math and computer science classes for local students; created 5 new full-time jobs for the residents of the community; and created 150 construction jobs with 50% set aside for local residents. Completed in November of 2000, it is a fine example of what this program can achieve.

I hope that this committee will explore how we can continue to build on the successes of this program. I look forward to this and further hearings on the subject of brownfields, and I yield back the balance of my time.

Mr. GILLMOR. If there are no further opening statements, we will proceed with Panel 1, which consists only of Governor Ruth Ann Minner of the State of Delaware, newly elected chief executive, Democratic Governor. And she is here testifying on behalf of the National Governors' Association.

Governor, we welcome you and we appreciate you taking the time to be with us and give us your thoughts on brownfields. The committee does have a copy of your written statement. And you have 5 minutes to summarize it. Members can then begin with questions.

Governor?

STATEMENT OF HON. RUTH ANN MINNER, GOVERNOR, STATE OF DELAWARE, ON BEHALF OF NATIONAL GOVERNORS' ASSOCIATION

Ms. MINNER. Thank you, sir.

Good morning, Mr. Chairman and members of the subcommittee. I am Ruth Ann Minner, the Governor of the State of Delaware. I am here today to represent the National Governors' Association. I currently serve as a member of the NGA's Committee on Natural Resources. We appreciate the opportunity to provide testimony today on brownfields issues.

The Governors believe that brownfields revitalization is critical to the successful redevelopment of many contaminated former industrial properties. It is a vital part of smart growth, and many of us are pursuing smart growth in our States.

We commend and we thank this subcommittee for focusing on the brownfield issues early in this session, and we agree with you that passage of brownfields legislation should be the priority of this Congress, but it must be legislation that encourages actual cleanup of sites in our States.

Brownfields represent an enormous potential economic development resource, one that can lead to many jobs, healthy communities and neighborhoods, increased local tax revenues, and less suburban sprawl. State brownfields programs have been operating now for about a decade. And in that short period of time, State programs have successfully facilitated reuse of more than 40,000 sites. There are still challenges ahead, and the States face those challenges in redeveloping brownfield sites.

Real and perceived barriers are keeping us from eliminating these blights in our communities. State programs have flexibility that should be recognized and not impeded to stimulate brownfield

redevelopment. We think the Federal Government can help remove some of these impediments that currently exist.

Owners of contaminated industrial sites often desire the site cleanup in order to sell their properties and return it to productive use. Some developers are afraid that their involvement in these State-managed sites may result in environmental cleanup liability, liability for contamination they did not create under the 1980 Superfund Act. Many of our potential developers of brownfields have been deterred from investing in a contaminated site. And that is because they know that even if a State is completely satisfied with the property that has been cleaned up, there is a potential for the EPA to take action against them under the Superfund liability scheme.

If there is legislation on brownfields, Governors believe that it should address this problem by providing for needed liability protection for innocent owners as well as owners of contiguous properties. Just as importantly, legislation should preclude enforcement by anyone other than a State at sites where cleanup has already occurred or is being conducted under a State program. This finality should mean what it says: completion of cleanup under State law. To not give this insurance reduces the chances of restoration at the site.

We do not disagree with those who want exceptions to this finality, but the exceptions should be limited and the exceptions should give States an opportunity to take appropriate action themselves before EPA is permitted to reopen the cleanup and take enforcement action.

What the Governors would strongly recommend is language that puts the burden on the EPA to demonstrate that the Governor was notified of a problem and that the State was unwilling or unable to take appropriate action. Of course, if the EPA needed to take emergency action to protect the public health or the environment and the State was unwilling to respond, intervention by the Federal Government would be appropriate. Similarly, a State could ask for Federal assistance in cleaning up any site if the circumstances warranted it.

Another provision that we believe is very important in any bill is to require the concurrence of the States' Governors before a site may be added to the national priorities list. It is currently an EPA policy, and we ask that you codify this practice.

We would also like to see action on the Superfund Act clarified regarding the States' cost share at Superfund sites. The Governors believe the law should clearly provide that the Superfund response trust fund can be used to support operation and maintenance at the same match as the cleanup actions; that is, the 10 percent.

Last, we would like to see a bill that includes a waiver of sovereign immunity for Federal facilities so that States can enforce State environmental laws. Such authority has been provided in the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act. And we seek to hold the Federal Government to the same standard of compliance for its brownfields in our States as other parties in our State.

We sincerely appreciate your consideration of our views. We look forward to working with you on the development of brownfields leg-

islation during this session. Thank you very much. And if you are interested in specifics by way of programs or what we have been doing in Delaware, I would be happy to answer those questions.

[The prepared statement of Hon. Ruth Ann Minner follows:]

PREPARED STATEMENT OF HON. RUTH ANN MINNER, GOVERNOR OF DELAWARE ON
BEHALF OF THE NATIONAL GOVERNORS ASSOCIATION

Good morning, Mr. Chairman and members of the Subcommittee. I am Ruth Ann Minner, Governor of the State of Delaware, and am here today representing the National Governors Association. I currently serve as a member of the NGA's Committee on Natural Resources; we appreciate the opportunity to provide testimony today on Brownfields issues. I have attached a copy of the NGA policy statement on Superfund reform and ask that it be included in the record of this hearing, along with my statement.

The Governors believe that brownfields revitalization is critical to the successful redevelopment of many contaminated former industrial properties. In fact, it is a vital part of the smart growth agendas being pursued by many Governors this year, including my own "Livable Delaware" plan. Therefore, we commend the Subcommittee for focusing on the brownfields issue so early in this session. We agree with you that passage of brownfields legislation should be a priority for this Congress, but it must be legislation that encourages actual cleanup of the sites.

Brownfields represent an enormous potential economic development resource, one that can lead to new jobs, healthier neighborhoods, increased local tax revenues, and less suburban sprawl. Some have called brownfields the "engines of the New Economy." Successful state brownfields programs improve the quality of life for a community, which in turn, increases that community's economic competitiveness and helps it attract new business and workers. State brownfields programs have been operating now for about a decade. In that short period, state programs have successfully facilitated reuse of more than 40,000 sites. For example, New Jersey, under the leadership of former Governor, now Administrator Whitman, led an effort to provide funding to reimburse brownfields developers up to 75 percent of remediation and cleanup costs, and in her last budget as Governor, she signed legislation to award \$15 million in grants to municipalities to acquire and clean up brownfields sites. Michigan passed a bond issue that devotes \$335 million to prepare brownfields sites for redevelopment, including grants and loans to municipalities and counties. Massachusetts provides brownfields tax credits ranging from 25—50 percent for owners who pursue site cleanups in economically distressed areas.

In my state of Delaware, brownfields account for nearly 25 percent of the land in our largest city, Wilmington. In 1995, we established several financial incentives for brownfields redevelopment and initiated a number of reforms to our state Superfund law. We provide a 50-50 matching grant of up to \$25,000 for the state share from our economic development strategic fund to cover the cost of environmental assessment. We also offer low-interest loans for site cleanup and offer a Blue Collar Job Creation and Capital Investment Tax Credit for redeveloping brownfields. Perhaps most importantly, our state law, which has a liability scheme identical to that in the federal Superfund Act, provides liability relief for prospective purchasers of brownfields sites that have gone through the state cleanup process and have been issued a Certificate of Completion of Remedy.

But there are still challenges states face in redeveloping brownfields, real and perceived barriers that are keeping us from eliminating these blights on many of our communities. In Delaware, we believe that the package of incentives and limited liability relief I've described are examples of the flexibility that should be recognized, and not impeded, under federal law to stimulate brownfields redevelopment.

State level creativity and innovation in meeting their brownfields needs has been the hallmark of redeveloping many industrial sites. But there are many more sites in Delaware and thousands more across this nation that need to be addressed. We think the federal government can help remove some of the impediments to their redevelopment.

Owners of contaminated industrial sites often desire site cleanup in order to sell the property and return it to productive use. State brownfields programs allow redevelopment to take place at these sites quickly, with appropriate cleanup standards, and with minimal government involvement. However, some developers are afraid that their involvement in these state-managed sites may result in environmental cleanup liability for contamination they did not create, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, commonly referred to as "Superfund." As a result, valuable industrial land remains con-

taminated, unused, or abandoned, denying communities economic activity and the direct benefits of jobs and taxes. Many potential developers of brownfields sites have been deterred from investing in a contaminated site. That is because they know that even if the state is completely satisfied that the property has been properly cleaned up, there is the potential for EPA to take action against the cooperating party under the CERCLA liability scheme.

If there is legislation on brownfields, Governors believe that it should address this problem by providing needed liability protections for innocent owners and owners of property contiguous to contaminated sites. Just as importantly, legislation should preclude enforcement by anyone (other than by a state) at sites where cleanup has already occurred or is being conducted under state programs. This “finality” should mean what it says—satisfactory completion of a cleanup under state law should be final. To not give this assurance to developers who are spending thousands, or hundreds of thousands, of dollars of their own money to rehabilitate a property reduces the chances that the rehabilitation will happen.

We do not disagree with those that want exceptions to this finality, but the exceptions should be limited and should give states an adequate opportunity to take appropriate action themselves before EPA is permitted to reopen the cleanup and take an enforcement action against the owner or the developer.

For example, we do not think that EPA’s mere assertion that a potential release of a contaminant from a brownfields site “may present an imminent and substantial endangerment to public health or welfare or the environment” should be sufficient to override the state’s approval of the cleanup and begin an enforcement action. Such language does not assure that the problem is taken care of; it just brings the federal government into the picture and scares away future developers from cleaning up other sites.

What the Governors would strongly recommend is language that at brownfields sites, the burden should be on EPA to show that the Governor was notified and given an reasonable opportunity to correct the problem, or threat of the problem, and was unwilling or unable to take appropriate action. Of course, if EPA needed to take emergency action to protect public health or the environment, and the state was unwilling to respond, intervention by the federal government might be appropriate. Similarly, a state could ask for federal assistance in cleaning up any site if the circumstances warrant it.

Another provision that we believe is very important in any bill that addresses contaminated sites is a provision to require the concurrence of the Governor of a state in which a site is located before a site may be added to the National Priority List. The nation’s Governors believe such a provision is vital. It is currently EPA policy to seek the concurrence of a governor before listing a site, and we ask that you codify this practice.

We also would like to see a section of CERCLA clarified regarding the state cost share at Superfund sites. The Governors believe that the law should clearly provide that the Superfund response trust fund can be used to support operation and maintenance activities at the same state match requirements as cleanup actions—that is, a 10 percent cost share.

Lastly, we would like to see a bill that includes a waiver of sovereign immunity for federal facilities, so that states can enforce state environmental laws. Such authority has been provided in the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act. Congress confirmed its commitment to state enforcement of environmental laws at federal facilities in 1992 under the Federal Facility Compliance Act, but the authority under the Superfund law is less clear. States seek clear authority to require and oversee response activities at federal facilities. As you may know, federal facilities and former federal facilities are among the worst contaminated sites in the nation. We seek to hold the federal government to the same standard of compliance as other parties in our states.

We appreciate your consideration of our views, and we look forward to working with you on the development of brownfields legislation during this session.

Mr. GILLMOR. Thank you very much, Governor.

Governor Whitman, who is going to be in, or ex-Governor Whitman, this afternoon, in the testimony she submitted emphasis a need for flexibility in working with State and local governments to promote faster, more efficient cleanup. What kind of flexibility would be of most benefit to the efforts of developers, cleanup contractors, investors, and regulators at the State level as well?

Ms. MINNER. Well, we can look at each State and each site and tell you that everyone is different. But, then, you have dealt with them in your States, and you know that. And so the flexibility is to allow the States to do the evaluation, to intercede with the cleanup, to help those people who are there, to have flexibility in our own programs, as long as our goals are all the same, to clean up the site, to make it reusable, and to keep the suburban sprawl down and save our open spaces and green land.

Mr. GILLMOR. Governor, some groups have testified that Federal reforms to bolster finality for brownfields cleanup is not needed because, even though the EPA has broad authority to reopen cleanups, that the agency rarely uses it.

Your testimony points out that the problem lies not only with instances where EPA actually uses this overfiling authority, but the problem also has to do with the perception and fear of Superfund liability and potential fellow involvement. Could you describe in greater detail how this so-called chilling effect inhibits development?

Ms. MINNER. A site that has been designated and is ready for cleanup, a developer willing to spend their own personal money and sometimes hundreds of thousands of dollars takes a look at the whole process and says: What do you mean there is no finality? I end up spending this money, and I still may have a problem. Here is a site 5 miles down the road, open space, green space, no problems. Why would I spend all of my money cleaning up a site?

They want the finality settled so that they know once they have done the work that we have asked them to do, once they have met all of the requirements, they don't have to worry about a problem unless it is a new problem that they need to deal with.

Mr. GILLMOR. In terms of Federal involvement, one suggestion has been made that I would like to bounce off of you. And that is, would you support limiting the Federal Government's ability to reopen State brownfield cleanups to instances where there is a public health emergency?

Ms. MINNER. That is part of what we have as a policy for the Governors. And we absolutely agree that if there is a health hazard or an environmental hazard, then the Federal Government should step back in. For the most part, they should work with us as they do that.

If we don't work to meet those standards once they have found the second problem, then they should step in. But we really hope that you would give the States the opportunity, the Governors would work with EPA in providing that additional cleanup and making sure that the site is safe.

Mr. GILLMOR. Governor, your testimony recommends that Federal law require EPA to notify a Governor of its concerns about an ongoing State cleanup and to provide the State with a reasonable opportunity to correct the problem. Can you elaborate on what this means and how it would work?

Ms. MINNER. Well, if you think of some of the sites we have had—and I will use one in Delaware, which is along the riverfront, and it does affect some of the things that you would have to do by way of the waterway as well as cleaning up the brownfield. As we work on that, we are dealing with two parts of State government.

We also are making sure that we meet the Federal compliances with all of those laws that are involved.

We wanted to do many things there. We wanted to create one part of that area as open park land and part of a wetland area but some area as park land, a river walk for our neighborhoods to enjoy. We also did the Riverfront Arts Center. We did some shops. We have got a ballpark there. If you are looking at a multiple-use facility, there are many things that we need to do. Give us the flexibility to do all of that at one time, rather than saying we have to work on each one of those issues, one cleaning up the riverfront, another putting in a site, which would be just an environmental site near the park land and the marshland that is there.

Mr. GILLMOR. Thank you very much, Governor.

My time has expired. The ranking member, Mr. Pallone?

Mr. PALLONE. Thank you, Mr. Chairman. And thank you, Governor.

I wanted to develop a little more this issue with regard to the language on finality that you mentioned and the chairman mentioned. You say in your written statement and I think you said the same thing, obviously, when you spoke that you don't think the EPA's mere assertion that a potential release of a contaminant from a brownfield site, quote, "may present an imminent and substantial endangerment to public health or welfare or the environment should be sufficient to override the state's approval." And then you go into this language about the burden to show that the Governor was notified. I am just trying to figure how that relates to some of the agreements that have been entered into.

I know that, in particular, in your state, if I could use it as an example, in 1997, Delaware and EPA signed a memorandum of agreement that said that unless EPA determines after consultation with the state, quote, "that there is or may be an imminent and substantial endangerment to public health or welfare or the environment that is not being adequately addressed under the State program." That is obviously the agreement or the language of the agreement.

Is there a problem with that language that you are citing? I don't mean in your state. On a national level, are you suggesting that that language be changed and you think it is inadequate?

Ms. MINNER. I think it works very well for us in most instances. However, one of the speakers spoke to the problem that every memorandum of understanding is different. They don't all have that. I think it works well for us in Delaware. We have been very fortunate in working very well with the region in making sure that we have complied to all of those restrictions.

But I don't speak just for myself and for Delaware. I speak for all of the Governors. And it is different in every state.

Mr. PALLONE. But if we had the imminent and substantial endangerment language and then we had language that says that is not being adequately addressed under the State program, you would think that is okay? That is satisfactory at this—

Ms. MINNER. As long as they come to us and work with us. A lot of times, if we don't know something is there, they find something that we didn't, they think that something is there, it makes it very difficult for us. If they come to the state, offer us the oppor-

tunity to work and correct the problem, and if that State Governor or the department says, "No, we don't do it," their stepping in is certainly understandable.

Mr. PALLONE. You just want to make sure that there is consultation with the state, effectively?

Ms. MINNER. Yes.

Mr. PALLONE. Okay. Then the other thing I was going to ask is on the second issue, which I guess is really a Superfund issue, but you mentioned it. So I am going to bring it up. The other provision that we believe is very important requiring the concurrence of the Governor of a State in which a site is located before a site can be placed on the national priority list. Has that been a problem either with you or other Governors, to your knowledge, in other words, that the EPA lists sites over the objection of a Governor?

Ms. MINNER. I think in the past, the policy has been that they have worked with us and worked with us very closely. In my statement, I said what we really want is that to be a part of the code, rather than just a policy. I think we all know, just as memorandums of understanding can be canceled or changed, so can policy. We like that very much. And we would like it to be codified so that we would know, we would continue to have that opportunity.

Mr. PALLONE. As far as you know, with the National Governors' Association or with your own state, there hasn't been any case in the last 5 years or in recent years where the EPA has not followed that, where they have listed something over the objection of a Governor?

Ms. MINNER. They have been working closely with us and have always addressed it in our State of Delaware. However, I can't say that that is true across the country in every state. But the whole idea is simply to have it as a part of the code so we will know in the future that that policy is in the code and will continue.

Mr. PALLONE. I guess I will probably ask my own former Governor that question. But I watched as the President started to appoint the members of the cabinet, they seemed to be mostly Governors. I guess knowing Whitman and her background, it is unlikely, it would seem to me, as administrator that she would do anything to list a site without a Governor's approval, but I guess that is your concern, obviously.

Ms. MINNER. We are all looking forward to working with one of our colleagues in this area.

Mr. PALLONE. Thank you. Thank you, Mr. Chairman.

Mr. GILLMOR. Mr. Largent, the gentleman from Oklahoma?

Mr. LARGENT. Thank you, Mr. Chairman. It is my turn? Is that what you said? I am sorry. I was talking to staff.

Mr. GILLMOR. You are recognized for questions if you wish.

Mr. LARGENT. Great. I just have a couple. Governor, other testimony provided to this subcommittee today by the U.S. Public Interest Research Group argues that there is no need for greater finality for State brownfields cleanups because the current memorandum of agreement process between State voluntary cleanup programs and EPA, while not a formalized process, is still a sufficient form of finality. In fact, at the end of 1999, only 14 States had MOAs. Do you think the MOA process defeats the need for stronger finality as part of a brownfields reform act?

Ms. MINNER. No. And I think you have to really look at that finality and say, "As a business person, would I invest my money if I thought I might still have a problem?"

And you are not talking in some cases of small amounts of money. In Delaware, especially, it is hundreds of thousands of dollars. We need to know that once it is done, that person who has invested that money has the finality they need.

If there is another problem, work with us. We will work with that owner. But give him some assurance. Otherwise, they are not going to invest their money in cleaning up brownfields. They are going to go tear up more green space and build there.

Mr. LARGENT. Governor, you are speaking on behalf of the National Governors' Association. I am wondering. I heard some of my colleagues say that they opposed moving a brownfields bill apart from a Superfund reform bill, more comprehensive bill. Do you agree with that position that we should wait on brownfields until it is a part of a more comprehensive bill?

Ms. MINNER. I think this is such an important issue and affects so many areas in our States, every town, every community. And if we are really serious that we want to run this program and have the States participate with our people to redevelop the areas that need to be redeveloped, rather than destroying more open space, I think we should move very quickly.

And it is the Governors' Association's position that we should move quickly on brownfields legislation. We would be quite happy to work with the committee or individuals on the subcommittee to work on Superfund legislation as well, but we strongly urge you to do this legislation on brownfields as quickly as possible.

Mr. LARGENT. Okay. Apparently it has been EPA's practice, although it is not in law, to seek the concurrence of a Governor before placing a new site on the national priority list. Is there any reason or argument against doing that from the National Governors' Association, actually placing that into law?

Ms. MINNER. That is exactly what we want, sir. We would prefer to have that, rather than just a noted policy, have it codified, so that we know we will have that opportunity to comment and to work with EPA on that priority listing.

Mr. LARGENT. Great. Thank you, Governor, for your time. I yield back.

Mr. GILLMOR. The gentleman yields back. The gentleman Mr. Barrett?

Mr. BARRETT. Thank you very much, Mr. Chairman.

I want to sort of continue along that line and the line that Mr. Pallone had to sort of help me with the real world here if you can. A State enters into a memorandum of agreement with the EPA. You indicated that if you were a business, that you would be reluctant to move forward. Who is actually investing the dollars or spending the dollars once that memorandum of agreement is entered into?

Ms. MINNER. Part of it, the 10 percent, normally comes from the Federal Government. The State does things by way of tax incentives and other programs. But the majority of the money invested in cleaning up a site comes from the individual who has that land.

Mr. BARRETT. Okay. And roughly what percent comes from the States? Again, I am just trying to understand.

Ms. MINNER. It varies in every State according to what our State program is. There is no set number.

Mr. BARRETT. Okay. And Delaware I assume does have a memorandum of agreement?

Ms. MINNER. Yes, we do.

Mr. BARRETT. How long have you had that?

Ms. MINNER. Back 1986 or 1987 if my memory serves me right. I am going back to a period of time when I was serving in the General Assembly.

Mr. BARRETT. Okay.

Ms. MINNER. I think it was about 1986 or 1987.

Mr. BARRETT. And has it worked?

Ms. MINNER. It has worked very well for us. However, we all know that at any time at their discretion, the department could decide to cancel our memorandums of understanding as well. And so we would like to know that we have those agreements and they are good agreements and they will continue to work.

We have been very fortunate in Delaware, and ours has worked very well.

Mr. BARRETT. Okay. So specifically what are the Governors asking for again so I understand?

Ms. MINNER. On the finality issue or—

Mr. BARRETT. Yes, on the finality issue.

Ms. MINNER. That once the program has been completed at the State level with—

Mr. BARRETT. When you say "the program has been completed," the—

Ms. MINNER. On any given site.

Mr. BARRETT. Okay.

Ms. MINNER. We do a plan for each site. Once that has been completed, the cleanup has been completed, that the owner of that land knows that he has a completion, rather than saying at some time in the future, EPA may step in and say, "Okay. We think that something different should be done, and we want you now to re-open this site." We don't have a problem if it is the health and safety of our people. We certainly want that as well or if it is because of different environmental damage.

But they need to have some finality. Otherwise they are not going to spend their money. They are going to go out and use that money to buy a site that is already clean.

Mr. BARRETT. Now, have you, again in the real world, had these problems in Delaware?

Ms. MINNER. Absolutely.

Mr. BARRETT. Okay. Can you give me an example?

Ms. MINNER. Well, we have many sites that have been cleaned up, but we have had many where people have looked at sites, looked at the tax incentives, looked at the cost, and said: Well, wait a minute. If I may have to go back and spend more money and I have this other site 5 miles down the road that has no problems at all, why would I invest my money there? I am going down the road.

And so you don't have that site cleaned up. You still have a blight in the community. You still have a problem in the community because it is not being addressed in the meantime. And you have more open space destroyed.

Mr. BARRETT. What is the best argument, if you can play devil's advocate, against that?

Ms. MINNER. The best argument I could think of against it? Golly, I wouldn't want to just say Federal interference because that might upset you, but that would be my first thought. I think basically the fact that we all want to make sure that the environmental cleanup is achieved, exactly what we want it to do. We all know we will never have a pristine site again, but if we have the environmental safeties of knowing we have cleaned up the damage that is there, we have protected our citizens and still are using that land, rather than destroying other open spaces.

Mr. BARRETT. Okay. To segue to the Governor issue, if I may, and the need or the desire for the gubernatorial concurrence, could you foresee a scenario where there would be political pressure on a Governor, say, from large contributors not to have a site listed?

Ms. MINNER. There is always that possibility. However, being a Governor for 2 months now, I can tell you that the people I have met and worked with on this Natural Resource Committee are as concerned about the environment as you are in making sure that that cleanup is done.

We had in Delaware just 2 weeks ago—a week ago, actually, we made the announcement—a problem in an area where the owner pleaded with me not to make the announcement. I believe in the right for the citizens to know if there is a problem in their area. And although he has been a dear friend for 30 years, I told him: I am sorry. My people have the right to know what is in that area.

I think you will find all of our Governors feel that way because it is our state. It is our future. It is our economic development. It is jobs. It isn't just an environmental site.

Mr. BARRETT. When I was first running for office, somebody asked me what my definition of a special interest was. I said it is someone who gave money to my opponent because I think all of us believe that we are the personification of goodness.

I think the reality is that there may be political pressures at times and there might be one part of a State that, frankly, is not as politically important or provides as many votes. I think that there could be pressures there.

Ms. MINNER. We can all say there will never be the time when there won't be pressures, but I can tell you very honestly in our State there would be more political pressures from our environmental groups and our citizens who care very much about those sites. That would far override one or two individuals that might be the landowners.

We are concerned about making sure our State is safe, not just for today's people but for future generations as well. That is the whole reason for these cleanup sites, the whole reason for reusing these sites. And I think that would far outweigh any political involvement by way of these cases.

Mr. BARRETT. Thank you. And I would yield back my time. Thank you.

Mr. GILLMOR. The gentleman's time has expired. The gentleman from Indiana Mr. Buyer.

Mr. BUYER. I appreciate Mr. Largent asking you the question about should you do Superfund reform with brownfield legislation. I am not surprised by your answer. If I were a Governor of a particular state, I would want relief that is quick and as soon as I can get it on a whole array of things.

You also have been in a legislative process. You know that sometimes in that process we like to do what is easy. Sometimes we will punt on that which is difficult.

I like to try to get along, but in the 8 years that I have been here, we still haven't gotten Superfund reform. I find that distasteful. The only one that really has cleaned up is lawyers. So when the gentleman mentioned about special interest, there is a powerful special interest out there: trial lawyers who are cleaning up most of the Superfund money over the years. I find that just very bothersome. So that is why earlier I made that comment. I want to do them both together.

Now, in the end, I don't run this place, but I don't know if we would ever actually get to Superfund reform if we do that which is the easiest. It is sort of a management thing. And that is why I threw that out.

Ms. MINNER. I think I would say to you, sir, that both are equally important. However, I think to wait and not do what we can accomplish with brownfields because of the problem of Superfund is letting our environment suffer. I would suggest that what we can do as quickly as we do we should and make sure that we get it—

Mr. BUYER. Well, see, Governor, that is exactly what I would say to my Democrat colleagues here: Why are you putting off Superfund reform when we can help everyone? So that is my frustration with the process. So I am in agreement with you.

The question that I have—and I am going to take this up with the new administrator of EPA—I noticed you shaking your head when I made the comments about the former EPA administrator had taken authority away from regional directors to prioritize sites within their regions and brought all of that power and authority to Washington.

I take it that you would concur. What I am going to make sure, I don't know what she is going to do, but I want authorities to go out there to those regional directors. If they have supervision over these sites, they know these sites the most and the best because they work with the States and localities. I think their input is powerful and important. Would you agree?

Ms. MINNER. I absolutely agree. I think the best way of saying it might be if I said to you: What do you think about the problem that we had at the Sunday Breakfast Mission or maybe at the Moveable Feast Program or at the riverfront or at the New Castle County Courthouse site? You are going to say you don't know.

