Remembering Repose: Voluntary Contamination Cleanup Approvals, Incentives, and the Costs of Interminable Liability

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INTRODUCTION

Virtually no federal regulatory scheme is fully consistent with the idealized rule of certain and predictable law; laws and regulations inevitably both leave room for flexible interpretation and necessarily fail to anticipate circumstances that will arise. As Oliver Wendell Holmes explained, “certainty generally is illusion, and repose is not the destiny of mankind.” Even where

1. “Rightly constituted laws should be the final sovereign; and personal rule... should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.” 3 THE POLITICS OF ARISTOTLE § 19, at 127 (Ernest Barker trans., Oxford 1946), quoted in Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1176 (1989).

2. Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 466 (1897). In legal usage, repose refers to rest from legal uncertainty and potential liability. Courts discuss repose as a central goal of our legal system, usually mentioned along with goals of legal certainty and fair notice of legal standards and prohibitions. It has not, however, been accorded constitutional status except as a constituent of other specified constitutional protections. See, e.g., Landgraf v. USI Film Prods., 114 S. Ct. 1488, 1497 (1994) (“Elementary considerations of fairness dictate that individuals should have an opportunity
federal agencies offer guidance, it is frequently tentative and
only partially binding on the government. Nevertheless, most
regulatory schemes with a major impact on market choices offer
means for regulated entities to discover, to at least a limited ex-
tent, their status and legal choices.

In the Comprehensive Environmental Response Compensa-
tion and Liability Act ("CERCLA"), known also as the
Superfund statute, Congress created a statutory scheme unu-
sual in the extent to which it deviates from an ideal system of
law governed by discoverable legal standards. CERCLA creates
broad potential liability for association with contaminated prop-
erty and grants broad enforcement power to the government.
The statute, however, contains only general guidance regarding
what types of cleanups are legally sufficient to terminate the
risk of massive statutory liability. The statute does not man-
date immediate cleanup of contaminated real property; a
cleanup is required only if so ordered by the government or a
court.

The primary goal of CERCLA is the cleanup of seriously
contaminated sites, with a slightly less central goal of imposing
cleanup costs on entities involved in, or profiting from, the activ-
ity causing the contamination (Potentially Responsible Parties,
or "PRPs") rather than on taxpayers. Voluntary cleanups at
to know what the law is and to conform their conduct accordingly . . . . [Various
constitutional provisions] protect . . . the interests in fair notice and repose that
may be compromised by retroactive legislation . . . ."); Doggett v. United States,
112 S. Ct. 2686, 2699 (1992) (Thomas, J., dissenting) (recognizing repose as a
legal value, but rejecting repose as an independent constitutional ground to
foreclose prosecutions where Speedy Trial Act arguably not violated); United
States v. Kubrick, 444 U.S. 111, 117 (1979) (stating that statutes of limitations
"are found and approved in all systems of enlightened jurisprudence," that they
are "statutes of repose," and that they "represent a pervasive legislative judg-
ment that it is unjust to fail to put the adversary on notice to defend within a
specified period of time"); United Airlines v. McDonald, 432 U.S. 385, 401 (1977)
(Powell, J., dissenting) (stating that statutes of limitations "are vital to the
welfare of society . . . because they 'promote repose by giving security and sta-
bility to human affairs'") (quoting Wood v. Carpenter, 101 U.S. 135, 139
(1879)).

3. See generally Michael Asimow, Advice to the Public from Federal
Administrative Agencies (1973) (discussing various agencies' procedures for
giving advice to regulated entities).

4. See infra notes 110, 165-168 and accompanying text (discussing agency
procedures to offer guidance to regulated entities).


6. This Article takes as a given that society has spoken through the na-
tional democratic process to state a political goal of cleanup of contaminated
property at the expense of those involved in the use of that property rather than
at the expense of taxpayers. This political choice could, and has been, criticized.
private expense would necessarily further these goals. Nonetheless, the United States Environmental Protection Agency ("EPA") steadfastly resisted, for over a decade, creating a program that would encourage voluntary private cleanups. Although EPA recently modified its policies to encourage reuse of abandoned industrial sites, it still resists involvement in a comprehensive voluntary cleanup approval program. A 1993 Congressional Report criticized policies discouraging voluntary cleanups:

Provisions in both CERCLA and RCRA [Resource Conservation and Recovery Act]\(^7\) discourage private parties from undertaking voluntary cleanups. Property and facility owners or operators fear that voluntary cleanup of a site will trigger a state or federal regulatory assessment, possibly resulting in listing on the [National Priorities List ("NPL")]\(^8\). . . . Private parties are hesitant to spend millions of dollars at a waste site only to be told by EPA the work fails to meet the [cleanup requirements dictated by the National Contingency Plan ("NCP")].\(^9\)

This Article, however, focuses on what has occurred under the statute and what can be done to better achieve these two overarching statutory goals.


8. See infra note 27 and accompanying text (discussing the NPL as EPA's list of priority sites for cleanup).

Such uncertainties about the legal liabilities associated with contaminated real property discourage private cleanup and reuse of the property.\textsuperscript{10}

Lost opportunities to spur voluntary cleanups of the country's many contaminated sites are no small matter.\textsuperscript{11} Contaminated property poses risks to surrounding residents or site workers, threatens natural resources, and harms neighboring real property values. Moreover, such property may be unmarketable because of cautious lending practices, contributing to

\begin{enumerate}
\item U.S. CONG., STATE OF THE STATES ON BROWNFIELDS: PROGRAMS FOR CLEANUP AND REUSE OF CONTAMINATED SITES, 1-4, 8 (1995) [hereinafter OTA, BROWNFIELDS] (stating that uncertain liabilities hinder use and redevelopment of former industrial sites). The NCP sets forth both the procedural and limited substantive guidance for what must occur in connection with a cleanup of contaminated real property if the party undertaking the cleanup hopes to avoid further liabilities or recover its costs in cost recovery or contribution actions against other Potentially Responsible Parties ("PRPs"). \textit{See infra} notes 63-68 and accompanying text (detailing the purpose and role of the NCP).

\item State common law schemes create an additional source of liability for anyone considering cleaning up, or acquiring an interest in, contaminated real property. Nevertheless, statute-based cleanup costs dwarf provable common law damages from contamination in most instances. Common law liabilities therefore remain less of a concern than massive potential statutory cleanup liabilities. This Article focuses on statutory liability.

\item As of September 1993, EPA's NPL, identifying the highest risk contaminated sites, contained 1320 sites. \textit{Final Consensus Report of the National Commission on Superfund: A Joint Project of the Keystone Center and the Environmental Law Center of Vermont Law School} 37 (1994) [hereinafter KEYSTONE REPORT]. This number is dwarfed by 10,624 sites listed on the Comprehensive Environmental Response, Compensation and Liability Information System ("CERCLIS"), a database used by EPA to track sites in the Superfund program, that await further evaluation by EPA for possible inclusion on the NPL. \textit{Id.} EPA derives CERCLIS from disclosures by site owners and operators pursuant to 42 U.S.C. § 9603(c), and by using state investigations and any other sources that EPA believes indicate a potential NPL site. That number itself is dwarfed by the many thousands of industrial sites with levels of contamination likely requiring cleanup, but not currently the subject of government attention; one estimate is that as many as 500,000 industrial sites across the nation fall into this category. \textit{See} \textit{Urban Land Reclamation: Hearings Before the Subcommittee on Technology, Environment and Aviation of the House Committee on Science, Space, and Technology}, 103d Cong., 2d Sess. 26 (1994) (testimony of Charles Bartsch, Senior Policy Analyst for Economic Development of the Northeast-Midwest Institute); OTA, BROWNFIELDS, \textit{supra} note 9, at 4 (stating that, although the number of sites is uncertain because many are unassessed, they number between the tens of thousands and 450,000); David Markell, \textit{The Federal Superfund Program: Proposals for Strengthening the Federal-State Relationship}, 18 WM. \& MARY J. ENVTL. L. 1, 27 (1993) (citing Representative Michael Synar as estimating that between 130,000 and 450,000 sites nationwide require contamination cleanup).\end{enumerate}
the abandonment of "Brownfield" sites in favor of uncontaminated exurban "Greenfield" sites.\footnote{12}{See infra notes 30-32 and accompanying text (discussing underutilization of "rustbelt" sites). Some CERCLA critics hypothesize that CERCLA's interminable and broad liability scheme has created substantial societally-borne external costs in the form of underutilized "rustbelt" industrial real property and lost employment opportunities in impoverished inner city areas. These critics call for modification of current policy based on posited external impacts of regulatory uncertainty. Other critics, examining the pervasive uncertainty under CERCLA caused by limitations of science, technology, and administrative and statutory policy, conclude, as does this Article, that while uncertainty may play a contributing role in the underutilization of old industrial properties, ascribing a causal relationship between the two is unwarranted. These latter critics of current policy correctly conclude, however, that uncertainty at least incrementally contributes to incentives to turn away from rustbelt industrial properties and instead utilize exurban "Greenfield" sites. See CONG. ADMIN. REP., supra note 9, at 8-10, 88-95 (discussing impact of statutory uncertainty); OTA, BROWNFIELD, supra note 9, at 12, 4-5 (stating that uncertain environmental liabilities contribute to abandonment of contaminated sites, but that other factors also contribute to Brownfields phenomenon); NORTHEAST-MIDWEST INSTITUTE, NEW LIFE FOR OLD BUILDINGS: CONFRONTING ENVIRONMENTAL AND ECONOMIC ISSUES FOR INDUSTRIAL REUSE, 1, 4 (1991) [hereinafter New Life] (discussing impact of statutory uncertainty); James T. O'Reilly, Environmental Racism, Site Cleanup and Inner City Jobs: Indiana's Urban In-Fill Incentives, 11 YALE J. ON REG. 43, 50-54 (1994) (same); RESOURCES FOR THE FUTURE, The Impact of Uncertain Environmental Liability on Industrial Real Estate Development: Developing a Framework for Analysis, Discussion Paper 94-03, at 21 nn.25-27 (Jan. 1994) [hereinafter Industrial Development] (same).}

After exploring private incentives to undertake voluntary cleanups, this Article examines why EPA has declined to develop a voluntary cleanup approval process under CERCLA and the overlapping "corrective action" provisions of RCRA.\footnote{13}{This Article generally will use the term "cleanup" to describe what environmental scientists, lawyers, and officials frequently call response actions. In fact, CERCLA distinguishes between response actions involving "removal" and "remediation." "Removal" generally refers to the removal of contaminants, containers, and other easily removed sources of contamination on the surface of the ground. CERCLA defines "remediation" as the long-term alleviation of contamination to make the site permanently clean. RCRA refers to contamination cleanups as "corrective actions." 42 U.S.C. § 6928(h) (1988). This Article uses the term "cleanup" to refer to any type of response or corrective action because its common meaning is more descriptive and is not an environmental term of art. See generally Anderson, supra note 6, at 104-06, 122-53 (criticizing CERCLA's distinction between removal and remediation).} In light of these statutes' goals, such reluctance to provide guidance and repose to cleanup volunteers may seem surprising. EPA's reluctance to expand its activities and create a voluntary cleanup approval program runs contrary to predictions of both New Deal theorists and law and economics scholars who, for different reasons, predict that agencies will expand their regula-


tory domain, particularly where such expansion would further statutory goals or please a regulated constituency. EPA's conduct under CERCLA and RCRA calls into question the prevalent view that agencies always regulate too much and grow too large.14 Here, despite its residual policymaking discretion and statutory authority, EPA avoided an opportunity to expand by creating a process to give cleanup volunteers feedback15 about the sufficiency of their cleanup plans. Statutory instructions and predictable bureaucratic tendencies, however, make EPA's reluctance understandable. Congress failed to anticipate regulators' and regulated entities' preferences and incentives and harness or control them to further the statutory goals of CERCLA and related sections of RCRA.16 In contrast to federal legislative and bureaucratic dynamics, different political pressures and rewards affecting local governments explain new state voluntary cleanup approval programs, most of which were initiated following recently defeated attempts to amend CERCLA.

This Article explores private and government incentives to become involved in private voluntary cleanups and proposes that either EPA or the political branches create a “Cleanup Approval Process” (“CAP”). This CAP scheme would be instituted primarily by delegating authority to states, but with ongoing federal oversight and available federal review of disputed


15. This Article uses the term “feedback” to refer to a mechanism by which regulated entities have recourse to codified law or an individualized (or adjudicatory) process in which the government provides legal guidance to a regulated entity. See infra notes 110, 165-168 and accompanying text (discussing individual guidance to regulated entities provided by federal regulatory agencies).

16. As discussed in greater depth infra note 171, the term “preferences” refers generally to an individual's innate interests and desires, or an individual's personal calculus of costs and benefits. The term “incentives” generally refers to externally imposed or created pressures that modify an individual's innate assessment of costs and benefits of particular actions. The distinction between “preferences” and “incentives” is frequently unclear. The term “control” refers to the need to constrain an actor who would otherwise deviate from statutory goals, while “harness” refers to the need to take advantage of preferences or incentives of regulated entities or actors where those motivations further statutory goals. See infra text accompanying notes 59-60 (arguing that failure to anticipate preferences and incentives of regulators will frustrate statutory goals).
cleanup approvals. Part I demonstrates that, because of the broad liability schemes of CERCLA and RCRA, lenders, municipalities, and private parties have powerful incentives to ascertain and limit the extent of their liabilities by engaging in voluntary cleanups. This section shows how private parties, at the moment of a transaction involving real property, would have heightened abilities and incentives to undertake voluntary contamination cleanups if finality and repose for cleanup volunteers were possible. Part II discusses federal statutory and regulatory policy and explores why current statutes discourage cleanup volunteers and discourage EPA creation of a voluntary cleanup approval process. Part II also criticizes current policy on jurisprudential grounds. Part III proposes the CAP scheme, reviews recent state and federal initiatives to encourage voluntary cleanups, and recommends a division of implementation responsibilities between state and federal officials. Part III also shows how recent state and federal initiatives confirm that to draft effective legislation or regulations, legislators or administrators must anticipate the preferences and incentives of impacted individuals and institutions.

I. THE MISSED OPPORTUNITY TO HARNESS VOLUNTARY CLEANUP INCENTIVES

In enacting CERCLA and RCRA, Congress failed to harness the dynamics of lending relationships, municipal redevelopment goals, and private real property transactions to increase the likelihood of voluntary cleanups. Instead, by creating potentially interminable liabilities without providing any procedure for approval of voluntary cleanups, these schemes actually discourage voluntary cleanups.

A. A CERCLA LIABILITY PRIMER

CERCLA was signed into law in 1980 following public outcry over the Love Canal contamination problem in upstate New York. Since its enactment, especially following its amendment

17. See Marc K. Landy et al., The Environmental Protection Agency: Asking the Wrong Questions 133-42 (1990) (discussing Love Canal furor as impetus for CERCLA's passage but questioning the rationale and soundness of CERCLA); Markell, supra note 11, at 1, 7-11 (discussing the political climate and events surrounding the passage of the original Superfund legislation). A gap in the federal statutory scheme gave the government few dollars and little statutory authority for dealing with abandoned hazardous substance waste disposal sites, particularly in emergency situations. CERCLA was initially colloquially referred to as the Superfund statute because of the name of the fund
through the Superfund Amendment and Reauthorization Act of 1986 ("SARA"), the broad liability language in section 9607(a) of the statute has become the heart of CERCLA.\textsuperscript{18} A series of court decisions in the 1980s held that, through this section, CERCLA imposes strict, joint, and several liability on virtually any entity associated with a contaminated property.\textsuperscript{19} PRPs associated with a facility where hazardous substances have been "deposited, stored, disposed of, or placed, or otherwise come to be located"\textsuperscript{20} are potentially liable to the government for "all costs of removal or remedial action" incurred by the government or "any other necessary costs of response incurred by any other person" consistent with the National Contingency Plan ("NCP").\textsuperscript{21} While CERCLA does not mandate immediate cleanup of contaminated sites, its liability scheme makes a broad category of entities vulnerable to cleanup liabilities.

Liability under CERCLA is retroactive.\textsuperscript{22} Because liability is determined by the contaminated state of the relevant parcel of

\textsuperscript{18} 42 U.S.C. § 9607(a) (1988).
\textsuperscript{22} 42 U.S.C. § 9607(a)(4)(B) (1988). While Judge Skelly Wright advocated an expansion of due process jurisprudence to create a constitutional right to "have one's conduct governed by rules which are stated in advance," J. Skelly Wright, Beyond Discretionary Justice, 81 Yale L.J. 575, 588 (1972), such an expansion of due process doctrine has not occurred. Battles over the constitutionality of CERCLA have waged, yet it stands intact except for a few minor successful regulatory challenges. See Barmet Aluminum Corp. v. United States, 927 F.2d 289, 296 (6th Cir. 1991) (CERCLA's provision barring judicial review prior to an EPA enforcement action does not violate due process); United States v. Cannons Eng'g Corp., 899 F.2d 79, 89 (1st Cir. 1990) (holding CERCLA's contribution protection to settling defendants "substantially fair"); O'Neil v. Picillo, 883 F.2d 176, 183 (1st Cir. 1989) (holding CERCLA's retroactive application constitutional), cert. denied sub nom. American Cyanamid Co. v. O'Neil, 493 U.S. 1071 (1990); United States v. Monsanto Co., 858 F.2d 160, 174-75 (4th Cir. 1988) (upholding CERCLA's imposition of retroactive, strict, joint and several liability), cert. denied, 490 U.S. 1106 (1989); United States v. Union Gas Co., 832 F.2d 1343, 1356-57 (3rd Cir. 1987) (holding that Congress has the
real property and because the federal government generally refuses ever to declare a potentially liable party released from liability, potential liability under CERCLA is also eternal. The following categories of private parties face liability as PRPs where hazardous substances have been or may be released from a facility or site: current owners or operators; past owners or operators at the time of hazardous substance disposal; generators of hazardous substances; transporters of hazardous substances who select waste disposal sites; and anyone accepting hazardous substances for disposal. More attenuated categories of PRPs, such as past owners during a time when contaminants migrated or leaked and corporate affiliates, have also been found potentially liable under CERCLA.

constitutional power to abrogate the states' 11th Amendment immunity in Superfund suits), aff'd sub nom. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726 (8th Cir. 1986) (retroactive application of CERCLA does not constitute unconstitutional taking of property), cert. denied, 484 U.S. 848 (1987); Wagner Seed Co. v. Daggett, 800 F.2d 310, 316 (2d Cir. 1986) (holding that CERCLA's provision authorizing fines, including treble damages, for willing violators does not violate due process); United States v. Alcan Aluminum Corp., 755 F. Supp. 531, 539 (N.D.N.Y. 1991) (holding CERCLA not void for vagueness, because it provides "fair notice of what is required and forbidden" and because the Constitution tolerates some vagueness where public safety is involved), modified on other grounds, 990 F.2d 711 (2d Cir. 1993). But see Reardon v. United States, 947 F.2d 1509, 1523 (1st Cir. 1991) (en banc) (holding EPA's implementation of CERCLA's lien provision violates due process by failing to provide notice and a pre-deprivation hearing to property owners); Solid State Circuits, Inc. v. EPA, 812 F.2d 383, 391 (8th Cir. 1987) (holding that CERCLA's treble damages provision violates due process if the party opposing such damages had an objectively reasonable belief that EPA's cleanup order was invalid or inapplicable).


24. The one exception is explicit authorization for EPA to give "de minimis" PRPs complete repose and finality when entering into consent decrees with EPA. 42 U.S.C. § 9622(g)(2) (1988); see infra notes 80-88 and accompanying text (exploring broad reopeners to CERCLA consent decrees); infra notes 120-155 (analyzing EPA's resistance to providing repose under existing statutory schemes).