Mr. BUYER. I don't know what that is.

Ms. MINNER. We know it. We worked with our regional directors. Therefore, they have the availability of the information. It takes that much longer to go the next step to get it to Washington to whoever is working here. I think you need to trust us at the local

level in saying I am one who has worked in environmental issues now for 26 years.

I care very much about the environment in my State. I am not going to allow anybody to do anything knowingly to damage that, and the local area is just as important. We will work with whoever up the ladder, but we should have the right to protect our State.

Mr. BUYER. Now, the testimony you just delivered, is that your personal opinion? Is that you as Governor? Would you say that that is also the consensus of the Governors' Association?

Ms. MINNER. I think I could probably speak for most of the Governors in saying we know our States. What I don't know perhaps about your State or the State of California or somewhere else I can't speak to today, but I can tell you that the Governors on the whole believe very strongly that the local control, our having the opportunity to work, whether it is this program or any other program, at the State and local level is the best way to go.

Mr. BUYER. Thank you, Governor, for your testimony. I yield back.

Mr. GILLMOR. Thank you. The Chair recognizes for questions the gentle lady from California, Mrs. Capps.

Ms. CAPPS. Thank you, Mr. Chairman.

Governor Minner, based on your experience in Delaware, is it accurate to say that the most important issue is to provide liability protection for prospective purchasers of brownfield sites?

Ms. MINNER. Protection from liability or finality? Now you are making me draw a line that perhaps my national Governors would not want me to do.

Ms. CAPPS. Please explain.

Ms. MINNER. I guess they are almost equally as important because unless you can do both, you actually don't offer any protection to those people who are investing their money in cleaning up the site.

Ms. CAPPS. So you would want to rank them equally but both very important.

Ms. MINNER. Absolutely.

Ms. CAPPS. I am sorry. I didn't want to have to make you pick one only, these two being extremely important. And also, in Delaware—I just want to hear it restated—do the prospective purchasers have to clean up the site before they get liability relief?

Ms. MINNER. Yes.

Ms. CAPPS. Maybe if you would explain a little bit about how that process works.

Ms. MINNER. Well, it has to meet all of the standards. We have a program. We have a plan for an individual site. That site has to be cleaned up, and then we sign off on it saying that it has been completed. Unless that is done, they are not then relieved from the liability and the cost.

Ms. CAPPS. So when a prospective buyer comes into the situation, they know that they are the bottom line and that they have the assurance that if they do it, that they will get the relief. And that is what you want also as an enticement for them to enter into the relationship so you don't want us backing out of that. It is an important statement, but I wanted to hear you say it in the chronology.

Ms. MINNER. But let me say again that is as long as they have met all of the standards. And if there is something that we find out later, we don't have a problem as Governors in saying we take another look at it. But we think we should be offered that opportunity as the Governor and as a state, rather than EPA stepping in and doing it.

Ms. CAPPS. I see. So it is your relationship with the prospective buyer that is the critical one?

Ms. MINNER. Yes.

Ms. CAPPS. And you need every means to hold them accountable so that you are reviewing the process every step along the way and only as the kind of like the tail end, then, does the Federal Government come in with this support?

Ms. MINNER. Right. Sometimes it might be as much as a year or 1½ years later.

Ms. CAPPS. I see.

Ms. MINNER. And construction is already underway and somebody is putting up a building. In one case, it was a school. And then we thought we had another problem. After we sat down and worked with them, their fears were allayed and we did not have a problem. Had they stepped in and sited and moved forward on it, that school construction would have been delayed and we would have had all sorts of problems for the children as well as for the district and for the area.

Ms. CAPPS. So the procedure is important, then?

Ms. MINNER. Yes, it is.

Ms. CAPPS. The process? Thank you. Your testimony has been very valuable.

Ms. MINNER. Thank you.

Ms. CAPPS. Thank you. I yield back.

Mr. GILLMOR. The gentleman from Pennsylvania, Mr. Doyle.

Mr. DOYLE. Thank you, Mr. Chairman.

Governor, welcome and thank you for your testimony. I just have two questions. You are quite clear when you assert that finality in your opinion and the Governors' Association's opinion should be defined as "satisfactory completion under State law"?

Ms. MINNER. Yes.

Mr. DOYLE. How important do you think it is to have a standard interpretation of what satisfactory completion means given that there is such a variance in State laws and cleanup programs?

Ms. MINNER. But the final point is the cleanup. And I think there each one of those sites must then meet the Federal requirement. And so to bring it to that level, then we should have finality. We don't always get that, but we want that. It makes it very difficult for us sometimes for us to get developers to enter into an agreement to clean up a site because they don't know what is going to be at the other end.

And once you have a problem such as the one we had at one of our schools, it then backs off other developers because they are saying: But wait a minute. That was already done. We thought the State was satisfied with the cleanup. And now there is another problem.

So it makes it very difficult. The end result should always be that the site is cleaned up and is able to be used for something else.

Mr. DOYLE. Does "satisfactory completion" in Delaware mean the same thing as it does in Ohio when you have these voluntary State programs—that is what I am trying to get at—or should there be some sort of a standard that when EPA is looking at 50 different States that have different programs and they say, "You know, this is substantially complete," does that mean the same thing in each state?

Ms. MINNER. I would think that under our memorandum of understanding and every other state's, it would be the same. For those States that do not have memorandums of understanding, it would be the Federal.

Mr. DOYLE. Would be the standard?

Ms. MINNER. Would be the standard. And so I would assume that that would hold true in every state.

Mr. DOYLE. Let me ask you another question, too. To what degree do you think allowing States the opportunity to take actions to redress problems before EPA is permitted to reopen a cleanup would help to mitigate the potential inconsistencies presented by the wide range of laws and programs?

Ms. MINNER. You have to remember that each state's standards are sort of tailored to their own State and what their problems might be. As that moves forward and we move forward with the programs, EPA does monitor quite often some of the things that we are doing. And if there is a problem partway through, we change if we have to.

Each site is different. It would be very easy if I could tell you there are 40,000 sites in this country and every one of them is exactly the same. The context of the soil, the water level, there are all sorts of things that make each site different. And you almost have to look at an individual site, not at a State or not at a region.

Mr. DOYLE. But it is the Governors' testimony that you think it might be helpful if States are given an opportunity to redress these problems before EPA comes in?

Ms. MINNER. Absolutely.

Mr. DOYLE. Thank you very much. Thanks for your testimony today.

Mr. GILLMOR. Thank you, Mr. Doyle. Gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman.

Governor, welcome again. Let me ask you:—it will be a simplistic question to begin with—Does State flexibility mean dirtier, less safe conditions for your constituents in your state?

Ms. MINNER. Every State has their own standards, but every State must be in compliance with the Federal law. So I don't think it would be dirtier. It would be how we achieve those standards. And some States might demand that it be done a little differently. The flexibility might be even within our States.

Mr. SHIMKUS. Let me ask another question. As a Governor, elected Governor of a state, are you concerned about your citizens' environment and safe drinking water and environmental actions of your state?

Ms. MINNER. Sir, if I were not interested in those things, I would never have run for Governor.

Mr. SHIMKUS. Thank you.

In addition, I am going to go back to the greater finality. Obviously that is an issue of debate here. Section 106 of CERCLA that authorizes the President to compel a response action that sites not on the Superfund national priorities list “when a threatened release may impose”—and here we go again—“an imminent and substantial endangerment.” Section 703 of RCRA contains a similar requirement authorizing EPA action in the face of an imminent hazard.

Your written testimony calls for greater finality to limit EPA’s ability to reopen a State cleanup using its Superfund authority. To ensure true finality, Mr. Greenwood’s legislation from the last Congress, which was House Resolution 2580, extended the finality bar to RCRA.

It is our understanding that the Governors do not object to such an approach. Can you comment on that?

Ms. MINNER. If it endangers the health of our citizens or the integrity of our environment, you are right. We do not object. But we still feel that you should work with the States in allowing us the opportunity first to address those issues. And if, for some reason, the Governors does not address the issue or will not take the responsibility for the problem, then EPA should step in.

Mr. SHIMKUS. And you do have the best interests of your citizens in mind, as the Governors stated?

Ms. MINNER. Absolutely.

Mr. SHIMKUS. In a written testimony submitted by the U.S. Public Interest Group for today’s hearing, they argue: If it ain’t broke, don’t fix it and, therefore, with broad state-based liability protection in place and limited Federal intrusion in the State cleanups, that there is simply no need for greater finality for State brownfield cleanups. In fact, they actually call for increased, not decreased, Federal involvement in State cleanup programs by requiring up-front review of State programs before Federal funding could be used.

What is your view on this approach?

Ms. MINNER. Well, I think if we want to continue to deter the cleanup of brownfield sites, we could move in that direction, but we really have to work with those people who are cleaning up those sites in making sure we achieve what we want to do.

Once we have problems and there is Federal intervention at a later point in time, you see the number of people who are looking at cleaning up those sites decline. And it will continue to do that if we increase that problem.

Mr. SHIMKUS. Thank you, Governor Minner. You have been a great witness, and we have enjoyed having you. I yield back, Mr. Chairman.

Mr. GILLMOR. Members having completed their questions, the Chair would announce that the record will be kept open for members to submit questions in writing.

That will conclude our first panel. Governor, I very much appreciate you being with us and the very helpful testimony that you have given us. Thank you.

Ms. MINNER. Thank you very much, Mr. Chairman. And I look forward to working with you in the future, as do all of our Governors, to achieve our goal of a cleaner environment.

Mr. GILLMOR. I expect we are going to be calling on you. Thank you.

Ms. MINNER. Thank you very much.

Mr. GILLMOR. Our second panel, I would ask them to come forward. The second panel consists of: the Honorable Robert Shinn, who is the Commissioner of the Department of Environmental Protection for the State of New Jersey; Mr. George Meyer, who is President of the Environmental Council for the States and is a special assistant to the Secretary for the Wisconsin Department of Natural Resources; and Mr. Grant Cope, who represents U.S. Public Interest Group.

Gentlemen, the committee does have a copy of your complete written statement. And you have 5 minutes to summarize it before the members begin asking questions. We will begin with Mr. Shinn.

STATEMENTS OF HON. ROBERT C. SHINN, JR., COMMISSIONER, DEPARTMENT OF ENVIRONMENTAL PROTECTION FOR NEW JERSEY; GEORGE E. MEYER, PRESIDENT, ENVIRONMENTAL COUNCIL OF THE STATES, SPECIAL ASSISTANT TO THE SECRETARY, WISCONSIN DEPARTMENT OF NATURAL RESOURCES; AND GRANT COPE, STAFF ATTORNEY, U.S. PUBLIC INTEREST RESEARCH GROUP

Mr. SHINN. Thank you very much, Mr. Chairman.

There are a number of mayors of smaller municipalities in many States who think brownfields are only a problem in larger cities or urban areas of the state. New Jersey is no exception.

Let me say that brownfield redevelopment is absolutely not limited to these larger cities or urban areas of the nation. The fact is that most of New Jersey's 566 municipalities have probably at least one brownfield that could be considered for remediation, as do many communities in the country.

Brownfields sites include that long-abandoned gas station, the out-of-business dry cleaner on the corner, in addition to the industrial complex that closed up years ago and is now abandoned or overgrown. These sites do not always pose an immediate threat to public health. So it is not surprising that many of our cities find other problems of a higher priority than brownfields redevelopment.

We need to stop thinking of brownfields as contaminated sites that burden a town and drain the tax rolls and to start viewing them as valuable real estate for that new business that wants to relocate in your town or perhaps a recreational opportunity that can benefit the community.

Brownfield sites are attractive opportunities for redevelopment because in most instances there is existing infrastructure. Many brownfields sites can become choice real estate when incorporated into a municipal redevelopment plan and you utilize the tools such as I am going to talk about in New Jersey.

The State of New Jersey has many incentives and dedicated resources to stimulate environmental cleanup at identified sites. A

good example, which demonstrates our commitment to this effort, is the Berger Industries site in Edison Township, New Jersey. This cleanup resulted in the protection of public health and also expanded the region's economic base.

As a former steel tube manufacturing facility, the Berger property lay abandoned due to financial hardship of the responsible party. The site had soil and groundwater contamination present. Contaminants included petroleum hydrocarbons, base neutral organic compounds, chemical solvents, residuals, chlorinated hydrocarbons, and VOCs.

The former areas of environmental concern included underground storage tank systems used for waste oil and fuel oil, above-ground storage tank systems, exterior hazardous substance drum storage areas, interior sumps, drains, trenches, underground concrete basins, electrical transformers, underground tunnels, and dry wells all used for operational purposes by the former owner and operator. This was in addition to the operational discharges that took place onsite during the operation.

The developer entered into a cleanup and redevelopment agreement with the New Jersey Commerce and Economic Growth Commission and the Department of Treasury that was endorsed by the New Jersey Department of Environmental Protection. This agreement allowed him to be reimbursed for 75 percent of the total cleanup costs from new taxes generated from the site. It should be noted that this New Jersey cash incentive is probably the first in the nation.

Project costs were approximately \$29 million overall with \$2.1 million in remediation costs with community benefits of hundreds of new full-time and part-time jobs as well as the developers making a repayment of over \$1 million in back taxes to the municipality.

As the first site in New Jersey to complete the redevelopment agreement process, the redeveloped site, known as Edison Crossroads, has generated over \$2 million in new State tax revenues in the first 9 months of operation. We expect that this project will generate \$4.4 million in new taxes in its first year of complete operation. In addition, more than \$4.4 million will be generated each year as new businesses open and existing ones expand. It is important to note that these taxes are not being generated as the site sat idle.

Additional incentives include an immediate third party defense for a prospective purchaser of a contaminated property who voluntarily enters into a department cleanup oversight document prior to taking ownership. Moreover, the department issues with every "no further action" letter a covenant not to sue. The covenant not to sue contains provisions releasing the non-responsible party who conducted the cleanup from all civil liability to the State to perform additional remediation under certain conditions.

New Jersey has also established a one-stop approach to acquiring permits. This innovative regulatory and compliance assistance process is based on a single point of contact in the Department of Environmental Protection. The one-stop approach is a total facility approach to permitting. One-stop's benefits include a thorough identification of all regulatory requirements and coordination

among various NJDEP programs for major construction, development, and remediation projects which are complex in number, requiring a variety of permits and specific timing of these permits. This assures better customer service to the public and regulated entities. In addition, it provides more opportunity to integrate pollution prevention concepts early on in the permitting process that may, in turn, reduce costs and improve efficiency of the facility.

New Jersey's goal is simple: solving environmental problems and providing business a place to locate, create jobs, to build new housing and entertainment opportunities, all without having to go into farmlands, open space, and other areas of the State which lack existing infrastructure.

However, additional resources are needed to be brought to bear on assisting all municipalities with their brownfield cleanup and redevelopment efforts. Municipalities need assistance in addressing demolition and disposal costs at sites where the demolition is necessary to assist in the cleanup and redevelopment effort. In addition, many State programs may provide low-interest loans and grants to municipalities and private entities but usually for conducting the preliminary assessment, site investigation, and remedial investigation.

Financial assistance needs to be provided to non-responsible parties for the completion for the remediation. Moreover, there is a need for financial assistance to municipalities who want to turn that abandoned, contaminated property into open space, perhaps a playground or park. This not only takes a brownfield site from an eyesore on the community but also improves the town's quality of life.

We need to encourage cleanup and redevelopment efforts at the Federal level as well. By streamlining some of the Federal processes regarding the cleanup of contaminated brownfields sites as well as putting some predictability and finality into the process, additional brownfields site cleanups could happen in our States. These initiatives could greatly enhance the programs that currently exist at the State level and certainly improve the quality of life. This is a huge, largely untapped national investment opportunity for both public and private sector.

Many of the municipalities in New Jersey have already taken the initiative and identified brownfield sites in their communities in the hopes of putting them back on the tax roll. Many of these sites can be found on the Department of Environmental Protection's GIS Web site, where we have established an interactive listing of brownfields called I-Map. This unique computer application allows for the identification and potential marketing of brownfields sites to interested parties via the Web. It gives you critical screening data like population density, per capita income, and aerial photography. This may be another tool that could be used in a broader sense to enhance the cleanup and redevelopment efforts within other communities around the country.

This is an exciting time for the brownfield marketplace and urban redevelopment, is truly a rare government win-win. Brownfield sites that have been previously overlooked for years in New Jersey are now seen as some of the most exciting real estate investment opportunities.

I would like to take this opportunity to thank you for allowing me to address the committee and hope this provides an opportunity to answer some questions and promote interest in the continued success of the States' brownfield cleanup and redevelopment efforts. Thank you.

[The prepared statement of Robert C. Shinn, Jr. follows:]

PREPARED STATEMENT OF HON. ROBERT C. SHINN, JR., COMMISSIONER, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW JERSEY

There are a number of mayors of smaller municipalities in many states who think brownfields are only a problem in larger cities or urban areas of the state. New Jersey is no exception. Let me say, that Brownfield redevelopment is absolutely not limited to those larger cities or urban areas of the nation.

The fact is that most of New Jersey's 566 municipalities have probably at least one site that could be considered a brownfield site. As do many communities in the country. Brownfield sites include that long abandoned gas station, the out of business dry cleaner on the corner, in addition to the industrial complex that closed up years ago and is now abandoned and overgrown. These sites do not always pose an immediate threat to public health, so it is not surprising that many of our cities find other problems of a higher priority than brownfields redevelopment.

We need to stop thinking of brownfields as "contaminated sites" that burden a town and drain the tax roles, and to start viewing them as valuable real estate for that new business that wants to relocate to your town. Or perhaps as a recreational opportunity that can benefit the community.

Brownfield sites are attractive opportunities for redevelopment because in most instances there is existing infrastructure. Many brownfield sites can become choice real estate when incorporated into a municipal redevelopment plan and you utilize the tools such as the state of New Jersey has to offer.

The State of New Jersey has many incentives and dedicated resources to stimulate environmental cleanup at identified sites. A good example, which demonstrates our commitment to this effort, is the New Jersey Phoenix Award Winner Berger Industries site in Edison Township, New Jersey. This cleanup resulted in the protection of public health and also expanded the region's economic base. As a former steel tubing manufacturing facility the Berger property lay abandoned due to financial hardship of the responsible party. The site had soil and groundwater contamination present. Contaminants included petroleum hydrocarbons, base neutral organic compounds, chemical solvents and residuals, chlorinated hydrocarbons and volatile organic compounds. The former areas of environmental concern included underground storage tank systems used for waste oil and fuel oil, above ground storage tank systems, exterior hazardous substance drum storage areas, interior sumps, drains and trenches, underground concrete basins, electrical transformers, underground tunnels, and dry wells all used for operational purposes by the former owner and operator. This was in addition to the operational discharges that took place on site. The developer, Marc Parell from ARC Properties Inc. entered into a cleanup and redevelopment agreement with the New Jersey Commerce and Economic Growth Commission and the Department of Treasury that was endorsed by New Jersey Department of Environmental Protection. This agreement allowed him to be reimbursed for 75% of the total cleanup costs from the new taxes generated from the site. It should be noted that this New Jersey cash incentive is the first in the nation. Project costs were approximately \$29 million, with \$2.1 million in remediation costs with community benefits of hundreds of new full time and part time jobs, as well as the developers repayment of over \$1 million in back taxes to the municipality.

As the first site in New Jersey to complete the "redevelopment agreement process" the redeveloped site, now known as Edison Crossroads, has generated over \$2 million in new state tax revenues in the first nine months of operation. We expect that the site will generate approximately \$4.4 million in new taxes its first year of complete operation. In addition, more than the \$4.4 million will be generated each year as new businesses open and existing ones grow. It is important to note that these taxes were not being generated as the site sat idle, abandoned and contaminated for the previous 8 years.

Additional incentives include an immediate third party defense for a prospective purchaser of a contaminated property who voluntarily enters into a Department cleanup oversight document prior to taking ownership. Moreover, the Department issues with every no further action letter a covenant not to sue. The covenant not to sue contains provisions releasing the non-responsible party who conducted the

cleanup from all civil liability to the state to perform additional remediation under certain conditions.

New Jersey has also established a "one-stop" approach to acquiring permits. This innovative regulatory and compliance assistance process is based on a single point of contact in the Department of Environmental Protection. The one stop approach is a total facility approach to permitting. One stop's benefits include a thorough identification of all regulatory requirements and coordination among the various NJDEP programs for major construction, development and remediation projects which are complex in number, requiring a variety of permits and the specific timing of those permits. This assures better customer service to the public and regulated entities. In addition, it provides more opportunity to integrate pollution prevention concepts early on in the permitting process, that may in turn reduce costs and improve the efficiency of the facility.

New Jersey's goal is simple: solving environmental problems and providing businesses a place to locate, create jobs, to build new housing and entertainment opportunities all without having to go into farmlands, open space and other areas of the state which lack existing infrastructure.

However, additional resources need to be brought to bear on assisting all municipalities in their brownfield cleanup and redevelopment efforts. Municipalities need assistance in addressing demolition and disposal costs at sites where the demolition is necessary to assist in the cleanup and redevelopment effort. In addition, many state programs may provide low interest loans and grants to municipalities and private entities but usually for conducting the preliminary assessment, site investigation and remedial investigation. Financial assistance needs to be provided to non-responsible parties for the completion of the remediation. Moreover, there is a need for financial assistance to municipalities who want to turn that abandoned, contaminated property into open space, perhaps a playground or park. This not only takes a brownfield site from an eyesore or blotch on the community but also actually improves that town's quality of life.

We need to encourage cleanup and redevelopment efforts at the Federal level as well. By streamlining some of the federal processes regarding the cleanup of contaminated brownfield sites as well as putting some predictability and finality into the process, additional brownfield site cleanups could happen in our states. These initiatives could greatly enhance the programs that currently exist at the state level. This is a huge largely untapped national investment opportunity for both the public and private sector!

Many of the municipalities in New Jersey have already taken the initiative and identified brownfield sites in their communities in the hopes of putting them back on the tax rolls. Many of these sites can be found on the Department of Environmental Protection's GIS website where we have established an interactive listing of brownfields called I-Map. This unique computer application allows for the identification and potential marketing of brownfield sites to interested parties via the web. It gives you critical screening data like population density, per capita income and aerial photography.

This may be another tool that could be used in other states to further enhance the cleanup and redevelopment efforts within their communities.

This is an exciting time for the brownfield marketplace and urban redevelopment its truly a rare government win-win. Brownfield sites that have been previously overlooked for years in New Jersey are now seen as some of the most exciting investment potential.

I would like to take this opportunity to thank you for you allowing me to address this Committee and hope that this provides an opportunity to answer questions and promotes interest in the continued success of the states brownfield cleanup and redevelopment efforts.

Mr. GILLMOR. Thank you very much, Mr. Shinn.
Mr. Meyer?

STATEMENT OF GEORGE E. MEYER

Mr. MEYER. Thank you very much, Mr. Chairman and members of the subcommittee.

My name is George Meyer. I served 8 years as Secretary of the Wisconsin Department of Natural Resources and currently am Special Assistant to the Secretary. I also have the great privilege of being President of ECOS, the environmental commissioners from the 50 States across the country.

These issues are important in virtually every state, as we have heard today from the committee members, and brownfields is a high priority. We are very interested in your organization to help draft legislation to break down the barriers to cleaning up and reusing the brownfields sites in this country.

Although I am using for purposes of this testimony my experience in Wisconsin, which I am most familiar with, over the last 15 years we have cleaned up 14,000 brownfield sites. And we have 8 to 10 thousand sites still remaining on our list for cleanup.

I want to point out very importantly of all those sites, less than 1 percent of the Federal connection being cleaned up by CERCLA or RCRA, 99 percent are being cleaned up under State laws, either under mandatory laws or voluntary cleanup. We have what we consider a single comprehensive cleanup regulation that sets a broad framework for cleanup of all sites, regardless of types of property; contamination; and, most importantly, the different types of Federal and State regulations there are to make it less complicated for developers and municipalities.

We have been able to do these cleanups, despite having the more stringent groundwater protection and quality protection laws in the country. We have been aggressive on financial incentives. The last biennium, the legislature appropriated \$26 million in brownfield grants. Twenty million dollars in brownfield loans, \$30 million in tax credits were available. And there were site assessment grants given to our agency for \$1.5 million a year.

We have also been very aggressive, and GAO has recognized us as being very innovative in terms of liability incentives, liability exemptions for lenders, local governments, offsite parties, and persons who volunteer to clean up an entire property. Last month we adopted a new innovation, and that is adding an environmental insurance component to our voluntary party exemption program where, in fact, if, in fact, a cleanup still has not met standards, but our staff and consultants believe it will, that is a loss that, in fact, can be ensured. So we can go to final closeout knowing there is going to be money there if, in fact, judgments happen to be wrong.

We have public information and outreach programs that, in fact, include, very importantly, a brownfields study group. So, in fact, we go back and fine-tune our law every legislative session based on a quality improvement basis which includes environmentalists, developers, and local units of government.

Let me make some recommendations to you on behalf of ECOS and our own personal experience. We would recommend that there be comprehensive reforms across all Federal cleanup programs. While attention is given to Superfund as a barrier to brownfield cleanup, we believe it is time for Federal legislation ultimately to address the challenges presented by all EPA cleanup programs. RCRA causes problems in terms of cleanup also.

States should be major partners in this initiative. The legislation, the oversight legislation, should reflect that. As I indicated in our state, 99 percent of the cleanups are state-based. So we have to be very careful in this legislation not to Federalize or complicate what are successful programs.

There needs to be improved delivery of the grants. We would recommend that States that elect you and are capable of admin-

istering grants and loan programs should be given the opportunity to do so on a delegated basis. These grants and loans should be given out on a project-specific basis without regard to the regulatory status of the program. And the recipient should follow the state's technical procedures.

You discussed at great length the issue of finality. I would like to address that also. Federal legislation must provide more assurances and finality to persons cleaning up a property using a State process.

Past legislation has provided too much discretion to EPA to reopen or step in during the cleanup process. In fact, we not only would recommend that; for instance, the word "may" is too open-ended. It may present an imminent and substantial endangerment. It is very broad, can be interpreted very broadly. There needs to be a higher standard, even whether it is just putting the word "does" in or coming up with another type of standard. And also there should not be an intervention in cases where, in fact, the State or the responsible party are willing and are, in fact, coming back in to address the issue.

There are also creative solutions. And I mention the one many of these risks can be dealt with by creative use of environmental insurance, and it can be done relatively expensively. In fact, it is a broad master policy like we have come up with in the State of Wisconsin.

Also, in terms of finality, I would like to address the issue the Governors have. The States through Governors' concurrence process on Superfund sites, you have a greater saying whether a site is put on the national priorities list. If, in fact, there is a State effort to go forward to deal with a Superfund site, that, in fact, should be a basis for nonconcurrence for the Governor for EPA to come in and put something on the NPL list.

Last, there should be flexible approaches to public participation. The States should have the opportunity to develop and enhance their public participation needs for their cleanups based on input from their own communities. I can reflect, even in a State such as Wisconsin, in Congressman Byrd's district, we would use a totally different, in Milwaukee, we would use a totally different, public participation process than we would use in a rural area of our state. And there needs to be that kind of flexibility built into the system.

Mr. Chairman and members of the committee, thank you very much for the opportunity to testify. Our organization would be very willing to help develop further legislation. Thank you.

[The prepared statement of George E. Meyer follows:]

PREPARED STATEMENT OF GEORGE E. MEYER, PRESIDENT, ENVIRONMENTAL COUNCIL OF THE STATES, SPECIAL ASSISTANT TO THE SECRETARY, WISCONSIN DEPARTMENT OF NATURAL RESOURCES

INTRODUCTION:

Good morning, Mr. Chairman and distinguished members of the Subcommittee, my name is George E. Meyer, and I am the President of the Environmental Council of the States (ECOS), and the Special Assistant to the Secretary of the Wisconsin Department of Natural Resources (WDNR). I would like to thank you for the opportunity to be here today, to speak on one of the more exciting and pragmatic environmental initiatives our country has embarked on in a decade: the brownfields initia-

tive. Today, I plan to touch on the brownfields experiences I have had in the State of Wisconsin, as a means of illustrating the efforts that are being replicated in the other states across our country.

As the title of your hearing clearly indicates, the key to revitalizing these brownfields properties is by forming partnerships and removing barriers. Through the use of partnerships—either between government agencies, with the private sector, or both—brownfields has become a model environmental program where all participants work together to return these properties back to the community. The success of this initiative in the states and at the Environmental Protection Agency (EPA) has involved the systematic process of identifying barriers and crafting creative, yet safe, solutions to overcoming these barriers.

Today, I would like to share with you our state's ideas, which I believe are strongly shared by other states, on how this country can build a smarter partnership to deal with brownfields. A key to this smarter partnership is recognizing the successful initiatives of those states that have conquered many of the barriers that were in place 5 or more years ago. In addition, I would like to identify, for you, what barriers remain. While much has been done in the states to improve their own cleanup programs, the states often lack the financial resources to make a large impact on the universe of brownfields they deal with on a daily basis. They need staff, equipment, and funds to support grant programs. In addition, while the states have sought to streamline their own cleanup programs, by making them less administratively burdensome, they still struggle with the requirements of cleanup programs that are under the jurisdiction of the federal government.

WISCONSIN'S BROWNFIELDS CHALLENGE

Wisconsin is not considered a state that is "rich" in brownfields. We estimate that we have approximately 8,000 to 10,000 brownfields properties in the state. We would likely not win any boasting contest with our sister states that surround the Great Lakes. On the other hand, we have quietly made progress on cleaning up the sites in our state over the last 20 years. To date, over 14,000 cleanups have been completed in the state. Over 2,000 of those did not involve petroleum contamination. Of the 8,000 or more brownfields properties which require further work, they : (1) are the more difficult properties to cleanup from an environmental standpoint; (2) have many societal challenges (e.g., tax delinquency, transportation concerns, blighted neighborhoods); or (3) have a combination of these challenges. While many states have made tremendous progress, we may have the more "challenging" properties left to deal with.

Because of the many environmental and societal challenges presented by these brownfields properties, our state knew we had to have different tools to deal with this type of property. Wisconsin entered into the brownfields arena by passing its first legislation in 1994, called the Land Recycling Act. Since then, the state has continued to consider this issue a priority, by forming strong, long-term partnerships with the private sector, environmentalists, local governments and other practitioners in the field. Each consecutive state budget has contained major brownfields initiatives, associated with financing and liability issues.

The state has received national prominence for the efforts it has undertaken to deal creatively and successfully with its brownfields. A General Accounting Office report, dated December 2000, "Information on the Programs of the EPA and Selected States," refers to Wisconsin's as one of the "most innovative brownfields programs in the nation." We believe we have achieved this status by forming smarter partnerships with the public, and safely, but creatively removing barriers to achieving a protective cleanup.

WISCONSIN'S BROWNFIELDS INITIATIVE

I would like to share with you the successful initiatives that we have undertaken in our state, which are replicated in whole or in part by other states across the nation, to make our cleanup process more responsive to the needs of all of the public. I believe that the success of our state and that of the other states' is that no one gave us a federal answer to a local problem. Rather, I think the states have been successful because they have listened to their many publics and have shaped solutions that address local concerns.

Here are the four successful components of our state's brownfields initiative. I hope they illustrate for you the creativity and the success a state can have by forming partnerships and by removing barriers to cleaning up and reusing contaminated properties.

1. A COMPREHENSIVE CLEANUP PROGRAM THAT APPLIES TO ALL DISCHARGES

In 1990, the WDNR undertook a large risk. We sat down with the public, including the regulated community, and asked: “how can we improve the way we do cleanups?” Six years later, we had a comprehensive cleanup regulation, which dealt with sites from discovery through final cleanup. The regulation was unique in that it covered investigation and cleanup for all types of sites, including underground storage tanks, landfills, wastewater treatment facilities, and spill sites. Finally, there was one regulation for the public to understand and comply with.

This comprehensive regulation includes promulgated soil cleanup standards, for both groundwater migration and direct contact concerns. It also provides the property owner the flexibility to choose the type of cleanup standard, based on the current land use of the site. This regulation is used in combination with our existing groundwater regulation, which has promulgated groundwater quality standards. Even though we have some of the most stringent groundwater quality standards in the country, we have completed cleanups at over 14,000 sites. We have achieved this level of success by using natural attenuation of groundwater, where appropriate, and by requiring actual monitoring—not just modeling—of the environment to ensure the remedy will work.

How does having a comprehensive regulation that applies to all types of discharges help get more brownfields cleaned up? It’s simple. The public, regulated community and consultants have one set of requirements to understand and follow. They do not have to spend valuable time trying to figure which “regulatory” program has jurisdiction over the release and which set of regulations to follow. Time is money, and simplifying the process saves the public’s time and money.

The WDNR also provides the public with the opportunity to seek assistance throughout the cleanup, both in terms of technical liability and financial assistance. Generally, the WDNR discovers a “site” because state law requires the person who caused the discharge or owns the property to immediately report the discharge (including existing environmental contamination) to the state. Once that is done, the person who is responsible for the cleanup is required to take all necessary actions to address the environmental contamination. WDNR can provide these individuals with assistance, when requested, in reviewing technical documents and clarifying liability. The WDNR tracks the progress of these properties through a comprehensive database, called the Bureau for Remediation and Redevelopment Tracking System (BRRTS).

What I hope is evident from this testimony is that there is no separate brownfields program, per se, in the State of Wisconsin. The financial and technical incentives that the state has created apply generally to all properties, regardless of whether it is a UST property, a spill site or a RCRA hazardous waste site. There are no separate cleanup standards for a brownfields property, versus a non-brownfields property. Putting up regulatory and programmatic fences is what helped to create the brownfields situation to start with. We felt it was time to bring those fences down.

2. FINANCIAL INCENTIVES TO PROMOTE CLEANUP AND REUSE

The states with the most successful programs understand that money is a key component of any brownfields initiative. Without it, you will only get the brownfields properties cleaned up that the private sector would have gotten to anyway. In Wisconsin, we had \$26 million in brownfields grants and \$20 million in loans available in state fiscal year 1999 “2001. In addition, the state had over \$30 million in tax credits available.

You don’t need large amounts of money to be successful in providing incentives. Over the last year, the WDNR created a new grant program to assist local governments with financing the non-cleanup costs at brownfields properties. (Please refer to the WDNR’s Site Assessment Grant at www.dnr.state.wi.us/org/caer/cfa/EL/Section/SAG.html for further information.)

In about a year’s time, the WDNR:

- Promulgated a regulation and issued guidance on the grant program.
- Issued two rounds of grants, worth a total of \$1.45 million to local governments.
- Awarded grants to 35 communities and signed 50 contracts with those communities.
- Received 110 requests from local governments for \$3.8 million.
- Obtained commitments from local governments to spend \$1 million in additional funds or in-kind services at these properties over the one-year grant term.
- Will fund 22 initial assessments, 22 site investigations, removal of 60 underground tanks, and demolition of 40 structures.
- Will make environmental progress on 109 acres of contaminated property.

What is the key to the success of this program? We were successful for two reasons: partnerships and simplicity. The public requested the program, and then helped us create it. We gave money to brownfields projects that were ready to start, rather than giving money to a community that had yet to select the projects. We kept the application and technical process simple. The agency giving the money was also the same agency assisting the community with the technical aspects of the environmental work.

3. LIABILITY CLARIFICATIONS AND EXEMPTIONS

Clarifying and providing finality to a person's environmental liability is a strong incentive to getting brownfields properties cleaned up and reused. This is especially true where a state or a federal cleanup program can hold a property owner responsible for the cleanup, even if they did not cause the environmental contamination. In Wisconsin, we have authority to ask the current property owner to conduct the necessary environmental activities at a property. Thus, having liability exemptions and letters, which clarify liability, are particularly important to getting sites cleaned up. In Wisconsin, we have a similar array of liability exemptions and "comfort" letters when compared to other states. A sampling of those exemptions and letters, include:

- **Local government exemption from the state's cleanup law:** If a local government acquires a property through tax delinquency, condemnation, slum clearance or through blight elimination, the local government is not required to investigate or cleanup the property.
- **Lender and trustee exemption from the state's cleanup law:** If a lender forecloses on a property, they are only required to conduct a phase I and II assessment of the property. A lender cannot be held liable under state law for a cleanup if their only involvement with the property was by virtue of lending money.
- **Off-site exemption from the state's cleanup law:** If a property is impacted by contamination migrating from a neighbor's property, the affected property is exempt from having to conduct an investigation and cleanup.

The state has two different types of liability clarifications that a person can receive, once they have a cleanup reviewed and approved by the state. A person can choose between receiving a "closure letter" or a "certificate of completion" at the end of the process. Where a person is cleaning up the known problems at a property, they are eligible for the closure letter path. They must investigate the known problem and cleanup according to state law. At the conclusion, WDNR staff reviews their case and they receive a closure letter. The WDNR may reopen the "closed" case if new information arises that indicates that the conditions at the property pose a threat to public health or the environment.

If a person is seeking a certificate of completion, they are required to conduct an investigation of the entire property, not just the known problem. Once the investigation has identified the areas to be cleaned up, the same technical standards apply to persons seeking a certificate as those seeking a simple close out letter. Once the cleanup is complete, the WDNR will issue the certificate, which limits the liability of the person receiving the certificate and future owners of the property. The WDNR cannot reopen the certificate, even if further "old" contamination is found, environmental standards change, or the remedy fails. In seven years, the WDNR has not encountered a situation where it felt it needed to reopen a certificate. Having this type of finality has resulted in some of the more "challenging" brownfields being cleaned up by voluntary parties.

I am aware that there are persons who have concerns about state cleanup programs and the limitations on "reopening" decisions made by the state. I would like to offer you an example of what we believe is a creative solution to balancing the need to give finality on cleanups, with the need to protect the interests of the public if the property needs to be revisited. Until recently, the State of Wisconsin would not allow persons to get a certificate of completion if they were relying on natural attenuation to cleanup the groundwater, and the groundwater still exceeded state groundwater quality standards, even if the plume was stable or receding. You could get a closure letter in this situation, because if natural attenuation failed, the state could reopen it.

Starting next week, the state will be allowing persons to get a certificate of completion while using natural attenuation—as previously described—if they pay an "insurance fee" to the state at the time that the certificate is issued. This insurance fee will be used by the state to pay for an environmental insurance policy that the state is purchasing to cover any anticipated loss it may have at these sites due to natural attenuation failing. The master policy covers the state's anticipated costs of

having to reopen these cases, less an agreed upon deductible. Because of this unique private—public solution, persons are able to get “finality” on their cleanups sooner, and the state is insured if the remedy does not perform as anticipated. The fees to participate in this option are much more reasonable than if the person was required to individually insure the state’s potential risk. It is the type of creative solution that we hope others explore, especially those that are concerned about limitations on the ability to reopen a state’s decision.

I would also like to mention that the State of Wisconsin has received a great deal of benefit from having the 3rd Superfund—Brownfields Memorandum of Agreement (MOA) in the nation. Having this written agreement, endorsing EPA’s belief in how we do cleanups, has cleared up a number of uncertainties with regards to the EPA’s role in Wisconsin cleanups. We would like the EPA to consider doing more brownfields MOAs that would encompass other federal cleanup programs.

4. PUBLIC INFORMATION, EDUCATION AND OUTREACH:

Smarter partnerships start and thrive with good public outreach and education. The foundation of our effort has been to reach out to the public, to ask for their input and to provide them with information in a form that easy for them to understand. I would like to highlight three models for outreach that WDNR and other states are using:

Partnerships: Brownfields Study Group

Since 1998, the WDNR has been meeting regularly with a group of 30 brownfields practitioners to continue to evaluate and improve this state’s initiative. This group includes mayors, county treasurers, EPA, industry representatives, attorneys, state agencies, environmentalists, planners, consultants and other interested persons. The group has had a major impact on improving this state’s initiative by identifying “real” barriers to cleanup and reuse, and offering “real” solutions to the problem. The key to the group is that the practitioners, not the state, chaired the “issue groups.” The WDNR offered administrative support for compiling and issuing the two Study Group reports to the Legislature and Governor, in 1998 and 2000. You can access the state’s Brownfields Study Group Web page at the following address: www.dnr.state.wi.us/org/aw/rr/brownfields/bsg/index.htm

Inventory of Sites Available on the Web

In the last year, the WDNR made publicly available on the world wide web the program’s comprehensive inventory of sites. (This had been available in the past in paper version.) The public has access to information on 21,000 open and closed (i.e., cleaned up) sites in the state where a hazardous substance was discharged, and an investigation is or was required. The location of the web site is www.dnr.state.wi.us/org/aw/rr/brrts/index.htm. A person can search for a property by name or location, and in the near future you can search a geographic area for information.

By the summer of 2001, the WDNR hopes to have detailed information on closed (i.e., cleaned up) sites available on the web. We are in the process of scanning actual WDNR approval letters, which include property use limitations, and we are geographically locating these sites, so you could view the properties through a geographical information system. The public will be able, in the future, to determine if a site has been cleaned up, and then review the actual WDNR approval letters on the web.

Improvements to Public Participation Requirements

The WDNR’s comprehensive cleanup regulation includes opportunities for public involvement and participation in the cleanup process. At present, we are updating those rules to further enhance the notice that must be provided to property owners whose property are impacted by off-site contamination. At the time that contamination is discovered off the property and at the time that the cleanup is complete, the property owner where the source of contamination is will be required to send a letter to neighboring property owners notifying them of the situation. Those impacted owners will be notified of their opportunities to receive information about the cleanup.

I think it is important to note that having these types of partnerships, web sites, and databases all take time and money. States need resources to implement and update these kind of initiatives. Money for staff, equipment—such as geo-localational devices, software, and scanners—is crucial if we are to fully implement these types of initiatives.

CLOSING REMARKS: A MEANS TO A SMARTER PARTNERSHIP

I believe that we can form a smarter partnership to improve this country's efforts to cleanup and reuse brownfields properties. As we have done in Wisconsin and in other states, we need to actively seek out the "real" people who are making the brownfields initiative a success. We need to continuously seek out their recommendations to remove the barriers to get these properties cleaned up in a protective manner. We need to adopt the attitude that the programs we operate can always be improved.

I would like to leave you with several recommendations that you may want to consider in formulating federal legislation on brownfields. I would encourage you to "think outside the box," and not simply adopt an existing federal pilot program. We should take what worked and did not work from those past pilot experiences, but also seek out other successful experiences, such as at the state level, to build a new federal model for brownfields.

Listed below are the recommendations that I would like to provide you with today, intended to form smarter partnerships and identify the remaining barriers to an effective brownfields initiative.

1. Any national brownfields reforms or initiatives must cut across federal regulatory and program boundaries. For those of us in the states that deal with a morass of brownfields properties on a daily basis, we would like you to consider more comprehensive reforms. We should ask ourselves: Why do the federal Underground Storage Tank (UST) and Superfund programs have liability relief for lenders, and the Resource Conservation and Recovery Act (RCRA) Hazardous Waste program does not? Why does Superfund—as well as many states—provide a liability exemption for local governments, but the federal UST and RCRA hazardous waste programs do not? A smarter partnership is one that involves comprehensive reforms across all federal cleanup programs.

2. In shaping a national brownfields initiative, it should be recognized that the environmental cleanups needed at most brownfield properties generally are the jurisdiction of the state. Let me illustrate this point by using Wisconsin as an example. Presently, Wisconsin has 39 Superfund sites, with 2 additional sites "proposed" for inclusion on the National Priorities List (NPL). In addition, we have approximately 125 RCRA hazardous waste corrective action sites, which the state has authorization to take the lead on all but 10 of these cleanups. Thus, the sites with specific "federal" interest add up to 51 sites, or less than 1% of the estimated brownfields sites in Wisconsin. I believe it important to point out that the remaining 99% of the remaining sites are being cleaned up using the state's law and regulations. Clearly, this state—as well as other states—have jurisdiction over most brownfields cleanups. The states' role should be considered as a major, not minor, component of any future federal legislation.

3. Consider a different approach to providing grants to local governments:

- Provide the states the opportunity to administrator the grants and loans, given their experience and relationships with their own local governments.
- Provide money to brownfields properties, regardless of the regulatory jurisdiction. Many federal Superfund removal sites and RCRA hazardous waste sites are tax delinquent, bankrupt properties. These properties are often the largest challenges to communities, yet past efforts at federal legislation have excluded these sites. Allowing them to receive grants as an "exception" may send the wrong message to communities. We would recommend all properties be included, unless the person that caused the contamination is able to pay for the environmental work.
- We need to make the grants available for demolition costs, and removal of underground storage tanks.
- Require that the grant recipient follow state—not federal—cleanup requirements, since these properties generally are not federal Superfund sites. Requiring these grantees to follow the federal cleanup process, or some form of it, is a duplication of effort, since the grantee will need to comply with state environmental laws as well.
- Simplify the administrative requirements, as the states have done.
- Provide grants to specific projects that are planned and ready to implement.
- Keep the process simple, so communities of all sizes can equally participate and succeed.

4. Provide assurances and finality to persons cleaning up properties under state cleanup programs:

- Federal legislation should provide more assurances to states and persons cleaning up that the federal government has limited ability, in all of its environmental programs, to reopen a state cleanup or “step in” during a cleanup, without the state’s approval.
- Exemptions for lenders and local governments should be included in legislation for those EPA programs that currently do not have those specific exemptions. For example, local governments should be afforded the same protections under RCRA Subtitle C, as they are under Superfund, if they acquire a property through involuntary means. Many of the worst brownfields properties in this state are the tax delinquent, bankrupt hazardous waste sites. At present, a local government can be required to cleanup one of these properties if they acquire it through condemnation or tax delinquency.
- Past drafts of legislation have given too much discretion to the EPA as to when it can step in. In the draft S. 350, EPA may take action if “a release *may* present an imminent and substantial endangerment.” Language such as this would likely allow EPA to step in at anytime, and would give little clarity to states and persons voluntarily cleaning up a property.
- Many states believe that the EPA should not be able to propose a site for inclusion on the NPL without the governor’s concurrence. Once again, the language gives too much discretion to EPA.
- There are creative ways to fashion a system that we can all live with. Wisconsin has addressed its concerns about reopening sites with very tight liability exemptions, by working with the insurance industry to develop a cost-effective solution.

5. Public Outreach and Participation

- The states believe that public participation is a very important part of any process.
- The key is not to dictate one method of public participation, but allow the states to fashion their own systems to meet the needs of their communities.
- Federal legislation should provide adequate funding to states that need to enhance their current processes. This funding needs to be over a 5-year period of time, at a minimum, if Congress wants the states to develop data bases and inventories of brownfields properties.
- Consider adopting a “brownfields study group” process at the federal level, to continue to identify barriers and improve the brownfields initiative, even if new legislation is enacted.

In closing, I would like to thank you Mr. Chairman and members of the subcommittee for allowing me to present to you today recommendations for creating smarter partnerships and removing barriers to brownfields cleanups. I understand that we may not all agree on a solution to this large challenge, but I believe that through open and continued dialogue we can build a better program. I look forward to working with you, ECOS, EPA and other interested persons to develop a better program to address the estimated 600,000 brownfields properties nationwide.

Mr. GILLMOR. Mr. Meyer, thank you very much.
And Mr. Cope?

STATEMENT OF GRANT COPE

Mr. COPE. Thank you very much, Mr. Chairman.

Mr. Chairman, Representative Pallone, thank you very much for inviting me to speak on the issue of brownfields legislation. I would like to address three different issues today: first, the need to redevelop expeditiously and safely brownfields throughout our nation; second, the need not to weaken, but to preserve or strengthen, the Federal safety net; third, the need for up-front Federal review of State voluntary cleanup programs.

Now, first, the need to redevelop brownfields is unquestioned. Doing so will help curb sprawl and increase investment in inner-city areas. This is vital because it inures increased protections for environmental quality as well as public health.

Now, in passing legislation that actually tries to accomplish those goals, it is absolutely essential that you not weaken the Federal safety net. I will give you five different reasons why. First, the Federal safety net actually provides a critical choice for public citizens between going to State governments or the Federal Government to get protection from contaminated areas in their neighborhoods.

Second, the Federal safety net actually increases the efficacy of State voluntary cleanup programs. State officials can in dealing with an intransigent party say, "Listen, you can either deal with me in good faith or you can deal with the Federal Government." Third, State voluntary cleanup programs actually provide broad liability relief for developers who go through their voluntary cleanup program.

Fourth, really, the specter of Federal Government intruding on a State program is a non-issue. Two different studies, surveys of State programs, actually, make this point, one by ECOS in late 1990's. They surveyed State environmental protection departments and asked them, "What about this overfiling issue, this intrusive Federal Government? How often does it happen?" In fact, the States reported in the survey that in less than a fraction of 1 percent had the State ever overfiled or, rather, had the Federal Government ever overfiled on a State action.

Second, National Association of Home Builders paid for another study that was completed last year, surveyed 42 State environmental voluntary cleanup programs. One of the questions that they asked was: What about the feds? What about EPA? Are they actually intruding in your voluntary cleanup program?

The findings of the report came back. It said virtually all of the States said that there was either no intrusion or minimal oversight.

Fifth and finally on this issue, falling up on Mr. Meyer's point, developers as long as they go through a program can actually cap their liability with environmental insurance. This means that they go through, they do what the State says. And if there is actually another need to do increased remediation at that state, their liability is capped.

Now, briefly I would like to address some of the issues that the Federal Government should look at when reviewing a State program. First and foremost, they should ensure that these programs deal with sites that have low levels of contamination or, put another way, they should exclude heavily contaminated sites from being involved in voluntary cleanup programs.

Second, State programs should make certain to make polluters pay to clean up the contamination.

Third, they should ensure that citizens are meaningfully involved in those cleanup decisions. And that concludes my testimony.

[The prepared statement of Grant Cope follows:]

PREPARED STATEMENT OF GRANT COPE, U.S. PIRG SUPERFUND ADVOCATE

Good morning Mr. Chairman and distinguished members the House Energy and Commerce Subcommittee on Environment and Hazardous Materials. I would like to thank you for the opportunity to speak about the important issue of brownfields legislation.

My name is Grant Cope. I am an Environmental Advocate for the United States Public Interest Research Group. U.S. PIRG is the national office of the state Public Interest Research Groups (PIRGs). PIRGs are nonprofit, nonpartisan environmental and consumer advocacy groups active across the nation.

Today, I will address three issues: first, the need to safely and expeditiously redevelop brownfields; second, the need to strengthen or at least preserve the federal safety net under current law; and third, the other critical issues that federal brownfields legislation should address. In brief, federal brownfields legislation should ensure that heavily contaminated sites are excluded from the definition of brownfields and ensure that EPA has the authority to conduct an upfront review of state programs to ensure they contain minimum, common sense criteria for protecting public health and environmental quality.

I. THERE IS A GREAT NEED TO CLEAN UP AND SAFELY REDEVELOP BROWNFIELDS

There is a serious need in thousands of communities across our nation to safely and expeditiously clean up brownfields. EPA defines brownfields as “abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.” While there is no definite tally on the number of contaminated sites across our nation, there may be as many as 600,000 such sites. These contaminated sites can contain numerous toxic substances, including substances that cause cancer, birth defects and a variety of other adverse health effects. Regardless of the ultimate number of sites, or their levels of contamination, there is a clear consensus that the nation needs to clean up and safely redevelop brownfields sites.

If this is not done correctly, the health of women, men, and particularly children that live, work, or play near contaminated sites will continue to be put at risk. In addition, developers will continue to seek out greenfields, rather than helping to redevelop blighted inner-city areas in need of reinvestment. Of course, this will exacerbate urban sprawl, which contributes to numerous health and environmental problems, including increased contamination of our nation’s water resources, air pollution, and fragmentation of wildlife habitat. Clearly, brownfields redevelopment that protects public health and helps prevent sprawling development needs to occur across our nation.

Brownfields redevelopment programs should include commonsense criteria such as strong clean up standards, provisions to ensure that polluters pay to clean up their contamination, and meaningful involvement of citizens in clean up decisions. These provisions are essential to help combat the real health dangers associated with contaminated sites.

The federal government can help facilitate these types of programs by providing common sense criteria for state clean up programs and federal funds to help spur beneficial redevelopment efforts.

Over the years, members in both the House and Senate have put forward responsible bills that sought to address the brownfields issue head on. Others bills have been drafted in such a way as to weaken protections for public health and environmental quality. U.S. PIRG would like to offer to assist the Committee, in any way possible, in constructing the former type of legislation.

Of course, the environmental community remains united in opposing bills that seek to roll back protections provided by Superfund, and other statutes concerned with the remediation of toxics. Such roll back efforts have included weakening the polluter pays principle, clean up standards, and the federal safety net.

II. NEED TO PRESERVE THE FEDERAL SAFETY NET

A. Federal Government Should Preserve Protections For Public Health

EPA’s order authority under the Superfund programs provides a vital federal safety net that is the last line of defense for protecting public health and environmental quality. EPA’s order authority has a number of beneficial effects. For example, state clean up officials rely on EPA’s order authority to force intransigent parties to negotiate in good faith, or risk involvement by federal authorities.¹ Similarly, concerned citizens can go to the EPA and request that they facilitate clean up efforts. *Additionally, EPA’s order authority ensures that people have the choice to seek protections from both the state and federal governments.*

¹ General Accounting Office, *Superfund, Stronger EPA-State Relationship Can Improve Cleanups and Reduce Costs*, GAO/RECD-97-77, 4-5 (1997). (The GAO surveyed Minnesota, Washington, Wisconsin, New Hampshire, and Texas. The report chose these states because they “are among the most experienced in leading cleanups as NPL sites”)

Proponents of barring or modifying EPA's order authority under Superfund fail to present coherent arguments for such actions. The main rationale generally given is the need to ensure developers get "finality." However, the need for additional finality disappears after considering five factors: 1) the benefits of a strong federal safety net for public health; 2) the benefits of a strong federal safety net for reduced transaction costs; 3) EPA's failure to credibly use its order authority; 4) consensus liability provisions that provide broad relief for responsible developers;² and 5) a growing market for environmental insurance.