This Article primarily addresses the potential liabilities associated with the many thousands of contaminated industrial sites that have not been placed on the NPL, EPA's list of priority cleanup sites.\textsuperscript{27} Any owner of contaminated property, even if the property is not on the NPL, is potentially liable for cleanup costs under both CERCLA and RCRA,\textsuperscript{28} as is any past owner who disposed of any wastes or owned the property while con-

\textsuperscript{27} EPA now devotes most of its CERCLA resources to the most serious known sites of contamination. Those sites are placed on the National Priorities List ("NPL"), an annually updated listing by EPA of contaminated sites assessed through a hazard ranking process as posing the highest risk to health and the environment. See, e.g., KATHERINE N. PROBST ET AL., FOOTING THE BILL FOR THE SUPERFUND CLEANUPS 4 (1995) (detailing EPA's use of the NPL). The NPL is created through a notice and comment administrative process in which EPA gives a numerical hazard ranking to contaminated sites. CONG. ADMIN. REP., supra note 9, at 24. Once EPA has placed a site on the NPL or initiated cleanup activities at a site, some of the problems of uncertainty disappear. Even where EPA initiates action, however, consent decrees generally have broad reopener provisions. See infra notes 80-88, (discussing the logistics of reopener provisions), and notes 120-155 and accompanying text (discussing the interplay between consent decrees and EPA response to voluntary cleanup efforts). This uncertainty is slight, however, compared to that associated with the far more numerous contaminated industrial sites not currently on the NPL. For such sites, the statute provides no mechanism by which cleanup volunteers can determine their status or what type of cleanup would be legally sufficient to eliminate liability. See infra notes 80-88 and accompanying text (describing 42 U.S.C. § 9622(a) and the statutory presumption in favor of reopeners). As EPA over time supervises or undertakes cleanups at the most contaminated sites, less contaminated sites will be considered for addition to the NPL. See PROBST, supra, at 19-20 (stating that EPA expected to add 75 new cites per year to the NPL). The current hazard ranking that places a site on the NPL was chosen by EPA and can be modified. See OFFICE OF TECHNOLOGY ASSESSMENT, COMING CLEAN: SUPERFUND PROBLEMS CAN BE SOLVED 116 (1989) [hereinafter COMING CLEAN] (briefly describing the ranking structure of the NPL).

taminants leaked or migrated. As with many "rustbelt" sites, such industrial property is frequently either unused or underutilized. A firm fix on what would be considered a sufficient cleanup is virtually impossible, however, without a site-

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29. See supra note 26 and accompanying text (discussing the liability of passive owners and corporate affiliates). Other provisions relate to PRPs' liabilities but are less relevant to the problems confronted by cleanup volunteers. For example, CERCLA mandates reporting of unpermitted releases above specified quantities of listed hazardous substances. 42 U.S.C. § 9603(c) (1988). This release reporting requirement, which subjects anyone failing to report a release and to facilitate effective and prompt responses when hazardous substances are released. Rodgers, supra note 25, at 687; see also Grad, supra note 17, at 32 (discussing House debate over the reporting requirement). CERCLA also mandates disclosure of inactive waste disposal sites that someone creates or discovers. 42 U.S.C. § 9603(c) (1988). In addition, an owner of contaminated real property who knows of site contamination but fails to disclose that knowledge to a buyer of the property remains liable as though a current owner of the contaminated parcel. 42 U.S.C. § 9601(35)(C) (1988). Again, the statute does not mandate immediate cleanup of contaminated real property by private parties. A cleanup is required only if EPA or a court so orders.

30. "Rustbelt" sites are older industrial sites in states and regions that in the past had concentrated industrial activity; most such sites are in the Northeastern and Great Lakes states. John A. Jakle & David Wilson, Derelict Landscapes 57-92 (1992).

31. The concept of property "underutilization" is inevitably somewhat amorphous. By the term, I refer to a building or land parcel (hereinafter the "industrial facility" or simply the "facility") that was once used intensively for manufacturing operations and that has infrastructure resources and a location now used in a less intensive manner. Examples of such facilities include former manufacturing facilities now used only for storage, sites having rail access that currently make no use of railroad transportation, sites employing few or no employees but that are surrounded by residential communities with an available labor pool, and former industrial facilities that are completely unused. A recent survey of NPL sites found that a plurality of these most contaminated sites are industrial or former industrial facilities where the class of PRPs numbers fewer than 10. See Probst, supra note 27, at 35, 38 (examining 1134 NPL sites and finding that a plurality of 38% of the sites are industrial facilities and finding that 59% of the sites involve 10 or fewer PRPs). Non-NPL sites with contamination problems are even more likely to be industrial sites with few PRPs. Katherine N. Probst, Remarks at New York University Conference on Superfund Reauthorization: Theoretical and Empirical Issues (Dec. 3-4, 1993) (notes on file with author) [hereinafter NYU Conf.]. Such a conclusion about the composition of non-NPL sites necessarily is somewhat tentative since such sites, by definition, will generally be sites that have been less scrutinized than NPL sites. This conclusion is likely, however, because the first generation of NPL sites were the readily identifiable landfills, illegal dumpsites, and grossly contaminated industrial sites. Far more industrial and formerly industrial facilities remain untested and unclassified by the government. Virtually all industrial facilities have some degree of contamination. See New Life, supra note 12, at 1, 4-6 (asserting that contamination of varying levels is endemic to industrial sites); O'Reilly, supra note 12, at 43, 50-54 (discussing widespread contamination of industrial sites). The vastly greater number of non-

specific evaluation by government officials; CERCLA cleanup standards in application are highly variable and subject to discretionary judgments, and thus yield unpredictable results.\textsuperscript{32} Without government feedback about the type and extent of necessary cleanup, efforts to determine liabilities associated with contaminated land are fraught with uncertainty.

B. PRIVATE CLEANUP INCENTIVES

Because CERCLA's, and to a lesser extent RCRA's, broad potential liabilities are unlimited by time, degree of culpability or causation of actual harm, entities falling into a PRP category or considering involvement with a contaminated site have powerful incentives to seek a certain and final resolution to their cleanup liabilities. These incentives exist even at sites requiring substantial cleanup.\textsuperscript{33} CERCLA and RCRA should harness transactional incentives by creating a CAP feedback mechanism to provide possible cleanup volunteers with certainty and repose. Such a scheme would not only encourage cleanups at private expense, but would also provide substantial external benefits by decreasing incentives to abandon old industrial sites.\textsuperscript{34} For over a decade, however, neither the federal political

\footnotesize
32. \textit{See Cong. Admin. Rep., supra} note 9, at 8-10, 88-95 (discussing problems of inconsistent levels of cleanup at various sites); \textit{OTA, Brownfields, supra} note 9, at 2-3, 6 (same); \textit{Industrial Development, supra} note 12, at 12 (same); \textit{see also infra} notes 63-71 and accompanying text (discussing varying standards of compliance with the NCP); \textit{see generally} New Life, \textit{supra} note 12, at 1, 4 (surveying cleanup costs); O'Reilly, \textit{supra} note 12, at 50-54 (discussing uncertainties inherent in cleanup cost assessments).

33. With cleanup costs regularly running in the multi-million dollar range, many contaminated parcels standing alone have a negative value. If they are part of a larger multi-asset transaction or if a particular property's location or resources are valued by a particular buyer, however, that buyer might be willing to acquire a contaminated property if seller and buyer could determine their relative liabilities. A sale of a single parcel with a negative value is even possible where a buyer could more cost-effectively clean up contamination than could the seller. In such a transaction, seller would pay buyer to acquire the interest in the contaminated site. \textit{See infra} note 55 and accompanying text.

34. The benefits are "external" in the sense that a voluntary cleanup could create benefits "external" to the private decisionmakers' personal value assessments. A decision to keep a factory in use might ensure the viability of a neighborhood, lead to increased employment, and provide additional tax base. \textit{New Life, supra} note 12, at 1, 4; \textit{Industrial Development, supra} note 12, at 21; \textit{see generally} Harold Demsetz, \textit{Toward a Theory of Property Rights}, 57 Am. Econ. Rev. 347 (1967) (discussing externalities and the need for certain property rights).
branches nor EPA created any program or policy to review and approve voluntary cleanups.  

Political and market developments reveal substantial interest in voluntary cleanup approvals. Industry representatives advocate the creation of voluntary cleanup approval programs. In addition, in those states that have just started to provide cleanup approvals and substantial repose from possible state enforcement, at least one company, perceiving a new market niche, acquires contaminated sites, secures cleanup approvals, and then markets the remediated site. Furthermore, the substantial political support for state voluntary cleanup programs indicates the presence of constituencies interested in such cleanups. The remainder of this section describes why private parties would likely undertake voluntary cleanups were government approval available. This section describes and analyzes the transactional dynamics likely to create special incentives for private voluntary cleanups.

Commercial lenders or investment syndicates frequently require an environmental assessment and cleanup activities to reduce future liabilities associated with contaminated property.

35. EPA has recently indicated, during the Spring of 1995, a new willingness to review proposals of prospective purchasers. Announcement and Publication of Guidance on Settlements with Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34,792, 34,793 (1995) [hereinafter 1995 Guidance]. In addition, numerous states have recently enacted schemes to review and approve cleanups of smaller contaminated sites, but those approvals (where available) lack federal statutory authority, do not preempt federal action, and in some instances are only available to a limited subset of cleanup volunteers. See infra notes 250-265 and accompanying text and Appendix A (discussing such state initiatives).

36. Mark Anderson, Editor of The Greenfields Report, Comments at the 1995 University of Georgia Red Clay Conference (Mar. 11, 1995) (stating that state programs are a step in the right direction, but that a federal signoff is needed to reduce disincentives to private cleanups); Daniel Riesel, Esq., Comments at 1995 Winter Meeting of N.Y. State Bar Environmental Section, Panel on Hazardous Waste Issues (1995).

37. Telephone interview with Kevin Bowles of Cherokee Industries, LLC (June, 1995) [hereinafter Bowles Interview]; Ann Marie Stack, Esq., Comments at the 1995 University of Georgia Red Clay Conference (Mar. 11, 1995).

38. Entities involved in contaminated real property provide the most likely constituency, but state officials fearing loss of business to jurisdictions offering greater regulatory certainty are also likely supporters of such programs. Interviews conducted by the author with various state officials confirmed that the political advocates for state voluntary cleanup approval initiatives have been state officials, their agencies, and private entities potentially involved with contaminated property. See infra Appendix A (surveying state cleanup programs).

Similarly, risk-averse investors may avoid a site based on exaggerated appraisals of cleanup costs. Were prior government approval available, lenders or investors could rationally decide whether the relevant industrial facility is a prudent investment.  

Municipalities also desire accurate cleanup cost appraisals. Municipalities have incentives to encourage, through financing or special legislative action, private reuse of underutilized properties to maximize tax revenues and employment. Public-private corporations are frequently the vehicle by which such industrial sites are prepared for complete privatization and proposed reuse. Contamination cleanup by such corporations might precede private development, although a city might instead offer administrative assistance for private cleanup activities. Without certainty that federal and state authorities would find a proposed cleanup sufficient, private parties are leery of participating in municipal efforts to encourage industrial reuse.


41. JAKLE & WILSON, supra note 30, at 104-08; see generally Symposium, Revitalizing the Industrial City, 488 ANNALS AM. ACAD. POL. & SOC. SCI. 9 (1986) (discussing efforts to revitalize decaying American cities).

42. See CHARLES HAAR & MICHAEL WOLF, LAND USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND REUSE OF URBAN LAND 925-29, 964, 1005 (1989) (detailing the “evolution and evaluation of public-private partnerships”); NEW LIFE, supra note 12, at 41-60 (discussing the public-private nature of many cleanup programs).

43. Another context in which a private entity may wish to ascertain the extent of its liabilities, if any, is where insurance funds may be available. Government approval of a proposal coupled with a private commitment under threat of government sanction to undertake a cleanup may make insurance funds available, or at least give rise to a colorable claim. The decreased availability of insurance for environmental concerns, however, makes this situation less and less likely. See, e.g., Richard B. Stewart, Environmental Regulation and International Competitiveness, 103 YALE L.J. 2039, 2083 (1993) (stating the “threat of uncertain and potentially enormous liability awards in the United States has made insurers unwilling to provide any coverage at all for such liabilities”).
The following scenario develops the thesis that private parties have heightened incentives in the transactional context to agree to voluntary cleanups, provided those cleanups were approved and final. Seller owns a factory ("Factory") with an old chemical waste disposal site in the woods behind Factory. Buyer is interested in Factory, and already has Lender and Investor lined up to support a prudent acquisition of the property.

Buyer seeks to determine the true value of the real property asset, which inevitably requires assessing its degree of contamination. Once Buyer investigates an asset and evaluates its worth, then Seller has incentives to determine the site's value, taking into account its associated environmental risks. In the absence of such information, Seller would be at a disadvantage in transactional negotiations. So ultimately, Buyer and Seller, and possibly Lender or Investor as well, will seek to ascertain the true value of a site.

If the sale of Factory would benefit both Seller and Buyer but is avoided because Buyer overestimates or Seller underestimates cleanup costs, Buyer, Seller, Investor and Lender all lose. If one accepts the classical economics tenet that a consensual market transaction, based on accurate information, benefits both the market actors and society as a whole by reallocating market resources to higher and better uses, then a transaction avoided because of erroneous information hurts everyone. Under the current federal hazardous substance schemes, in particular CERCLA, the government and the statutory liability scheme are the cause of market imperfection. Without government involvement in assessing what will suffice to clean up Factory, Buyer and Seller can only estimate prospective value and prospective cost; even the best lawyers and consultants cannot tell them what cleanup plans would legally suffice. As Profes-


45. See Max H. Bazerman & Margaret A. Neale, Negotiator Rationality and Negotiator Cognition: The Interactive Roles of Prescriptive and Descriptive Research, in NEGOTIATION ANALYSIS 109, 111-22 (H. Peter Young ed., 1991) (describing the role of information in negotiation strategy); Ronald Coase, The Problem of Social Cost, 3 J. L. & Econ. 1, 40 (1960) ("[A] pricing system . . . leads to the employment of factors in places where the value of the product yielded is greatest.").

46. Under the current CERCLA and RCRA schemes, statutory or regulatory guidance on "how clean is clean" unavoidably leaves substantial uncertainty about what type and extent of cleanup would suffice. See discussion
sor George Stigler established, acquisition of accurate information is both costly and essential for markets to function.\textsuperscript{47} Here, such information cannot be obtained in the absence of a CAP-like scheme providing government review and approval of cleanup plans.\textsuperscript{48}

Without a CAP scheme's finality, Seller has strong incentives not to undertake its own cleanup; uncertainties in recouping cleanup costs and the possibility that additional cleanup might later be required discourage cleanup.\textsuperscript{49} Buyer may decide that the risk of an expensive cleanup weighs against acquisition of a contaminated site. Under the current CERCLA and RCRA schemes, some transactions will correctly be avoided, but others that should occur will not.\textsuperscript{50}

In addition, if a transaction were consummated despite the liability uncertainties caused by the lack of any approval process, Seller and Buyer would continue to reserve funds to cover contingent statutory liabilities, diverting those funds from higher and better uses. Both Seller and Buyer would lack repose under the current legal scheme. Future efforts to market or finance the contaminated land would still be hindered. Unavoidable potential liability would remain.

Now, consider the same Factory scenario under a revised RCRA or CERCLA with a CAP-like scheme offering government

\textit{supra} note 32 and \textit{infra} notes 63-72 and accompanying text (detailing limitations of such guidance). The uncertainty problem extends beyond scientific uncertainty. Legal judgment calls are unavoidable under CERCLA and RCRA. Only a government decision regarding the sufficiency of a cleanup plan can eliminate cleanup uncertainty currently borne by PRPs. See \textit{infra} note 66 and accompanying text (surveying cases showing substantial deference to EPA cleanup decisions).


\textsuperscript{48} Professor Ronald Gilson added to Stigler's insights by showing how business attorneys add value to a transaction by allowing that transaction to occur in circumstances closer to those of an ideal market, by reducing uncertainties and thus improving the quality of transactional information. Ronald J. Gilson, \textit{Value Creation by Business Lawyers: Legal Skills and Asset Pricing}, 94 Yale L.J. 239 (1984). Environmental attorneys' practice of auditing real property in a transactional context supports Gilson's insights. The lawyer's essential task in an audit is to gain a more accurate understanding of real property conditions. See Michael Herz, \textit{Environmental Auditing and Environmental Management: The Implicit and Explicit Federal Regulatory Mandate}, 12 Caro dozo L. Rev. 1241 (1991) (asserting that companies will not flourish under federal environmental regulatory schemes without comprehensive information gathering systems).

\textsuperscript{49} Cong. Admin. Rep., \textit{supra} note 9, at 38-39; OTA, Brownfields, \textit{supra} note 9, at 2-3, 4, 6-7.

\textsuperscript{50} \textit{Industrial Development}, \textit{supra} note 12, at 3, 18, 31.
feedback and approval of cleanup plans or binding government statements of no interest in a site or a party associated with the site. In this scenario, Buyer and Seller have the option of ignoring contamination risks, evaluating them on their own without government involvement and either undertaking or avoiding a cleanup, or seeking government review of cleanup plans. Following government review, the parties could either engage in a cleanup or decide against cleanup. Assume that cleanup costs will fall somewhere between $1 million and $5 million. Depending on the dynamics of negotiations, the parties might or might not reach an agreement. Assume further that the government would approve a cleanup costing $2 million and the parties could utilize a CAP scheme to ascertain this information. This information might make the transaction attractive or unattractive to Buyer, who could always choose another site, or might lead Buyer to offer a price viewed as unduly low by Seller. For the following reasons, however, at the moment of a transaction, the parties would have greater motivations, or at least increased financial capabilities, to commit to a cleanup than they would have at any other time.

From Seller’s perspective, prior to any transaction, a cleanup would be a cash drain without any concurrent influx of cash. Similarly, where the process of assessing environmental risk and planning a cleanup may itself cost millions, utilization of the CAP scheme might also be avoided in the absence of a cash influx. Unless Seller had reason to believe that a contaminated site was dispersing or leaching contaminants and thus increasing unavoidable future cleanup costs, Seller would probably decide not to clean up or even investigate property conditions to determine the presence or extent of any contamination.

51. An alternative scheme could require parties to undertake cleanup plans once government guidance was sought, but such a cleanup mandate might discourage parties from considering voluntary cleanups. As does New Jersey under its Memorandum of Agreement policy, this Article rejects a cleanup mandate for parties seeking government cleanup guidance or approval for this very reason. See infra notes 254-257 and accompanying text (detailing New Jersey’s initiative whereby volunteers can receive protection and official guidance without a cleanup mandate once that guidance is sought). Nevertheless, government scrutiny under such a process would alert government authorities to contamination problems. Participation in an aborted voluntary cleanup approval process would not provide amnesty to the volunteer.

52. Given an average NPL site cleanup cost of $30 million to $40 million, the $1 million to $5 million range for non-NPL industrial sites may be low.
Once an interested Buyer appears, Seller's incentives change. An influx of cash from a sale of Factory and other assets could fund cleanup assessments, plans and actual cleanup activities. Seller would like to discharge uncertain liabilities associated with the property were it to remain contaminated. Seller would also fear future blame for contamination caused by Buyer but imposable on Seller under CERCLA's strict, joint, several, retroactive and eternal liability scheme. Seller would thus have powerful incentives to utilize a CAP scheme to fix its liabilities. The price to be paid for the asset would be adjusted to reflect cleanup costs, and Seller would remain interested in the transaction.

The only circumstance in which Seller might seek to avoid the CAP scheme is if Seller thought it might succeed in selling a contaminated site under the false pretense that it was clean, or based on wishful thinking that an unaudited site was clean. Buyer's, Lender's, and Investor's incentives make it unlikely that such strategic behavior by Seller would succeed.53

Buyer also would have strong incentives to utilize the CAP scheme. Buyer does not want to overpay for the property, and a CAP scheme would offer an accurate assessment of contamination costs associated with a site. A CAP scheme would also allow Buyer to avoid the risk of liability for contamination preexisting Buyer's ownership of Factory. If Buyer were still interested once cleanup costs were known, then Buyer and Seller would negotiate an appropriate setoff or reduction in price and proceed with the transaction.54 Buyer and Seller might even agree to a transaction in which Seller paid Buyer to acquire and clean up a contaminated site.55 If Buyer were confronted by a Seller reluctant to engage in the CAP scheme or to allow or undertake environmental audits of Factory, a prudent Buyer

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53. In addition to the reasons set forth below why strategic nondisclosure would likely fail, negotiating parties may act against immediate self interest even where economic benefits to such behavior may not be apparent. See Robert H. Frank, Passions Within Reason ix-x, 51, 67-69, 258 (1988) (exploring why individuals may take actions against their apparent self-interest). Furthermore, a seller's failure to disclose contamination of which he has knowledge allows the government to continue to treat the seller as a current owner of the property. See supra note 29 (discussing 42 U.S.C. § 9601(35)(c) (1988)).

54. Buyer would still bear the risk associated with any contamination Buyer might cause in the future. Buyer would also bear some residual risk that in the event of a future contamination spill, Buyer might have to clean up the spill along with any contamination possibly left after the CAP cleanup.

55. At least one market transaction was almost consummated in which a buyer would be paid by a seller to assume responsibility for ownership and cleanup of a contaminated site. Bowles interview, supra note 37.
would become more insistent on environmental auditing and use of the CAP scheme. Unless Factory were a "must" purchase for Buyer, neither Buyer, Lender, nor Investor would even consider Buyer's acquisition of such real property with a possible contamination problem of uncertain magnitude. A rational Seller would capitulate and utilize the CAP scheme unless Seller had reason to believe that contamination was so substantial that an informed Buyer would definitely avoid the transaction.

Under CERCLA's and, to a lesser extent, RCRA's liability schemes, as augmented by a CAP scheme, market incentives thus would provide substantial motivation for cleanup volunteers to seek CAP approvals. Without any expenditure of Superfund dollars and with limited government administrative expenses, actual cleanups of contaminated real property would occur.66 Recent industry calls for voluntary cleanup approvals, along with new private cleanup schemes under state laws offering approvals and repose, indicate that such cleanups are not just a theoretical possibility.57 Furthermore, as shown in Appendix A, a survey of states offering voluntary cleanup approvals reveals that most such voluntary cleanups occur in the transactional context. Given that cleanups of contaminated sites at PRP expense are the paramount goals of CERCLA and RCRA's corrective action program, the question is why neither the federal political branches nor EPA created a voluntary cleanup approval policy or program. The following sections explore this question and further discuss the desirable elements of a CAP scheme.

II. EXPLORING WHY NO FEDERAL VOLUNTARY CLEANUP APPROVAL PROCESS EXISTS

Current federal regulatory schemes pertaining to hazardous waste contamination fail to encourage voluntary cleanups because of the particular instructions and mandates the political branches articulated in CERCLA and RCRA, and because bureaucratic preferences and incentives run, in part, counter to the statutes' goals of cleanups at PRP expense. As political scien-

56. Under the proposed CAP scheme, administrative expenses would be offset by an application fee or would be paid directly by applicants. See infra notes 224-234 & 286 and accompanying text (presenting the CAP scheme). It is likely, however, that some net drain on agency budgets would still occur from the expenses incurred in creating a new office to administer a CAP scheme and from responding to any third-party challenges to CAP approvals.

57. See supra note 36 and accompanying text (presenting comments on need for voluntary cleanup programs).
tists, economists, and public choice scholars have argued, legislators must consider the particular cost-benefit calculus of private and government officials in designing a political solution to a problem. This Article starts with a political choice or

58. The phrase "public choice" has been given a number of meanings. Its basic definition is the application of the tools of economic analysis to the study of political behavior. See Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 1, 7 (1991) (citing D. Mueller, Public Choice II 1 (1989)) (defining public choice scholarship as "the economic study of non-market decision making, or simply the application of economics to political science"). Public choice scholars frequently examine the failings of political systems or political choices, advocating that before the political system is turned to as the solution to apparent market failings or flaws, the political system's weaknesses should also be analyzed and acknowledged. See infra notes 158-160, 162-164 (presenting public choice "budgetary expansion" hypothesis). Ronald Coase presented one of the earliest statements of the idea that market and political institutions must be compared in solving problems. Coase, supra note 45, at 20. Coase stated:

[T]he problem is one of choosing the appropriate social arrangement for dealing with the harmful effects . . . . [T]here is no reason to suppose that government regulation is called for simply because the problem is not well handled by the market or the firm. Satisfactory views on policy can only come from a patient study of how, in practice, the market, firms and governments handle the problem of harmful effects.

Id.

59. This Article's perspective differs from the focus of the public choice school because it does not weigh the relative merits of political or market systems, but rather utilizes public choice insights into bureaucratic and legislative failures to propose an improved statutory scheme. In some respects, this Article's proposals parallel suggestions of Bruce Ackerman, Richard Stewart, Terry Anderson and Donald Leal, all of whom have, to varying extents, advocated that statutory and regulatory schemes should anticipate and utilize private motivations and use "market-mimicking" mechanisms to achieve statutory goals more efficiently. See Bruce Ackerman & Richard Stewart, Reforming Environmental Law, 37 Stan. L. Rev. 1333 (1985) (discussing strategies of setting intelligent priorities, making maximum use of resources, encouraging environmentally superior technologies, and avoiding unnecessary penalties on innovation and investment); Terry L. Anderson & Donald Leal, Free Market versus Political Environmentalism, 15 Harv. J.L. & Pub. Pol'y 297, 301 (1992) (advocating that regulatory schemes utilize market dynamics).

This Article differs from the arguments set forth by these authors in that it focuses on legislatively anticipating responses of market actors and regulators, and does not advocate creation of a new system of property rights, a proposal that confronts substantial implementation problems. See Howard Latin, Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine Tuning" Regulatory Reform, 37 Stan. L. Rev. 1267 (1985). This Article also shows how EPA's actions contradict empirical assertions of these scholars. See infra notes 170-208 and accompanying text (exploring this contradiction and presenting other factors relevant to EPA actions). Anderson and Leal furthermore fail to analyze rigorously failings of both markets and political systems. See William Funk, Free Market Environmentalism, Wonder Drug or Snake Oil?, 16 Harv. J.L. & Pub. Pol'y 511, 513 (1992) ("To make the case for property rights and markets, one must address the circumstances where prop-
goal—cleaning up contaminated sites at minimal expense to the taxpayer—and analyzes how a failure to anticipate and control or harness preferences and incentives of regulators and regulated entities has frustrated that goal.

For example, if a regulator is likely to expand upon the legislature's instructions, and that is the legislature's intent, then limited legislative guidance will suffice. If, however, a regulator is likely to resist the legislative goal, then stronger instructions or mandates may be necessary, or possibly the legislature should choose a different government entity to carry out a political task. Similarly, if regulated entities have preferences or incentives that could further statutory goals, then those private motivations should be harnessed as part of the statutory scheme.

Part I explored how current statutes and administrative policy fail to harness private incentives to undertake voluntary cleanups to avoid or limit uncertain statutory liabilities. The section below analyzes legislative and bureaucratic explanations for the failure to provide a voluntary cleanup approval process. This section closes by analyzing jurisprudential objections to the current regulatory schemes.

Two additional institutions that must be considered in designing an effective scheme are courts and the public. In part because the vast majority of analyses of statutory substance and process has focused on the role of courts in interpreting statutes, and because courts are not the initial entities that must implement or comply with statutory goals, this Article does not emphasize their role. See Edward L. Rubin, Law and Legislation in the Administrative State, 89 Colum. L. Rev. 369 (1989) (criticizing focus on judicial role in interpreting legislation and offering a theory of legislation for the modern administrative state). The public's role in overseeing and acting to check official error or privately-caused harms is essential, see infra text accompanying notes 224-226, but it is not the focus of this Article.
A. THE "LEGISLATIVE FAILURE" EXPLANATION

An initially appealing explanation of the current CERCLA and RCRA schemes and their flaws is simply that the political branches inadequately stated their intent. Instead, the argument goes, the legislature enacted statutes in the traditional New Deal mode of broadly delegating authority to agency experts, anticipating that EPA would further general statutory aims. To correct these statutes' current shortcomings, clearer legislative instructions would suffice. This analysis is somewhat persuasive, but nevertheless incomplete.

Congress actually did many things right in these statutes, creating liability schemes that deter future harmful conduct and giving EPA power to attack contaminated sites. It failed, however, to give EPA explicit authorization to bind the government in the context of private voluntary cleanup proposals. In significant ways, the legislature discouraged EPA's creation of a voluntary cleanup approval policy like the CAP scheme proposed by this Article. Nevertheless, EPA was left with weak residual authority to create a voluntary cleanup approval policy, but it has generally failed to utilize this authority to further broad statutory goals.

1. Current Federal Statutes Discourage But Would Allow EPA to Approve Voluntary Cleanups

This section briefly discusses legislative instructions and mandates to EPA under CERCLA and RCRA's corrective action program that are relevant to the voluntary cleanup issue. This section focuses primarily on CERCLA because it is the principal federal statute governing cleanups of contamination caused by past disposal of hazardous substances. RCRA is also potentially applicable to such sites that are still in use, but generally has not been applied to sites that are not traditional hazardous waste treatment, storage or disposal ("TSD") facilities. As is shown below, these statutes make any finality and repose virtu-

60. I will alternatively refer to choices of "the political branches," "Congress" or "the legislature," but the more accurate terminology is to the "political branches," considering the shared involvement of Congress and the President in enacting any legislation. See Cynthia Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 503 n.223 (1989) (stating that the President is the "dominant force in regulatory policy making").

61. See infra notes 89-96 and accompanying text (analyzing RCRA corrective action scheme).
ally impossible without site-specific government feedback and approval of voluntary cleanup plans.

a. CERCLA's uncertain cleanup standards and empowerment of EPA.

As discussed above, in CERCLA and in subsequent amendments, Congress created a broad liability scheme. The statute, however, gives EPA and PRPs limited guidance regarding cleanup standards. In addition, while giving EPA generally broad enforcement authority, CERCLA limits that authority in the context of settlements with PRPs.

i. CERCLA cleanup procedures and standards.

If a private party or the government desires to undertake a cleanup, the NCP provides the procedural framework, with limited substantive guidance. Only if a cleanup is consistent with the NCP can the government or a private party initiate action to recover cleanup costs from other PRPs in cost recovery or contribution actions.

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62. See supra notes 17-32 and accompanying text (discussing CERCLA liability scheme).

63. The statute mandates the creation of the NCP by the President. The NCP has been promulgated and amended several times by EPA for the President. 42 U.S.C. § 9605 (1988). Guidance on cleanup standards in the NCP are promulgated pursuant to authority granted to EPA under 42 U.S.C. § 9621 (1988).

Under CERCLA and its regulations, PRPs cannot know when a cleanup would be legally sufficient because the NCP and CERCLA incorporate by reference numerous possible benchmarks for determining "how clean is clean," thus giving the government substantial flexibility in deciding the extent to which a site must be remediated. Perhaps more importantly, judicial deference to EPA's cleanup decisions makes EPA's ultimate judgment call unlikely to be overturned, but the variable legal standards, risk assessment processes, and scientific uncertainties make private anticipation of that judgment call difficult. Highly variable numerical levels of "cleanliness" under government-directed cleanups indicate the flexibility of cleanup standards under CERCLA and the NCP. While one of the


See, e.g., Employer's Ins. of Wausau v. Brown, 52 F.3d 656, 666-67 (7th Cir. 1995) (stating courts will defer to EPA's expert judgment about cleanups unless arbitrary and capricious, even though other cleanup decisions could have been made); United States v. Hardage, 982 F.2d 1436, 1441-43 (10th Cir. 1992) (same, but also stating that even if costs are excessive, if expended on justifiable cleanup, no authority to strike cleanup costs from government cost recovery action); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 748 (8th Cir. 1985) (reviewing EPA cleanup choices under an arbitrary and capricious standard); United States v. Ward, 618 F. Supp. 884, 899-900 (E.D.N.C. 1985) (stating burden of proving cleanup "inconsistent" with NCP on defendants). But see Bell Petroleum v. Sequa Corp., 3 F.3d 889, 905-07 (5th Cir. 1993) (stating review should be deferential, but finding no record support for portions of EPA cleanup decision).

COMING CLEAN, supra note 27, at 193-217 (discussing substantial variation in types and levels of approved cleanups and the large disparities in cleanup costs depending on cleanup standard or technology approved by EPA); OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONG., SUPERFUND STRATEGY 103-184 (1985) (describing the Superfund system and analyzing the consequences of pursuing different strategies for implementing the program); Donald A. Brown, EPA's Resolution of the Conflict Between Cleanup Costs and the Law in Setting Cleanup Standards Under Superfund, 15 COLUM. J. ENVTL. L. 241 (1990); Erin Sheridan, How Clean is Clean: Standards for Remedial Actions at Hazardous Waste Sites Under CERCLA, 6 STAN. ENVTL. L.J. 9, 10-41 (1986/1987).

Reported decisions arising out of disputes over the adequacy of a hazardous substance cleanup are evidence of less than definite mandates. See, e.g., Amland Properties Corp., 711 F. Supp. at 799-800 (D.N.J. 1989) (holding that the defendant inadequately considered as required by the NCP the use of solvents and microbes to clean up PCB contamination); Artesian Water Co. v. Govern-
goals of the 1986 SARA amendments was to make the choice of cleanup standards less variable, this goal has been, at best, only partially realized.68

The variable nature of cleanliness decisions is unavoidable. Even as critics of CERCLA advocate reducing this variability, few propose mandating inflexible cleanup standards. Even an amended CERCLA would require some degree of site-specific analysis, taking into account a site's geology, population patterns, future use, types and extent of contamination, and the costs of alternative cleanup techniques and levels.69 Given that no two sites will ever be identical in virtually any respect, some degree of flexibility based on a site's distinguishing characteristics is both desirable and inevitable.70

While rigid cleanup standards might eliminate uncertainty and thus the need for government guidance or approval, such rigid standards would necessarily lead to excessive or insufficient cleanups.71 Unless the country were to unite behind the ment of New Castle County, 659 F. Supp. 1269, 1291 (D. Del. 1987) (ruling plaintiff's plan to provide alternate water supplies inconsistent with NCP).


69. See KEYSTONE REPORT, supra note 11, at 6-8 (advocating narrowing of variability of cleanups, but still recommending site-specific analysis); Brown, supra note 67, at 249-59 (discussing tensions in EPA's role in mandating cleanups, setting cleanup levels to protect health and the environment, minimizing societal and industry costs, and protecting the Superfund); Sheridan, supra note 67, at 10-11 (discussing how proposed statutory changes would reduce but not eliminate site-by-site analysis); The Forum, Different Standards of Industrial Use?, ENVTL. F., Nov.-Dec. 1993, at 34-40 [hereinafter The Forum] (discussing cleanup standards and debating desirability of allowing different levels of cleanup depending on likely future uses); see also infra notes 235-244 and accompanying text (discussing 1994 proposed amendments to CERCLA).

70. See 132 CONG. REc. S14,985-96 (daily ed. Oct. 3, 1986) (advocating flexible cleanup standards). Several recent proposals with EPA's support provide greater cleanup standard flexibility by allowing current and future site-use characteristics to be taken into account in making decisions about the extent and nature of a cleanup. See infra notes 235-244 and accompanying text (setting forth proposed CERCLA amendments); see also The Forum, supra note 69, at 37 (statement of Karen Florini of the Environmental Defense Fund questioning practical problems in implementing variable cleanup standards depending on future uses of land).

71. In the words of Judge Richard Posner, a codified rule setting an inflexible standard inevitably "overdeters to a certain extent, because its bounds are uncertain and fear of inadvertent liability causes some people to steer well clear of those bounds." Richard A. Posner, Economics, Politics, and the Reading of
goal of a pristine environment without regard to use, risk, or cost, rigid cleanup standards would pose problems. Excessive cleanup expenditures would deter reuse of contaminated industrial property, while insufficient cleanups would leave undesirable levels of environmental risk. Recent legislative proposals call for greater use of cost-benefit analysis and risk assessments in regulatory decisionmaking.\textsuperscript{72} If passed into law and superimposed on site-specific activities under CERCLA, these proposals would create even greater regulatory uncertainty.

Due to this uncertainty, neither the current CERCLA statute, the NCP, nor proposed amendments to either are likely to reduce significantly, let alone eliminate, uncertainty about whether a particular cleanup is legally sufficient. Some other mechanism based on review of individual sites and proposals is necessary to eliminate the current scheme's interminable liability and to encourage voluntary cleanups.

\textbf{ii. EPA's enforcement power and discretion.}

In CERCLA, the political branches granted EPA vast enforcement authority and discretion,\textsuperscript{73} but with one significant exception. In the provision most relevant to the voluntary cleanup problem, and the lack of repose under this statute, the

\textit{Statutes and the Constitution}, 49 U. CHI. L. REV. 263, 280 (1982). Judge Posner goes on to say that where substantial liabilities are feared erroneously, "the greater [is] the overdeterrence and the resulting costs in socially beneficial conduct foregone." \textit{Id.}; see also Colin Diver, \textit{The Optimal Precision of Administrative Rules}, 93 YALE L.J. 65, 72 (1983) (discussing tensions between "perfectly transparent rules" and transparent rules that are too cumbersome and deprive their audience of fair warning).


\textsuperscript{73} See discussion supra notes 17-32 and accompanying text (reviewing CERCLA's broad liability scheme). The 1986 SARA amendments, largely to protect the CERCLA Superfund's diminishing reserves, strengthened CERCLA's provisions allowing the government to sue or compel a cleanup by less than all PRPs connected to a site. The SARA amendments alleviated somewhat the resulting financial inequities by explicitly authorizing PRPs bearing disproportionate cleanup burdens to sue other PRPs for contribution. \textit{See} 42 U.S.C. § 9613(f) (1988).
legislature weakened EPA's discretionary authority to enter into truly final settlements with private parties. The statute does, however, provide EPA with sufficient discretionary authority to develop a voluntary cleanup policy or program offering finality and repose.

Possible cleanup volunteers cannot compel government suits to create greater certainty about what type of cleanup would be legally sufficient. Government choices of whom to sue or compel to take action are usually immune from judicial challenge,\textsuperscript{74} in part because of the prosecutorial nature of those decisions and their presumptive unreviewability under \textit{Heckler v. Chaney}.\textsuperscript{75} Furthermore, CERCLA explicitly and broadly limits the jurisdiction of courts to review any private party challenges to removal or remedial actions by EPA or orders to PRPs, unless EPA has initiated a lawsuit against a PRP.\textsuperscript{76}

Only through one provision in CERCLA may a citizen request government response concerning a contaminated site. A person possibly impacted by a release of hazardous contaminants can petition EPA to assess the hazards of that release, but

\textsuperscript{74} \textit{But see infra} note 76 (surveying cases upholding courts' jurisdiction to review EPA CERCLA actions once EPA has PRPs into court).

\textsuperscript{75} 470 U.S. 821 (1985). In \textit{Heckler}, Justice William Rehnquist's majority opinion made presumptively unreviewable by courts an agency's decision not to undertake enforcement actions. \textit{Id.} Courts frequently cite and follow \textit{Heckler} despite criticisms that the decision is overly broad. \textit{See} Ronald M. Levin, \textit{Understanding Unreviewability in Administrative Law}, 74 Minn. L. Rev. 689, 752-79 (1990) (surveying cases interpreting and limiting \textit{Heckler}).