1. Federal Safety Net Helps State Programs Meet Minimum Protections For Public Health

The federal safety net can assist state voluntary clean up programs (VCP) provide minimum protections for public health and the environment. This is important because state programs provide widely differing levels of protection.³ Unfortunately, social, political and economic factors can contribute to inadequate state environmental protection programs, particularly for state brownfields programs.⁴ For example, because states constantly compete with neighboring states in attracting business and residential development, some states may relax clean up standards and liability systems.⁵ This could initiate a race to the bottom on protections that ultimately ends with an increase in threats to human health.⁶ Therefore, it is vital that state programs meet minimum standards, to ensure the long-term protection of human health. The federal safety net can help states meet these minimum standards.

a. State and EPA MOA Process Provides A Tool For Protecting Human Health

The current Memorandum of Agreement Process (MOA) between State Voluntary Clean Up Programs and EPA, while not a formal review process of a delegated program, provides a surrogate for such a process.⁷ Under this program, EPA provides increased certainty to developers who operate under state programs that have an MOA. Under this process, a state and EPA agree to an MOA if the state VCP meets six minimum criteria.⁸ These baseline criteria include requirements that state programs provide opportunities for meaningful community involvement; ensure that voluntary response actions are protective of human health and the environment; and have adequate resources to ensure that clean up are conducted in appropriate and timely manner.⁹

² E.g. 106th Cong. 1st. Sess. H.R. 1750, Sections 201 (Innocent Land Owner), 202 (Prospective Purchaser), and 203 (contiguous Property Owner).

³ Environmental Law Institute, *An Analysis of State Superfund Programs: 50-State Study*, 1998 Update, (1998) (finding differing levels of public participation in cleanup decision, resources, adequacy of oversight at clean ups, and enforcement powers, among other important program components); Charley Bartsh and Christine Anderson, *State of the States: An End of the Session Review of Initiatives and Program Impacts In the 50 States* (Oct. 1999) (describing types of liability relief and eligible sites); Charley Bartsh, Christine Anderson, and Bridget Dorfman, *Brownfields voluntary Clean Up Program Impacts: Reuse Benefits, State by State* (1999) (describing widely different program results); Charley Bartsh and Bridget Dorfman, *Brownfields and Housing: How Are State VCPs Encouraging Residential Development*, 3-4, 6-7, 8-9 (May 2000) (finding considerable variability among state programs with respect to clean up standards, public participation requirements, and liability relief); and General Accounting Office, *Brownfields: Information on the Programs of EA and Selected States*, GAO-01-52 (2000) (noting different clean up standards, levels of publicly accessible information, and liability standards).

⁴ William Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 *William & Mary Env'tl. L. Rev.* 1, 58 (2000).

⁵ Lisa Dittman, *Overfiling: Policy Arguments in Support of the Gorilla in the Closet*, 48 *UCLA L. Rev.* 375, 392 (2000) and Ellen Zahren, *Overfiling Under Federalism: Federal Nipping At State Heels To Protect The Environment*, 49 *Emory L.J.* 373, 3419-420 (2000).

⁶ William Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 *William & Mary Env'tl. L. Rev.* 1, 22-24 (2000).

⁷ Charley Bartsh and Bridget Dorfman, *Brownfields and Housing: How Are State VCPs Encouraging Residential Development*, 3 (May 2000) (at the end of 1999, 14 states had MOAs with EPA and 7 more states were in negotiations for such an agreement).

⁸ EPA, Memorandum from Elliott Laws to Superfund National Policy Managers, *Interim Approaches for Regional Relations with State Voluntary Cleanup Programs* (Nov. 1996).

⁹ EPA, Memorandum from Elliott Laws to Superfund National Policy Managers, *Interim Approaches for Regional Relations with State Voluntary Cleanup Programs* (Nov. 1996) (To receive an MOA, state programs must: 1) provide opportunities for meaningful community involvement; 2) ensure that voluntary response actions are protective of human health and the environment; 3) have adequate resources to ensure that clean up are conducted in appropriate and timely manner and that both technical assistance and streamlined procedures, where appropriate, are available from the State agency responsible for the Voluntary Cleanup Program; 4) provide

Continued

Unfortunately, the State of Ohio is an example of a poor state clean up program that lacks an MOA (see discussion in III. D. below) For example, an initial report on Ohio's program raises serious concerns regarding the program's ability to protect public health.¹⁰ However, citizens are urging the State of Ohio to improve its VCP so that the program can enjoy the increased certainty associated with an MOA, and people can enjoy minimum protections under the state program.

b. Federal Safety Net Gives Public Choice Between State and Federal Protections

In addition to helping to develop better state clean up programs, the federal safety net provides people with a choice between seeking protection from the state or federal government. This protection is critical because, at a minimum, developers will make mistakes during some clean ups. However, state programs also provide varying levels of protections. In fact, some states may bend to parochial considerations and choose to expedite their state's clean up process by weakening standards, cutting the public out of the clean up process, and seeking to protect industrial and redevelopment interests from federal enforcement efforts.¹¹ When combined with state releases from liability, this can create a dangerous combination of ill-planned and unprotective cleanups with little or no incentives that development protect public health.

Therefore, the federal government should maintain the ability of the public to choose between state and federal protections. At a minimum, we should retain the ability of citizens to request swift federal protection. Changing this protection could lead to burdensome litigation over new legal standards. This choice goes to the very heart of the benefits of a federal system of government, where states can choose to innovate and go beyond protection provided by the federal government.

c. Federal Safety Net Provides Important Deterrent Effect

The federal safety net also provides an important deterrent effect against inappropriate clean ups. This deterrent effect can benefit state VCPs, reduce transaction costs and conserve limited public resources. For example, EPA's order authority assists state regulators in forcing intransigent parties into good faith negotiations at clean ups or during revisions to a program's regulations.¹² Parties are less likely to negotiate in bad faith with state entities if they know such action will result in the Federal government assisting state efforts to ensure compliance with applicable laws.¹³ This increases the efficacy of state VCPs, decreases the possibility that businesses may have to negotiate with multiple parties, and allows federal and state agencies to better target and coordinate resources.

2. Federal Safety Net Can Help Reduce Transaction Costs

Ensuring state voluntary clean up programs incorporate minimum protections can increase consistency and certainty for businesses wishing to redevelop contaminated sites.¹⁴ This consistency can decrease transaction costs for business and the govern-

mechanisms for the written approval of response action plans and certification indicating that clean ups are complete; 5) provide adequate oversight to ensure that clean ups are conducted in a manner to protect public health and the environment; and 6) shows capability, through enforcement or other authorities, of ensuring completion of response actions if the volunteering party(ies) conducting the response actions fail(s) or refuse(s) to complete the clean up, including operation and maintenance or long-term monitoring activities.

¹⁰Greene Environmental Coalition, *The State of Ohio's Voluntary Action Program: Findings and Recommendations* (Jan. 2001) (citizens have critiqued the program and are actively working with federal and state entities to remedy the program's deficiencies so that Ohio would qualify for an MOA).

¹¹William Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, William and Mary Environmental Law and Policy Review 3 (1997).

¹²General Accounting Office, *Superfund, Stronger EPA-State Relationship Can Improve Cleanups and Reduce Costs*, GAO/RECD-97-77, 4-5 (1997). (The GAO surveyed Minnesota, Washington, Wisconsin, New Hampshire, and Texas. The report chose these states because they "are among the most experienced in leading cleanups as NPL sites") and Ellen Zahren, *Overfiling Under Federalism: Federal Nipping At State Heels To Protect The Environment*, 49 Emory L.J. 373, 427 (2000).

¹³Lisa Dittman, *Overfiling: Policy Arguments in Support of the Gorilla in the Closet*, 48 UCLA L. Rev. 375 (2000).

¹⁴See Jerry Organ, *Environmental Federalism Part II: The Impact of Harmon, Smithfield, and Clean on overfiling under RCRA, the CWA, and the CAA*, 30 Env'tl. L. R. 10732 (2000) (discussing federal oversight within the context of federally delegated state programs), Lisa Dittman, *Overfiling: Policy Arguments in Support of the Gorilla in the Closet*, 48 UCLA L. Rev. 375, 391 (2000) (same); and William Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 Wm. & Mary Env'tl. L. Pol'y Rev. 1, 61-62 (2000) (applying same argument to state clean up programs).

ment in a variety of ways. This is particularly true for good actors that do not want bad actors to financially benefit by being allowed to cut corners.

Importantly, states retain the flexibility to develop and negotiate innovative programs within the MOA process.¹⁵ For example, states can respond to business concerns by targeting federal funds to certain parties and geographic regions. Alternatively, states can use tax incentives and federally funded state informational systems (e.g. databases and geographic information systems) to help spur safe redevelopment efforts.

3. *There Is No Evidence That EPA Has Abused Its Enforcement Authorities*

The force behind weakening the Federal Safety Net is filled with more hyperbole than fact. Put simply, overfilings are a very rare occurrence.¹⁶ ("Overfiling" refers to a situation where the EPA conducts an enforcement action against the same entity and for the same violation as a state enforcement official.) The Environmental Council of the States (ECOS) conducted a state-by-state survey regarding EPA's use of its overfiling authorities.¹⁷ This survey used an extremely broad definition of "overfile," which included instances where EPA brought an action for violations that a state had failed to address, rather than just instances where EPA brought an action for violations that a state had claimed to already have addressed. Even under this expansive definition of "overfiling," the survey demonstrated that EPA overfiles in a fraction of one percent of all cases under numerous environmental laws. In fact, states reported that EPA overfiling accounted for just 0.3 percent of all Federal enforcement actions during fiscal years 1992-1994, and, during fiscal year 1994-1995, EPA overfiled on about 0.1 percent of all state enforcement actions.¹⁸ Based on these numbers, it is clear that EPA almost never uses its enforcement authority, indeed, it appears that EPA only overfiled against the worst violators or in the most inadequate state programs.

The findings of the ECOS state-by-state survey are mirrored in a survey of 42 states' voluntary cleanup programs funded by the National Association of Homebuilders.¹⁹ This state survey reports that "virtually all of the states [confirmed] that U.S. EPA is not involved or only minimally active in monitoring the state's [voluntary clean up programs]."²⁰ A few states reported that while they have a close working relationship with EPA, the agency does not extensively monitor the state program, but rather provides funds and program support.²¹

There are a variety of reasons for the exceedingly low level of federal oversight of state programs. Some reasons include limited federal resources, the discretionary nature of enforcement actions, EPA respect for the cooperative federalism structure of environmental regulation, and the political repercussions of such overfiling.²²

4. *Consensus Liability Exemption Already Exists That Would Give Responsible Developers Finality*

Over the course of many years, bills in both the House and the Senate have contained consensus liability exemptions that provide expansive relief from liability for responsible developers. These provisions include limitations on the liability of prospective purchasers, innocent landowners and contiguous landowners.²³ Innocent

¹⁵ See, Ellen Zahren, *Overfiling Under Federalism: Federal Nipping At State Heels To Protect The Environment*, 49 Emory L.J. 373, 434 (2000) (discussing MOA within the Clean Air Act, not brownfields process).

¹⁶ Salt Lake City Tribune, *Representative Stirs Up a Western Turf War With EPA; State's environmental watchdog is growling at fed interference*, A4 (1999) (citing three instances of overfiling over a two year period including instances where the state failed to take any action against a violator, the state failed to fine a violator, and an instance where the state grossly underfined another violator).

¹⁷ Senate Committee on Environment and Public Works, *The Relationship Between the Federal and State Governments in the Enforcement of Environmental Law*, S. Hrg. 105-173, 161-162 (June 10, 1997).

¹⁸ Senate Committee on Environment and Public Works, *The Relationship Between the Federal and State Governments in the Enforcement of Environmental Law*, S. Hrg. 105-173, 161-162 (June 10, 1997).

¹⁹ Charley Bartsh and Bridget Dorfman, *Brownfields and Housing: How Are State VCPs Encouraging Residential Development* (May 2000).

²⁰ Charley Bartsh and Bridget Dorfman, *Brownfields and Housing: How Are State VCPs Encouraging Residential Development*, 12 (May 2000) (emphasis added).

²¹ Charley Bartsh and Bridget Dorfman, *Brownfields and Housing: How Are State VCPs Encouraging Residential Development*, 12 (May 2000).

²² Ellen Zahren, *Overfiling Under Federalism: Federal Nipping At State Heels To Protect The Environment*, 49 Emory L.J. 373, 384-386, 414-415, 430 (2000).

²³ E.g. 106th Cong., 1st. Sess. H.R. 1750, Sections 201 (Innocent Land Owner), 202 (Prospective Purchaser), and 203 (contiguous Property Owner); 107th Cong. 1st Sess. S. 350, Section 201

landowners language protects people that purchased land prior to the enactment of the legislation and who took steps to protect public health from contamination found on their property. Prospective purchasers language limits the liability of people that purchase property after enactment of the legislation and who take steps to protect public health from contamination found on their property. Contiguous landowner language protects people whose property has been contaminated by a nearby property, so long as the landowner takes steps to protect public health from that contamination. All three of these liability limitations protect responsible developers, while maintaining disincentives for irresponsible developers who desire quick profits at the expense of public health.

a. Developers Also Enjoy Broad Liability Limitations Under State Law

In addition to enjoying a negligible amount of federal oversight, developers also enjoy broad liability protection under state laws. A 1999 study funded by the National Association of Homebuilders found that most state voluntary clean up programs offer “Covenants Not to Sue” or “No Further Action Letters” to developers that complete the clean ups under state programs.²⁴ By issuing these documents, states largely foreclose on their ability to make developers civilly liable for future clean ups costs. As described below, EPA provides similar assurances under federal brownfields initiatives.

5. Insurance Policies Also Provide Developers With Protection

There is an already established and growing environmental insurance market for brownfields redevelopment. The Northern Kentucky University and The E.P Systems Group, Inc. published a 1999 report of such products that is based, in part, on a survey and interviews with insurance carriers and brokers, including AIG Environmental and Kemper.²⁵ The report found that developers already widely use such policies; further, the types of coverage, occurrences covered, dollar limits, and coverage periods of policies are expanding, while costs and preconditions to coverage are decreasing. The report quotes one insurance carrier representative, “The market now provides very broad coverage, which it didn’t five years ago...”²⁶

These insurance policies, which are no different from any other type of real estate insurance coverage, provide real estate buyers and developers with certainty. These policies cap liability, thereby enabling buyers and developers to better assess the impacts of market forces. Ultimately, these market forces dictate when, where, and how redevelopment occurs.

B. Federal Safety Net In Under Other Federal Statutes

A number of federal statutes give EPA the ability to protect public health using their enforcement authorities.²⁷ These authorities also provide a plethora of protections for public health. To weaken one of these provisions invites a downward spiral of weakening protections, and the benefits inherent in those protections.²⁸ For example, requests for “finality” have led to calls for rolling back protections under a host of statute, such proposals have also suggested language that bars criminal fines and penalties. U.S. PIRG strongly urges the government to uphold EPA’s ability to protect public health and environmental quality, rather than eroding it in this fashion.

(Contiguous Property Owners), Section 202 (Prospective Purchasers), and Section. 203. (Innocent Landowners).

²⁴Charley Bartsh and Christine Anderson, *State of the States: An End of the Session Review of Initiatives and Program Impacts In the 50 States* (Oct. 1999).

²⁵Northern Kentucky University, The E.P Systems Group, Inc., *Environmental Insurance Products Available for Brownfields Redevelopment* (Nov. 1999).

²⁶*Id.* at 52.

²⁷Numerous statutes authorize EPA to issue clean up orders and assign liability, including 42 U.S.C. §§9606 (Superfund); 6973 (RCRA); 33 U.S.C. §§1321(c) (Clean Water Act); 15 U.S.C. §2606 (TSCA: standard is “unreasonable risk”); 30 U.S.C. §1271 (SMCRA: standard is “imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm.”); 42 U.S.C. §107(a) (Superfund: must pay clean up costs); 42 U.S.C. §§7003 (RCRA: penalties for violating orders) and 6991b (RCRA: order and penalty authority for releases of petroleum); and 42 U.S.C. 404 (TSCA: federal enforcement authority under federal programs concerning lead abatement).

²⁸*E.g.* 1) Ellen Zahren, *Overfiling Under Federalism: Federal Nipping At State Heels To Protect The Environment*, 49 Emory L.J. 373 (2000); 2) Jerry Organ, *Environmental Federalism Part I: The History of Overfiling Under the RCRA, the CWA, and the CAA*, 30 Env’tl. L. R. 10615 (2000); 3) Jerry Organ, *Environmental Federalism Part II: The Impact of Harmon, Smithfield, and Clean on overfiling under RCRA, the CWA, and the CAA*, 30 Env’tl. L. R. 10732 (2000); and Lisa Dittman, *Overfiling: Policy Arguments in Support of the Gorilla in the Closet*, 48 UCLA L. Rev. 375 (s000).

1. Numerous Statutes Provide People With Protection Against Particular Contaminants

EPA and other federal agencies rely on their order authorities to protect public health under a variety of circumstances. For example, EPA currently uses its order authority under the Resource Conservation and Recovery Act to protect children from lead based paint. Similar provisions also exist under the Toxic Substances Control Act (TSCA). TSCA and RCRA orders also apply to polychlorinated biphenyls, dioxin and a variety of other highly toxic substances. There is no justifiable reason to weaken EPA's authority with respect to such dangerous substances.

Any attempt to modify EPA's enforcement authorities under numerous statutes is fraught with peril. Different statutes apply differing standards to a variety of regulatory requirements that pertain to hundreds of highly toxic substances. Modifying EPA's authority under numerous statutes risks not only creating massive confusion, but also an across-the-board weakening of EPA ability to protect public health and environmental quality.

The same is true when modifying EPA's order authority under one statute. For example, EPA's order authority under RCRA includes the ability to enforce a variety of different requirements at different types of sites regulated under the program. Varying standards provide flexibility while protecting human health. Modifying this structure would create an adverse ripple effect across the RCRA program.

C. Strong Federal Enforcement Benefits Business and Public Health

In addition to the benefits of retaining the federal safety net described above, a host of other benefits also inure to government, business interests, and the public through consistent and vigorous enforcement of environmental laws. First, consistent enforcement efforts ensure that members of the business community are treated fairly. This fact is reflected in the findings of a 1996 General Accounting Office report (GAO), which reiterated the findings of a 1991 GAO report, that "penalties play a key role in environmental enforcement by deterring violators and by ensuring that regulated entities are treated fairly and consistently so that no one gains a competitive advantage by violating environmental regulations. [The GAO also found that] environmental statutes have been violated repeatedly when penalties have not been applied."²⁹

Vigorous enforcement of environmental laws, particularly hazardous waste, can also provide incentives to increase pollution prevention efforts. In fact, 96 percent of respondents to a 1995 Price Waterhouse survey identified enforcement pressure as one of the most important drivers of pollution prevention among both large and small businesses.³⁰ Within the context of brownfields cleanups, enforcement actions can help to ensure that current regulated entities do not create future brownfields sites. This means that the by retaining the federal safety net, we both prevent harm and preserve future options for land and groundwater use.

D. There Is a Need For Increased Oversight Of State VCPs

While there is no need to weaken the federal safety net, there appears to be a need for stepped up federal enforcement and oversight of state environmental programs. While this testimony goes into more detail below (See Section III. D.), a brief recitation of concerns regarding state enforcement of environmental laws is provided here. Both governmental and non-governmental studies document a consistent lack of state enforcement efforts against even significant violators of environmental laws.³¹ This deficiency stretches across environmental programs, and therefore

²⁹ General Accounting Office, *Water Pollution: Many Violations Have Not Received Appropriate Enforcement Attention*, GAO/RECD-96-23, 13 (March 1996).

³⁰ Senate Committee on Environment and Public Works, *The Relationship Between the Federal and State Governments in the Enforcement of Environmental Law*, S. Hrg. 105-173, 5 (Statement of Hon Steven Herman, Assis. Admin. Office of Enforcement and Compliance Assurance, EPA) (June 10, 1997).

³¹ United States Public Interest Research Group, *Poisoning Our Water* (2000) (finding a lack of state and federal enforcement actions against significant noncompliers under the Clean Water Act); Environmental Working Group, *Prime Suspects: The Law Breaking Polluters America Fails To Inspect* (2000) (finding weak state monitoring and enforcement measures against sources of pollutants under the Clean Air Act); General Accounting Office, *More Consistency Needed Among EPA Regions in Approach to Enforcement*, GAO/RECD-00-108 (2000); Inside EPA has printed a number of articles on state enforcement of environmental laws and EPA enforcement and oversight of state programs that implement such laws. Articles include Vol. 20, No. 19 and Vol. 20, No. 21. Articles are based on internal EPA reports from the Office of Enforcement and Compliance Assurance that Inside EPA obtained through Freedom of Information Act requests. (Documents can be downloaded at <http://www.iwpextra.com>); Environmental Protection Agency, Office of Enforcement and Compliance Assurance, *Enforcement and Compliance Evaluation of*

raises concerns regarding weak state oversight and enforcement in voluntary clean up programs. Indeed, initial assessments of some state programs provide reason for such concerns.³² However, without modifications to budgetary priorities and political predilections, such protections will likely remain illusive. Therefore, at a minimum, the federal government should preserve or strengthen the federal safety net.

E. Conclusion

With consensus on broad forms of liability relief, an insignificant risk of federal intrusion in state programs, and bars on state civil liability for future clean up costs, developers could enjoy broad guarantees of “finality,” so long as they do one simple thing: ensure that cleanups adequately protect public health. Indeed, the only people that would need additional “assurance” are developers that do an inadequate job of cleaning up contamination. Importantly, this is the very situation where the federal government should retain “unencumbered” its ability to protect public health.

There is an old saying, “If it ain’t broke, don’t fix it.” Nowhere is this adage more true than with the fundamental protection for public health that is currently embodied in EPA’s order authority.

III. CRITICAL ISSUES THAT FEDERAL BROWNFIELDS LEGISLATION SHOULD ADDRESS

There are a number of issues that are critical to redressing the problem of brownfields redevelopment. In this testimony, I would address two of the more prominent and contentious issues. First, I will address the need to ensure that heavily contaminated sites are excluded from the definition of brownfields. Second, I will address the need for an upfront review of state programs prior to getting any federal funds. In this section, I will also outline some of the commonsense criteria that state programs should include. The need for this federal review and for the inclusion of only sites with low levels of contamination is that state programs provide disparate levels of protection. Therefore, an upfront review process would ensure minimum levels of protection that also precludes a race-to-the-bottom between state clean up programs.

A. Brownfields Legislation Should Only Apply To Sites With Low Levels Of Contamination

Many state clean up programs incorporate expanded liability relief under state law and varied clean up standards without adequate oversight or long-term assurances of protection. Therefore, state programs should only include sites with low levels of contamination.

This is vitally important because some legislative proposals have called for state clean up programs to include heavily contaminated sites. This is danger given that such federal legislation also calls for vastly increased funding. According to the National Conference of Mayors, lack of funding for redeveloping brownfields is the number one factor inhibiting redevelopment.³³ However, such money should not be used to fuel inadequate and inappropriate state programs. Rather, federal funds should be appropriately focused on thoroughly cleaning up brownfields, preserving and promoting parks and open spaces, and meaningfully incorporating the local community in clean up decisions.

B. Brownfields Legislation Should Incorporate An Upfront Review Of State Programs

Federal legislation should include an upfront review of state clean up programs prior to funneling federal resources to those programs. This review process should ensure that state programs include commonsense criteria to protect public health and integrate citizens into the clean up process. The lack of a review process could result in federal funds increasing the capacity, but not the quality, of state clean up programs. This could dramatically accelerate ill-planned and unprotective rede-

Region 5, Final Evaluation Report, (Dec. 1998) (finding general decreases in state enforcement of environmental programs); Environmental Protection Agency, Office of Enforcement and Compliance Assurance, *Enforcement and Compliance Evaluation of Region 9, Final Evaluation Report*, 29, 31 (May, 1998) (same); Office of Inspector General, Environmental Protection Agency, *Superfund, State Deferrals: Some Progress, But Concerns For Long-Term Protectiveness Remain*, (Sept. 10, 1998) (finding that EPA administration of policy that allows states to clean up hazardous waste sites that would otherwise qualify as Superfund sites to result in less than adequate protections for public health); and Office of Inspector General, *Region 6’s Enforcement and Compliance Assurance Program* (1997) (noting that stronger state enforcement is needed to ensure effective deterrent against polluters breaking the law).

³² See discussion about the inadequacy of state clean up programs below.

³³ National Conference of Mayors, *Recycling America’s Land*, 11 (Feb. 2000).

velopment activities. If this occurs, our nation could face a new public health crisis in the coming decades. After all, lead, arsenic, and mercury will be toxic long after the last developer leaves a brownfields site and the first homeowner moves in. Therefore, it is vital that states ensure developers thoroughly clean up sites.

Put another way, prevention is the best approach when protecting public health and environmental quality. Therefore, U.S. PIRG strongly supports an upfront federal review of state programs prior to the distribution of any federal funds or transfer of oversight authorities. A front-end review process is a preventative measure that helps to ensure peoples' lives are not put at risk by inadequate and unprotective state programs.

1. Elements Of State Clean Up Programs

The following issues are criteria that state should incorporate in their clean up programs. This is not meant to be a full vetting of the issues, but rather a brief highlight of the main components for such programs.

a. Highly Protective Clean Up Standards

State clean ups must protect human health, welfare, and the environment. Programs should completely remediate both soil and groundwater. State programs must monitor and track all contaminated sites in a public database. If a "remediated" site may endanger public health or the environment, the State must, with public input, reassess the site remedy and rectify any problems.

b. Safeguards on the use of Institutional Controls

State programs use institutional controls (e.g. deed and zoning restrictions) if they decide to allow developers to leave contamination on-site. Institutional controls are "non-engineered instruments such as administrative and other legal controls that minimize the potential for human exposure to contamination by limiting land or resource use. State use of institutional controls to limit exposure to toxic substances must protect public health—including the most vulnerable in our society" and the environment, incorporate multiple layers of institutional controls that rely on different parties for enforcement, be supported by the community, and include a publicly available database.³⁴ Additionally, all entities must use the database prior to conducting any work on or near a site.

c. Site Surveys and Assessments

State programs must survey their state for contaminated sites, assess the risks posed by each site to humans and the environment, and list all known or suspected sites in a publicly available database.

d. Appropriate Sources of Stable Funding

State programs must not use taxpayer funds to finance the program. States must provide a stable, long term source of funding based on the polluter pays principle (e.g. taxes or fees on polluting industries) to finance clean up programs. This funding must pay for all program costs, including the clean up of orphan sites (sites for which there are no liable parties).

e. Liability System Based On Polluter Pays Principle

Clean ups must be primarily funded by strict, joint and several, and retroactive liability, or with revenue derived from funding as described in paragraph "d." The only acceptable defenses to this liability system are for "innocent landowners," "bona fide prospective purchasers" and "contiguous property owners."

f. Citizen Enforcement Of Clean Up Plans

All states must give citizens the right to file citizen suits for contamination resulting from such sites and provide citizens with a fees for winning any such suit in court.

g. Redevelopment Should Decrease Sprawl and Increase Preservation of Open Space

State clean up programs should focus their programs on devising smart growth plans that decrease sprawl and revitalize urban areas. This includes preserving existing parks, open spaces and greenways, as well as promoting the creation of such areas.

h. Meaningfully Involve The Public In Clean Up Decisions

State programs must meaningfully involve all citizens in clean up decisions. This includes making all clean up related documentation and correspondence publicly

³⁴The database should contain the name and location of sites, types of controls used and the entities that are responsible for enforcing those controls.

available, providing for public notice, comment, and a hearing, and giving citizens the right to appeal the results of that hearing. Clean up activities must not occur until the community is satisfied with the protectiveness of the clean up. This includes assurances that state clean up programs and individual clean up plans act to remedy any pattern of industrialization that has created pockets of contamination and contaminated lands.³⁵ Further, state programs should provide communities with resources (both technical and financial) to fund citizen boards that provide an avenue for meaningful public input in the construction of the clean up plan.

i. Assure The Public's Right To Know About Toxics In Their Community

State programs must ensure all citizens have the right to know about all toxics in their community. This includes ensuring that citizens are made aware of any past, current, or ongoing releases, the name of the company responsible for the release and responsible for cleaning up the release, as well as health effects associated with the chemicals being released (including any cumulative or synergistic effects, if known).