Declaratory judgment actions under CERCLA against the government have not occurred, and likely would not be recognized, because section 113 precludes judicial review of cleanup plans except in limited circumstances when EPA forces a party into court. 42 U.S.C. § 113(h) (1988). If a cleanup volunteer attempts at an earlier date to force EPA to agree to a particular cleanup through judicial intervention, section 113 ensures failure. \textit{Id.} Similarly, the explicitly discretionary nature of citizen petitions for EPA consideration of listing a site on the NPL further supports the view that, under this statute, a declaratory judgment action against the government seeking cleanup approval would not be recognized. \textit{See infra} note 77 and accompanying text (explaining the discretionary nature of EPA's response to citizen petitions).
EPA is granted complete discretion to deny such a petition.\textsuperscript{77} Furthermore, it is unclear if persons impacted by a release or threatened release on their own property, or on property in which they have a commercial interest, could utilize this provision.\textsuperscript{78} Such a petition procedure, however, is only the first step in investigating and ranking a contaminated site and planning its cleanup.\textsuperscript{79} Nothing in CERCLA mandates any further government response to private cleanup proposals.

The settlement provisions of section 9622 also fail to give cleanup volunteers much hope of finality and repose. This section of CERCLA makes any government decisions whether to settle claims discretionary.\textsuperscript{80} Nevertheless, EPA has authority

\textsuperscript{77} Section 9605(d) of CERCLA provides that "any person who is, or may be, affected by a release of a hazardous [contaminant] . . . may petition the President to conduct a preliminary assessment of the hazards" posed by the relevant site. 42 U.S.C. § 9605(d) (1988). The President must either conduct the assessment or explain why an assessment is "not appropriate." \textit{Id}. While this section does not preclude judicial review of the executive decision whether to conduct a preliminary assessment, it explicitly gives the executive the option of declining with explanation the request for an assessment. Such a decision, accompanied by explanation, is unlikely reversible by a court given that decision's discretionary nature and the explicit statutory authorization to decline to undertake an assessment. 42 U.S.C. § 9605(d) (1988); \textit{see also} Andrea Bull, Note, \textit{Superfund and the Hazardous Waste Site Next Door: Can Citizens Clean It Up?}, \textit{6} PACE ENVT. L. REV. 643, 651-52 & nn.51-58 (1989) (discussing petition provision and noting that survey indicated such petitions in Region II are never denied).

\textsuperscript{78} Although § 9605(d) of CERCLA unquestionably provides an impacted neighbor the right to petition, the statute unfortunately does not define the phrase "affected by a release," so the statutory text does not resolve if any group of persons cannot avail themselves of this petition process. 42 U.S.C. § 9605(d) (1988).

\textsuperscript{79} Even if available to a potential cleanup volunteer, such an assessment is of limited help in ascertaining the government's view of whether a particular cleanup plan is sufficient. Such an assessment in no way provides the government's view of cleanup proposals.

\textsuperscript{80} 42 U.S.C. § 9622(a) (1988). First, the section says that "[t]he President, \textit{in his discretion}, may enter" into settlements. \textit{Id}. (emphasis added). The precautatory language encouraging use of the settlement device is conditioned by the words, "as determined by the President." \textit{Id}. The section ends by stating that "[a] decision of the President to use or not to use the procedures in this section is not subject to judicial review." \textit{Id}. Other portions of § 9622 similarly make the President's settlement-related decisions unreviewable. \textit{See}, e.g., 42 U.S.C. § 9622(b)(2) (1988) (decision whether to use mixed funding settlements not subject to judicial review); 42 U.S.C. § 9622(e)(3)(E) (1988) (decision to reject private response to proposed allocation of cleanup responsibility "not... subject to judicial review"); 42 U.S.C. § 9622(f) (1988) (decision whether to utilize covenants not to sue in President's discretion). The only minor constraint on the settlement choices is contained in provisions allowing other PRPs to comment on and seek to challenge settlement choices contained in consent decrees between PRPs and the government. \textit{See} 42 U.S.C. § 9622(d)(2)(B) (1988) (al-
to pursue truly final settlements; the statute contains precatory language encouraging such settlements where they would be in the public interest and consistent with the NCP.\textsuperscript{81}

In provisions critical to the voluntary cleanup problem, even if a private party convinces EPA to enter into a consent decree, including a covenant not to sue, section 9622 presumptively makes settlements subject to uncertainty and reopeners. First, a settlement with a covenant not to sue does not actually take effect until a cleanup is completed to the government’s satisfaction.\textsuperscript{82} Second, the statute mandates that a covenant not to sue for future liabilities “shall include an exception that allows the President to sue such person” for future releases from the same site “where such liability arises out of conditions which are unknown at the time the President certifies” that cleanup is completed.\textsuperscript{83} This broad reopener can only be omitted in “extraordinary circumstances.”\textsuperscript{84} CERCLA does not define this term, although it enumerates factors to be considered in the decision whether to eliminate the usual reopener.\textsuperscript{85} CERCLA also gives EPA authority to settle with parties on terms making the Superfund liable under “mixed funding” agreements.\textsuperscript{86}


\textsuperscript{85}. \textit{Id}. (stating that the factors to be considered are “volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, predecendential value, and inequities and aggravating factors” and additional factors specified in § 9622(f)(4)).

\textsuperscript{86}. 42 U.S.C. § 9622(b) (1988). Under current practices, such mixed funding agreements have rarely been used, but are meant to be utilized where an attempt to allocate cleanup costs leaves an “orphan share” to be allocated among PRPs or the government. Legislative history indicates Congress antici-
The statute thus tilts EPA towards partial settlements, leaving much potential liability and giving little finality to settling parties. The "extraordinary circumstances" and mixed funding provisions, however, empower EPA to give cleanup volunteers greater finality. Given the courts' general deference to EPA's development of policy, explicit statutory references to the "President's discretion," precatory language encouraging settlements and cleanups "in the public interest," and the existence of explicit statutory language allowing greater finality and certainty in "extraordinary circumstances," EPA possesses discretionary authority to encourage cleanup volunteers with the possibility of enhanced settlement finality. 87

This weak residual EPA authority aside, nowhere in CERCLA is there a provision creating, or mandating that EPA create, a procedure by which a PRP could propose a settlement to EPA and compel a response. Without government agreement to a proposed cleanup, a cleanup volunteer remains vulnerable to government claims that more cleanup is necessary, or other PRPs' claims that a voluntary cleanup is legally insufficient and thus ineligible for shifting of cleanup costs through a cost recovery or contribution action. 88 Any settlements set forth in consent decrees presumptively provide only limited finality except

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87. See supra notes 80-81 and accompanying text (discussing discretionary aspects of settlement provisions). The "extraordinary circumstances" provision, however, has seldom been utilized or construed. There is only one reported case discussing the "extraordinary circumstances" exception to reopeners in any depth. See In re Acushnet River, 712 F. Supp. 1019 (D. Mass. 1989) (discussing settlement provisions, congressional concern with Reagan-era "sweetheart deals," and legislative history indicating truly final settlements are only expected in "rare cases" and striking down a settlement decree because of lack of usual reopener provisions and because no evidence existed of extraordinary circumstances to justify lack of reopeners); see also infra notes 120-155 and accompanying text (discussing EPA's policy interpretation of the "extraordinary circumstances" provision and EPA's reluctance to provide complete covenants not to sue and repose).

88. 42 U.S.C. § 9622(h)(4) (1988). Under this provision, a party settling CERCLA liability with EPA in a consent decree, and maybe even in an administrative order, is protected from other PRP cost recovery or contribution suits. See Ferrey, supra note 19, at 51-53 (discussing cases regarding settlement protection from claims by other PRPs). Of perhaps greater importance, a cleanup volunteer who proceeds without EPA approval will confront challenges by other PRPs as to the sufficiency of that cleanup, so recovery in a contribution or cost recovery action would be uncertain. If EPA has agreed to a cleanup volunteer's
in undefined "extraordinary circumstances." In short, apart from the possibility of a preliminary site assessment, a private party cannot expect or compel a substantive government response to a voluntary cleanup proposal.

b. The RCRA corrective action scheme also applies to a non-NPL site with contamination

While CERCLA is the statute usually identified with contaminated real property that is not an active waste disposal operation or facility, EPA could also utilize RCRA to deal with cleanups of contaminated sites. In contrast to CERCLA, which is principally oriented towards cleanup of inactive contaminated sites and allocation of cleanup costs, RCRA Subtitle C constitutes a comprehensive "cradle to grave" scheme for the management of hazardous wastes. 90

One of the categories of facilities subject to RCRA's scheme is treatment, storage and disposal ("TSD") facilities. The principal focus of this section of the statute and applicable regulations is on active facilities that, by their nature, treat, store and dispose of hazardous wastes. 90 A parcel of real property might, however, be identified as a "storage" or "disposal" facility because RCRA hazardous wastes are considered to be stored where discarded or disposed of at an earlier date. 91 RCRA's language gives EPA latitude to subject such a parcel of real property either to response actions under CERCLA, to a permit process as a RCRA TSD facility, or to a review and approval proposal, that decision would likely receive judicial deference. See cases cited supra note 66.

89. See Michael B. Gerrard, Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis, 68 TULANE L. REV. 1047, 1061 (1994) (stating that the RCRA corrective action program is still in its infancy and is "very similar to CERCLA's NPL program but addresses contamination at operating facilities rather than at inactive sites"); see also supra note 28 (citing RCRA provisions that expose contributors to contamination of real property to potential liability).

90. National Priorities List for Uncontrolled Hazardous Waste Sites, Sites Subject to the Subtitle C Corrective Action Authorities of the Resource Conservation and Recovery Act, 53 Fed. Reg. 23,978, 23,981 (1988). EPA states it has authority to subject "converters," which had been hazardous waste treatment or storage sites and converted to generator-only status, to corrective action orders under 42 U.S.C. § 6928(h), but acknowledges RCRA corrective actions focused "primarily" on TSD facilities. Id.

91. For "interim status" sites, 42 U.S.C. § 6928(h) grants EPA authority to issue a corrective action order. Id. at 23,980.
cess under a RCRA “corrective action” order.\textsuperscript{92} The onerous and time-consuming TSD permitting process, which usually takes four to five years,\textsuperscript{93} makes unviable a voluntary cleanup program under TSD permitting; no time-sensitive cleanup proposal would be consummated if a TSD permit were first required. However, RCRA gives EPA authority to review and compel cleanups at facilities requiring corrective action, even if they do not have TSD permits.\textsuperscript{94} EPA can issue corrective action orders to facilities previously identified as “interim status” facilities, even if those facilities are never granted TSD permits.\textsuperscript{95}

Were EPA to begin identifying abandoned or underutilized real property sites, including industrial facilities, as TSD facilities or sites that could be handled under the corrective action scheme, then RCRA’s corrective action provisions and regula-

\textsuperscript{92} In several Federal Register documents, EPA has discussed this overlap between CERCLA and RCRA and has sought to set general guidelines for when particular sites or situations should be handled under CERCLA or RCRA programs. The National Priorities List for Uncontrolled Hazardous Waste Sites; Deletion Policy for [RCRA] Facilities, 60 Fed. Reg. 14,641 (1995); Corrective Action Management Units and Temporary Units; Corrective Action Provisions Under Subtitle C, 58 Fed. Reg. 8658, 8660 (1993) (discussing overlap of RCRA and CERCLA and stating RCRA is both a prevention program and a cleanup program); The National Priorities List for Uncontrolled Hazardous Waste Sites—Criteria for Determining Unwillingness for Sites Subject to Subtitle C Corrective Action Authorities of [RCRA], 53 Fed. Reg. 30,005 (1988) (discussing when permits or orders can be used under RCRA).

\textsuperscript{93} See City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588, 1590 (1994) (characterizing the lengthy permit process as imposing “burden-some financial assurance requirements,” and “stringent design and location standards”).


\textsuperscript{95} 42 U.S.C. § 6928(h)(2) (1988) (authorizing EPA to compel corrective actions at a site qualifying for interim status under § 6925(e) and including the right to revoke authorization to operate as an interim status facility). See Amendment to National Oil and Hazardous Substances Contingency Plan; National Priorities List, 51 Fed. Reg. 21,054, 21,057-62 (1986) (discussing “deferral policy” delineating which sites should be handled under RCRA corrective action program or CERCLA). While there is no explicit authority for EPA to order corrective actions at facilities that have not identified themselves as TSD facilities or sought classification as “interim status” facilities, the RCRA corrective action scheme would be somewhat illogical if a private party’s failure to appropriately identify itself as a TSD facility precluded belated private party acceptance of corrective action mandates or late EPA identification of a facility as a TSD facility. See United States v. Indiana Wood Treating Corp., 686 F. Supp. 218, 223 & n.3 (S.D. Ind. 1988) (construing RCRA to allow EPA corrective action order for site lacking TSD permit or interim status despite noting lack of express authority for such order, but stating that to preclude corrective action authority would undermine congressional intent and EPA’s interpretation of its authority).
tions would apply. Presently, a private party cannot compel an EPA response to a voluntary corrective action, although some EPA regions have reviewed, on a case-by-case basis, voluntary corrective action proposals. Nothing in RCRA precludes EPA's creation of a voluntary corrective action approval program.

2. The Legislative Flaws in CERCLA and RCRA

Before discussing how CERCLA and RCRA fail to encourage or mandate EPA creation of a voluntary cleanup approval program, even though such a program would further the statutory goals of achieving cleanups at the expense of PRPs, the successes of these statutes must be acknowledged. Most notably, these statutes' liability schemes deter new site contamination.

CERCLA's broad grants of power and discretionary authority to EPA, especially coupled with its broad liability scheme, keep any parties associated with a contaminated site guessing about their liabilities and vigilant to avoid future liabilities. CERCLA and RCRA have thus deterred the creation of new contaminated sites, without bureaucratic standard setting expenditures, enforcement activities by EPA, or any scrutiny by

96. TSD corrective actions require much of the same analysis of cleanup techniques as under CERCLA, but RCRA differs in one important respect. Under RCRA, a party undertaking a corrective action in connection with a TSD permit receives administrative approval. Thus, in contrast to CERCLA, RCRA offers a limited administrative feedback mechanism for private parties.

97. Confidential telephone and in-person interviews conducted with regional and Washington, D.C., EPA officials by the author during 1994 and 1995 [hereinafter Author Interviews]. Officials indicate that a few EPA regions occasionally respond to private voluntary corrective action proposals, but these officials confirm that no EPA program or policy mandates an EPA response to voluntary corrective action proposals. Id.

98. Government officials concede that the two statutes overlap substantially with respect to cleanup of already contaminated sites no longer receiving hazardous wastes. Id.; see also CONG. ADMIN. REP., supra note 9, at 36-39 (discussing RCRA permits and cleanup programs); supra notes 90, 92, and 95 (discussing relevant Federal Register provisions).

99. As Professors Richard Revesz and Lewis Kornhauser have discussed, fear of falling into the web of CERCLA liabilities will lead private parties to take substantial prophylactic action to avoid creating new sites without costly regulatory calibration of incentives and disincentives as would be necessary with "ex ante" regulatory measures. LEWIS KORNAUSER & RICHARD REVESZ, POLICY CHOICES FOR THE REGULATION OF HAZARDOUS WASTE (draft distributed at NYU Law School Superfund Conference 1991) (manuscript at 14, on file with author). Professors Kornhauser and Revesz conclude that a mixture of ex ante and ex post measures provide appropriate incentives to deter creation of new contaminated sites. Id.
EPA of a particular piece of real property. The strict, joint, several and retroactive liability scheme thus furthers the statutory goal of "minimiz[ing] the burden on the fee-based [Superfund]" and eases the government's burden in compelling PRPs either to undertake cleanups or to reimburse government cleanup expenditures. The onerous liability scheme also enhances the likelihood that the government can find PRPs obligated to clean up priority sites.

Despite complaints by industry and banks that CERCLA's liability scheme is unfair, the statute has effected a sea change in the practices of industry and lenders. The breadth of the liability scheme has been key to this achievement. RCRA, too, is successful both because of fear of corrective action liabilities and because of its "cradle to grave" tracking scheme for hazardous wastes. As discussed in Part I, these statutes' broad liability schemes could be the motor driving private incentives to undertake voluntary cleanups, were approvals and repose possible.

Statutes such as CERCLA and RCRA have also created a benefit by modifying the public sense of what is right; CERCLA

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100. By noting how CERCLA reduces bureaucratic burdens on EPA, this Article is not claiming CERCLA has been implemented with minimal costs. As many critics have asserted, EPA's efforts to direct and compel cleanups have been tremendously costly, both for the government and for private parties. See Cong. Admin. Rep., supra note 9, at 119-23 (discussing the transactional and administrative costs of the Superfund program). Additional societal costs in the form of collateral litigation also have done little to contribute to CERCLA's paramount goal of cleaning up contaminated sites. Id.

101. Landy et al., supra note 17, at 5.

102. See Jerome M. Organ, Superfund and the Settlement Decision: Reflections of the Relationship Between Equity and Efficiency, 62 Geo. Wash. L. Rev. 1043, 1043 n.2 (surveying literature critical of CERCLA); see also supra note 6 (surveying additional literature critical of CERCLA).


104. See OTA, Brownfields, supra note 9, at 13 ("[I]t is the potential threat of enforcement under state or federal superfund laws that is largely responsible for encouraging private sector participation in these [state voluntary cleanup approval] programs."); 'Maximum Funding' Urged by House Members to Allow for Comprehensive Reform of CERCLA, Env'tl. Rep., June 30, 1995, at 488 (quoting Environmental Defense Fund attorney's statement that "retroactive liability, in addition to serving as a funding source, provides an incentive for voluntary cleanup of hazardous waste sites").
and other statutes regulating the handling and disposal of hazardous waste have "shaped preferences" and created new norms of acceptable behavior. Any proposal to change these statutory schemes should attempt to retain the beneficial "preference shaping" and deterrent impacts of the broad liability schemes.

The legislature failed, however, to encourage, let alone clearly instruct, EPA to create voluntary cleanup approval policies or programs. In fact, as shown above, Congress left EPA only weak residual authority to create such a policy or program. A fair reading of these statutes suggests that Congress was unconcerned with voluntary cleanup programs, but intended to create a scheme in which the government always wins contamination cleanup disputes, with little attention to costs imposed on society or the private sector. This lack of explicit legislative instruction contributed to EPA's failure to resolve the voluntary cleanup problem. CERCLA's vague allowance of exceptions to broad consent decree reopeners did not provide EPA with a politically secure environment in which to agree to voluntary cleanups, to EPA's possible risk for general societal benefit.

105. See Carol Rose, Rethinking Environmental Controls: Management Strategies for Common Resources, 1991 DUKE L.J. 1, 30-32 (discussing the moral exhortation or suasion impacts of law); Richard Stewart, The Reformation of Administrative Law, 88 HARV. L. REV. 1667, 1704-05 (1975) (stating that under "economic analysis . . . preferences are normally assumed to be fixed; . . . [but] tastes and values are shaped by experience [and have] preference-shaping effects"); Cass R. Sunstein, Endogenous Preferences, Environmental Law, 22 J. LEGAL STUD. 217 (1993). Of course, this preference-shaping impact of CERCLA might be of limited duration were the statute to be substantially weakened.