C. Upfront Review is Commonplace Under Other Programs

An upfront review is commonplace in other environmental programs, including the Resource Conservation and Recovery Act and the Clean Air and Water Acts.³⁶ Despite this type of review, experience with these programs demonstrates that states are extremely varied in their ability and commitment to strongly enforce these laws that protect public health and environmental quality.³⁷ Simply put, some states do a better job of protecting public health than do others. However, because there are minimum standards, citizens can both work to ensure their states meet these minimal standards and, realizing the true benefits of federalism, push their states to go beyond these minimal protections.

D. Upfront Review Is Needed Because Some States Have Inadequate Clean Up Programs

It is clear that not all state clean up programs are alike. However, some broad themes are evident from the available data. For example, initial data on state clean up programs demonstrates that some states do an inadequate job of protecting public health, meaningfully involving the public in clean up decisions, ensuring that polluters pay to clean up contamination, enforcing the law, managing contained sites over the long-term, funding their clean up programs, and retaining and developing sufficient technical expertise to remediate very contaminated sites.

The following failings highlight the need to ensure that state programs meet minimum, commonsense criteria that protect public health and environmental quality.

1. Some States heavily Rely On Institutional Controls To Decrease Human Exposure, Rather Than Cleaning Up Contamination

For example, one of the most controversial issues regarding the clean up of contaminated sites is the use of institutional controls to decrease human exposure to

³⁵ For information on this issue, please see the following articles: 1) Bradford Mank, *Reforming State Brownfield Programs To Comply With Title VI*, Harvard Envtl L. Rev. 115 (2000) and 2) EPA, *Brownfields Title VI Case Studies*, EPA 500-R-003 (June 1993).

³⁶ Resources Conservation and Recover Act, 42 U.S.C. § 6926; Clean Air Act, 42 U.S.C. § 7410; and Clean Water Act, 33 U.S.C. § 1342(b)

³⁷ *E.g.*, United States Public Interest Research Group, *Poisoning Our Water* (2000) (finding a lack of state and federal enforcement actions against significant noncompliers under the Clean Water Act); Environmental Working Group, *Prime Suspects: The Law Breaking Polluters America Fails To Inspect* (2000) (finding weak state monitoring and enforcement measures against sources of pollutants under the Clean Air Act); General Accounting Office, *More Consistency Needed Among EPA Regions in Approach to Enforcement*, GAO/RECD-00-108 (2000); *Inside EPA* has printed a number of articles on state enforcement of environmental laws and EPA enforcement and oversight of state programs that implement such laws. Articles include Vol. 20, No. 19 and Vol. 20, No. 21. Articles are based on internal EPA reports from the Office of Enforcement and Compliance Assurance that Inside EPA obtained through Freedom of Information Act requests. (Documents can be downloaded at <http://www.iwpextra.com>); Environmental Protection Agency, Office of Enforcement and Compliance Assurance, *Enforcement and Compliance Evaluation of Region 5, Final Evaluation Report*, (Dec. 1998) (finding general decreases in state enforcement of environmental programs); Environmental Protection Agency, Office of Enforcement and Compliance Assurance, *Enforcement and Compliance Evaluation of Region 9, Final Evaluation Report*, 29, 31 (May, 1998) (same); Office of Inspector General, Environmental Protection Agency, *Superfund, State Deferrals: Some Progress, But Concerns For Long-Term Protectiveness Remain*, (Sept. 10, 1998) (finding that EPA administration of policy that allows states to clean up hazardous waste sites that would otherwise qualify as Superfund sites to result in less than adequate protections for public health); and Office of Inspector General, *Region 6's Enforcement and Compliance Assurance Program* (1997) (noting that stronger state enforcement is needed to ensure effective deterrent against polluters breaking the law).

toxic substances that are left on-site after clean up activities are complete. (Institutional controls are legal instruments, such as a deed restriction, that restricts the use of land as a way of controlling exposure to toxic substances.)

In 1997, the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) conducted a survey of 40 states to determine how they used institutional controls when remediating toxic waste sites.³⁸ The survey found that 31 states required the use of institutional controls, while 8 states allowed them as an option in clean ups. Of the 40 states, only 16 states required public notification or participation when there is a restriction put on the use of the land and only 11 required public notification and involvement when there was restriction placed on the use of contaminated groundwater.

Importantly, limiting the use of land or groundwater in an area can adversely impact a community. For example, cleaning up areas to only industrial or commercial standards may decrease the amount of residential development in a neighborhood, while vastly increasing the amount of industrial development. This could increase pollution, depress property values and degrade the residential quality of nearby communities. These types of issues affect the entire community; therefore, states should reach out and attempt to integrate the public into the decision-making process for cleaning up contaminated sites.

The ASTSWMO study also surveyed states about their enforcement of institutional controls.³⁹ Only 9 states provided for fines or penalties for a failure to comply with institutional controls. Further, many types of institutional controls rely on local government for enforcement. However, 20 states noted that local governments generally lack adequate funding to enforce institutional controls.⁴⁰ The ASTSWMO survey also found problems with enforcing institutional controls, as well as raft of problems that inhibit the successful use of these controls.

Another study, by the Environmental Law Institute, examined the effectiveness of institutional controls at Superfund sites.⁴¹ This study found problems with enforcement at a local level, even at these highly contaminated sites. One problem noted was the failure to implement some institutional controls, as required in clean up plans. Other failures included the lack of a public education program regarding the dangers of waste left on-site and the failure to pass local regulations restricting the use of contaminated sites. The study also documents instances of possible human exposure to contaminated waste as a result of noncompliance with institutional controls.

Importantly, a report published by Northeast-Midwest Institute in 2000 found that states are encouraging residential development on brownfields.⁴² For example, California reported that 5,200 new housing units had been built on brownfields, and Colorado reported the construction of 2,855 such units. The report goes on to site numerous incentives that states have implemented to encourage residential development on brownfields. Particularly at residential sites, of developers use institutional controls, it is vital that the controls are effective.

However, even if a site is initially cleaned up and developed for commercial or industrial development, it is still vital that authorities monitor for any changing land use and the adequacy of protections over the long term. Land use is a dynamic process of economic and social growth, not static endpoint. Commercial developments can hold day care centers and industrial areas can be transformed into housing developments. Therefore, it is essential that authorities monitor the adequacy and enforce the requirements of institutional controls.

2. *The Effectiveness of States Clean Up Programs Vary*

A wealth of data indicates a variety of problems with states' clean up programs.

³⁸ ASTSWMO, *Survey of State Institutional Control Mechanisms* (Dec. 1997).

³⁹ *Id.*

⁴⁰ Other reports have noted similar problems. Resources for the Future, *Linking Land Use and Superfund Cleanups* (1997) (The report noted that an ICMA focus group had indicated "many state and local officials do not fully appreciate the long-term demands—including oversight and enforcement—that institutional controls may place upon local governments."); and Robert Hersh, *et. al.*, *Linking Land Use and Superfund Cleanups, Uncharted Territory*, at 91 (1997) (citing International City/Council Management Association, *ICMA Draft Preliminary Summary of Findings of Institutional Controls Study* (Washington, D.C., Nov. 1996) (the survey "suggested that fewer than 10% of the local government respondents have experience implementing and enforcing institutional controls at former hazardous waste sites.") (emphasis added).

⁴¹ Environmental Law Institute, *Protecting Health at Superfund Sites: Con Institutional Controls Meet the Challenge?* (1999).

⁴² Northeast-Midwest Institute (on behalf of the National Association of Homebuilders), *Brownfields and Housing: How are State VCPs Encouraging Residential Development?*, (May 2000).

a. Ohio

Public notice and involvement in cleanup decisions is critical for ensuring the long-term protection of public health, particularly when contamination is left on-site. When the public is informed about the risks of a site and understands the tools used to decrease those risks, they are uniquely situated to help enforce those controls, whether by telling children not to play in certain areas or by informing new residents or businesses not to undertake certain actions.⁴³

However, a study by the Northeast-Midwest Institute on Ohio's Voluntary Action Program (VAP) found that the public might not be notified of a clean up plan until after a cleanup occurs and the state has issued a covenant not to sue.⁴⁴

A coalition of groups recently reviewed Ohio's VAP.⁴⁵ Their findings are rather disturbing. Under Ohio's VAP, if the Ohio EPA agrees that a site meets the standards set forth in the VAP, Ohio EPA will issue a Covenant Not to Sue, which releases the owner from state civil liability. By releasing developers from liability, the state largely forecloses its primary tool to ensure that landowners or developers pay to clean up dangerous contamination left on-site. This means that taxpayers may bear the costs of any future clean ups.

The report lists a number of other disturbing findings regarding Ohio's VAP. For example, Ohio provided financial incentives for some sites to participate in the VAP, but the sites were never cleaned. Additionally, the report notes that the VAP process did not address offsite contamination concerns, as required by Ohio statutes, and that "[s]ome sites were located on or near critical resource aquifers, wells, and/or municipal water supplies. On- and offsite [contamination] threatened these critical resources, [and] potentially [threatened] human health."⁴⁶

The VAP program also strongly relies on institutional or engineering controls as a form of clean up, rather than requiring contamination to be remediated or removed. For example, deed restrictions on land use or groundwater use, the most common form of institutional control employed, were applied at 49.5 percent of the 111 surveyed sites. Additionally, Ohio's program has an Urban Setting Designation that allows developers to avoid cleaning up contaminated groundwater. Thus far, the Ohio Program has issued 57 "Covenants Not to Sue" at VAP sites; of these sites, 17,526 acres of groundwater have been defined as Urban Setting Designators, while another 525 acres of groundwater and 828 acres of land have also been restricted through institutional controls.

Other problems continue to crop up with Ohio's clean up program. For example, The Columbia Dispatch recently reported that only 10 sites within Ohio have been completely cleaned up since the program began over a decade ago.⁴⁷ Additionally, owners of contaminated property recently won a suit that bars Ohio EPA from publicly listing contaminated sites.⁴⁸

Currently, citizens across Ohio are urging their state government to improve their program by meeting EPA's standards that would allow for a Memoranda of Agreement. Thus far, the state has failed to make the required program improvements.

b. New York

Problems have also been found with New York's state clean up program. In February 2001, the New York comptroller published an audit of the state clean up program.⁴⁹ The audit found that since 1979, 167 sites have been taken off of the state contaminated site list. Of those sites, only two met the goal of being as clean as they were before being polluted. Of the 221 treated sites that were still on the list, 30 did not meet the state's minimum standards for protecting public health. At five other sites, state workers had failed to meet their own cleanup goals. At 141 other

⁴³ Robert Hersh, *et. al.*, *Linking Land Use and Superfund Cleanups, Uncharted Territory* (1997).

⁴⁴ Northeast-Midwest Institute (on behalf of the National Association of Homebuilders), *Brownfields and Housing: How are State VCPs Encouraging Residential Development?*, 5 (May 2000).

⁴⁵ Greene Environmental Coalition, *The State of Ohio's Voluntary Action Program: Findings and Recommendations* (Jan. 2001).

⁴⁶ *Id.* at 7.

⁴⁷ Columbus Dispatch, Ohio cleanup program shows only 10 successes since 1989 (Feb. 25, 2001).

⁴⁸ Michael Hawthorne, Brownfields widespread, *Confidential Ohio industrial pollution list shows*, Columbus Dispatch (Feb. 25 2001) (discussing fact that Ohio EPA is not allowed to maintain a pub

⁴⁹ H. Carl McCall, New York State Comptroller, *Dept. of Environmental Conservation, Selected Operating Practices Related to the Remediation of Inactive hazardous Waste Disposal Sites* (99-S-33) (Feb. 2001) (discussing audit); New York Times, *McCall Faults Pataki's Record on Cleanup of Toxic Waste* (Feb. 9 2001); and Times Union, *Superfund Cleanup Record Hit In Audit* (Feb. 9 2001) (discussing audit).

sites, the comptroller found that state records did not demonstrate whether the state's cleanup goals were met. The audit also noted that gaps in the system could have left the public unaware of the continuing dangers or the restrictions on some sites. Finally, the state administration has recently projected that the state clean up fund will be exhausted by March, with a projected deficit of about \$50 million.

c. California

In 1999, the California legislature failed to reauthorize the state's Superfund cleanup law.⁵⁰ On November 19, 1998, a state agency had to adopt emergency cleanup regulations, which were effective for only 120 days.

In 1998, the Los Angeles Daily News reported that at least nine Los Angeles schools were built on sites that school district officials knew might be contaminated.⁵¹ These findings came from a study prepared by California's Joint Legislative Audit Committee.

d. Pennsylvania

The Philadelphia Inquirer reported that "many states [including Pennsylvania], under the banner of so-called brownfields, have dramatically loosened cleanup regulations and standards in recent years to spur the development, or sales, of contaminated lands."⁵² The story quotes Rick Gimello, assistant commissioner at New Jersey's Department of Environmental Protection as stating, "I don't think any state is as busy as we are... Our pace [of putting properties through the program] is off the charts."

e. Washington

On April 16, 1999, the Seattle Post-Intelligencer reported that the state fund which pays for the cleanup of toxic spills and environmental contamination is facing a \$5.9 million shortfall, about a seventh of the program's annual budget.⁵³ The story noted that cleanup work could be halted or delayed at a minimum of 12 highly contaminated, high-priority sites. The shortfall could also severely limit monitoring and testing operations. The paper referenced Jim Pendowski, manager of the state toxic cleanup program, as stating that the "shortfall would compromise the department's ability to detect emerging toxic problems in the environment and deal with existing ones."

A series of reports by the same paper present compelling evidence that the state's Department of Ecology failed to protect 635 Hispanic migrant workers from drinking contaminated groundwater, while providing other (mostly Caucasian) people with bottled drinking water.⁵⁴ The migrant workers lived for "several years at a camp with a well that had ethylene dibromide levels 17 times higher than federal regulators considered safe." The paper quotes agency memos from 1988 and 1989 that describe agency debate about whether to provide bottled water to workers. The memos also express concern about the public reaction if people learned that the agency was providing water to white residents, but not Hispanic workers.

f. New Jersey

In a series of stories, the Bergen Record reported that the Mayor of Secaucus, New Jersey failed to notify citizens and city council members about the migration of contamination from a nearby Superfund site, under the homes of nearby residents.⁵⁵ The paper also reported that the Mayor ordered engineers to locate test wells on municipal property where there was no requirement to notify the public. The Mayor stated that since the waste did not pose a danger to the residents, release of the information would have unnecessarily alarmed the public. While some city council members agreed with the Mayor's decision, the paper reported that

⁵⁰ Legislative Analyst's Office, *State Superfund Reauthorization Expediting Hazardous Substance Site Cleanup*, http://www.lao.ca.gov/011199_superfund_reprint.html, 1 (January 11, 1999) (noting sunset of law on January 1, 1999).

⁵¹ David Baker, *Nine Schools on Possibly Toxic Ground*, Los Angeles Daily News, <http://democrats.assembly.ca.gov/members/a43art98.htm> (Aug. 28, 1998).

⁵² Bob Fernandez, *Rules let contaminants be covered, not cleaned*, *The Philadelphia Inquirer* (April 13, 1999).

⁵³ Heath Foster, *\$5.9 million shortfall for toxic cleanup*, Seattle Post-Intelligencer Reporter, <http://www.seattle-pi.com/pi/local/eco16.shtml> (Fri., April 16, 1999).

⁵⁴ Heath Foster, *Migrant workers heard nothing of pesticide danger*, Seattle Post-Intelligencer Reporter, <http://www.seattle-pi.com/pi/local/migr22.shtml> (Mon., March 22, 1999).

⁵⁵ Peter Sampson, *Something foul is spreading in the ground*, The Bergen Record (Fri., May 14, 1999) & Peter Sampson, *Council clears air on toxic plume*, The Bergen Record (Fri., May 21, 1999).

homeowners and other city council members insisted that they should have been included in the decision making process.

E. Problems May Be National In Scope

These problems do not appear to be relegated to the few state programs highlighted above. A 1999 report by the National Conference of Mayors surveyed officials in 231 cities across the nation. The survey asked the officials to rank their state's voluntary clean up program.⁵⁶ Only 23% of the officials reported that their state programs were excellent, while almost one out of every five officials reported that their state program was not very good. Perhaps more troubling, 34% could not rank their state program, pointing to a large gap in knowledge or a lack of any coherent efforts at education, oversight, and implementation.

F. Inadequate State Clean Up Programs Threaten Vital Public Resources

Recent EPA reports on the quality of our nation's groundwater document the extremely high value of this resource and startling statistics on groundwater contamination.⁵⁷ These reports find that groundwater use is of fundamental importance to human life and is of significant important to our nation's economic vitality.⁵⁸ Groundwater supplies drinking water to half of the nation and virtually all people living in rural areas. Some states obtain more than 50% of their total water supply from ground water. Groundwater supports billions of dollars worth of food and industrial production. It also supplies the majority of streamflow in large areas of the nation and provides much of the water in our country's lakes and wetlands.⁵⁹

1. Hazardous Waste Sites Threaten Our Nation's Groundwater Resources

A variety of agricultural, *industrial*, commercial, and *waste disposal practices* contaminate our nation's ground water supply.⁶⁰ Some of the most frequently cited major sources of potential ground water contamination are landfills, *hazardous waste sites*, impoundments, industrial facilities, and hazardous waste generators.⁶¹ "Spills [of industrial contaminants] are a source of grave concerns among states."⁶² Unfortunately, because of existing data gaps, inaccurate data submitted by states, and a lack of appropriate analytical tools, the problem of groundwater contamination may be far worse than currently estimated.⁶³

2. More Vigorous Oversight and Enforcement Is Needed To Clean Up Contaminated Ground Water

A wide variety of public health and environmental concerns accompany groundwater contamination from hazardous waste sites.⁶⁴ Only through the expense of millions of dollars to clean up contaminated groundwater have "people [been protected] from exposure to ground water contaminants released from sources such as hazardous waste sites and leaking underground storage tanks."⁶⁵ However, despite these clean up efforts, the reports recognize that more federal, state and local coordination is needed to prevent future contamination and to clean up contaminated ground water resources.⁶⁶

G. Conclusion

Looking at clean up programs along a continuum, upfront federal review protects public health by ensuring that state programs meet common sense criteria, while the federal safety net protects public health at the back end. Since prevention is often less costly, in terms of funds expended and lives affected, than remediation, U.S. PIRG supports an upfront federal review of state programs prior to giving these programs the resources to ramp up their redevelopment activities. This position is supported by data that indicates a wide disparity between the protections afforded by state programs.

⁵⁶ National Conference of Mayors, *Recycling America's Land* (Feb. 2000).

⁵⁷ *Safe Drinking Water Act, Section 1429 Ground Water Report to Congress*, (1999) (Section 1429 Report); Environmental Protection Agency, *National Water Quality Inventory, 1998 Report to Congress*, (2000) (National Inventory).

⁵⁸ *National Inventory*, 187.

⁵⁹ *Section 1429 Report*, ii, 5-6 and *National Inventory*, 157-58, 162-23.

⁶⁰ *Section 1429 Report*, ii, 15-16 (emphasis added); *National Inventory*, 161-64.

⁶¹ *Section 1429 Report*, 12 (emphasis added) and *National Inventory*, 164, 166, 168 (emphasis added).

⁶² *National Inventory*, 168.

⁶³ *National Inventory*, 187, 189; *Section 1429 Report*, iii, 25, 35-36; and U.S.G.S., *Strategic Directions for the U.S. Geological Survey Ground-Water Resources Program: A Report To Congress*, 4, 11-12 (1998) (hereinafter U.S.G.S. Strategic Direction).

⁶⁴ *National Inventory*, 191; *Section 1429 Report*, 5-6, 19-20, 35.

⁶⁵ *Section 1429 Report*, 11.

⁶⁶ *Section 1429 Report*, iii, 11, 35-36. *National Inventory*, 158.

IV. CONCLUSION

In conclusion, we look forward to working with the committee to craft good brownfields legislation that both speeds much-needed redevelopment of blighted inner city areas, while preserving and increasing protections for public health. Of course, legislation that weakens protections would certainly engender strong opposition from the environmental community. In particular, this includes modification to federal safety new.

Thank you very much for opportunity to testify today. I will be happy to answer any questions that you may have.

Mr. GILLMOR. Thank you very much, Mr. Cope.

We will go to questions. If I might start out with Mr. Shinn, we have had a lot of State cleanup officials testify in the past that all or the majority of brownfield sites will never be placed on the NPL, they are still subject to CERCLA liability, even after the site has been cleaned up to State standards and that the potential for EPA overfiling for third party lawsuits under CERCLA is beginning to cause many owners of potential brownfield sites to simply mothball the properties and, further, that States ought to be able to release sites from liability once a site has been cleaned up.

A couple of questions. Is it correct that Superfund liability does apply even after the site has been cleaned up to State standards? And, second, would you agree with the statement that States should be able to release sites from liability once it has been cleaned up to State standards?

Mr. SHINN. Well, we have gone at this in several ways. We have implemented State programs that the legislature has passed in New Jersey. One deals with landfills that allows the developer to recoup 50 percent of its investment.

The other is a brownfield incentive that we work with the Department of Treasury, Department of Commerce, Economic Development Authority, and our department that will reimburse the developer 75 percent of his cleanup costs out of new tax revenues. For instance, if you generate sales tax and New Jersey State income tax, as that tax is generated, treasury will pay back the cleanup cost of that site up to 75 percent.

I also reiterate what George Meyer said. The predictability and liability of this site, private insurance carriers are providing environmental liability insurance to cover that possibility. So it is becoming more predictability.

We are putting programs together to fill these different gaps in predictability and finality. But a little legislative reform at this level would certainly be welcome to help us through this process and get to another level of sites that we all have in our States.

Mr. GILLMOR. Thank you very much. Mr. Meyer, could you tell us how Wisconsin has successfully dealt with the issue of finality in the closure of brownfield sites?

Mr. MEYER. The recent proposal we put into place has been insurance. Let us take the situation. Before we issue a certificate, in a situation where we have a site that, in fact, we have approved the cleanup, the cleanup has been done but the final remedy involves natural attenuation, it still doesn't meet groundwater standards, but there is a desire to have a closure, at that point a certificate issued, what we have done is created a master State contract for insurance. And what, in fact, this allows someone to do now, a

developer, we are not going to close out that site because, candidly, it may not work. We don't know for sure.

The State did not want to accept that risk. Obviously the future buyer of that property wouldn't want to create the risk. So what we have done is through a master State contract required but also allowed them the completion to be certified by that individual or that developer buying an insurance under this program, a one-time fee.

The insurance contractors have come in, looked at our program. There is a great deal of confidence that the sites are going to be relatively safe. We have got a good track record.

So, in fact, there is a very favorable premium. Well, what that does, it allows the developer to get a certificate of completion for no further liability. And, in fact, the State doesn't hold a liability in that situation. I think this may be a solution to some of these finality issues.

Mr. GILLMOR. Mr. Meyer, Governor Minner talked about some of the problems or chilling effect of not being able to get finality. Mr. Cope has testified, essentially doesn't think that that is a problem because they seldom come back.

Your testimony points out that the problem lies not only with instances where the EPA actually uses the overfiling authority but the problem also to do with the perception or fear of Superfund liability and potential involvement. Could you describe in greater detail how that chilling effect would inhibit redevelopment?

Mr. MEYER. That is really the case. I think once you are in the front line of these issues, you see it every day. I think the numbers are probably true in terms of overfiling. What we have learned, we have put this brownfield study group together which has developers, environmentalists, State and local officials, and lenders. And they worked on barriers.

In fact, if you talked to the developers, some of these projects are going to be financially closed or, in fact, they may not be able to get the funds. And the perception that there may be a reopener, in fact, often does drive the decisions.

We have cleaned 14,000 sites, but I can tell you there are sites, in fact, people have walked away from because, in fact, there may not be our protection. We sort of protected that in our case by going to an MOA, but it still has a broad opener with EPA. It is a perception issue, and we see it every day.

In our State because we have had this group together, including developers, we have constantly refined the law and came up with this insurance provision. There still is a concern, and it does drive people away, even if there isn't a real threat of old filing.

Dollars will go to different sites and often greenfield sites, rather than brownfield sites.

Mr. GILLMOR. Thank you very much. Mr. Pallone?

Mr. PALLONE. Thank you, Mr. Chairman. I have to start out by welcoming my DEP commissioner. And I am sure he is thinking or at least I was thinking that it is always nice to be in a meeting where we are not talking about fish or shore protection. We are actually talking about something other than that. Usually I only see him on coastal issues.

Let me start out. I wanted to start out with Mr. Meyer before I get to Commissioner Shinn. Mr. Meyer, you commented, made reference in the written testimony to S. 350 and specifically the finality language that says "A release may present an imminent and substantial endangerment," which we discussed with Governor Minner and has been a major focus here.

I have to be honest with you. I know that I was kind of amazed that S. 350 was able to get such widespread support early in the session. I mean, you have people like Senator Smith and Senator Helms on the one side. You have got Senators Boxer and Corzine. This is like the liberal conservative gamut there in the Senate.

Of course, Governor, now Administrator, Whitman also indicated support for the bill in the Senate. So I was surprised that you seemed to be so critical.

I know you referenced particularly that finality language, but there are other statements that you made in the written document that seemed to be very critical of S. 350. I mean, let me ask right out: Has the Environmental Council of the States taken a position in opposition to that bill? Are they against it? Are you against it?

Mr. MEYER. I think the concerns I referenced—and they are very similar to the concerns that NGA has referenced—are things, in fact, we see on a daily basis; in fact, cause difficulties in terms of cleaning up these sites.

Yes, S. 350 is a step in the right direction, but the breadth of that language does cause difficulties. We see on a daily basis as commissioners this perception of cleanup.

Mr. PALLONE. So would you say that at this point the ECOS is actually opposed to it? Have they taken a position?

Mr. MEYER. No, we have not taken a formal position against that bill. We are here today before the House to try to present improvements that can be made to that bill so that it, in fact, will better remove barriers. Well, it is still protecting the environment. That is our bottom line as commissioners.

There are better things that could be done that can get more of these sites cleaned up faster and more cost efficiently back into either residential or commercial use.

Mr. PALLONE. Okay. Thank you. I wanted to ask Mr. Cope, if I could,—I guess I am passing over Mr. Shinn again, but I think we are going to get back to you—two issues that you seem to highlight. One is this idea of the up-front review. And the second one is this categorization, if you will, of brownfield sites so that those eligible not be those that may I guess be eligible for Superfund status at one point. You are concerned that maybe they drop out of the Superfund program and maybe they should be eligible.