106. Whether some part of the retroactive, strict, joint and several liability scheme could be modified without losing the deterrent impacts of the current scheme is debatable. Most critics of the current scheme have inadequately acknowledged CERCLA's deterrent effects, and have called for modification of the scheme to one based on degrees of fault, measured by percentage contribution to a particular site. See, e.g., Elizabeth G. Geltman, Superfund: A Call for Restraint, in RETHINKING SUPERFUND: IT COSTS Too MUCH, IT'S UNFAIR, IT MUST Be FIXED (1991). Such proposals underplay the difficulty of government attempts to allocate liability, and also fail to address how much of CERCLA's deterrent effect would be lost if contributors to contaminated sites confronted more limited liability. In Part I, this Article demonstrates how private desires to avoid onerous potential statutory liabilities create incentives for voluntary cleanups.

107. See William T. Mayton, The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies, 1986 DUKE L.J. 948, 962-63 (stating that the vague delegations of authority "contribute to an institutional neurosis that mak[es] rational regulation unlikely, if not impossible. . . . [If] Congress itself resolves major policy issues . . . then the agency [would have] a politically secure framework in which
Such a legislative choice to empower the government but re-
quire little action of it is not wholly illogical in this era of
strained governmental budgets. 108 Imposition of additional ad-
ministrative costs on EPA would not, however, necessarily cre-
ate an overall drain on the federal budget or an increase in
societal costs. Additional EPA administrative expenditures to
approve and encourage voluntary cleanups would create many
benefits, as discussed in Part I. Such expenditures would also
reduce the likelihood of later Superfund-financed cleanups of
sites that might have been cleaned up by private volunteers.

Furthermore, the legislative failure to provide private par-
ties a means to obtain government guidance or approval of
cleanup plans is not an inevitable part of the modern adminis-
trative state. Numerous regulatory statutes, particularly in the
environmental area, provide government "feedback." 109 Such
statutes are designed to allow, if not require, private parties to
ascertain their legal obligations, either by reference to rules or
through a feedback process in which the relevant agency re-
sponds to private inquiries or requests. Ascertainable standards
in statutes or regulations are one form of legal feedback. Where
statutes or regulations do not provide a definite answer, permits
and plan approvals are the principal devices by which regulated
parties receive feedback about the legal sufficiency of their con-
duct. 110 CERCLA, which in contrast is a liability-driven statu-

expertise [could be] applied so as to make rational social choices possible and
perhaps even likely.".

108. Among CERCLA's main goals is minimizing government expenditures
by "letting the polluter pay." CONG. ADMIN. REP., supra note 9, at 119-20. The
absence of any statutorily mandated response to private inquiries reduces bu-
reaucratic expenditures by EPA. Any statutory scheme mandating government
response to private inquiries would involve increased agency administrative
budget expenditures unless offset by a fee or charging process. Under a CAP
scheme, EPA might also face court challenges to CAP consent decrees.

109. Because of differences between CERCLA, RCRA and other regulatory
statutes, the existence of these other schemes does not in itself establish the
weakness of current federal hazardous substance law or establish that an
analogous procedure would work in the context of contaminated real property
and cleanup plans.

anyone discharging pollutants through a point source (any "discernible, con-
fined and discrete conveyance"), 33 U.S.C. § 1362(14) (1988), must obtain a per-
mit from EPA or its state or local designee, to make that discharge legal. 33
U.S.C. § 1342(b) (1988). Provided that permit applications and related commu-
nications are complete and truthful, the discharger can readily ascertain
whether the level of pollutants discharged conform to legal obligations. 33
tory scheme, stands alone among federal environmental statutes in lacking any mechanism by which a private party can request and obtain government response to plans that impact the environment and may create liability.


The Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671 (1988), was amended in 1990 and now has an enhanced permit scheme. See 42 U.S.C. § 7412(j)(3) (Supp. IV 1992) (permit program for hazardous emissions); 42 U.S.C. § 7661 (Supp. IV 1992) (setting forth elements of permit programs); 42 U.S.C. § 7503 (Supp. IV 1992) (permits in nonattainment areas); see generally Operating Permit Program Final Rule, 57 Fed. Reg. 32,250 (1992) (to be codified at 40 C.F.R. § 70). This permit scheme, when implemented, will provide pollution sources with more certain legal obligations. Municipalities and states must devise and receive approval for State Implementation Plans ("SIPS") designed to ensure that the relevant city or state will reach Clean Air Act National Ambient Air Quality Standards ("NAAQS"). 42 U.S.C. § 7410(a)(1) (Supp. IV 1992). Those plans go through a complicated and lengthy process of review and approval by EPA. 42 U.S.C. § 7410(a)(1)-(3) (Supp. IV 1992). Arguably, the CAA feedback schemes are not inevitable; under a different statutory scheme, states could be left to devise SIPS on their own, since rules dictate what levels of pollution are allowed of specific industries and of new, modified, or existing facilities and since the Clean Air Act and its regulations dictate what levels of "criteria" air pollutants are permissible. See 42 U.S.C. § 7411(b)(1)(B) (Supp. IV 1992) (providing standards of performance for new or modified sources); 42 U.S.C. § 7411(d)(1) (Supp. IV 1992) (providing standards of performance for existing sources). At the peril of facing penalties for not achieving NAAQS, however, states must seek federal government review and approval of SIP proposals. See 42 U.S.C. §§ 7410(a)(2), 7410(c)(1)(A)-(B) (Supp. IV 1992) (providing SIP plan components). As discussed above, RCRA's regulation of TSD facilities with real property contamination explicitly requires commitment to undertake a corrective action plan either when the facility is seeking an operating permit, when a facility is undergoing closure, or if a corrective action is necessary at a TSD facility to alleviate an environmental or health risk. 42 U.S.C. § 6928(h)(1)-(2) (1988). EPA either disapproves of the TSD facility's plans, issues a permit, issues a corrective action order, or approves of the corrective action plans. RCRA does not, however, mandate EPA review and approval of cleanup plans other than in the permit approval process.

Other federal environmental statutes involve analogous forms of government analysis, instruction, or approval. See, e.g., Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136a(a) (1994) (prohibiting sale of a pesticide until it has been registered); Toxic Substances Control Act, 15 U.S.C. §§ 2603(a)(1), 2604(a)(1)(B) (1994) (mandating that where insufficient data to determine whether or not a chemical product may pose a risk to health and the environment, testing is required and if a new chemical substance is to be produced or a chemical substance is to be put to a new use, with 90 days' notice to the Administrator required); The Coastal Zone Management Act, 16 U.S.C. § 1455b(c) (1994) (providing that state plans must be approved before implementation); The Safe Drinking Water Act, 42 U.S.C. § 300g-1(a)-(b) (1994) (providing uniform national drinking water standards).
Outside the federal environmental law context, feedback is available under the federal antitrust regulatory scheme, in which transactions above a certain size must be pre-cleared by either the Federal Trade Commission ("FTC") or the Antitrust Division of the Department of Justice. Private parties are not left guessing about the government's position on antitrust issues. Moreover, numerous states have recently created approval schemes for contaminated site cleanups. These schemes do not preclude potential federal liabilities, but they do reduce regulatory uncertainty.

As developed more fully below in Part II(B), a statutory mandate that EPA create a CAP scheme would encourage voluntary cleanups. Even without such a mandate, clearer authorization for EPA to consider creating such a program also would enhance currently meager incentives for EPA to do so. Lessening legal uncertainty for cleanup volunteers would further improve these statutory schemes. It is unlikely, however, that mere clarification of legislative desires would prompt EPA to create a voluntary cleanup program. More pervasive bureaucratic and political propensities, many of which have been identified by EPA, better explain EPA resistance to involvement in a voluntary cleanup approval process.

One qualification is necessary, however. Any flawed statutory scheme is, of course, ultimately to be blamed on the political branches. As I conclude below, a modified statutory framework could better achieve the broad twin goals of contamination cleanups at the expense of responsible parties. The "legislative failure" explanation is only partially satisfactory, however, because it focuses inordinately on clarity of instructions; it implicitly assumes that if the legislature articulates its preferences more clearly, agencies will not "drift" from legislative goals.

111. See infra note 168 and accompanying text (discussing further the antitrust scheme).

112. See infra notes 250-265 and accompanying text and infra Appendix A (discussing state voluntary cleanup programs and the success of programs offering certainty of environmental obligations and liabilities).

Even a clear statement of legislative goals, however, may fail when general and statute-specific preferences and incentives of regulators and regulated entities run strongly counter to such goals. Even a clear statement of legislative goals, however, may fail when general and statute-specific preferences and incentives of regulators and regulated entities run strongly counter to such goals. Better legislative drafting, which anticipates bureaucratic and private preferences and incentives and accordingly modifies statutory mandates and structures, is far more likely to achieve statutory objectives than is a mere clarification of congressional goals.

B. THE "BUREAUCRATIC FAILURE" EXPLANATION

EPA's failure to offer a scheme to approve voluntary cleanups may seem difficult to comprehend given CERCLA's and RCRA's goals and EPA's residual discretionary authority to facilitate voluntary cleanups. EPA's position, however, is consistent with much of the literature on government dysfunction, "implementation" failure, and bureaucratic risk avoidance. Given predictable preferences, incentives, and disincentives in a bureaucracy like EPA, both related and unrelated to particular statutory goals, CERCLA's weak legislative authorization of truly final consent decrees made EPA unlikely to create a voluntary cleanup approval policy. CERCLA and RCRA focus inor-
dinately on the goal of facilitating government-compelled cleanups by PRPs. Apart from protecting EPA's position as a litigant, these statutes reflect little attention to creating incentives for EPA officials to pursue policies that serve broader societal and governmental goals of actually achieving cleanups.\textsuperscript{119} This section starts by examining how, until recently, EPA has avoided involvement in approving voluntary cleanups. This section then analyzes EPA's explanations for its refusal to create a voluntary cleanup approval policy, as well as additional explanations for EPA's actions.

1. EPA Reluctance to Bind the Government in Response to Private Proposals or Inquiries

As shown above, EPA might have exercised some of its residual discretionary authority to provide greater finality for cleanup volunteers.\textsuperscript{120} Instead, EPA interpretive materials show the agency's reluctance to bind itself.

In 1985, prior to the 1986 SARA amendments, EPA issued a policy on settlements, acknowledging public sentiment that EPA policies were discouraging "voluntary private party cleanup actions."\textsuperscript{121} EPA acknowledged that government-initiated clean-up of how statutory exceptions can become the rule when an agency is confronted with strong constituency pressures or programmatic necessity. Peter H. Schuck, \textit{When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process}, 1984 \textit{Duke L.J.} 163. In the context of CERCLA, programmatic priorities of EPA appear to have trumped concern for the public's desire for cleanups, certainty and repose.

119. A tension exists for EPA and its lawyers who could treat EPA as a client or institution to protect, versus an entity that should always act to further public goals. An official involved in reviewing "prospective purchaser" policies stated to the author that in drafting revisions to that policy, among the issues discussed was the extent to which, in establishing settlement policies, EPA's lawyers should zealously seek to maximize the strength of EPA's litigation position, or instead surrender some litigation strength for public benefit to EPA's detriment. Cf. Bruce A. Ackerman & William T. Hassler, \textit{Beyond the New Deal: Coal and the Clean Air Act}, 89 \textit{Yale L.J.} 1466, 1487 (1980) (criticizing Clean Air Act's failure to create "sound structure" for EPA and partisans in regulatory debate to consider the larger aim of protecting and preserving the environment).

120. Under Chevron \textit{U.S.A., Inc. v. Natural Resources Defense Council}, 467 U.S. 837 (1984), it does not matter whether Congress has intentionally or unintentionally left a gap or ambiguity in CERCLA's provisions. CERCLA's language is more than sufficient to authorize EPA creation of a voluntary cleanup program. Similarly, the overlap of RCRA and CERCLA justify EPA creating a voluntary cleanup approval program under either statute or based on authority under both statutes.

121. EPA Request for Public Comment on Interim CERCLA Settlement Policy, 50 Fed. Reg. 5034 (1985). Since this policy is still referred to by EPA after
ups alone would not effectively achieve CERCLA's goal of "expedited cleanup" of contaminated sites, and thus EPA ostensibly sought to encourage voluntary cleanups. Nevertheless, the agency stated its reluctance to accept proposals of less than 100% private funding of cleanups in light of the strict, joint, and several liability of PRPs, which meant, so EPA reasoned, that the government would seldom be left holding unreimbursed cleanup costs. The agency guidance also emphasized consideration of the strength of its litigation position in deciding whether and on what terms to agree to settlements. As Dean Frederick Anderson observed, EPA adopted a "tough enforcement-oriented posture." On the key issue of the finality of consent decrees, EPA acknowledged the problem of scientific uncertainty about the efficacy of proposed cleanups and stated that the more certain the remedy, the greater the finality a consent decree would provide. Nevertheless, prior to SARA's mandating of broad reopeners, EPA administratively mandated reopeners for any "unknown or undetected conditions," or in light of new information indicating that a site posed greater risk than originally believed.

After the 1986 SARA amendments, which mandated reopeners as the norm subject to the "extraordinary circumstances" exception, EPA reiterated its reluctance to provide consent decrees offering true finality. In a 1987 Federal Register request for comments, EPA narrowly construed the "extraordinary circumstances" exception to broad and eternal liability. The only two circumstances that might justify a lack of reopeners, stated EPA, were following a "premium pay-

\begin{enumerate}
  \item \textit{Id.} at 5035.
  \item \textit{Id.} at 5037.
  \item \textit{Id.} at 5038.
  \item \textit{See supra} notes 24, 80-87 and accompanying text (explaining presumptive reopeners in EPA covenants not to sue).
  \item Anderson, \textit{supra} note 125, at 298.
  \item Public Notice, Superfund Program; De Minimis Landowner Settlements, Prospective Purchaser Settlements, 54 Fed. Reg. 34,235, 34,240, 34,244 (1989) [hereinafter Public Comment, Settlements].
  \item Request for Public Comment, Superfund Program; Covenants Not to Sue, 52 Fed. Reg. 28,038, 28,042 (1987) [hereinafter Public Comment, Covenants].
\end{enumerate}
ment" by a PRP or a PRP's imminent bankruptcy. EPA did not even mention the possibility of giving true finality and refuse to cleanup volunteers.

Regarding settlements with "potential purchasers" of contaminated real property, EPA stated in 1989 that it is "Agency policy not to become involved in private real estate transactions." The agency further stated that it "will not entertain requests for covenants not to sue from prospective purchasers unless an enforcement action is contemplated with respect to the facility." The agency acknowledged that this meant that covenants would "generally" be available only for facilities "listed or proposed for listing on the NPL," or facilities already the subject of Superfund expenditures or enforcement. EPA thus presumptively closed the door to requests for finality in the context of private voluntary cleanups of sites not on or under consideration for the NPL.

EPA also indicated that in deciding whether to enter into a consent decree containing covenants not to sue a prospective purchaser, EPA would consider whether "entering into [such] a covenant . . . is sufficiently in the public interest to warrant expanding [sic] the resources necessary to reach such an agreement in light of competing priorities for the use of limited Agency resources." EPA noted that settlement at an early stage might be of little benefit to the agency because it might "achieve the same result anyway by pursuing other viable PRPs." EPA conceded that such a settlement might provide "an environmental benefit through a payment to be applied to clean-up of the site or a commitment to perform response ac-

130. *Id.* The agency also noted that even when the "extraordinary circumstances" condition is satisfied, SARA allows for the exclusion of reopeners only when the terms and conditions of the settlement agreement provide "all reasonable assurances that public health and the environment will be protected from any future releases at or from the facility." Public Comment, Covenants, supra note 129, at 28,042 (quoting Superfund Amendment and Reauthorization Act of 1986 § 121(a), 42 U.S.C. § 9622(f)(6)(B) (1988)).


132. *Id.*

133. *Id.*

134. *Id.* EPA noted that it would be less likely to entertain such settlements if uncertainty existed regarding site conditions or if a prospective purchaser's activities might interfere with a remedy "ultimately selected" by EPA. *Id.* The agency also questioned whether further use of a contaminated site should generally be encouraged given potential hazards to future workers or inhabitants at that site. *Id.*

135. *Id.*
EPA required a "substantial benefit" for itself from a prospective-purchaser settlement proposal; it identified as the chief benefit government avoidance of cleanup costs that the EPA would otherwise likely bear. EPA nowhere mentioned societal or economic benefits associated with certainty and repose.

After the Clinton administration took office, EPA announced the "Brownfields Economic Redevelopment Initiative" as part of its "Brownfields Action Agenda." Through this initiative, EPA seeks to encourage reuse of older industrial areas. EPA's willingness to provide special consent decrees for sites under this initiative is unclear at this time. After the fall 1994 election, new Republican majorities ascended to both houses of Congress, with their explicit agenda of rolling back regulatory activity, particularly EPA CERCLA activity. Shortly thereafter, in a 1995 guidance, EPA authorized its officials to make greater use of prospective purchaser agreements, especially in Brownfield areas. In this new guidance, EPA acknowledged for the first time that "indirect public benefit[s]" and

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136. Id.
137. Id. at 34,242.
138. Id.
140. See Notice, Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Section 104; Announcement of Competition for Final Five Brownfield Economic Redevelopment Initiative Pilots, 59 Fed. Reg. 60,012, 60,012 (1994) (stating that Brownfields Initiative represents EPA "commitment to help communities revitalize abandoned contaminated properties," and thereby to "restore economic prosperity to areas where these properties exist"); Browner Offers Superfund Liability Relief for Property Redevelopment, INSIDE EPA, Nov. 12, 1993, at 7 (reporting on Brownfields speech by EPA Administrator Carol Browner); Michael McIntyre, Cleanup Program Gets Trial Run in Cleveland, THE PLAIN DEALER, Nov. 9, 1993, at 1B (same); see also Brownfields Action Agenda, supra note 139 (describing the Brownfields Initiative as "an organized [EPA] commitment to help communities revitalize idled or under-used industrial and commercial facilities").
141. Under the Brownfields Initiative, EPA has reached at least two reported agreements offering finality to an entity planning to reuse an abandoned industrial site. Both agreements, however, involve sites on EPA's NPL. Seattle Settlement Agreements Reflect EPA's Push for Urban Redevelopment, ENVTL. POL'Y ALERT, Sept. 28, 1994, at 9.
142. 1995 Guidance, supra note 35, at 34,793.
“environmental benefits” provide additional justification for EPA covenants not to sue with prospective purchasers.\textsuperscript{143}

EPA also recently implemented a new policy of deleting screened sites from the list of potential NPL sites (the CERCLIS sites) when the agency foresees no federal action at a site.\textsuperscript{144}

\textsuperscript{143} Id. at 34,794. The 1995 guidance nevertheless shows continued EPA concern with diverting “resources necessary to reach agreement,” id. at 34,793, and surrendering its strong litigation position and enforcement discretion. See id. at 34,793-95 (stating that EPA must “obtain adequate consideration;” that agreements will be considered where there are “substantial benefits for the government;” that agreements are most likely where EPA is likely to impose Superfund liability on a prospective purchaser; and that agreements should be “essential” to remove redevelopment barriers). This guidance reflects a new acknowledgment that government agreement with a prospective purchaser may result in “indirect public benefit” to the community where the site is located, may “remove Superfund barriers and allow the private party cleanup and productive use, reuse, or redevelopment of the site,” and may result in “environmental benefit.” Id. at 34,793-95.

Such guidance still falls short of the voluntary cleanup approval program advocated by this Article. EPA still generally resists involvement in “private real estate transactions.” Id. at 34,793. EPA must itself be convinced that its agreement is necessary and will create public benefits; markets actors’ judgments alone will not suffice. Id. at 34,793-94. EPA will even attempt to analyze implications of a purchaser paying a high or low price for contaminated property. Id. at 34,794-95. Perhaps most oddly, this guidance does not condition such agreements on private commitments to undertake voluntary cleanups of any significant contamination, although private cleanup commitments are a factor favoring EPA agreements with prospective purchasers. Id. at 34,793-94. Such agreements also remain unavailable to current owners of contaminated property, leading to incentives for current owners to sell contaminated property. See infra note 227 (criticizing current policy and how it may lead to real property transfers simply to cap CERCLA liabilities). EPA agreement with a prospective purchaser does not eliminate other PRPs’ potential liabilities associated with a site. Announcement and Publication of Guidance on Settlements with Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34,792, 34,794-95 (1995). Under this guidance, a buyer could be left with ascertained liabilities and a seller with uncertain liabilities even where both desire a cooperative cleanup. This uncertainty may distort negotiation outcomes and might leave a seller with residual liability risk. See supra Part I (discussing negotiation dynamics and disincentives to cleanup created by uncertain liabilities). EPA also will not, under this guidance, declare a site clean; its form “Agreement and Covenant Not to Sue,” appended to the guidance, expressly states EPA is not making any declaration regarding the condition of a site, although EPA will consider future requests for consent to assign or transfer the property. Announcement and Publication of Guidance on Settlements with Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34,792, 34,795-98 (1995).

\textsuperscript{144} Where EPA has decided that it intends to take no further action at a CERCLIS site, it will assign that site a “No Further Response Action Planned” (“NFRAP”) designation and delete it from the CERCLIS. Amendment to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP);
This delisting, however, is nonbinding on the government; EPA expressly reserves the right to resume activity at the site if "information so warrants." In addition, at least one regional office of EPA recently has begun offering two "status letters" to voluntary cleanup proponents: "No Further Federal Interest Letters" and "Voluntary Cleanup Letters." EPA has occasionally responded to voluntary cleanup plans under RCRA's corrective action program, but it has created no program or policy to facilitate a voluntary cleanup initiative. Moreover, RCRA imposes a lengthy and burdensome administrative process unsuitable for giving private parties timely feedback, finality and repose.

EPA's actual enforcement practices at particular contaminated sites during the last decade have been consistent with the agency's goal of preserving the Superfund by compelling PRPs to fund or actually undertake NPL-site cleanups. EPA has reached few settlements with prospective purchasers. It appears that EPA has never entered into a consent decree with true finality for any private party seeking EPA guidance with respect to cleanup of a non-NPL site.

CERCLIS Definition Change, 60 Fed. Reg. 16,053, 16,054 (1995) (to be codified at 40 C.F.R. pt. 300). These actions are intended to reduce the stigma and economic drawbacks associated with such listing, and thereby eliminate any possible CERCLIS-related disincentive to purchase and redevelop delisted sites. Id. at 16,053.

145. Id. at 16,054-55.
146. EPA Region I Announces Measures to Speed Cleanup of Waste Sites, BNA DAILY REP. FOR EXECUTIVES, Feb. 22, 1995, at 35. While these innovations are consistent with actions advocated by this Article, they appear inconsistent with some of EPA's earlier guidance and policy documents. Nevertheless, these EPA actions and those discussed supra notes 139-145 and accompanying text, support this Article's view that EPA has sufficient statutory authority to provide a process for approving voluntary cleanups and giving cleanup volunteers repose. Given statutory restrictions on complete covenants not to sue, it is unlikely that regional administration could preclude future government action without agreement from EPA headquarters or the Department of Justice.

147. See supra note 93 and accompanying text (exploring the burdensome nature of the RCRA administrative process).
148. According to an EPA enforcement attorney, EPA has only entered into a few such agreements. A recent article found a total of only sixteen agreements signed in the history of CERCLA. Howard M. Shanker & Laurent R. Hourclé, Prospective Purchaser Agreements, 25 ELR NEWS AND ANALYSIS 10,035, 10,036 & nn.9-10 (1995). The first four consent decrees reached under the new 1995 Prospective Purchaser Guidance are awaiting comments. Author Interviews, supra note 97.

149. At least a handful of volunteer-initiated cleanups have proceeded through the lengthy RCRA corrective action permit process. A thorough review of reported consent decrees under CERCLA, however, reveals only a few that lack reopeners, none of which were identified as involving voluntary cleanups.
Conversations between the author and numerous EPA officials and attorneys in the regions and Washington reveal broad agreement with the idea that EPA should encourage voluntary cleanups, especially at Brownfield sites.\textsuperscript{150} Officials working on enforcement issues, however, resist the notion that EPA should assume any of the risk of remedy failure or cleanup if additional contamination is discovered. One stated that “the government has no talismanic ability to glean what is an appropriate cleanup.”\textsuperscript{151} This same official agreed, however, that without government approval, a cleanup volunteer cannot know if his cleanup would be found legally sufficient by EPA or a court.\textsuperscript{152} The other fairly consistent response was that budget constraints limit EPA’s capability to undertake a significant new role in approving voluntary cleanups. As one official put it, Remedial Project Managers (“RPMs”), who oversee cleanups in the field, “are [already] the most stressed employees of [EPA].”\textsuperscript{153} Another stated that “folks will be all over our backs if we make a mistake” and referred to how EPA was “hammered” in the 1980s for “sweetheart deals.”\textsuperscript{154} Several officials stated that Congress’s intent regarding an EPA role in approving voluntary cleanups is unclear.\textsuperscript{155}

EPA has thus done little with its residual statutory authority to encourage voluntary cleanups, except for a recent increased willingness to enter into prospective purchaser agreements and (in a nonbinding manner) to disavow federal interest in previous CERCLIS sites. Instead, for most of the last fifteen years, EPA has avoided involvement with private initiatives, even though it has recognized the environmental benefits of voluntary cleanups. The remainder of this section explores the reasons for this avoidance.

\textsuperscript{150} Inquiries to EPA’s central office and several regional offices by the author also revealed no such voluntary cleanups approved in consent decrees providing true finality.
\textsuperscript{151} Author Interviews, supra note 97.
\textsuperscript{152} Id.
\textsuperscript{153} Id. The same official explained this comment by stating that RPMs are overworked and face potential criticism if their judgments on cleanup methods turn out to be insufficiently protective. Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
2. CERCLA and RCRA Fail to Anticipate Bureaucratic Resistance

EPA's reluctance to expand its regulatory domain to include a voluntary cleanup approval program is contrary both to traditional New Deal expectations that expert agency officials will act to further the public interest,\footnote{See James M. Landis, The Administrative Process 28, 154 (1938) (arguing that administrators will be driven to serve by an "urge for public service," a desire for the "satisfaction of achievement," and by a universal "dedication to the idea of justice"); Diver, supra note 71, at 101-02 (discussing New Deal expectation of "public-spiritedness of government officials" and more recent view that administrators seek to maximize budgets, votes, and power).} and to expectations that agencies will be "captured" by and act to please regulated industry.\footnote{See, e.g., Gary S. Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q.J. Econ. 371 (1983) (modeling interest group pressures and outcomes and developing the theory that "pressure groups" will operate to reduce expenditures on political activities); Roger Noll, Government Regulatory Behavior: A Multidisciplinary Survey and Synthesis, in Regulatory Policy and the Social Sciences 9, 24-33 (Roger Noll ed., 1985) (summarizing various capture theories); Richard Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1684-87 (1975) (discussing capture theories but also noting "more subtle explanations of industry orientation"); George J. Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971) (developing thesis that "regulation is acquired by industry and is designed and operated primarily for its benefit"); Robert D. Tollison, Rent Seeking: A Survey, 35 Kyklos 575, 591-95 (1982) (summarizing theories of capture).} This reluctance is also inconsistent with some broader assertions of analysts of bureaucratic failure. Instead, the particular scientific, political and statutory context within which EPA acts under CERCLA and RCRA makes EPA's reluctance to act understandable. The many risks and potential costs that would be borne by EPA and its officials, were it to implement a voluntary cleanup approval program, outweigh the more attenuated benefits officials might derive from such a program.

EPA's reluctance to surrender its programmatic and enforcement discretion for a scheme in which it could be compelled to respond to private initiatives is consistent with the basic suppositions of many analysts of bureaucratic failure. From the perspective of the "public choice" school of analysis,\footnote{See supra note 58 (discussing briefly the meaning of "public choice").} one would expect EPA's implementation of these statutes not to reflect overarching concern with statutory goals—cleanup of contaminated sites at PRP expense—but rather to reflect efforts by EPA
officials to maximize their own welfare.\textsuperscript{159} Under this view, government officials are not passive mediators between private parties seeking a benefit; such officials have their own priorities, which may be substantially or wholly unrelated to statutory goals.\textsuperscript{160}

Even scholars who do not adopt a public choice-driven analysis of legislative and administrative process share the view that effective policy requires anticipating decisionmakers' incentives.\textsuperscript{161} These scholars share the sound supposition that offi-

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\begin{itemize}
\item \textsuperscript{159} William A. Niskanen, Jr., Bureaucracy and Representative Government 5, 36 (1971) (asserting that bureaucrats seek to maximize their own utility).
\item \textsuperscript{160} Fred S. McChesney, Rent Extraction and Rent Creation in the Economic Theory of Regulation, 16 J. Legal Stud. 101, 102 (1987) (stating that politicians are not "mere brokers" but are "independent actors making their own demands"); Daniel Shaviro, Beyond Public Choice and Public Interest: A Study of the Legislative Process As Illustrated by Tax Legislation in the 1980s, 139 U. Pa. L. Rev. 1, 71, 76 (1990) (criticizing many public choice assertions, but crediting McChesney with the "powerful" argument that politicians are not "passive brokers," and calling for supplementing rather than abandoning public choice modes of analysis).
\item Many public choice scholars focus on interest group pressures and how those pressures will translate into statutes reflecting the desires of a particular pressure group rather than the larger public interest. See, e.g., Becker, supra note 157, at 371 (arguing that policy will be determined by those pressure groups that operate most efficiently); Stigler, supra note 157, at 3 (analyzing administrative agency policies and actions). A subset analyzes administrative policies and actions. See Bureaucracy vs. Environment: The Environmental Costs of Bureaucratic Governance passim (John Baden & Richard L. Stroup eds., 1981) [hereinafter Bureaucracy vs. Environment] (collecting essays examining the behavior of regulatory agencies and the impact of that behavior on the environment); Niskanen, Jr., supra note 159, at 5, 9-12 (developing a theory of regulatory "supply" based on individual preferences of "maximizing" bureaucrats). This subset of analysts of administrative agency activity has similarly argued that agency policies are generally the result not of publicly-oriented selfless activities, but rather are the result of individual preferences of agency officials. Bureaucracy vs. Environment, supra, at 5; Niskanen, supra note 159, at 5. George Stigler's seminal economic analysis of regulation bridges the generally separate treatment of legislative process and administrative agency activities, alluding to bureaucrats' own incentives, or "thoughts of self survival." Stigler, supra note 157, at 7.
\item Latin, supra note 113, at 1718 ("Legislators and high-level administrators cannot simply identify the social goals, policies, priorities and procedures they want implemented. They must also devote careful attention to the kinds of issues that agencies are asked to resolve and to professional and personal incentives that influence the behavior of agency officials."). Bruce A. Ackerman and William T. Hassler, in their influential study of Clean Air Act regulation of coal-burning utilities, similarly explained unduly costly and environmentally ineffective regulatory efforts by stating that "EPA was responding rationally to the bureaucratic incentives created by the Act." Ackerman & Hassler, supra note 119, at 1486. See Michael C. Blumm, The Fallacies of Free Market En-
cial officials' preferences and incentives matter, influencing likely agency reactions to legislative instructions.

Although analysis of agency officials' preferences and incentives goes far in explaining EPA's unwillingness to encourage voluntary cleanups, EPA's actions contradict some public choice predictions. For example, EPA's actions contradict the assertions of Terry Anderson, Donald Leal, and Richard Stroup, who argue that agency officials are principally motivated by a desire to obtain increased budget allocations, and thus inexorably seek to expand their regulatory domain and secure increased budgets. The view of these scholars is that agencies expand too much and should be constrained. Others, by analyzing particular regulatory histories, conclude that agencies seek to expand budgets. Several federal agencies have expanded their

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162. TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM 6-7, 11, 16 (1991); see also BUREAUCRACY VS. ENVIRONMENT, supra note 160, at 5.

Bureaucrats, like most other people, are largely self-interested. Like the rest of us, they will sometimes act altruistically to advance the public interest. In most work-related situations, however, a bureaucrat will act to improve his own welfare. . . . The components of bureaucrats' welfare are improved when the agency is growing. . . . [D]ecision makers face strong incentives to continually expand the scope of their agency's activities.

Id.; RODNEY D. FORT & JOHN BADEN, THE FEDERAL TREASURY AS A COMMON POOL RESOURCE AND THE DEVELOPMENT OF A PREDATORY BUREAUCRACY 17 (John Baden & Richard L. Stroup eds., 1981) ("The conclusions reached in [the literature on bureaucratic pathology] remain fairly consistent with the following: bureaucrats operate to increase their discretionary control over resources. In sum, they operate to expand their budgets."); IAIN McLEAN, PUBLIC CHOICE 89-95 (1987) (reviewing thesis that agencies seek to expand budgets); Wallace E. Oates & Robert M. Schwab, Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?, 35 J. OF PUB. ECON. 333, 344 ("One common hypothesis is that bureaucrats seek to maximize budgets.").

163. See, e.g., BUREAUCRACY VS. ENVIRONMENT, supra note 160, at 5-6 (arguing that agencies expand too much, leading to economic inefficiency and destructive policies).

164. See, e.g., Fred S. McChesney, Government As Definer of Property Rights: Indian Lands, Ethnic Externalities, and Bureaucratic Budgets, 19 J. LEGAL STUD. 297 (1990) (analyzing the history of the Indian land allotment pro-
activities to include individual guidance to regulated entities, even where their enabling statutes do not require such guidance.\footnote{165} The best known agencies providing such guidance are the Internal Revenue Service ("IRS"), primarily in its letter ruling procedure or opinion letter process,\footnote{166} the Securities and Exchange Commission ("SEC") in its no-action letter process,\footnote{167} and the no-action or pre-merger clearance process of the FTC and the Antitrust Division of the Department of Justice.\footnote{168}
These activities are consistent with the budgetary expansion hypothesis, although the fact of such activities does not establish underlying motivations of agency officials. Such additional work pleases a regulated constituency and allows for expansion of the agency and attendant increased budgets and job security. 169

To the extent the "budgetary expansion" theory is intended as an inevitable law of agency behavior, however, EPA's conduct contradicts it. EPA resisted expanding its programs to advance broad statutory goals or please regulated entities. If, however, one looks at budgetary expansion as a propensity of agency officials, or perhaps agencies as a whole, which may be counterbalanced by other assessments of costs and benefits, then EPA's behavior here is evidence only of the many factors that agency officials consider when making regulatory decisions. 170

The legislative task is to identify the factors that shape officials' likely preferences or incentives. 171 Even if most bureau-
crats have some usual set of generic preferences (such as budget expansion, greater regulatory coverage, public service, or personal wealth and job security), surely these preferences and incentives will not always, or equally, prevail in all regulatory contexts.  This Article's examination of EPA activities under CERCLA and RCRA indicates that generic preferences, if they actually can be proven to exist, can be overcome by the specific incentive structures within which bureaucrats operate.

structures may also shape and modify preferences. Cf. Sunstein, supra note 105, at 221 ("[S]ometimes there are no acontextual preferences with which to do normative or positive work. Preferences can be a function of the initial allocation of the legal entitlement.").

In the context of EPA's failure to create a voluntary cleanup program, for example, one could speak of pervasive bureaucratic preferences to avoid risk, expand budgets, and maintain job security. One might speak, however, in the alternative of "incentives" created by general administrative and political structures that in turn shape choices made, given the bureaucrat's preexisting "preferences." No bright line distinguishes where baseline preferences end and incentives begin in guiding or influencing a bureaucrat's choices. Baseline preferences could be an individual's state of mind after graduation from college, after job training, or perhaps even generally existing within EPA's bureaucracy. Incentives might be identified as risks and rewards created under a particular statutory environment such as CERCLA or RCRA. See, e.g., Ronald N. Johnson & Gary D. Libecap, Agency Growth, Salaries and the Protected Bureaucrat, 27 Econ. Inquiry 431, 433-48 (1989) (discussing preferences as more generic tendencies, particularly tendencies to seek maximization of monetary wealth, and discussing incentives as legal or administrative structures designed to constrain or control bureaucracies to reduce agencies' diversion from a principal's intent); Ronald N. Johnson & Gary D. Libecap, Bureaucratic Rules, Supervisor Behavior, and the Effect on Salaries in the Federal Government, 5 J. L., Econ. & Organization 53, 54 (1989) ("Bureaucratic rules both reduce contracting and monitoring costs to limit agency problems and provide a structure for instilling incentives. In doing so they limit and mold supervisory discretion in contracting with subordinates to increase output.").


173. See Johnson & Libecap, supra note 171, at 448 (concluding that, contrary to the assertion that agency bureaucrats will seek to increase agency size and budgets as a means to increase salaries, empirical survey does "not reveal a strong significant linkage between changes in staffing and salaries within an agency. . . . [P]romoting growth does not appear to be the way to increase salaries.").

174. The conclusion reached in this Article that EPA activities contradict some analysts' predictions of agency behavior is not intended to belittle the importance of trying to ascertain usual or general preferences and incentives in solving political problems. Indeed, this Article advocates just such an exercise. The observation made here is more limited; EPA has not sought to expand its budgets and regulatory coverage, at least in the short term. Viewed in the long term, EPA's actions may have enhanced officials' job security by reducing the
A particular statute's mandates and the political climate at the time both of statutory enactment and of agency implementation inevitably modify agency and agency officials' assessment of what conduct is in the agency's or official's best interests. Tested against a broader hypothesis that agencies and agency officials are motivated by political reward and recognition, agency power and discretion, the job security associated with positive recognition or at least avoidance of risk, as well as possible personal satisfaction with acting altruistically to improve the environment, EPA's actions under these statutes are understandable.

Perhaps most important to EPA's decision not to expand its activities to include voluntary cleanup approvals is the particular statutory context in which it operates under CERCLA and RCRA. As shown above, Congress did not give EPA explicit authority to approve voluntary cleanups. By leaving EPA discretion to create a voluntary cleanup program only through an exception process in which all presumptions disfavored any finality or depletion of the Superfund, Congress created a climate leading to predictable official assessments of political risks and benefits. Fearful of criticism, EPA officials approached with trepidation any surrender of EPA discretion and consequent possibility of criticism and concomitant budget reductions. See infra note 177 (presenting theory of Louis De Alessi rejecting regulatory expansion hypothesis but embracing idea that officials will act to enhance job security). The theory that agencies inexorably seek to expand their budgets may need modification to take into account other factors that may trump a general tendency to seek regulatory expansion. Whether the budgetary expansion hypothesis retains its resolving power in most instances can be determined only by empirical examination of a variety of actions by agency officials under different statutory schemes.

175. See McCubbins et al., supra note 113, at 440-45 (discussing how Congress creates statutory mechanisms to reduce bureaucratic drift from statutory goals, but showing how agency noncompliance may not be rectified by future legislatures because of modified legislative coalitions); see also Hamilton & Schroeder, supra note 113, at 116-19 (analyzing use of statutory procedural constraints to reduce agency drift); Arthur Lupia & Matthew D. McCubbins, Designing Bureaucratic Accountability, 57 LAW & CONTEMP. PROBS. 91, 91-94, 106-10 (1994) (discussing agency control mechanisms).