If you could, this up-front review is not practiced now. In other words, there is nothing in what the EPA does now that would provide for that up-front review. How are you suggesting that it be done? In some kind of legislative vehicle or what?

Mr. COPE. Yes. It is actually a fairly common practice. You can look at the Clean Water Act, the Clean Air Act, or the Resource Conservation Recovery Act. It is commonplace for the Federal Government to delegate programs to the States, also supply funds to run those programs.

Mr. PALLONE. So you just have the example that whatever we adopt here legislatively, you would like to have that in there in the same way?

Mr. COPE. Absolutely. It can provide, really, at the front end a preventative measure against inadequate State programs. What we see is that States are just all over the map in the levels of protection that they provide.

Of course, Representative Brown pointed to Ohio's program. We have some real serious concerns in talking with environmental organizations that deal on the ground on a day-to-day basis with that program. There are other States that have environmental organizations that also deal with those cleanup programs that have very serious concerns. So that up-front review is critical to ensuring minimum protection. It is common sense protections, really.

And then the critical issue that you brought up with respect to the type of sites that are included?

Mr. PALLONE. No. You referenced a categorization of the sites. In other words, you seem to be concerned I think that there may be some sites that haven't been reviewed for Superfund status that shouldn't be eligible for brownfields cleanup. I wondered if you had a legislative suggestion there in terms of how to make certain sites ineligible for brownfields cleanup if that is what I think you are suggesting.

Mr. COPE. Yes, certainly. Actually, the environmental community has put our heads together and come up with language just on that issue. I would be happy to share it with your staff.

The essential issue is to make certain that sites with high level of contamination are excluded from the definition of brownfields. So essentially when EPA or a State agency will go onto a site, they will do a preliminary assessment and possibly a site investigation after that.

If that initial step, that initial cut, if you will, at how contaminated a site is, shows that it could be an NPL-caliber site, it should be excluded from brownfields programs given just the diversity and the levels of cleanup standards that they have.

Mr. PALLONE. Thank you. Thank you, Mr. Chairman.

Mr. GILLMOR. The gentleman from Illinois Mr. Shimkus?

Mr. SHIMKUS. Thank you, Mr. Chairman. I will be brief because hopefully we can move and get to our votes. And hopefully there is agreement on ending this problem.

I was going to ask other questions, but, Mr. Cope, just briefly, one of the three areas you talked about was making polluters pay. That is something we address all the time up here. Wouldn't it be appropriate to use a causation standard where those who actually cause environmental damage would be responsible for the cleanup?

Mr. COPE. The problem with the causation standard is that when you have, say, one industrial site next to a manufacturing site, next to another site and, say, that they are all three contaminating groundwater, you get into a toxic soup situation whereby somebody can say, "Well, it is not me. The other guy caused it" and then the other guy can say, "Well, it is not me. The other guy caused it" and then you get everybody pointing fingers.

Mr. SHIMKUS. Didn't that happen already?

Mr. COPE. Well, what you have, strict joint settlement retroactive liability as in the Superfund program, which I believe you are referring to right now, is the EPA steps in and says: Okay. Let us take a look at your past actions. What types of contaminants have you been handling on the site?; matches those with the contaminants in the ground and says: Okay. We can see a release. We can see contamination on the ground. You have been here for 20 years. The contamination has been here for that long. We can tell just through our studies. You are an owner of property. Pay.

Now, what will often happen is that one particular polluter will then sue other parties. The EPA doesn't sue them. That one polluter will sue other parties and attempt to try to draw them into litigation to compensate for their costs.

Mr. SHIMKUS. I think the problem is the law. I mean, they have the—

Mr. COPE. Upon their ride, yes.

Mr. SHIMKUS. They will ride on the Superfund reform that we are going to try to address on the other issue, but I would say that we need to focus on brownfield cleanup and on the small business liability with making polluters pay, holding them accountable and making sure that the non-polluters aren't drawn into this legislative trap and, really, the community's, too, because they end up paying, too.

For the sake of time, Mr. Chairman, I yield back my time.

Mr. GILLMOR. The gentleman yields back. The gentleman Mr. Ehrlich?

Mr. EHRLICH. Thank you, Mr. Chairman.

Commissioner Shinn, in the interest of time, I am just going to make this a request, rather than a question. I was impressed and fascinated with the innovative rebate, tax rebate program, you testified about earlier.

You said it was a first in the Nation type of initiative? Was that your testimony?

Mr. SHINN. That was our first example. That was the first project under the new program.

Mr. EHRLICH. And it worked and everybody is happy and the tax revenues are coming in? Is there any problem with respect to quantifying the tax revenues?

Mr. SHINN. This goes through a fairly elaborate process. As you noticed, we have got economic development authority which is a loan authority in New Jersey. We have got the Department of Treasury, which has a special accounting system to keep track. I think there are six taxes that it triggers that are generated from this new remediated brownfield. This particular site—

Mr. EHRLICH. Do you mean—I am sorry.

Mr. SHINN. This particular site has facilities like Home Depot, Office Depot. It has a bank. It has got quite a nest of businesses on the site. So the reason it is generating the kind of revenues it is, it is a fairly well-populated site in Edison, New Jersey.

Mr. EHRLICH. Obviously this had to be negotiated very carefully. I suspect there are rules with respect to tax revenue and the amount of money that goes—

Mr. SHINN. You have to generate it before you get paid back.

Mr. EHRLICH. Right.

Mr. SHINN. Accounting keeps track of what is generated. And you pay back out of that accounting. I think it has taken us about the better part of a year to pay back the developer 75 percent of its investments cost, which I think amounted to \$1.6 million in this particular project.

Mr. EHRLICH. That was an agreed-upon figure?

Mr. SHINN. That was all agreed upon up front. And any changes in that—any new discoveries on the site, as you heard, it was a fairly complex site—could easily be qualified as an NPL site with all of the contaminants on that site.

So it seems to me that we are going to clean up more sites with some flexibility on how we define sites. I will agree that there are some sites that should be NPL sites and not brownfields, but there is a huge opportunity in a host of different category sites to use a brownfield strategy and really gain some progress or clean up inventory.

What I found particularly interesting in the reimbursement program, a State can get more of its list on the table of what it wants to do on that site and actually achieve a better cleanup because it is investing in part of the cleanup itself.

So it adds an interesting wrinkle to the possibilities. If that was permissive in the statute, it would be beneficial and, of course, having EPA be able to contribute to the actual cleanup cost would help as well.

Mr. EHRLICH. It is an exciting idea. Would you send me a fact sheet or information? Would you send that to my office? I would love to learn more about it.

Mr. SHINN. Sure, absolutely.

Mr. EHRLICH. Thank you. I yield back, Mr. Chairman.

Mr. GILLMOR. Thank you, Mr. Ehrlich. We have probably a little less than 5 minutes before the vote closes. But before we terminate this hearing, I would like to go to Mr. Pallone again.

Mr. PALLONE. Just quickly, Commissioner Shinn, because I don't want to think I have left you out here today. You know, when the State brownfields program was being considered, there was a lot of concern about eliminating the preference for permanent cleanup and possibly not having as much public participation, which has been so important in New Jersey.

I just wondered if you could get back to me. You don't have to do it now necessarily because I don't know if we have the time, but if you could get back to me with some information about the percentage of the sites that have deed restrictions that are using fences, caps, and covers, as opposed to removal of contaminants or permanent treatment of toxicity because that remains a concern that a number of the environmentalists in New Jersey have brought up. If I could get some statistics on that, I would appreciate it.

Mr. SHINN. Okay. Sure.

Mr. GILLMOR. Very good. We will now excuse this panel, but I do want to announce we will leave the record open for any other questions or responses. I would like to thank you, Commissioner Shinn and Mr. Meyer, Mr. Cope for being here.

The committee now plans to take a recess until 2:30 p.m., at which time we will reconvene to hear the testimony of Christine

Todd Whitman, the Administrator of the U.S. EPA, and members of her advisory team promptly so that we can participate at that time. Thank you very much.

Mr. SHINN. Thank you.

[Whereupon, at 12:21 p.m., the subcommittee recessed, to reconvene at 2:44 p.m. that same day.]

Mr. GILLMOR. The subcommittee will come to order. We have been advised that the ranking member is on his way, and we will proceed.

The Chair on behalf of the committee is very pleased to welcome the new Administrator of the U.S. Environmental Protection Agency, Christine Todd Whitman. Administrator Whitman came to her post after almost 8 years serving as Governor of New Jersey. During that time, she built a strong environmental record on air, water, and land protection. She is an advocate of forging smart growth partnerships that bring together citizens, government, and business interests working for the common good.

We are very pleased that you could join us today, Administrator, because I do know you have a very demanding schedule. I would like to start with your statement, and then we will get into questions.

**STATEMENT OF HON. CHRISTINE TODD WHITMAN,
ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY**

Ms. WHITMAN. Certainly. Well, first of all, Mr. Chairman, thank you and members of the subcommittee very much for the opportunity to appear here today. I want to commend you as subcommittee Chair and Representative Pallone as well for focusing on what is for us and for this administration a very critical issue.

State brownfields programs have been enormously successful, as I know you have heard this morning. We'd like to think that the Environmental Protection Agency has been an important partner there. I think the way that this hearing has highlighted those State programs has been very helpful for everyone's understanding, but we believe that actions that Congress will take can further expedite brownfield cleanup and redevelopment and improve EPA's ability to act as a partner and support State and local groups.

Enacting brownfields legislation this year is an important priority for President Bush and this administration, as you may well know. It provides the opportunity to remove existing barriers to brownfields site cleanup and development. I look forward sincerely to working with all of the members of this committee to develop bipartisan legislation as soon as possible and legislation that is consistent with the President's principles and his budget.

In my confirmation testimony, as you may have noted, I emphasized the need for flexibility when working with States and local communities. States have developed significant expertise in cleanup and development of brownfields properties, together with local communities. I know they will and must continue to play the primary role there.

I am pleased that the purpose of this hearing is to examine ways in which we can develop smarter partnerships to help remove barriers to brownfields cleanup and development.

Brownfields cleanup is an important urban redevelopment tool. It provides an alternative to the development of greenfields or open space. The administration believes that brownfields legislation is important enough to be considered independently of other statutory reform efforts, such as Superfund.

I know many members of this committee are very concerned and interested in reforming Superfund. And I am committed to work with you and with them. But I would urge that Superfund as well as other statutory reform issues not hold up the passage of brownfields legislation.

President Bush is committed to strengthening State and local brownfields programs based on several principles, which I would like to reiterate for you. Brownfields legislation should remove a significant hurdle to brownfields cleanup by providing redevelopers with protection from Federal Superfund liability. Brownfield legislation should ensure that States have the authority and resources to run their own brownfields programs while ensuring those cleanups are protective of human health and the environment. Brownfields legislation should direct the Environmental Protection Agency to work with States to ensure that they employ high, yet flexible cleanup standards, and allow EPA to step in to enforce those standards when and if necessary. Brownfields legislation should streamline and expedite the process by which grants are given to States and, in turn, to local communities so that they have maximum flexibility to use the funds according to their unique needs.

The Federal Government should focus additional research and development efforts on new cleanup technologies and techniques to clean up brownfields. And while I recognize the brownfields tax incentive is not under the jurisdiction of this committee, it should be made permanent. The President has included this proposal in his fiscal year 2002 budget.

The States and the U.S. Environmental Protection Agency have been at the forefront of encouraging the cleanup and economic redevelopment of brownfields. EPA has awarded more than 360 assessment pilots of up to \$200,000 each to States, tribes, and local governments to help assist them in brownfields redevelopment. Grantees report that EPA funding supported assessments at over 2,000 properties and helped leverage more than \$2.8 billion in economic development and generated more than 11,000 jobs. EPA's job-training pilots have trained more than 560 people and put more than 400 to work. In addition, EPA has funded 104 revolving loan fund pilots, provided over \$80 million in funding for State programs, and worked with States to perform targeted brownfield assessments at more than 550 properties.

However, much remains to be done to facilitate rapid, high-quality assessment, cleanup, and sustainable economic development in communities across the nation. With your help, this administration will provide the tools that communities need to address the problems posed by brownfields properties and will encourage redevelopment while fully protecting human health and the environment.

I understand that barriers may exist as a result of the uncertainty over Federal liability and enforcement issues. In addressing these concerns, there should be limited circumstances where EPA

would need to take further action if the State approves a protective cleanup.

As I discussed before the Senate Environment and Public Works Committee, there should be compelling evidence that a cleanup is no longer protecting human health or the environment before EPA would step in. In fact, we know of no case in the past where EPA has acted on its own to step in at a brownfield site.

Brownfields legislation must strike the correct balance between liability certainty sought by parties cleaning up brownfields and the need to protect human health and the environment. Legislation should also clarify Superfund liability for contiguous property owners, prospective purchasers, and innocent landowners.

The administration supports brownfields legislation that encourages the identification, assessment, cleanup, and redevelopment of a full range of contaminated brownfields properties by specifically authorizing a Federal program for grants and loans to States, tribes, and local governments.

In addition, legislation should relieve EPA's current brownfields program of unnecessary Superfund regulatory procedures for brownfields cleanup revolving loan fund and provide for expedited grant funding of cleanup of contaminated properties.

Brownfields legislation that is consistent with the President's principles should provide flexible grant funding to the States, local communities, and tribes to support their brownfields programs in ways that will enhance the already impressive achievement of the 47 State programs that address brownfields currently.

According to a study by the Northeast/Midwest Institute, more than 16,000 sites have enrolled in State voluntary cleanup programs. States with emerging programs would benefit from the resources and support that enable them to use creative programs in encouraging protective assessment, cleanup, and redevelopment of properties. States with established brownfields programs, such as Ohio and New Jersey, would benefit from support that enhances successful brownfield redevelopment work.

The administration also supports funding for technical assistance, training, and technology to encourage the best methods and approaches to clean up brownfields. New tools that improve the ability to conduct protective cleanups while reducing costs can help promote the redevelopment of brownfields across the nation.

Whether States and localities receive Environmental Protection Agency grants for assessment and cleanup, Housing and Urban Development grants for redevelopment, Economic Development Administration grants, Department of Energy research support, or whether redevelopment is encouraged by the Federal brownfields tax incentive, this administration is committed to strengthening State and local brownfields programs to address the problem of derelict brownfields properties.

Thank you for the opportunity to appear before you today and to describe the President's support for brownfields legislation. I look forward to working with you, as I stated at the onset, to ensure swift passage of brownfields legislation.

Mr. Chairman, I would be happy to take questions.

[The prepared statement Hon. Christine Todd Whitman follows:]

PREPARED STATEMENT OF HON. CHRISTINE TODD WHITMAN, ADMINISTRATOR, U.S.
ENVIRONMENTAL PROTECTION AGENCY

Good morning, Mr. Chairman, and members of the Subcommittee. It is my pleasure to appear before you today as Administrator of the Environmental Protection Agency on the important subject of brownfields. I commend Subcommittee Chairman Gillmor and Representative Pallone for holding a hearing on brownfields to highlight State brownfields programs and the actions Congress can take to further expedite brownfields cleanup and redevelopment and improve EPA's ability to support State and local programs.

Enacting brownfields legislation this year is an important priority for President Bush and this Administration and provides the opportunity to remove existing barriers to brownfields cleanup and development. I look forward to working with all members of this Committee to develop bipartisan legislation as soon as possible that is consistent with the President's principles and budget.

In my confirmation testimony I emphasized the need for flexibility when working with States and local communities. States have developed significant expertise in the cleanup and development of brownfield properties, and together with local communities, will continue to have the primary role. I am pleased that the purpose of this hearing is to examine ways to develop smarter partnerships to help remove barriers to brownfield cleanup and development.

Brownfields cleanup is an important urban redevelopment tool that provides an alternative to development of greenfields. The Administration believes that brownfields legislation is important enough to be considered independently from other statutory reform efforts, such as Superfund. I know that some members of this Committee are interested in reforming Superfund and I am committed to working with them, but I would urge that Superfund, as well as other statutory reform issues, not hold up brownfields legislation.

President Bush is committed to strengthen state and local brownfields programs based on the following principles:

- Brownfields legislation should remove a significant hurdle to brownfields cleanup by providing redevelopers with protection from federal Superfund liability;
- Brownfields legislation should ensure that states have the authority and resources to run their own brownfields programs while ensuring those cleanups are protective of human health and the environment;
- Brownfields legislation should direct EPA to work with the States to ensure that they employ high, yet flexible cleanup standards, and allow EPA to step in to enforce those standards when necessary;
- Brownfields legislation should streamline and expedite the process by which grants are given to states, and in turn to local communities, so that they have maximum flexibility to use the funds according to their unique needs;
- The federal government should focus additional research and development efforts on new cleanup technologies and techniques to clean up brownfields; and
- While not under the jurisdiction of this committee, the brownfields tax incentive should be made permanent. The President has included this proposal in his Fiscal Year 2002 budget.

The States and the U.S. Environmental Protection Agency have been at the forefront of encouraging the cleanup and economic redevelopment of brownfields. EPA has awarded more than 360 assessment pilots of up to \$200,000 each to states, Tribes, and local governments to assist them with brownfields redevelopment. Grantees report that EPA funding supported assessments at over 2000 properties and helped leverage more than \$2.8 billion in economic development and generated more than 11,000 jobs. EPA's job training pilots have trained more than 560 people and put more than 400 to work. In addition, EPA has funded 104 revolving loan fund pilots, provided over \$80 million in funding for state programs, and worked with states to perform Targeted Brownfields Assessments at more than 550 properties.

However, much remains to be done to facilitate the rapid, high-quality assessment, cleanup and sustainable economic development in communities across the nation. With your help, this Administration will provide the tools that communities need to address the problems posed by brownfield properties, and will encourage redevelopment while fully protecting human health and the environment.

I understand that barriers may exist as a result of the uncertainty over Federal liability and enforcement issues. In addressing these concerns, there should be limited circumstances where EPA would need to take further action if a State approves a protective cleanup. As I discussed before the Senate Environment and Public Works Committee, there should be compelling evidence that a cleanup is no longer protecting human health and the environment before EPA would step in. In fact,

we know of no case in the past where EPA has acted on its own to step in at a brownfields site.

Brownfields legislation must strike the correct balance between the liability certainty sought by parties cleaning up brownfields and the need to protect public health and the environment. Legislation also should clarify Superfund liability for contiguous property owners, prospective purchasers, and innocent landowners.

The Administration supports brownfields legislation that encourages the identification, assessment, cleanup, and redevelopment of a full range of contaminated brownfields properties by specifically authorizing a federal program for grants and loans to states, Tribes, and local governments. In addition, legislation should relieve EPA's current brownfields program of unnecessary Superfund regulatory procedures for the Brownfields Cleanup Revolving Loan Fund, and provide for expedited grant funding of cleanup of contaminated properties.

Brownfields legislation that is consistent with the President's principles should provide flexible grant funding to the states, local communities, and Tribes to support their brownfields programs in ways that will enhance the already impressive achievements of the 47 state programs that address brownfields currently. According to a study by the *Northeast/Midwest Institute*, more than 16,000 sites have enrolled in state voluntary cleanup programs. States with emerging programs would benefit from resources and support that enable them to use creative approaches in encouraging protective assessment, clean up and redevelopment of property. States with established brownfields programs, such as Ohio and New Jersey, would benefit from support that enhances successful brownfields redevelopment work.

The Administration also supports funding for technical assistance, training, and technology to encourage the best methods and approaches to cleaning up brownfields. New tools that improve the ability to conduct protective cleanups while reducing cost can help promote the redevelopment of brownfields across the Nation.

Whether states and localities receive Environmental Protection Agency grants for assessment and cleanup, Housing and Urban Development grants for redevelopment, Economic Development Administration grants, Department of Energy research support—or whether redevelopment is encouraged by the Federal Brownfields tax incentive—this Administration is committed to strengthening State and local brownfields programs to address the problem of derelict brownfields properties.

Thank you for the opportunity to appear before you today and to describe the President's support for brownfields legislation. I look forward to working with you to achieve swift passage of brownfields legislation. Mr. Chairman, I will be happy to answer any questions you or the committee members may have.

Mr. GILLMOR. Thank you very much, Administrator.

I understand that this is your first appearance before the House. Our committee does have dominant jurisdiction over EPA programs. I just want to ensure you that I and I think the other members of this committee are looking forward to working with you on a new partnership and a smarter partnership for environmental protection. We need economic development. We need jobs. But I think it is clear that economic development and strong environmental protection are not mutually exclusive goals.

I have asked several of our witnesses today about the fact that some groups have testified that Federal reforms to boost their finality for brownfields cleanups is not needed because even though the EPA does have broad authority to reopen cleanups, the agency rarely uses it.

Your testimony points out that this problem lies not only with the circumstances where EPA actually uses the overfiling authority, but the problem also has to do with the perception or the fear of Superfund liability and potential Federal involvement. Could you describe how this chilling effect inhibits redevelopment?

Ms. WHITMAN. There is no question that uncertainty is what prevents people from maximizing the opportunity to clean up brownfield sites. And the issue to which you are speaking, finality,

is one that obviously speaks to certainty on the part of redevelopers.

I would just reiterate what I said in the testimony, that to our knowledge, having surveyed all of those who participated with the EPA in brownfields redevelopment, we have never come in to over file at a State-led brownfield site cleanup. Having said that, we believe that it is important, however, if there are substantive changes to the cleanup, if there becomes a time when there is a significant question about whether or not there is a threat to human health or the environment, that we allow the Environmental Protection Agency to have that ability to step in under certain very limited conditions. I would envision that it would not occur very often. It hasn't to date.

Mr. GILLMOR. Thank you, Administrator.

I guess I would ask you if you would commit to a direct dialog with this subcommittee and with the Governors and with the agencies involved to develop legislation that would respect the finality and the certainty of State enforcement actions so that the remaining EPA authority would be used only in those exceptional circumstances where there is a clear and compelling need for EPA actions and where States will not take the necessary steps.

Ms. WHITMAN. Mr. Chairman, I commit to working with you on any type of bipartisan language that can get us brownfields legislation. And I recognize that an understanding that there is some finality and some certainty as you move forward will be an important part of that.

Mr. GILLMOR. One of your former colleagues in the Governors' Association, Governor Minner, actually, I guess she came in just as you were leaving—Governor Minner of Delaware, testified this morning on behalf of the NGA that Federal law ought to be amended to require the EPA to notify a Governor of its concerns about an ongoing State cleanup and provide the State with a reasonable opportunity to correct the problem before it intervenes in a State cleanup action. Would you agree with that view?

Ms. WHITMAN. Actually, that is our standing policy. That is how the EPA approaches things at the moment. And so that is not problematic as far as we are concerned, respecting that relationship between the States and the Federal Government.

Mr. GILLMOR. Could you touch briefly on what you envision as some of the more serious barriers that we are facing in terms of encouraging more, better, and faster brownfield cleanups?

Ms. WHITMAN. Again, I think a lot of it comes down to the issue of certainty, liability. That is why I think it is so important that legislation includes some liability protection for the innocent party that comes in to clean up a brownfield site.

I know you received testimony this morning from Commissioner Shinn from New Jersey's Environmental Protection Agency. And one of those things that was so important in the program that we put forward in New Jersey was the flexibility applied and given to the local communities. And that would be important in any Federal legislation so that the States and local communities have maximum flexibility, some insurance liability protection, some liability relief, some insurance protection. And we provided a tax reimbursement.

Again, what we see in brownfields redevelopment is very often the up-front costs are enormous with no guarantee that there is going to be a whole lot of profit at the other end. That is why this administration supports making the tax credit a permanent part of the tax code, to provide some incentive and some certainty for developers that expend the dollars necessary for cleanup.

We are in the happy position of having seen many of those sites in New Jersey become very, very economically successful, but you can't guarantee this result and the costs are large. The other part of that, of course, is the certainty that once you have cleaned up, if you get a notice of no further action, you are not going to be subject to late penalties for things that suddenly are found on the site.

Mr. GILLMOR. Thank you very much, Governor. I will now recognize the distinguished ranking member, Mr. Pallone.

Mr. PALLONE. Thank you, Mr. Chairman. It is really nice to see Governor Whitman—I guess it is Administrator Whitman, but you will always be Governor Whitman to me—here today. I know I have congratulated you several times on your new position in New Jersey.

Ms. WHITMAN. Thank you very much, Congressman.

Mr. PALLONE. I know that the environment has always been a major concern the whole time that you were the Governor and even before that in other positions. So I think it is certainly helpful for New Jersey and for the Nation to have you in that position.

I have to say some of the things that have happened so far with regard to the clean air standards and some of the other issues is certainly a good beginning for what you are doing at the EPA.

Ms. WHITMAN. Thank you.

Mr. PALLONE. I know we talked this morning and you heard I am sure about some of the other panels in the discussion. I guess I wanted to focus on some of the questions that I asked the previous panel and come back to you with some of the same things.

There was a Mr. Meyer who was here this morning from the Environmental Council for the States. And he basically was somewhat critical, actually, of the Senate bill S. 350, which I mentioned in my remarks seems to be sort of a remarkable compromise because we have people on the ideological in a spectrum from Senator Helms all the way to John Corzine to Senator Boxer supporting this bill. He was critical of the standard that says—I guess this is the finality—that preserves EPA's authority where release or threatened release may present an imminent and substantial endangerment to public health or welfare.

I know I believe you stated on the Senate side that you thought this was a good bill, that you supported the bill. I just wanted to ask you if you specifically endorse and support that standard within S. 350, which I think is a good standard.

Ms. WHITMAN. Well, I had indicated the administration's general support of the legislation. But, again, I will state this afternoon that we would be willing to work with the committee on language necessary to get a bi-partisan brownfields bill through.

Having said that, I think there is a history behind the use of that "finality" language. It appears in a number of Federal statutes. We are not wed to specific language. We just want to know that there is some ability for the Environmental Protection Agency to step in

if a State should request us to do so. If you have a migration of pollution onto Federal property or from one State into the next, we feel that it is important that we have that ability. And whatever language receives the bipartisan support necessary to get the bill through, I am sure we could work with it. We would be happy to work with you.

Mr. PALLONE. The way I understand, basically you think that in general, that is a pretty good standard and that certainly there is no evidence that that standard has been abused by the EPA with any State voluntary cleanup site?

Ms. WHITMAN. Not to our knowledge. And there is 20 years of case law behind it. Again, I would just reiterate that the most important thing to me is that we get the brownfields legislation through and that we do preserve some form of Federal safety net. I believe the public does deserve that.

Mr. PALLONE. The other thing that came up,—and I guess I asked it of Commissioner Shinn—as you know, in New Jersey when the brownfields legislation was passed that you signed, there was some concern on the part of the environmentalists about whether the permanent cleanup standard was being substituted for something less than that.

That came up again this morning in the context of the member from PIRG who was on a previous panel, Mr. Cope. He talked about how there are so many different kinds of State programs and some of them don't seem to require any kind of permanent cleanup and some of them don't seem to have much in the way of public participation, which I know has always been important in New Jersey.

And so I guess I wanted to say this is this whole idea of up-front review. Do you think that at some point there needs to be some sort of up-front review so that, for example, a State would not be able to merely place a deed restriction on the land or groundwater or just put up a fence around the site, no active cleanup, as opposed to some kind of permanent cleanup standard.

At what point would the State standard or the requirement be so minimal that perhaps there should be some sort of up-front review by the Federal Government?