176. The dearth of analysis of statute or program-specific incentives may be less the result of denial that such incentives may matter than the result of the difficulty of measuring such impacts. See, e.g., Johnson & Libecap, Agency Growth, supra note 171, at 448 (focusing primarily on how the civil service structure impacts bureaucratic interest in programmatic expansion, but also stating that "greater prestige and additional perquisites may also be associated with a growing agency, but these are all difficult to quantify").
tential exposure of Fund dollars. Under CERCLA, agency officials "feel compelled to be norm-defining regulators, enforcers, and monitors while also functioning as a deep pocket that will try to minimize its obligation." The "budgetary expansion" hypothesis may have less resolving power in periods of fiscal austerity. Any CAP scheme would reduce agency discretion to allocate scarce agency resources. EPA officials must make the best use of a generally fixed or shrinking budget, even as the political branches since 1980 have added additional statutes and programs to EPA's enforcement burden. EPA must preserve scarce budget resources for the most visible and pressing problems. If Congress or EPA created a CAP scheme frequently utilized by the private sector, EPA would have to provide staff and attorneys to evaluate each cleanup proposal. A voluntary approval scheme would thus necessarily cost something, unless offset by a fee or other charging scheme. EPA could no longer unilaterally dictate its own budgetary and enforcement priorities, but would have to respond to each voluntary cleanup proposal. As EPA noted in declining to review such proposals, voluntary cleanups would frequently concern sites not on the NPL. Thus, all of these bu-

177. EPA's wariness of surrendering its discretion is evident in its narrow construction of CERCLA's "extraordinary circumstances" provision. See supra notes 120-155 and accompanying text (describing EPA's reluctance to provide final consent decrees and the agency's narrow construction of the "extraordinary circumstances" exception to broad and eternal liability). EPA used none of its discretionary policymaking authority to expand upon this language to further statutory ends.
178. Anderson, supra note 125, at 365. Anderson concludes that agency officials "feel conflict and confusion about the attitude they should adopt toward negotiation" of cleanup decisions with PRPs. Id.
179. In conversations with the author, EPA attorneys and officials doubted that EPA would be allocated more budget funds if it undertook voluntary cleanup approvals. These officials stated that EPA strives to address the greatest risks with its limited budgets. Author Interviews, supra note 97; see generally JOEL MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES (forthcoming 1995) (noting that EPA faces increased statutory obligations unaccompanied by concomitant budget increases); James L. Regens & Robert Rycroft, Funding for Environmental Protection: Comparing Congressional and Executive Influences, 26 Soc. Sci. J. 289 (1989) (same).
180. EPA highlighted this limitation when the agency declined to provide consent decrees with true finality. See supra note 134 and accompanying text (describing when EPA would be least likely to enter into a consent decree).
181. See infra notes 228-233, 250-264 and accompanying text and Appendix A (discussing fee and charging system alternatives under the CAP proposal and under state schemes).
182. See infra notes 228-229 and accompanying text.
183. See supra notes 133-135, 142-143 and accompanying text.
reaaucratic expenditures of time and money would be in addition to current agency activities.

The scientific risk and uncertainty that pervade the task of reviewing cleanup proposals further explain EPA's resistance to creating a voluntary cleanup approval program. Assessing the risks posed by a contaminated site, the best technological and scientific means to remedy that contamination, and what constitutes a sufficiently clean site requires intensive, recurrent, and costly review of voluminous documentation. Even after all of this effort, uncertainty remains. Unavoidable judgment calls in preparing risk assessments and cleanup plans make any final consent decree with a cleanup volunteer fraught with risk for EPA officials; remedy failure and unforeseen site risks expose EPA decisionmakers to criticism for leaving EPA and the Superfund responsible for the costs of later additional cleanup. "In the present political dynamic of the CERCLA program, failure to clean up a site at all has fewer consequences for the Agency's reputation than cleaning it up inadequately."

EPA's task is thus distinguishable from IRS, SEC, or antitrust agency activities: if those agencies make an error, the associated costs are generally borne by the public as a whole, not by the agency itself or the federal budget. Relevant enabling statutes for the SEC, IRS, FTC and Antitrust Division also do not presumptively prohibit agreements providing finality, as does CERCLA. Antitrust premerger clearance is actually required in some contexts. Furthermore, these economy-regu-

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184. Under the current scheme, EPA-led cleanups at NPL sites take an average of three to four years to proceed from an initial remedial investigation to a final decision concerning the nature, extent, and feasibility of a cleanup. Cong. Admin. Rep., supra note 9, at 53. Non-NPL sites take substantially less time to review and clean up; any contaminated site, however, requires labor-intensive review.

185. Substantial criticism of Reagan-era EPA officials for approving allegedly "sweetheart," or lax, cleanups by industry has further heightened EPA officials' concerns about the political risks of erroneously approving insufficiently protective cleanups. See infra note 204 (citing case discussing Reagan era "sweetheart deals"); see also supra note 153 and accompanying text (describing Remedial Project Managers as the "most stressed" of EPA employees).

186. Anderson, supra note 125, at 312. As Anderson asserts, "[i]f a toxic dump that the EPA has cleaned up, or has allowed to be cleaned up, later presents a significant hazard, the Agency is likely to be viewed as responsible for any harm to persons or resources." Id.

187. See supra notes 165-168 and accompanying text (describing procedures by which the SEC, IRS, FTC, and the Antitrust Division of the Justice Department provide guidance to regulated entities).

188. See Phillip Areeda & Louis Kaplow, Antitrust Analysis 110-11 (1985) (discussing advisory opinions and clearances); see also supra note 168
lating agencies' areas of work lack the legal and scientific uncertainty that pervades cleanup proposals. The SEC and IRS have generally removed themselves from the task of responding to factually complex and time-intensive inquiries.

EPA's reluctance to act here is analogous to the slowness of the Federal Drug Administration ("FDA") and the Occupational Safety and Health Administration ("OSHA") in reviewing and making decisions, respectively, about the safety and efficacy of drugs and safe levels of exposure to workplace toxins. As one industry official commented about FDA's slow approval of new drugs, the FDA "is almost never criticized for failing to make any decisions . . . and indeed the history of the handling of thalidomide in the United States is a classic example of the awards of procrastination." As Professor (now Judge) Guido Calabresi remarked, the public or politicians may view imprudent FDA drug approvals leading to harm or death as a "situation in which it can be said that some victims [were] sacrificed by our government." In 1988, the difficulty and risk of OSHA's task led it unsuccessfully to promulgate an omnibus regulation of over four hundred workplace occupational health hazards. Much as FDA and OSHA move slowly because of scientific uncertainty and fear of blame, EPA has understandably been reluctant to expose itself to blame for erroneously lax cleanup approvals.

Analysts of employee behavior within corporate bureaucracies similarly conclude that risk avoidance is a powerful mo-


190. Asmow, supra note 3, at 24-25; see also supra notes 166-167 and accompanying text (describing the procedures by which the IRS and SEC provide individualized guidance to regulated entities).

191. William N. Hubbard, Jr., Preclinical Problems of New Drug Development, in Regulating New Drugs, supra note 172, at 49. Largely because of slow FDA review, thalidomide had not been cleared for use in the United States when actual birth defects linked to thalidomide occurred in Europe. Id. at 47.


193. See AFL-CIO v. OSHA, 965 F.2d 962 (11th Cir. 1992) (striking down OSHA's attempt to issue an omnibus regulation as lacking the requisite substantial evidence required for each permissible exposure limit).

194. EPA was vociferously criticized early in CERCLA's history for moving slowly in evaluating and undertaking contamination cleanups. COMING CLEAN, supra note 27, at 3. Such regulatory delay is consistent with EPA's wariness of involvement in voluntary cleanup approvals.
tivator for bureaucrats. Psychologically driven to avoid making risky decisions, employees within corporate bureaucracies will frequently act not to maximize the corporation's welfare, but to protect their job security. In a huge hierarchical bureaucracy like EPA, it is fair to posit that similar risk avoidance by agency officials would play a major role in policymaking decisions. Risk avoidance is consistent with EPA resistance to providing finality and repose to voluntary cleanup proponents, as well as with staff decisions not to utilize the "extraordinary circumstances" exception to broad reopeners in covenants not to sue.

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195. See Ralph O. Swalm, Utility Theory—Insights Into Risk Taking, HARV. Bus. Rev., Nov.-Dec. 1966, at 123, 134 (reporting a study in which business people made choices with their own best interests, rather than the interests of the company, in mind); see also William Carney, Fundamental Corporate Changes, Minority Shareholders, and Business Purposes, 1980 Am. B. FOUND. Rss. J. 69, 117-18 & n.190 (citing risk perception psychology studies in connection with different investor reactions to likely or unlikely risks); Isaac Erieh & Richard Posner, An Economic Analysis of Legal Rulemaking, 3 J. LEGAL STUD. 257, 262-64 (1974) (concluding that it is a plausible assumption that "people who engage in socially desirable activities are risk averse"); Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 ECONOMETRICA 263, 265 (1979) (explaining "that people overweight problems which are considered certain, relative to outcomes which are merely probable").

196. Analysts of consumer behavior have found similar evidence of avoidance of error. See Norman I. Silber, Observing Reasonable Consumers: Cognitive Psychology, Consumer Behavior and Consumer Law, LOYOLA CONSUMER L. REP., Spring 1990, at 70-71 (discussing the regret hypothesis, which "proposes that consumers' choices are affected by their desire to avoid later finding that they would have done better had they chosen differently").

197. One of the underpinnings of the "budgetary expansion" hypothesis is that expansion will enhance job security. See supra notes 159-160, 162-164, 169-170, 173-174 and accompanying text (discussing hypothesis that self-interest of bureaucrats leads to desire to expand budgets). EPA's reluctance to undertake a new task that would pose risks to its officials is thus consistent with this underlying rationale of the budgetary expansion analysis; the end result, however, is agency opposition to short-term programmatic expansion.

An alternative explanation for EPA's refusal to facilitate voluntary cleanups is that ultimately such facilitation of private cleanups could threaten future government jobs displaced by private efforts. This anti-privatization theory seems unpersuasive. If one takes seriously the economics perspective that officials look out for their immediate interests, it is hard to see why they would forego immediate programmatic expansion to create long-term agency work. Today's officials cannot be certain they will be working in the government in the future, and even if they anticipate long-term government employment, the present value of long-term work would have to exceed the present value of programmatic expansion to make avoidance of expansion explainable by reference to a desire for job security alone. Were EPA confronting a choice between doing cleanups itself now or giving up such work to the private sector, the anti-privatization explanation would be more tenable. Here, however, EPA could have expanded programmatic reach and budgets, but did not do so. For a skeptical survey of pro-privatization literature, see Michael Schill, Privatizing Fed-
Reluctance to approve voluntary cleanups is also partially explainable by the fact that a CAP scheme would only provide attenuated political rewards for EPA. Most of the direct benefits of encouraging industrial site reuse would flow to local governments in the form of tax revenues, increased employment, and enhanced real property values.\footnote{198}

Perhaps another explanation for EPA's reluctance to expand its domain, as would be anticipated by adherents to the budgetary expansion hypothesis,\footnote{199} relates to the mode of agency activity. Assumptions or observations of excessive agency output may hold true more often in the context of agency promulgation of regulations than in the context of agency adjudicatory activities.\footnote{200} Much as legislators frequently grant broad lawmaking authority to agencies, allowing legislators to

\begin{quote}
\textit{eral Low Income Housing Assistance: The Case of Public Housing, 75 CORNELL L. REV. 878, 881-88 (1990).} Nevertheless EPA's actions here are consistent with long-term concerns about protecting budgets and enforcement discretion. \textit{See} Louis De Alessi, \textit{On the Nature and Consequences of Private and Public Enterprise, 67 MINN. L. REV. 191, 206 (1982)} (arguing that instead of seeking to expand regulatory domain, "government employees have greater incentive to allocate resources to enhance their job security, thereby increasing the present value of all future job related pecuniary and nonpecuniary sources of utility"). Again, this alternative hypothesis of official behavior does not result in budgetary and programmatic expansion, but something closer to turf protection. EPA's reluctance to give approvals to cleanup volunteers is also arguably consistent with Congress's instructions regarding settlements. \textit{See supra} notes 80-88, 120-155 and accompanying text (describing statutory restrictions on EPA settlements).
\end{quote}

\footnote{198} \textit{See} discussion \textit{infra} Part III (further analyzing the different awards and costs confronted by state, local or federal officials in undertaking cleanup approvals).

\footnote{199} \textit{See supra} notes 159-160, 162-170, 173-174, 197 and accompanying text (discussing hypothesis of bureaucratic goal of budget expansion).

\footnote{200} The distinction here is between rulemaking-type activities in which EPA is issuing a rule or regulation of general applicability and an adjudicatory context in which officials within EPA must make actual choices with respect to an individual potentially subject to CERCLA or RCRA liabilities. \textit{See generally} \textit{PETER L. STRAUSS ET AL., GELLHORN \\& BYSE'S ADMINISTRATIVE LAW, at ch. 3 (9th ed. 1995)} (materials distinguishing rulemaking and adjudicatory activity). Much of the public choice literature asserting that agency officials will act to expand budgets makes little distinction between different modes of agency action. \textit{See supra} notes 162-170 and accompanying text (discussing the hypothesis that bureaucrats desire to expand budgets). Regulatory reform proposals pending in Washington during the summer of 1995 are based in part on the view that agencies expand and excessively regulate. \textit{See S. REP. No. 90, 104th Cong., 1st Sess., pt. 1, at 28 (1995)} (stating that agencies have produced too much regulation causing market dysfunction, imposing excessive costs on the public, and regulating excessively small risks); \textit{see also supra} note 14 (describing a congressional committee counsel's belief that bureaucrats desire expansion).
dodge difficult political judgment calls, agency officials might readily regulate to show their audience in the political branches and the public that they are diligently carrying out statutory goals. Thus, agencies may issue regulations even when those regulations might have little impact or remain unenforced. In addition, regulations generally impose burdens primarily on those regulated, not on agency regulators. It seems less likely that an agency such as EPA would seek to expand adjudicatory obligations. In contrast to rulemaking, an adjudicatory process would require substantial expenditures of agency resources and would expose agency officials to new work and to criticism for real-world outcomes.

A final, more intangible explanation relates to prevalent ideologies or perceptions of agencies and their employees. Much as an agency like the Equal Employment Opportunity Commission may come to identify its task and agenda with the interests

201. This theory is most developed in debates over the non-delegation doctrine. See, e.g., William N. Eskridge, Jr. & John Ferejohn, The Article I, Section 7 Game, 80 Geo. L.J. 523, 534 (1992) (“There are numerous reasons for Congress’s willingness to delegate significant lawmaking power to agencies, including the institutional advantages agencies have in developing detailed policy prescriptions and the congressional inclination to avoid or defer controversial policy decisions.”); see also John H. Ely, Democracy and Distrust 131-33 (1980) (quoting Representative Elliott H. Levitas’ statement that “[w]hen hard decisions have to be made, we pass the buck to the agencies with vaguely worded statutes”).

202. See Mayton, supra note 107, at 960 & n.45 (explaining that given a statutory mission, agencies will “succe...
of those subjected to discrimination, not the employers it regulates, EPA officials have historically shown distrust of industry and have resisted giving industry a large role in determining the timing and nature of contamination cleanups.\textsuperscript{205} EPA’s enforcement-oriented relationship with industry under CERCLA is at odds with the more client-oriented relationship that would exist under a cleanup approval program.\textsuperscript{206} EPA’s current head of industrial policy recently conceded just this problem, stating that EPA needs to become more “consensus-based” and “less adversarial,” which would require a “culture change” for many EPA officials.\textsuperscript{207}

Given the preferences and incentives at play under CERCLA and RCRA, if Congress wants to encourage voluntary cleanups, it must articulate with greater clarity, probably through mandates, that EPA create a program akin to the CAP scheme. Generic bureaucratic preferences or incentives, coupled with the particular climate, incentives and risks created by CERCLA and RCRA, make EPA creation of a voluntary cleanup program extremely unlikely, absent explicit legislative mandates or new reward structures for voluntary cleanups. EPA’s avoidance of such an approval scheme is rational when one arrays the numerous risks specific to these statutes against the

\textsuperscript{205} EPA for years resisted allowing PRPs a substantial role in risk assessments, remedial investigation and feasibility studies that precede cleanup decisions. \textit{See} \textsc{Coming Clean}, supra note 27, at 52-57 (discussing EPA position on private participation in CERCLA processes and risks of industry self-policing). EPA subsequently modified its position and allowed a larger industry role in evaluating contaminated sites. \textit{See} \textit{Supplemental Guidance on Performing Risk Assessments in Remedial Investigation/Feasibility Studies Conducted By Potentially Responsible Parties}, EPA Administrative Materials, 17 Envtl. L. Rep. (Envtl. L. Inst.) 35,404 (July 2, 1991); \textit{Releasing Information to Potentially Responsible Parties at CERCLA Sites}, 20 Envtl. L. Rep. (Envtl. L. Inst.) 32,251 (Feb. 28, 1990). Analysts of government opposition to privatization efforts might also argue that EPA would resist private voluntary cleanups out of fear of being embarrassed by private volunteers performing better cleanups. \textit{See} De Alessi, supra note 197, at 206-08 (arguing officials will make choices to maximize long-term prospects); Schill, supra note 197, at 881-89 (summarizing the rationale for privatization).

\textsuperscript{206} Such an ideological or institutional disposition creates the opposite results from that anticipated under the usual capture theory of agency activity; rather than EPA coming to identify its tasks with the needs of industry, EPA behaves more like an enforcer or prosecutor. \textit{See} Anderson, supra note 125, at 367 (discussing EPA reluctance to negotiate with PRPs and surrender “its tough enforcement-oriented ... posture”).

\textsuperscript{207} Robert Benson, Chief, Pollution Prevention and Toxic Branch, Industrial Sector Policy Development, Address at the University of Georgia Red Clay Conference (Mar. 11, 1995).
C. Repose and Certainty Should Be Regulatory Goals

As shown above, a strong economic argument can be made that a voluntary cleanup approval process would benefit private market actors with connections to contaminated real property (who could ascertain and cap liabilities), federal government budgets (by reducing exposure of the Superfund for initial cleanups of contaminated property), and society (by reducing incentives to abandon contaminated Brownfield sites, reducing urban and suburban sprawl, assisting efforts to rehabilitate such sites, and creating certainty so real property could reenter the market). Viewed through the prism of property scholars with an economics orientation, the shortcoming of the current CERCLA and RCRA schemes is that they impair marketability of particular parcels of real property by making uncertain the extent of property liabilities. Yet it is possible that the number of such sites and the administrative costs of reviewing cleanup proposals, coupled with possible future government liability for additional cleanups, could make a CAP scheme costly, at least from

208. In addition, as discussed in Part III, infra, positive incentives in the form of political rewards are much less tangible at the federal level than they are at the state or local level. This difference in positive political incentives explains why numerous states have initiated their own voluntary contamination cleanup approval processes.

209. Richard Posner, Harold Demsetz, and, to a lesser extent, Carol Rose all see certainty of legal obligations associated with real property to be one of the cornerstones of an efficacious private real property scheme. See, e.g., Richard Posner, Economic Analysis of Law 32-33 (1992) (discussing need for certain and exclusive property rights); Demsetz, supra note 34, at 347 (“Property rights . . . derive their significance from the fact that they help a man form those expectations which he can reasonably hold in his dealings with others.”); Carol M. Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 73, 78 (1985) (“Society is worst off in a world of vague claims; if no one knows whether he can safely use the land, or from whom he should buy it if it is already claimed, the land may end up being used by too many people or by none at all.”). Without certainty, real property transfers will be deterred and investments in real property will not be made.

Although these property rights discussions make convincing arguments regarding the likely market or economic benefits of certainty, they explore less thoroughly other values that might be implicated by a lack of certainty. Professor Rose has, however, sought to articulate some of the norm-creating benefits flowing from environmental schemes involving “moral suasion or exhortation,” even where such schemes may neglect market choices and the benefits of harnessing market dynamics to achieve environmental ends. Carol M. Rose, Rethinking Environmental Controls: Management Strategies for Common Resources, 1991 Duke L.J. 1, 30-32.
the perspective of the federal government.\textsuperscript{210} It is also possible, although unlikely, that the number of cleanup volunteers would be so few that society as a whole would see little benefit.\textsuperscript{211} For these reasons, it cannot be posited with certainty that net economic benefits would flow from such a plan, even if particular property owners would benefit. This section explores how noneconomic, jurisprudential values nonetheless weigh in favor of a CAP scheme.