Ms. WHITMAN. We are looking at this point at maximum flexibility. We have found that most States, in fact, have done a very good job in meeting the needs of these sites. We think it would be good on the part of any State to seek, in their brownfields legislation, maximum public opportunity for input. We think it is important that they have the ability to oversee and enforce a response action.

Requiring approval on the part of the State for cleanup plans and documentation of when the response is completed is important. We also would encourage that any brownfield legislation or any State program actually make the effort to compile a list of all brownfield sites in the State so that you can have some way of knowing what kind of cleanup is going on and how many sites have been cleaned up.

It depends on what final piece of legislation comes through, but we have the ability now to work in close partnerships with the States. We would certainly want to continue that ability.

We haven't had to overturn any State programs in the past. So I am not sure that there is a compelling need at this point to assume that that is going to become necessary. But if there are re-openers, the Federal safety net provision in any legislation would enable us to address a specific issue if it became problematic and became a threat to human health or the environment.

Mr. GILLMOR. The gentleman's time has expired. The gentleman from Oklahoma, Mr. Largent?

Mr. LARGENT. Thank you. And we appreciate your attendance here at our hearing. We want to welcome you to Washington.

I have just a couple of questions. The National Governors' Association supports the requirement of receiving the concurrence of the Governor of the State where a site resides prior to placing it on the national priority list. Do you agree that this is a sensible approach?

Ms. WHITMAN. That has been our practice. That is the policy. It is not codified anywhere, but that is the policy that the EPA has used to date.

Mr. LARGENT. Would you have a problem if it were codified in a brownfields bill?

Ms. WHITMAN. Since it is what we use as our standard, that wouldn't be a problem. I want to ensure that we get bipartisan brownfields legislation. I think it is so important.

Mr. LARGENT. Let me ask you another question. That is: Do you support the proposition of the Governors and State cleanup directors that there is no need for increased Federal intervention in the form of up-front EPA approval of State cleanup programs?

Ms. WHITMAN. Well, as I just was indicating in my response to Representative Pallone, I think we have a very good relationship now. State programs should have the goals of providing for meaningful public participation, providing the ability to oversee the response actions, keeping a list of brownfields sites in the State so that there is a way of ascertaining how the cleanup is going and where it is going, and requiring their own approval of cleanup plans and oversight of those cleanup plans.

To date, we have never, to our knowledge, ever had to overfile on a brownfield site cleanup of a state. So I am reluctant to presume that all of a sudden now we would have to.

Mr. LARGENT. Okay. Thank you very much. I yield back my time, Mr. Chairman.

Mr. GILLMOR. The gentleman yields back. The gentleman Ms. McCarthy?

Ms. MCCARTHY. Thank you very much, Mr. Chairman. Administrator, we are delighted to hear from you today on this important project. I wanted to pursue with you something that was touched upon earlier today. Superfund and CERCLA cover remediation that is associated with petroleum, lead-based paint, and asbestos.

Many of the potential brownfield sites that were noted as potential projects for cleanup in my community and I think around the Nation and also for redevelopment involved former gas stations in the urban core that closed and are now vacant, but they have a strategic location and the potential for future commerce.

I wonder if you would reflect on what modifications, if any, should be made to afford brownfields cleanup authority to these sites and what criteria or threshold would you suggest for modi-

fyng Superfund and brownfield law and regulations to address contamination involving petroleum, lead-based paint, and asbestos?

Ms. WHITMAN. Well, I recognize at this point you don't have specific language before you on the House side. On the Senate side, one of the things that is part and parcel of that legislation is flexibility for the Administrator of the Environmental Protection Agency on a site-by-site basis to review those sites that are outside the traditional definition of brownfields. We could extend brownfield grant funding to these sites. That is important, and that is good.

I would be happy to work with you on any kind of language we could come up with that would ensure that we have the ability to be flexible. What we want to do is be flexible. What we want to do is clean up these sites.

Ms. MCCARTHY. Yes.

Ms. WHITMAN. That is the basic thing here for a whole host of reasons, environmental and economic.

Ms. MCCARTHY. I appreciate your enthusiasm.

Another idea that came out this morning was about the State of Wisconsin and their brownfields program. They post an inventory of their brownfield sites on the World Wide Web so that citizens in the State can obtain information about the whereabouts of the sites and the cleanup taking place. What do you think of posting an inventory of brownfield sites nationwide on the World Wide Web so people would be aware of this and the opportunities posed as well as improvements going on?

Ms. WHITMAN. Well, we have done that same thing in New Jersey. And we have looked at it very much as an investment tool. We have had developers who have developed an expertise in reclamation of brownfield sites and they have wanted to find the sites. And, rather than having to have the developers try to track the sites down themselves, we have been able to show them with an overlay and a map in our GIS system so they would be able to identify the sites quickly. Again, that kind of thing has great promise. I would be happy to work with you toward that.

Ms. MCCARTHY. Thank you. In your testimony this morning and even in your comments, there is talk of protecting the innocent party who comes in to clean up, who wants to make this better.

It is my understanding that in the Brownfields Act in New Jersey, the liability protection, that covenant not to sue, is extended to a party, not just who is innocent, you know, the protected from suit, but also to the party responsible for the discharge or creating the problem. Am I correct on New Jersey law?

Ms. WHITMAN. No. We still believe in polluter pays. And polluters pay in New Jersey. One of the things that we did in New Jersey, though, was to provide the polluter with protection from further liability if the polluter conducted a cleanup that resulted in a notice of no further action.

Ms. MCCARTHY. Well, I am glad for the clarification because I would not want to entertain a Federal notion that those who create the problem are not responsible.

Ms. WHITMAN. No. We believe they should be responsible.

Ms. MCCARTHY. Thank you very much. Thank you, Mr. Chairman.

Mr. GILLMOR. Thank you. The gentleman Mr. Shimkus?

Mr. SHIMKUS. Thank you, Mr. Chairman. It is great to have you, Administration. Congressional prerogative is when we get someone from the administration, even though we are on a certain topic, to maybe veer off while we have a chance.

The whole debate on polluter pays just lends into the aspect of the failed Superfund small business liability protection we talked before the hearing. Why we are asking for codification of some issues is because we weren't successful in getting a codification, even on agreed principles with the previous administration, even using their language at times to write legislation.

And so I am excited about the aspect and your confirmation of polluter pays. We want to make sure that that is enforced in these brownfield cleanups, but we also want that to be involved as we address the small business liability aspects. Everyone agrees it is another issue.

My position, we don't want to merge. I think we can move them separately. I am going to be working with the ranking member of this committee to try to roll out a bipartisan bill that we can get support from the administration. We think that is critical. But for too long, there have been people that have not polluted that have paid across this country. I just tell my colleagues that their turn is coming when they have a site that is on the NPL list and then years and years later, someone is going after their mom and pop doughnut shop in their small town square of 3,000 people for their whole yearly income, gross income, to pay some extorted amount to the EPA to help them out or from the government where it would help.

And so that is my little filibuster. I appreciate getting this opportunity. The question that I am going to refer to is based upon previous testimony from Mr. Cope also, who was here this morning from the U.S. Public Interest Research Group. It addresses the polluters pay and the effect that we should have either the causation standard in legislation proposed; in other words, our ability to identify the polluters, instead of assuming that they were polluters.

Would you be supportive of some type of language on a causation standard?

Ms. WHITMAN. Again, I would be very supportive of working with you toward achieving the goals that you are setting there because obviously those make sense. And we would be happy to work on specific language. I hope we could get something that would receive that bipartisan support so we could move the legislation forward, but we would be happy to work with you.

Mr. SHIMKUS. this in trying to address this finality debate. The EPA now issues status of comfort letters on a case-by-case basis to provide what has been said is some letter of finality. Do you see the use of these status comfort letters as a real issue of providing finality to these sites as far as our ability to redevelop them, fear of litigation in the future?

Ms. WHITMAN. Were there an appropriate reopener provision, that is what they are intended to do. "An appropriate reopener" means some significant new knowledge has come forward that the site is no longer protecting human health or the environment. For example, there may be a migration of the pollution to a Federal site across State lines or the Governor may ask us to come in.

These would represent the kind of limited circumstances under which we would come back in. As I say, we have never had to do that on a brownfield site.

So it can be assumed that those letters of comfort have, in fact, provided just that. The track record is there to indicate that, in fact, they have been just what they say they are.

Mr. SHIMKUS. And I think the reason why I bring that up,—and I didn't get a chance to follow up with questions on this because of votes and we closed the hearing—it was my impression that the folks who testified from New Jersey and from Wisconsin were crying for more finality. And the implication was the status of these letters were not presenting as much finality as would have been hoped.

With that, Mr. Chairman, I am finished. I thank the administrator, and I yield back my time.

Mr. GILLMOR. The gentleman yields back. I recognize the gentleman from Texas, Mr. Green, and then go to Mr. Terry. Mr. Green?

Mr. GREEN. Thank you, Mr. Chairman. Again, I welcome our administrator. I am just glad my colleague from Illinois didn't ask about ethanol versus MTBE, but I am sure that will be something on another hearing.

My colleague from Missouri mentioned a concern, and Commissioner Shinn this morning in his testimony identified abandoned service stations as an example of a typical brownfield site that a community might have and how to render the current brownfields restrictions, it is my understanding that with few exceptions, notwithstanding simple petroleum contamination, would render sites like the corner gasoline station ineligible to be redeveloped under brownfields.

Since my district is in Texas in a very urban area in Houston, where, like New Jersey, the petrochemical industry is a very thriving part of our economy, I would be interested in your thoughts on how the fact we can deal with petroleum-contaminated sites are generally ineligible for brownfields redevelopment and what we can do to make it maybe better.

Ms. WHITMAN. As I indicated, the language in S. 350 on the Senate side does provide and allow for a case-by-case review by the Administrator to determine whether sites that are not within the traditional definition of brownfield can, in fact, be addressed.

We would welcome the ability to be proactive with sites that States want to have cleaned up under a brownfield program that they have established and would look forward to working with you to establish the appropriate language that would get the bipartisan support necessary to see the legislation move.

Mr. GREEN. Thank you, Mr. Chairman. I look forward to working with you to see if we could do that.

Mr. GILLMOR. Thank you, Mr. Green. With the concurrence of my colleagues on the majority side, we will recognize Mr. Terry out of order. He has to go to another meeting. Mr. Terry?

Mr. TERRY. Thank you, Mr. Chairman. I appreciate your flexibility.

I mentioned in my opening statement several hours ago—you are from another side of the city—I am from Omaha, Nebraska. And

when I served 8 years on the city council, probably the most significant, bloodiest, ugliest battle I was ever involved in was reclamation of a brownfield that we wanted as city property as part of our Back to the River project. An old smelting plant was around for over 100 years on a river bank in Omaha.

The issue is that since it was a voluntary cleanup by the owner, the State has supplied their plans to the state, Nebraska Department of Environmental Quality, approved a significant cleanup of removing several feet of dirt, capping. So I think it was about a 5 or 6 million-dollar cleanup of this property before they transferred the ownership to the city.

One of the major issues in this process that the environmental groups used and even put it in the basis of their lawsuit in which they named me personally for my vote, which I will hold that forever, but we won't go there today, was the uncertainties, legal uncertainties, not only in the sense that you have a subsequent holder that could be liable for whatever contamination would be left, but what they kept saying—and this was the subject of their lawsuit again—was the letter that we had from the EPA saying, "Looks like a good cleanup to us" was really meaningless because the EPA could come in at any time and require different standards.

And I was on the city council then or the subsequent holders. We are really putting all of the taxpayers at risk. So we should not do the project.

So my issue becomes: in order to create some sort of legal finality because there was no doubt in my mind. I spent a lot of hours and with a lot of experts. And I fundamentally believe this was a great cleanup, probably exceeding anything that EPA would have demanded. That letter from the EPA and its importance was the focal point of the whole battle.

So what can we do? Where does the EPA stand? And what can we do in the legislation in order to provide some finality where a city of Omaha or a new investor in a piece of property if they wanted to do a commercial project on a brownfield, that they could rely. I think the finality, legal finality, and certainty is so important here. Otherwise I think everything is meaningless because you always have that open-ended "What if?" And you can testify before us today that it has never happened before and we would not do it. But the very fact that it is still open-ended really prevents a lot of people from taking over a brownfield. So where do you stand on the finality? How can we do it? Is it a good idea?

Ms. WHITMAN. Well, Congressman, what I have said previously and any time we talk about this, is we want to do everything that we can to assure that we are providing all the protection that people want and need to go ahead and redevelop brownfield sites. We provide them with the certainty that they require and desire.

However, we have also said that we do think it is important for the public and for all of us to have some form of Federal safety net still there, for extraordinary circumstances where we would have to come back in. There needs to be some ability to do that under very refined and specific circumstances, where it is no longer protecting the public health and the environment.

We look forward to the opportunity to work with this committee in drafting language that would address the issue that you are

touching on because it is the key issue. It is a very, very important part of what I in my response to the chairman indicated is one of those drawbacks to development of brownfields sites. They tend to be very expensive. They tend to be very complicated to do. And it is the lack of certainty that scares away many of the developers.

However, again, I think it is important that we do have some kind of ultimate Federal safety net. I could suggest what we did in New Jersey. We did a prospective purchaser provision that provided some protection for a prospective purchaser. Those kinds of things are good.

There are a number of State programs that I am sure you have heard about today that do provide some certainty in the State program. Of course, their problem is you still have the question of Federal authority. So that has always been what they felt to have been a drawback.

I can speak as a Governor on that. But there are things that you could do that would help ensure that there was reason, enough certainty and real reason, with potential for reaping the benefits of the investments you put in to start this redevelopment.

And we would be very happy to work with you to find legislation that would meet the bipartisan criteria that are going to be necessary to get this legislation through. I believe we can do that. There is a record out there.

Mr. TERRY. Do you have any proposed language which would help create at least a perceived finality?

Ms. WHITMAN. We don't have specific language. I have in general supported S. 350. But, again, as I indicated to the senators on their side, I would be happy to work with them to get bipartisan legislation, legislation where everyone can be comfortable that we are going as far as we can.

The only thing that the agency is asking is that we do feel it is responsible to have some form of reopener in case there is the kind of change that sometimes we have seen, never on a brownfield site. And that is the delicate balance that we have to make here.

Mr. TERRY. That is a delicate balance because the broader the authority to go in, the less certainty that exists.

Ms. WHITMAN. Right. I appreciate that.

Mr. TERRY. Thank you, Mr. Chairman.

Mr. GILLMOR. The gentleman's time has expired. Now the gentleman from New York, Mr. Towns.

Mr. TOWNS. Thank you very much, Mr. Chairman. Let me join my colleagues in welcoming you to Washington.

Ms. WHITMAN. Thank you, sir.

Mr. TOWNS. Let me just say, first of all, I agree with your testimony, very much so, in terms of the fact that brownfield legislation should be independent and we should move that. I mean, I agree with that.

Now, your testimony also provides an impressive description of the EPA's brownfields program accomplishments. Will you inform the subcommittee of the funding levels for the EPA brownfield program for the President's fiscal year 2002 budget?

Ms. WHITMAN. Well, as you know, Congressman, we haven't done the details yet of the budget which will be submitted in April. You

have seen the broad numbers. But I can assure you there will be more money for brownfields in EPA's budget.

The overall budget at \$7.3 billion is the second largest administrative request that has been ever sent with a President's budget. There will be increased funding for brownfields. I can tell you that. I just can't tell you the exact number because we haven't gotten to that yet.

Mr. TOWNS. What about for site assessment grants? Would you have any idea as to the revolving fund program?

Ms. WHITMAN. We are looking at increasing the overall spending on brownfields. We have not broken it out yet as to which program is going to get which dollars.

Mr. TOWNS. All right. Thank you. The balance of the bills I sponsored in the last Congress, there were several criteria that we wanted State voluntary cleanup programs to meet in order to obtain an assurance that EPA would not overfile on brownfield cleanups under the State program. I would like to know.

Did you have a chance to sort of look at that to see in terms of the areas? If not, I could just very quickly run down the list, but I don't want to take too much time, Mr. Chairman. I could run down the list very quickly. Should a program provide for cleanup that ensures adequate site assessment and protect human health and the environment? Should programs provide for meaningful opportunities for public participation on issues that affect the community? Does this include prior notice and opportunities? In other words, will the community have a lot of input in the process?

Ms. WHITMAN. Well, EPA thinks that it is very important that any State program have the goals of providing meaningful opportunity for public participation. That is a critical part.

It should be a critical part of any State program that there is an ability to oversee and enforce response action by the State, that the State program have the goal of requiring approval of the cleanup plans and documentation of completion and response actions. That also there be developed and maintained a list of the brownfield sites throughout a State we think is important. And we touched on perhaps the desirability of being able to expand that.

We think those are important goals and public participation is one of the most important of those goals of a State program.

Mr. TOWNS. Yes. Okay. Well, let me just say that I look forward to working with you. I think that brownfield legislation is something that we really should put forward, and we should do it right away. I am happy that you support that. Thank you very much. I yield back, Mr. Chairman.

Mr. GILLMOR. The gentleman yields back. The gentleman from Indiana, Mr. Buyer.

Mr. BUYER. Welcome, Administrator.

Ms. WHITMAN. Thank you.

Mr. BUYER. Congratulations on your new job.

Ms. WHITMAN. Thank you.

Mr. BUYER. On April 4th of 1997, I drove to Chicago to meet with EPA's Region 5 administrator, Valdas Adamkus, who, incidentally, now is the new President of the Republic of Lithuania. During that meeting, he expressed great concern that the Clinton administration had removed decisionmaking authority of contaminated Super-

fund sites away from these regional directors and they sent it directly to Washington. Washington had removed this decision-making authority and was holding it here. He could not even give recommendations for priority of sites within his own region.

When I brought this up this morning with Governor Minner, who was testifying on behalf of the Governors' Association, I noticed her shaking her head. So I asked for her input. She shared with me and stated testifying on behalf not only of herself but of the Governors' Association, "Trust us at the local level."

So I want to ask you, Administrator Whitman, has the new administration looked into returning decisionmaking authority back to the regional administrators and let them give recommendations to you with regard to the priorities of sites for which they know? They work closely with these sites and know them very well. What are you doing on the inside of your administration?

Ms. WHITMAN. Well, Congressman, first of all, let me say to you that our focus really has been on brownfields and this brownfields legislation. We have not spent to date a lot of time on Superfund and the administration position on Superfund relative to changes in Superfund. As I have indicated, we look forward to working with any kind of Superfund reform that the committee wants to work on.

In general, as far as my attitude toward local decisionmaking, I am very supportive of it. That is one of the reasons why in the testimony I indicated that we should have flexibility in brownfields legislation to allow States and municipalities to design programs to meet the needs of their State and their municipality within obviously some broad parameters.

I anticipate working very closely with the regional offices because they do know the problems in their various regions, but at this point we have not done any assessment of Superfund reform at the agency. We have been focusing on brownfields. But I would be happy to do that.

Mr. BUYER. I take personal interest and am most hopeful that when you look at it, you empower the regional directors.

Ms. WHITMAN. That is what we have got them there for. We pay them a lot of money.

Mr. BUYER. That is right.

Ms. WHITMAN. They have got good staff. They should know what they are doing.

Mr. BUYER. All right. That makes me feel better. I just wanted to raise it on your radar screen.

The other question relates to that which Mr. Cope testified earlier. You brought up this issue about the Federal safety net. He gave us testimony that States constantly compete with neighboring States in attracting business and residential development, some States may relax cleanup standards and liability systems. He called it a race to the bottom on protections. So it sort of beckons that should there be some form of Federal minimum standard or when you in this quote give flexibility to the States? I am trying to define the nebulus.

Ms. WHITMAN. Congressman, you used the phrase that as a Governor I dealt with quite extensively on welfare reform. I heard time and again it would be a race to the bottom.

I think our experience has been just the opposite. That is not to say, as I have testified before the Senate and here today, that I believe there should not be a Federal safety net and some ability for the Federal Government to reenter if a site is no longer protective of human health or the environment.

There is language that is proposed. There has been language proposed in the bills in the last session that I believe set us on the right path to allow us to do that.

But I believe it really would be a mistake to assume that States will engage in a race to the bottom. If I may set aside my hat as administrator for a moment and speak as a former Governor, I will tell you we hear very directly from our constituents. And we have a very direct responsibility to those constituents. To assume that any Governor would enter into a program knowingly or allow any agency or department within their government to knowingly embark on a program that was not going to meet the stated goals of cleaning the environment and protecting the public is a leap that I think is going too far.

And so while we have ideas with respect to the goals that State programs should have—and those are pretty clear—and the history would bear this out as far as brownfields is concerned—the Federal Government has not had to intercede in brownfields. We haven't overfiled on brownfield sites to date because the States have been doing a good job of it.

The important thing here is we are talking about between an estimated 450,000 and 600,000 sites across this country. These are sites that are currently sitting unused and are polluting. If we can encourage people to start to move toward at least encapsulating and controlling the pollution that is leeching into the environment, we will be doing a good thing. If we can return these sites to economically viable sites, we will be doing a very good thing. That is going to be the desire of Governors, and I don't know that we need to presume ahead that we are going to have severe problems.

Again, I would just remind you that I have said that I do believe that some form of reopener is important. Some form of Federal safety net is important. But I am reluctant to subscribe to the presumption that States are going to do the wrong thing if given flexibility. We simply have not seen that in what was a very important debate that Congress took very, very seriously on welfare reform.

Mr. BUYER. Thank you for the thoughtful answer to this question. Thank you, Mr. Chairman.

Mr. GILLMOR. The gentleman's time has expired. The gentleman Mr. Luther?

Mr. LUTHER. Thank you, Mr. Chairman. Administrator Whitman, it is a pleasure to have you here today.

Ms. WHITMAN. Thank you.

Mr. LUTHER. As I mentioned when I introduced myself before the hearing, I represent suburbs around the Minneapolis-St. Paul area. Like so many areas, we are experiencing exploding growth and all of the problems associated with that.

Local officials in my district and in the suburban area would like flexibility with the use of Federal cleanup dollars. In other words, they have instances where, for example, they might want to develop a park or open space, rather than an office building or an-

other commercial establishment. As you know, current law emphasizes commercial uses, rather than recreational or open space uses.

So the question that I would have is: What are your thoughts on allowing Federal cleanup dollars to be used for open space or recreational purposes?

Ms. WHITMAN. Well, Congressman, if you are talking about cleaning up a brownfield site to allow for that sort of use, that is the kind of thing we have done and we did in New Jersey. I was very supportive of that.

We need to understand that the way we redesigned our legislation recognized the potential and future use of that property. We put constraints on it depending on the level of cleanup, and then use was restricted. But open space, particularly urban parks, was very much a part of that effort because that, again, is a worthy goal.

That is where the flexibility comes in to allow States and municipalities to meet their particular needs. One size does not fit all, and we should not be trying to impose that from Washington.

Mr. LUTHER. I am pleased to hear that response. As I indicated before the meeting, I would be very interested in having you tour. As you know, Minnesota has been in the lead in this area. I appreciate your willingness to see if you could fit that kind of a tour into your reviewing your various regions. I will follow it up with correspondence to you.

Ms. WHITMAN. Thank you.

Mr. LUTHER. I very much appreciate that openness on your part. Thank you.

Ms. WHITMAN. I would just like to add that, of course, HUD now does recognize that. EPA traditionally hasn't because our responsibility is the environment and public health. But I look forward to working with my colleagues to see what ways we can, in fact, encourage brownfields redevelopment, containment of pollution, and the ability of municipalities and States to meet their specific and particular needs.

Mr. LUTHER. Thank you.

Mr. GILLMOR. The gentleman Mr. Walden?

Mr. WALDEN. Thank you very much, Mr. Chairman. Governor, welcome. It is a delight to have you at the helm of the EPA, and I appreciate your testimony today, especially that which talks about things like flexibility and clarity and local involvement in the decisionmaking process. I think that is going to be very important as we work together on brownfields legislation. I commend the legislation for that.

Do you agree that the source of some of that uncertainty and lack of finality includes a number of EPA enforcement authorities, including those under RCRA, which has very similar language to Superfund law?

Ms. WHITMAN. I would hope that brownfields legislation clarifies all of the applicable law for reopeners and would ensure that we did provide the kind of certainty that was necessary to get these sites cleaned up. And that is why I look forward to working with this committee as you draft the language that is going to be your bipartisan effort to get this legislation through.

Mr. WALDEN. One of the issues is, as you know, out in the Northwest right now is the whole combined animal feeding operation laws and AFL and CAFL. There we seem to have some conflict going on between what the States do and what EPA does.

I am hearing from a lot of constituents now as the State tries to get its rules in order to comply fully with the Federal Government that the agency is back in doing overflights, back in doing enforcement. And there seems to be some real conflict occurring there as trying to determine who is doing what right now.

It is an issue that I think begs the question of the need, I believe, to establish some sort of provision in the law for the ability for people to consult, to come to an agency and seek guidance so that they can conform the law without the fear of also getting hammered by the very same agency they seek to get guidance from.

I would just wonder if you might be interested in pursuing that avenue in legislation. I know there is a bipartisan group of us in the Oregon delegation that is looking at trying to come up with something that would allow for that.

Ms. WHITMAN. Congressman, I would be happy to work with you on that and have the agency work with you on that. I would also appreciate hearing from you and your staff on the particulars of the situation you are describing because I would like to look into that and see if we can't get some certainty.

Mr. WALDEN. I appreciate that, and I appreciate the openness of your staff.

The final comment I would make, my colleague Congressman Buyer mentioned about turning the authority over to these regional directors and really using them. I understand and support that concept in general. I hope, too, that we will look at making sure those regional directors are not only accountable but responsible to the agency and perhaps aren't overzealous in their enforcement activity.

Sometimes it is one thing to go by the book and the letter of the rule. It is another to actually solve the problem.

Ms. WHITMAN. I would agree with you, Congressman. While I would expect that the staff and the Regional Administrators would use their local knowledge to help guide the best way to solve the problem, policy will be made here in Washington, the overriding policy.

I will tell you from the very beginning that one of the messages that I am sending to people, actually, it is a twofold message. One is that we want to accomplish things. We want to clean the environment. We want to make the environment healthier than we find it today. And we should be looking for ways to promote that.

To the extent that we find ourselves in court, we find ourselves fining States or localities. We ought to look at ourselves to see if we haven't failed. If we can't be more creative, we still will always use the stick.

Mr. WALDEN. Sure.

Ms. WHITMAN. The stick is going to be an important part of how we manage the environment. But I would far prefer to see us work out collegial ways to solve problems and move cleanups forward than have to resort to sanctions.

Mr. WALDEN. I think you mentioned the figure between 450,000 and 600,000 brownfield sites.

Ms. WHITMAN. Yes.

Mr. WALDEN. There are probably a few out there that some owner is hoping nobody ever figures out because they don't necessarily want to do anything about it. They are afraid they will get fined. But maybe if there were a mechanism where they could come forward, we could get the pollution cleaned up.

Ms. WHITMAN. We would be happy to work with you on that.

Mr. WALDEN. Okay. Thank you, Mr. Chairman. Thank you, Governor.

Mr. GILLMOR. Thank you. The gentleman Mr. Doyle?

Mr. DOYLE. Thank you, Mr. Chairman.

First let me congratulate you on your confirmation as the new head of EPA.

Ms. WHITMAN. Thank you.

Mr. DOYLE. I know that I am the only thing standing between you getting out of here. So I will try not to be too long. I hope and I want to echo the comments that my colleague Greg Walden just made, too, that one of the top priorities of EPA will be to try to improve the manner in which you collect all types of data, particularly when it comes to combined sewer overflows and sanitary sewer overflows, so that we don't see a disparity in the way that different regions enforce the law.

You know, when you talk about empowering the regions, we have seen different regions act very differently on the same sets of problems and the same sets of data. Some are quick to slap on consent decrees. Others work with local communities.

I am optimistic that Region 3 will continue its partnership with the communities I represent in Pittsburgh and Allegheny County. I can tell you, especially on the SSOs and CSOs, it is a big problem in Allegheny County. We have half of our communities in the county under this order.

I can tell you the level of confidence in moving forward to solutions to these problems would be greatly enhanced if we received the same kind of consideration as projects such as Rouge River Demonstration Project has in Michigan. So we are looking for that type of cooperation.

And while we like things at the local level, we don't want the administrators to become too powerful because sometimes it is a double-edged sword.

Just a couple of questions. We heard George Meyer from the Wisconsin Department of Natural Resources talk about the fact that they have a comprehensive cleanup program for all types of properties and all contaminants. And, as such, he doesn't advocate for the need to have a definition of what constitutes a brownfield site.

Now, EPA defines brownfields as abandoned, idled, or underused industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. Let me ask you: Do you think that the current definition is sufficient? Should it be narrowed or broadened to leverage the program to its maximum potential? And should materials such as petroleum be included under the brownfields definition without requiring them to be characterized as hazardous material?

Ms. WHITMAN. Well, Congressman, as I indicated, I am looking for maximum flexibility and will be happy to work with you and this committee to determine what is appropriate as far as that flexibility in language to ensure that we are addressing the public's health and concerns.

There is some impending legislation to allow the Administrator on a case-by-case basis to make a determination to include sites that go beyond the traditional definition of brownfields.

So that is an indication of the fact that we are desirous of being flexible and would work with you very closely to determine the appropriate language that would allow for maximum use in cleanup.

We want to see these sites cleaned up. We would be happy to work with whomever will help us with that.

Mr. DOYLE. We heard several of my colleagues talk about the underground storage tanks and how there may be as many as 100 to 200 thousand of these in the approximately 450,000 brownfield sites nationwide and that many of these sites could go undeveloped as a result.

Let me ask you the question a different way. Do you think that the leaking underground storage tank program is sufficient to address the petroleum in underground storage tanks?

Ms. WHITMAN. We know that we have a huge problem with underground storage tanks. It has been addressed differently by different States. And some have had good finances and been very proactive in dealing with the issue. Others have been less able to take those similar steps. As combined sewer overflow it is an important area.

I don't know if there is ever enough money or resources to do it all. I am not sure there ever would be. So we need to prioritize. We need to move forward and target our dollars appropriately. And that would be one part I would presume of any State effort at cleanup.

And as the State targets and puts together its brownfields program, I would not be at all surprised if given sufficient flexibility that they wouldn't look for some help in the area of underground storage tanks as well because. I know it is an enormously expensive and complicated problem in New Jersey and other States .

Mr. DOYLE. Thank you very much. I look forward to working with you. Thank you, Mr. Chairman.

Mr. GILLMOR. Thank you, Mr. Doyle. Are there any further members wishing to comment? I know Mr. Shimkus wishes to be recognized for a brief comment or question.

Mr. SHIMKUS. Thank you, Mr. Chairman.

Just because I was challenged by my colleague from Texas, I would be remiss if I didn't put in my plug for ethanol. The New York Times had that editorial over a week ago calling us the children of corn. I am a child of corn. So my lobbying would be keep the Clean Air Act and deny the California waiver.

If there are moves to do otherwise, I would think it would be advisory to work very closely with members of the House, especially this committee. I know on the Senate side with Senator Grassley, there may be things we can do, but we need to tread very, very carefully. And we would like your help as we move forward for clean air and clean water.

Ms. WHITMAN. We look forward to working with you on that.

Mr. SHIMKUS. Thank you.

Mr. GILLMOR. Thank you, Mr. Shimkus.

If I could recognize myself for just one very brief comment and very brief question? I mean, it does appear that the really tough nut to crack on this issue when we get into it is going to be how we define finality, how we define those very extreme circumstances where EPA is going to have to reopen. In that respect, would you contemplate that reopening would require the discovery of something totally new and unknown from the time that the comfort letter is given or can we go back with something that was already known?

Ms. WHITMAN. If the legislation sets up the appropriate standards for a State plan to move forward that would require careful review of the site and would require keeping the appropriate records, we don't think that the reopener would need to be employed, that the likelihood of it being employed would be very great.

Having said that, it only makes sense to have the ability for the Environmental Protection Agency to come in if a State were to request it, if, in fact, it were found that the site was posing a threat and/or was no longer protective of the public health and the environment, if there had been a movement of contaminant across States lines or into Federal property. Those would be the circumstances under which at the present time we are considering reopeners.

As I said before, I look forward to working with you on it. You are right in having identified that as probably being the crux and one of the more difficult issues in crafting language. It is going to take all of your skill as legislators to do that in a bipartisan way that will allow us to move forward, but I think we can reach that and would be happy to work with you.

Mr. GILLMOR. I think we know what we agree on. Now we have got to figure out a way to put it in words. That is going to be real tough.

Well, Administrator, I want to take this opportunity to thank you for your testimony and thank you for your time that you have very generously spent with us. I would ask unanimous consent to keep the record open for 10 days for members to insert statements, questions, and additional material for the record. Without objection, it is so ordered. And the committee stands adjourned.

[Whereupon, at 3:51 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

PREPARED STATEMENT OF THE AMERICAN WATER WORKS ASSOCIATION

INTRODUCTION

The American Water Works Association (AWWA) appreciates the opportunity to present its views on removing barriers to brownfields cleanups. AWWA is the world's largest and oldest scientific and educational association representing drinking water supply professionals. The Association's 55,000 plus members are comprised of administrators, utility operators, professional engineers, contractors, manufacturers, scientists, professors and health professionals. The Association's membership includes over 4,000 utilities that provide over 80 percent of the nation's drinking water. Since our founding in 1881, AWWA and its members have been dedicated to providing safe drinking water.

AWWA commends Chairman Gillmor and the members of the subcommittee for their leadership in moving the legislative process forward by holding hearings on improving the brownfields cleanup and reuse program. AWWA supports reforming the brownfields program to make it more efficient and productive. However, AWWA members are concerned about the liability exposure of utilities that must work at a brownfield site. AWWA respectfully recommends that the brownfields program should be improved by providing the same exemption from liability for utilities that work at a brownfield site as is provided to a response action contractor in Section 119(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 (42 U.S.C. 9619).

BROWNFIELDS REDEVELOPMENT LIABILITY

The brownfields initiatives raise liability issues for public water suppliers as well as for others who work in a brownfield site. Both administrative and legislative efforts have been initiated to address the need to reuse properties that have been contaminated in the past and are now potential sites for productive use. Broadly, these efforts include provisions to fund the revitalization of brownfield sites, efforts to protect innocent landowners and prospective purchasers of brownfield sites from liability related to their use of the land, and reliance on state clean up programs to manage existing contamination which could include leaving contaminated ground water or other contaminants in place under the brownfield site.

Certainly, the concept of returning property to productive use should be facilitated and barriers need to be removed. However, AWWA is concerned that previous initiatives to improve the brownfields program did not directly address potential liability for public water suppliers and others who work at a brownfield site. For many of these brownfield sites, the expansion, redevelopment or reuse will require new or modified utilities—water, sewerage, electric, gas, communications cables, etc. These underground utility connections will require deep disturbance of the ground under a brownfield site and construction of utility trenches to connect the site to the offsite utility grid. It is possible that these trenches could create a route for hazardous substances remaining on the site to move off the brownfield site. Given the broad scope of liability and the many novel ways in which liability has been interpreted, there is a risk that actions taken to provide essential utilities to a brownfield site will result in a liability claim against the utility. This would be an unintended and inappropriate consequence and could further limit the reuse of many properties. Contractors may be reluctant to work at a brownfield site because of the liability exposure. Congress needs to clearly protect the essential services provided by utilities and others working at a brownfield site from this liability threat.

The situation of public water suppliers and others working at a brownfield site is analogous to the response action contractors working at a Superfund site. If contractors were reluctant to work at Superfund sites, the sites would not get cleaned up. Congress recognized the liability exposure and threat of litigation facing such contractors and provided them with liability protection in the CERCLA statute. The same rationale by which Congress provided response action contractors with liability protection applies to providing liability protection for utilities that work at a brownfield site. AWWA respectfully recommends that brownfields legislation considered by this subcommittee provide the existing response action contractor liability protection in CERCLA to utilities that work at a brownfield site. We believe that this will greatly enhance brownfields legislation by removing a potential barrier to returning brownfields to productive use.

CONCLUSION

AWWA thanks you for the opportunity to present comments on removing barriers to brownfields cleanup. We hope that our comments will be helpful to the subcommittee in its deliberations.

This concludes the AWWA statement for A Smarter Partnership: Removing Barriers to Brownfields Cleanups hearing.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
 WASHINGTON, D.C.
 March 16, 2001

The Honorable PAUL E. GILLMOR
 Chairman
 Subcommittee on Environment and Hazardous Materials
 United States House of Representatives
 Washington, D.C. 20515

DEAR CHAIRMAN GILLMOR: Thank you and the members of the Subcommittee on Environment and Hazardous Material for your leadership on developing Brownfields legislation and for setting the debate in Congress on this issue. Although the U.S. Chamber did not participate in the hearing "Removing Barriers to Brownfields Cleanups" that the subcommittee held on March 7, 2001, please include our attached written testimony in the hearing record.

Sincerely,

R. BRUCE JOSTEN
 Executive Vice President, Government Affairs

Enclosure

PREPARED STATEMENT OF R. BRUCE JOSTEN, EXECUTIVE VICE PRESIDENT,
 GOVERNMENT AFFAIRS, U.S. CHAMBER OF COMMERCE

Chairman Gillmor, Ranking Member Pallone, and members of the Subcommittee on Environment and Hazardous Materials, I am R. Bruce Josten, Executive Vice President of Government Affairs for the U.S. Chamber of Commerce ("U.S. Chamber"), the world's largest business federation representing more than three million businesses of every size, sector, and region.

We commend you for conducting this important hearing on redeveloping abandoned and potentially contaminated former industrial and manufacturing properties, commonly referred to as "Brownfields" sites. Thank you also for the opportunity to submit this testimony for the record on "Brownfields: Lessons from the Field."

The U.S. Chamber believes legislation is necessary to encourage Brownfields redevelopment by reducing the uncertainty regarding the cleanup of Brownfields sites, and the separation of Brownfields redevelopment from the Comprehensive Environmental, Responsibility, Compensation, and Liability Act ("CERCLA" or "Superfund") liability structure for sites with little or no contamination.

In my testimony, I present recommendations that, if adopted, the U.S. Chamber believes will greatly accelerate the pace at which Brownfields sites are cleaned up and redeveloped for commercial, industrial and community uses.

BROWNFIELDS REDEVELOPMENT SHOULD BE A NATIONAL PRIORITY.

Among the members of the U.S. Chamber's federation are 3,000 state and local chambers. Perhaps no other environmental issue impacts these chambers and their respective communities as much as Brownfields redevelopment. Various estimates indicate there are as many as 500,000 Brownfields sites throughout the United States. These sites are blights on communities, drain the local tax base, hinder economic growth, and often pose environmental risks. The vast majority of Brownfields sites remain abandoned, derelict and unattractive to developers—even though these sites are usually located in areas with access to a strong workforce, and transportation and utility infrastructure—because of uncertainty regarding:

The nature and extent of potential contamination;
 Potential liability to be imposed on the owners and operators of the site by the retroactive, strict and joint, and several liability provisions of CERCLA; and
 The ability of state voluntary cleanup programs to enable Brownfields restorations without undue federal intervention.

THE U.S. CHAMBER IS A LONGSTANDING ADVOCATE OF BROWNFIELDS REFORMS.

The U.S. Chamber has worked to bring together state and local governments, environmental regulators, local chambers, developers, the financial and insurance industries, and major sports organizations, such as the U.S. Soccer Foundation, to discuss strategies for Brownfields redevelopment. As part of this strategy, the U.S. Chamber:

Hosted the "Brownfields to American Dream Fields" conference in 1999 to explore methods to redevelop sites into athletic fields;

Hosted the “Let’s Make it Happen” conference in 2000 that centered on approaches to redevelop Brownfields sites as commercial and community facilities; and Will convene the “Brownfields Summit” on June 18, 2001 to highlight strategies for implementing new Brownfields legislation, should it be enacted, or efforts to promote and support Congressional Brownfields legislation.

BROWNFIELDS RESTORATION INITIATIVES ARE BEGINNING TO DEMONSTRATE SUCCESS.

Over the past few years, the U.S. Environmental Protection Agency (“EPA”) has established a process, through a series of policies described in guidance documents, that encourages states to assert control over the restoration of Brownfields sites.¹ Currently, 35 states have voluntary cleanup programs designed to remediate Brownfields.² Of the more than 12,273 sites in these state programs, 2,691 have been restored and redeveloped. Pennsylvania’s program has been the most successful, cleaning up 583 of the 654 sites—89 percent—in its program.

Although this progress is praiseworthy, at the current pace it will take centuries to remediate 500,000 Brownfields sites. To accelerate the pace of redevelopment for Brownfields sites, Congress needs to build on the progress made by these 35 states and EPA. Redevelopment of Brownfields sites will bring jobs, significant economic development, an expanded tax base, and a better quality of life to the communities where these sites are located.

CONGRESS MUST RECOGNIZE THE DIFFERENCES AMONG BROWNFIELDS SITES.

Any Brownfields reform legislation should treat sites according to the risk they pose to human health and the environment. Superfund was established to respond to the most highly contaminated sites that posed imminent and substantial endangerment to human health and the environment. However, as currently interpreted, any site that contains a detectable level of a hazardous substance—down to a few molecules—is potentially subject to CERCLA liability. Due to this extremely broad, ridiculous interpretation of CERCLA, the number of Brownfields sites has grown from a few thousand to approximately 500,000.

However, the vast majority of Brownfields sites are not contaminated at levels that require Superfund National Priority List (“NPL”) listing and Superfund liability. Among the 500,000 Brownfields sites in the United States, there are three categories. Each type of site requires a different remediation strategy:

Sites with significant contamination. Sites in this category are high-risk sites under EPA or state screening criteria, listed or proposed NPL sites, and sites subject to CERCLA enforcement action should remain under CERCLA jurisdiction. Superfund is the appropriate mechanism for restoring these highly contaminated sites.

Sites not contaminated or sites with insignificant amounts of contaminants. Sites with little or no contamination should be released immediately from the CERCLA liability structure and restored through state voluntary cleanup programs. Using Superfund to clean up these sites is like using a bulldozer to build a sandcastle. The Superfund “bulldozer” may work, but for many Brownfields sites, it is not the right tool.

Sites that need additional investigation. Many sites require further testing to determine the quantity and amount of contamination. Sites that have not been characterized but are believed to be contaminated should be studied to determine the nature and extent of contamination and the best course of remediation.

To this end, the U.S. Chamber provides the following three common sense recommendations for Brownfields legislation.

¹ See <http://www.epa.gov/swerosps/bf/gdc.htm> for a list of guidance documents. For information on EPA Brownfields efforts, see <http://www.epa.gov/swerosps/bf/index.html>.

² Of these states, 12 have entered into Memoranda of Agreement (“MOA”) with EPA and follow the Agency’s guidance. The remainder have state-sponsored voluntary cleanup programs that are similar to EPA’s programs but independent of EPA oversight. The primary difference between these two efforts is that cleanups in those states working under MOAs receive a release from federal CERCLA liability when a site is remediated according to the appropriate plan. These MOAs include provisions that allow EPA to reopen the cleanup based on a set of conditions. Sites remediated in states with voluntary cleanup programs that do not have MOAs with EPA only receive a release from state liability and remain subject to CERCLA liability should there be subsequent discovery of significant contamination of the site. The state voluntary programs, however, have cleaned up 1,530 Brownfields sites and 1,161 sites have been cleaned up pursuant to EPA MOA programs. The vast majority of final cleanups have occurred in five states—Pennsylvania, Illinois, Texas, Washington and California.

RECOMMENDATION 1: SUPPORT EFFORTS TO FULLY CHARACTERIZE SITE CONTAMINATION.

Brownfields legislation should provide funding to encourage the full, comprehensive characterization of Brownfields sites. Funding, which could include grant programs and state revolving loan funds, will greatly reduce the uncertainty surrounding the extent of contamination at sites, and identify and implement the measures necessary for remediation.

This type of financial support would greatly expedite Brownfields redevelopment because the potential number of sites with little or no contamination is significant. A report published by the U.S. General Accounting Office ("GAO") in December 2000 stated that of the 1,666 site assessment that had been completed pursuant to EPA Brownfields Restoration Pilot Program funding, 623 sites—approximately 37 percent—did not require cleanup activities.³ If the GAO study is representative of the entire inventory of Brownfields sites, this data may indicate that 30–40 percent of the estimated 500,000 Brownfields sites may require little or no remediation, totaling 150,000 to 200,000 sites. Of the remaining sites, characterization would determine how to best cleanup and redevelop sites, through state voluntary cleanup programs, Superfund, or other statutes.

RECOMMENDATION 2: ENACT CERCLA LIABILITY REFORMS.

Certain site remediation should be managed through Superfund. As previously stated, sites that are proven to be significantly contaminated should be cleaned up and restored pursuant to CERCLA. Working with the states, EPA is the appropriate government body to ensure these sites are cleaned up and restored.

Contamination below NPL listing criteria should be managed by state programs. For sites contaminated at levels below NPL listing standards, parties redeveloping sites should be able to work with state environmental agencies to establish cleanup plans under which the site will be remediated. Upon completion of the remediation, the state would certify to EPA that the site had been remediated according to the plan and appropriate cleanup standards. As long as the retroactive, strict and joint, and several liability provisions of CERCLA continue to apply to all sites that may contain any hazardous substance, the site owners and operators will be reluctant to redevelop these sites.

To authorize this process, Brownfields reform legislation should release from CERCLA liability contiguous property owners, prospective purchasers, innocent landowners, and parties that redevelop Brownfields sites in accordance with a state approved plan. These provisions would remove potential uncertainty that could deter parties from cleaning up or purchasing restored Brownfields sites by ensuring that developers and purchasers of redeveloped sites will not be held responsible for any contamination on the site that occurred in the past.

This reform would enable cleanups in accordance with other traditional federal and state environmental laws and common law liability requirements. Although Superfund would not apply in these cases, other federal and state statutes that regulate the treatment, storage, handling, transport and disposal of hazardous waste would ensure that cleanups are conducted in a manner that protects public health and the environment. These statutes contain severe sanctions for violators, and specify measures for addressing improper disposal, corrective action and other activities that endanger human health and the environment. Should unknown site contamination be discovered in the future, responsibility for cleanup would be assigned to potentially responsible parties ("PRPs") pursuant to the CERCLA liability scheme.

Release uncontaminated sites. As noted above, there may be 150,000 to 200,000 sites classified as Brownfields that are not contaminated or do not pose a risk to human health and the environment. Provisions of legislation should allow developers to file with a state environmental permitting agency an audit report establishing the site as "not contaminated." Should site characterization clearly demonstrate that Brownfields sites are free of environmental degradation, the site would be released from CERCLA liability.

This categorization process will promote the expedited restoration and redevelopment of low-risk sites by encouraging state voluntary cleanup programs to harness and leverage private sector resources. It will also limit federal intervention in state cleanup programs concerning sites with minimum contamination and those restored to minimum state standards.

³U.S. General Accounting Office, Report to the Chairman, Committee on Commerce, House of Representatives, "Brownfields: Information on the Programs of EPA and Selected States," Report Number GAO-01-52, (December 2000), at 31.

RECOMMENDATION 3: ESTABLISH FINALITY FOR STATE CLEANUPS.

Brownfields legislation must limit the role of the federal government in non-CERCLA, state voluntary cleanups to instances of imminent and substantial endangerment. Other more expansive provisions would lead to EPA meddling in state cleanups. Such an expansive ability to second-guess the states will discourage state cooperation.

Under existing cleanup programs, many states have already proven reluctant to cooperate with EPA. Although 35 states currently have voluntary cleanup programs, only 12 have entered into agreements with EPA.⁴ The 23 remaining states have established independent voluntary cleanup programs to escape EPA micro-management of activities that states are very capable of performing.

Clearly, EPA should not have a blank check to micro-manage state-led remediation efforts. Without limiting EPA authority over state voluntary cleanups, a significant degree of uncertainty will continue to deter parties from redeveloping Brownfields sites. Such a degree of EPA oversight is unnecessary. As noted, state voluntary cleanup programs have already resulted in more than 2,600 restored Brownfields sites. Congress needs to build on the progress made by the states—not establish new statutory provisions that will undercut state responsibility.

Once again, thank you and the members of the committee for your leadership on the Brownfields issue. The U.S. Chamber appreciates your consideration of our views on restoring Brownfields sites. These efforts are necessary to improve the economic prosperity and environmental conditions of communities throughout the nation.

PREPARED STATEMENT OF THE AMERICAN INSTITUTE OF ARCHITECTS

INTRODUCTION

The American Institute of Architects (AIA) is a professional society representing approximately 67,000 licensed architects and associated professionals located in 305 chapters throughout the United States. They are leaders in their community and understand the contribution architects make to the economic vitality of America. Working together with other elements of the design and construction industry, the AIA promotes a better quality of life through good design.

BROWNFIELDS DEVELOPMENT OPPORTUNITIES ABOUND

Architects throughout this nation understand the enormous significance of redeveloping former industrial sites—brownfields—into mixed uses including parks, shopping areas, learning centers, and affordable housing. Brownfield sites appear in every state and nearly every community, many in prime locations.

Architects view brownfields redevelopment legislation as an opportunity to redesign and enhance America's communities. A simple act like redeveloping a brownfields site has profound effects on the community. It increases the local tax base, creates jobs, revitalizes neighborhoods, and extends environmental protection for all citizens. The benefits of brownfields redevelopment can be seen throughout the community for years to come. It is not only an investment in a parcel of land, it is an investment in our communities.

The AIA commends Congressman Paul Gillmor (R-OH), Chair of the Environment and Hazardous Materials Subcommittee, and Congressman Billy Tauzin (R-LA), Chair of the Committee on Energy and Commerce, for holding these hearings on much-needed brownfields reform. This is a strong, positive step to providing much-needed relief to thousands of communities from coast to coast and the AIA stands ready to support the design and passage of brownfields legislation.

The AIA urges the House to consider brownfields legislation that includes long awaited financial and liability remedies. Successful legislation would spur the cleanup of troublesome sites by providing financial resources and liability relief in a manner that both public and private sectors can endorse and wholeheartedly embrace. The financial remedies should include a combination of tax incentives and direct funding that is flexible and addresses the specific needs of the states and localities. Furthermore, liability reform needs to be included in the brownfields legislation to assist in the cleanup and redevelopment of these industrial sites while protecting parties not responsible for the contamination.

Last week, the AIA endorsed the Brownfields Revitalization and Environmental Restoration Amendments Act of 2001 (S. 350), sponsored by Sen. Lincoln Chafee (R-

⁴See footnote 2.

RI) and Sen. Bob Smith (R-NH). S. 350 is a good legislative model because it would provide the financial and liability remedies necessary for successful brownfields redevelopment.

For example, S. 350 would build on the Environmental Protection Agency's (EPA) current brownfields program by providing funding through a \$150 million grant and loan program for fiscal years 2002-2006. These grants and loans are designed to help state and local governments identify and cleanup properties that are abandoned. EPA is authorized to provide grants to state or local governments and to set up the Revolving Loan Fund for remediation grants.

Successful brownfields legislation must recognize that one size does not fit all and, thus, offer community-friendly solutions. It should provide flexibility to communities through grants and access to loan capitalization funds. These remedies must be designed to address both urban and rural communities that are experiencing problems with contaminated sites.

In addition to commitment of federal financial resources, liability reform is critical to the success of brownfields redevelopment efforts. According to a recent Conference of Mayors (USCM) report, the most frequent impediments in redeveloping brownfields sites are liability concerns and lack of cleanup funding. Brownfields legislation should provide liability protection for landowners—who did not contribute to the contamination—whose property may be contaminated by a contiguous contaminated site, as well as relief for purchasers of contaminated property. These are the types of liability reforms that the private sector developers, entrepreneurs and architects view as necessary ingredients to recycle the estimated 500,000 brownfields properties in our nation.

It is imperative that brownfields legislation passed in the 107th Congress address this issues in the manner that best facilitates the needs of the communities.

REALIZING THE POTENTIAL? TWO CASE STUDIES

Two successful case studies of brownfields redevelopment where architects played a major role can be found in East Palo Alto, California, and Atlanta, Georgia. Both case studies demonstrate the unique skills architects bring to the brownfields redevelopment debate.

Silicon Valley Gets a New Front Door

East Palo Alto is a Brownfields Regional Pilot, a federal Empowerment Zone, and an Enterprise Community. At the doorstep of the Silicon Valley, the town, incorporated for only about 15 years, is a prime location. It is still distancing itself from a disreputable past. The former downtown area was known as Whiskey Gulch and lived up to the moniker, according to those familiar with the area. East Palo Alto also had the dubious distinction of being the 1992 murder capital of the U.S. Enough was enough for community leaders who have begun to turn the tide, with the help of police from adjacent jurisdictions, eager developers, and The American Architectural Foundation (AAF).

With a grant from the AAF, and with assistance from AIA San Mateo County and other area leaders, including Lee Lippert, AIA, and D. Michael Kastrop, AIA, East Palo Alto is in the process of planning to redevelop the 130-acre Ravenswood Industrial Area, an EPA-designated Regional Brownfield Pilot site. Cleanup of the site was initially put at \$30 million, killing any chance of development. A more thorough evaluation put the cleanup cost at \$2 to \$5 million and set a plan in motion. With an AAF grant funding a charrette, East Palo Alto residents finally have a chance to bring in such basics as grocery stores, other retail shops, and small businesses. Prior to this effort, East Palo Alto had virtually no tax base to speak of. Architects have made a difference in how this community tackled its brownfields problem.

Restoring Steel Town

In Atlanta, Thompson, Ventulett, Stainback & Associates, Inc.(TVS), has completed the master plan to redevelop the 138-acre former midtown site of Atlantic Steel. Combining 3,600 residential units, 6.25 million square feet of retail and entertainment space, and 1,000 hotel rooms, developers Jacoby Development, Inc., and CRB Realty Associates are creating a new in-town community. "The long-term benefit of the redevelopment of this site is not only the amenities, but that the project also extends and complements the existing mass transit and pedestrian infrastructure," said Philip A. Junger, AIA, TVS project manager. "This project is big enough to make a real difference." There were no public funds for remediating the brownfield, said Thomas W. Ventulett, FAIA. Junger added that other than slag residue, a construction obstacle because it is expansive, there is minor contamination apparent. Architects view this not only as a financial or business opportunity but also as a successful community revitalization effort.

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