An ideal regulatory scheme would offer either discoverable standards in existing codified law or an adjudicatory process by which those regulated could ascertain their status. Such a regulatory scheme would offer finality, certainty, and repose for regulated entities. A regulatory scheme lacking certainty and repose, while perhaps protective of administrative agency flexibility and discretion, is vulnerable to criticism on "rule of law" grounds.\textsuperscript{212} Lon Fuller, Friedrich Hayek, H.L.A. Hart, and Jus-

\textsuperscript{210} The government might expend administrative resources in reviewing cleanup proposals plus bear financial liability in the event additional cleanup later becomes necessary. Indirect tax benefits from site rehabilitation might be less than such administrative costs.

\textsuperscript{211} States that have instituted a variant on the proposed CAP scheme have approved numerous voluntary cleanup proposals. See, e.g., O'Reilly, supra note 12, at 64-65 (discussing likely success of Indiana voluntary cleanup program); Ken Haberman, Recycling Dumps, N.Y. Times, Jan. 15, 1994, at A19 (reporting that almost 500 sites in Minnesota have had successful voluntary cleanups); see also infra notes 254-257 and accompanying text (describing the New Jersey cleanup approval program and its 3600 cleanup volunteers); supra note 36 and accompanying text (describing industry desire for voluntary cleanup approvals); Appendix A (summarizing substantial response to and political impetus for voluntary cleanup approvals at the state level).

\textsuperscript{212} Various scholars use the phrase "rule of law" to signify a legal scheme that provides certainty, discoverable legal rules, and constrained or limited government authority against citizens. See generally Harold J. Berman, The Rule of Law and the Law-Based State, The Harriman Inst. F., May 1991, at 1 (tracing the historical development of the "rule of law"); Scalia, supra note 1 (explaining the importance of certainty and continuity in our legal system). The "rule of law" is frequently used to distinguish a system of ascertainable codified or written decisional authority from a system giving decisionmakers broad discretionary power. Scalia, supra note 1, at 1177. In the words of Friedrich Hayek, one of the most zealous advocates of a predictable rule of law, "[t]he interference of the coercive power of government with our lives is most disturbing when it is neither avoidable nor predictable." F. A. Hayek, The Constitution of Liberty 143 (1960). Hayek further states:

[If the government] tell[s] me what will happen if I do this or that, the laws of the state have the same significance for me as the laws of nature; and I can use my knowledge of the laws of the state to achieve my own aims as I use my knowledge of the laws of nature. Id. at 142. But see Kenneth C. Davis, Discretionary Justice 32 (U. of Ill. Press 1973) (1969) (criticizing Hayek for "absurdity" in advocating an "extravagant version" of the rule of law).
tice Scalia all argue that certain and discoverable law is simply a necessary component of a legitimate legal system. Hart posits that where no ascertainable rules resolve a legal question, "later settlement" will be available through recourse to "informed, official choice." A statute like CERCLA, which imposes substantial liabilities but lacks both codified standards and a means for fixing liabilities, is problematic because a contamination cleanup volunteer confronts a scheme under which, to use Hart's words, "informed, official choice" cannot be obtained. Under the RCRA and CERCLA schemes, certainty through statute or regulation is not possible given the varied conditions and risks of contaminated sites. Citizens associated with a contaminated property thus cannot with any certainty conform their conduct to a standard and avoid future liability, nor can they utilize an adjudicatory process to discover their particular cleanup obligations.

213. LON L. FULLER, THE MORALITY OF LAW 33-41 (rev. ed. 1977) (discussing through the parable of Rex the perils of ad hoc decisionmaking or excessively rigid law); H.L.A. HART, THE CONCEPT OF LAW 129-30 (2d ed. 1994); HAYEK, supra note 212; Scalia, supra note 1.

214. HART, supra note 213, at 130. Hart states:
[All systems, in different ways, compromise between two social needs:
the need for certain rules which can, over great areas of conduct, safely
be applied by private individuals to themselves without fresh official
guidance or weighing up of social issues, and the need to leave open,
for later settlement by an informed, official choice, issues which can
only be properly appreciated when they arise in a concrete case.

Id.

215. Id. Justice Scalia similarly criticizes avoidable discretionary justice in a recent essay. He expounds upon the tensions between a system of discretionary, case-by-case, "totality of the circumstances" resolution of legal disputes and a system comporting to the "rule of law" which offers more certain, "previously enunciated rule[s]." Scalia, supra note 1, at 1178-79.

Neither Fuller, Hart nor Justice Scalia address schemes like CERCLA, and to a lesser extent RCRA, where the government, or more accurately the taxpayer, is the insurer of last resort if no private party is available to clean up a contaminated site. If a CAP scheme were adopted, it would lead to a final consent decree under which the government would be responsible for some or all of any potential unanticipated future cleanup costs of a site. See infra notes 227-234 and accompanying text (discussing division of liability for unanticipated later cleanup costs). There is thus a counterweight to the argument of scholars such as Hart, Fuller and Justice Scalia who share the supposition that indeterminate and undiscoverable law is undesirable. They appear to envision a scheme in which government sets legal standards, not a scheme where the government itself faces potential liability. Here, a more certain scheme risks imposing administrative and cleanup costs on the government and the taxpayer.

216. See supra notes 63-72 and accompanying text (discussing the discretionary nature of CERCLA and variable cleanup standards).

217. In the criminal law context, the doctrine of lenity seeks to avoid such a problem of liability based on uncertain legal prohibitions. Under the lenity doc-
A legal scheme creating interminable contamination liability is objectionable, apart from economic and empirical arguments about real-world impacts, because citizens face a government whose powers in connection with contaminated sites are largely unlimited. By failing to require government response to voluntary cleanup proposals, CERCLA and RCRA fail to constrain EPA’s enforcement power and discretion in any meaningful way. Even a soft mandate that EPA give substantive responses to cleanup proposals would act to constrain or reduce the government’s substantial and threatening discretionary authority; “rules allocate power,” and rules requiring responses would appropriately constrain that authority. Much as respect for judicial precedent is essential to the legitimacy of judicial decisionmaking, creation of more certain regulatory schemes would further valuable legal goals of certainty, predictability and repose. This section’s criticism of CERCLA’s potentially interminable liabilities does not propose that EPA be disabled from acting in the face of uncertainty about contamination problems. The CAP scheme proposed by this Article leaves agency officials with substantial discretion to decide the type of cleanup necessary at a contaminated site, even where the legal or scientific bases for decisions are uncertain. Under this Article’s CAP proposal, however, EPA would lose the unfettered discretion to allocate its resources as it chooses and the ability to turn down requests for government feedback concerning substantial voluntary cleanups.

The idea is not to prohibit the discretionary exercise of authority, but to “find the optimum degree for each power in each

trine, criminal laws will be construed against the government where the criminal law provisions do not clearly prohibit particular conduct. See generally Bruce A. Markell, Bankruptcy, Lenity and the Statutory Interpretation of Cognate Civil and Criminal Statutes, 69 Ind. L.J. 335 (1994) (exploring the doctrine of lenity and its use in criminal, and more recently, civil settings). Under CERCLA and RCRA, however, a real property owner faces potentially disastrous liabilities but confronts highly discretionary rules and receives no guidance or feedback. Unlike the lenity situation, Congress in CERCLA and RCRA has created positive law that sets forth legal standards, but those standards set forth so many potential variables that they provide little guidance. See Diver, supra note 71 (discussing and comparing rules with so many variables they deprive audience of warning).


219. See Scalia, supra note 1, at 1178-80 (exploring importance of respect for precedent).

220. A more complete description of the CAP scheme is set forth infra Part III.A. and notes 223-234 and infra text accompanying note 286.
set of circumstances."\textsuperscript{221} The "choice to do nothing—or to do nothing now" is one form of discretion that must be bridled.\textsuperscript{222} Whether one focuses on the onerous potential liabilities the government can impose under CERCLA and RCRA, notions of legal legitimacy, or the general desire to constrain discretionary government authority, a CAP-like scheme would be an improvement, even if its economic benefits are uncertain.

III. THE CLEANUP APPROVAL PROCESS ("CAP") SCHEME AND THE FEDERAL VERSUS STATE IMPLEMENTATION CHOICE

Recent developments show new state and federal interest in providing cleanup volunteers with an approval process. This section sets forth in greater detail this Article's proposed CAP scheme, analyzes recent state and federal developments, and evaluates the merits of state-directed alternatives to a purely federal CAP scheme. Because the political and economic benefits of approved and final cleanups are locally felt, state or local governments have greater incentives to implement voluntary cleanup approval programs than do federal officials. Local officials, however, are likely to be more easily pressured to approve lax cleanups than federal officials unconcerned with interstate competition to attract or retain business. This section therefore argues that states should be given authority to institute CAP schemes, subject to both threshold programmatic review by the federal government and potential federal appellate review of disputed state cleanup approvals.

A. THE CAP PROPOSAL

This section proposes a CAP scheme for proposed voluntary cleanups. Between CERCLA's mixed funding provisions, the "extraordinary circumstances" exception to reopeners in covenants not to sue, and increased utilization of the RCRA corrective action scheme, EPA could survive any challenge, with a few minor exceptions, to its creation of the following procedure to respond to voluntary cleanup proposals.\textsuperscript{223} However, for reasons discussed above, it is unlikely EPA would ever voluntarily

\textsuperscript{221} DAVIS, \textit{supra} note 212, at 4.
\textsuperscript{222} \textit{Id.}
\textsuperscript{223} It is uncertain whether the Superfund could be used to fund the administrative costs of reviewing cleanup proposals. EPA generally has used Superfund dollars only for NPL sites, although CERCLA does not explicitly so mandate. \textit{COMING CLEAN}, \textit{supra} note 27, at 195-96.
create such a procedure, so statutory modification is likely
necessary.

A CAP scheme would entitle parties interested in undertak-
ing an appropriate cleanup above a specified magnitude at an
NPL or non-NPL site to submit a cleanup proposal to EPA or its
designated representative, possibly a state or local government
agency. While the government would have no obligation to
fund the initial cleanup, it would be obligated to review the
cleanup plan. In accordance with the current NCP process, any
cleanup plan would be made public and subjected to public,
state, and municipal comment. Following the assessment of
risks posed by the site, choices of cleanup technology, and agree-
ment about the extent of cleanup that would suffice, EPA or its
designee would respond to and ultimately agree to a CAP con-
sent decree. The consent decree could be challenged by any op-
ponents either at the initial agency level, in an administrative
appeal (possibly from state designees to EPA) or in federal
court for the district in which the contamination site is
located.

224. Some limitation on the size or magnitude of anticipated cleanups is
necessary to avoid saddling federal officials, or their designees, with substantial
administrative expenses for minor cleanups. Conversations with EPA and
state officials indicate that sites below a half million dollars are generally han-
dled by state and local governments, while sites above $10 million dollars are
frequently federal sites. Author Interviews, supra note 97. Perhaps only sites
estimated to cost above a half million dollars to investigate and clean should be
able to utilize the CAP scheme. Sites below that magnitude would remain sub-
ject to possible local or state supervision. See discussion infra Parts III.B-C.
(considering the allocation of such responsibilities to federal, state or local au-
thorities). Nevertheless, a binding federal disavowal of interest in a particular
site or cleanup volunteer as a PRP would enhance incentives to clean up a site.
OTA, BROWNFIELDS, supra note 9, at 6-8, 26 (acknowledging uncertainties
about the scope of contamination, possible state or federal actions at a site, lim-
ited assurance provided by state cleanup approvals, and the possible need for
federal program approval or site-specific federal approvals or disavowals of in-
terest). See supra note 144-145 and accompanying text (discussing new non-
binding EPA delisting process).

225. See infra Parts III.B-C. (discussing delegation of authority to states).

226. It is, on balance, preferable to involve agency or federal court appellate
review only when someone challenges the legality of a cleanup decision, rather
than in connection with every approval. Such periodic appellate review would
reduce duplication of government activities. See Markell, supra note 11 (asserting
need to avoid excessive redundancy and discussing benefits of a more streamlined process). Appellate review triggered only by an objector would be akin to the “fire alarm” statutory schemes that McCubbins and his co-authors
(also known as “McNollgast”) have proposed. See McCubbins et al., supra note
113, at 434 (explaining how politicians can rely on constituencies’ “fire alarms”
as an indication of agency noncompliance). The lack of finality at the moment a
CAP consent decree is signed will leave a degree of uncertainty for cleanup vol-


In contrast to current settlement policy, compliance with the CAP consent decree would provide substantial repose to a cleanup volunteer. In itself, government review and approval of cleanup plans would provide some security and repose. Moreover, if changes in law or discovery of unremediated contamination were to require further cleanup, EPA or its state designee would be obligated to undertake or fund a percentage of that cleanup.\textsuperscript{227}

Dividing the burden of any unanticipated later cleanup would reduce incentives for strategic nondisclosure or partial site investigation by PRPs. Such a division would also deter dilatory review of cleanup proposals by government officials. The precise division of obligations in the event of later necessary cleanup would depend on the particular facts of a proposed cleanup, the needs of the local jurisdiction, and the previous involvement of the cleanup volunteer with activity causing the contamination.\textsuperscript{228} All repose and finality could be terminated volunteers for a limited time for possible appellate review or challenges. Because appellate review provides protections against unduly lax or collusive "sweetheart deals," however, this reduction in certainty is acceptable.

227. Voluntary cleanup approvals should be provided not only to new or prospective real property owners, but also to current property owners. These statutory schemes are not based on culpability, but on responsibility. No compelling reason exists for government policy regarding cleanups virtually to force current owners to engage in real or paper transfers of contaminated land just to gain the benefits of final and approved cleanups. Unfortunately, both EPA and several states target their voluntary cleanup approval initiatives toward approvals only for prospective purchasers, not current owners. See supra notes 131-137, 142-143 and accompanying text (discussing EPA policy toward potential purchasers) and Appendix A infra (listing state programs and statutes). Nevertheless, some differences in treatment are appropriate. See infra note 228.

228. The proposed CAP scheme, however, would allow such flexibility only within a range. Exactly how these costs associated with unanticipated additional cleanup should be divided is one of the most difficult issues in designing a voluntary cleanup approval program. If all reasonably unforeseen costs were borne by the government, the government would become the insurer of all remedy failures and private parties would have strong incentives to make the minimum necessary level of disclosure. While government financing would strongly encourage cleanup proponents to undertake cleanups, it would also create incentives for diligent government supervision.

Dividing unforeseen cleanup expenses would still create incentives for private parties to volunteer, but would incrementally deter private parties hoping to foist liabilities onto the government and, in turn, the taxpayers. Because of the substantial costs incurred in designing and installing necessary equipment and in implementing actual cleanups, private parties responsible for a share of future cleanups would have an incentive to make adequate cleanup plans. Of course, diligent government review and approval of plans would be the best check on private abuse of such a cleanup approval program, but remedy failures
were the government to establish that the cleanup proponent willfully, knowingly or recklessly failed to disclose complete information about site conditions or cleanup plans.

A state implementing an approved CAP scheme would also have access to Superfund dollars in the event of unanticipated necessary additional cleanup. As under current law, the state would retain a percentage of any possible future government cleanup liability. To harness agency incentives to expand budgets or avoid budget depletion, CAP administrative costs should be recoverable from cleanup volunteers, either through a fee or through site-specific compensation for government time expended in reviewing cleanup proposals.

A CAP consent decree would explicitly preclude any later enforcement under RCRA, CERCLA, or any state statutory scheme. Such a decree would also provide contribution protection to the CAP proponent. In contrast to recent Superfund amendment proposals, a party entering into such a consent remain likely at some remediated sites. The exact division of unforeseen cleanup expenses could either be negotiated on a site-by-site basis, depending on the scope of the cleanup plans, or on a programmatic basis. Since a non-PRP has no advance obligations in connection with a contaminated site, a CAP consent decree with a non-PRP volunteer should leave a greater portion of any unforeseen later liabilities for the Superfund. Some latitude to modify the cost-splitting formula depending on a city or region's cleanup needs would be appropriate, provided states pay any government liability above the cost-division presumptively set under a CAP scheme.

CERCLA or RCRA should also allow state or federal officials to require a "premium" payment akin to an insurance premium to offset future possible cleanups. The premium amount would be calculated on a case-by-case basis. States implementing a CAP scheme might choose to pay the premium for cleanup volunteers to provide further incentives for voluntary cleanups.


230. See supra notes 159-160, 162-170, 173-174, 197 and accompanying text (discussing the budgetary expansion hypothesis).

231. Although such a scheme would be consistent with EPA's current practice of requiring PRPs in cost-recovery actions to pay government oversight costs, the United States Court of Appeals for the Third Circuit recently rejected that practice as unlawful. United States v. Rohm & Haas Co., 2 F.3d 1265 (3d Cir. 1993). Contra Colorado Dep't of Toxic Subs. Control v. SnyderGeneral Corp., 876 F. Supp. 222 (E.D. Cal. 1994) (declining to follow Rohm & Haas as "misguided"). A statutory amendment to allow such a fee or administrative reimbursement therefore may be necessary.

232. See supra notes 66 & 88 and accompanying text (discussing cleanup volunteers' vulnerability to claims against them by the government or other PRPs).

233. See H.R. 3800, 103d Cong., 2d Sess. § 408(e)(1)(C) (1994) (authorizing more final settlements than under existing law but conditioning that greater finality on settlor's promise not to sue others in contribution actions).
decrees would not be precluded from suing other responsible parties. Prohibiting CAP proponents from pursuing causes of action would create a substantial disincentive to use of the CAP scheme. As under current statutory law, existing common law actions for personal and property injury would still be allowed against a CAP proponent.  

Recent federal and state developments reviewed below show a trend toward providing repose through mechanisms similar, but not identical, to the proposed CAP scheme.

B. Recent Federal and State Initiatives

1. Superfund Amendment Proposals

During the 1994 Superfund amendment proposal process, which ultimately resulted in no amendments to the statute, EPA was a prime player in the drafting of the Clinton administration’s proposed Superfund Reform Act of 1994. This proposal was later introduced in Congress as H.R. 3800.

The EPA proposals contained several changes of relevance to this Article. First, the proposals attempted to reduce the threat of burdensome liability by creating a discretionary and non-binding allocation process through which parties might ultimately confront not strict, joint and several liability far exceeding their actual contributions of contaminants to a site, but prorated liability shared among existing PRPs. This proposal did not, however, eliminate EPA’s discretion to seek to impose strict, joint and several liability on a PRP. The EPA-proposed amendments also sought to narrow the breadth of possible cleanup standards, but coupled that narrowing with authority to take into account “future use” of a site. Thus, while the
proposed changes in one section slightly reduced uncertainty in determining "how clean is clean," other proposals required even greater tailoring of cleanup decisions to the particular attributes, risks, and possible future uses of a contaminated site.\textsuperscript{238}

The EPA proposals also contained provisions intended to encourage voluntary cleanups.\textsuperscript{239} These provisions, however, did not impose any such programs on EPA or any other federal authorities. Instead, they gave states the option of implementing voluntary cleanup approval programs.\textsuperscript{240} Such programs would have to meet federal thresholds of quality and enforceability if states were to seek access to Superfund dollars.\textsuperscript{241} Several members of Congress introduced similar bills designed to give states authority to implement voluntary cleanup approval programs while providing federal grants and other assistance to encourage such programs.\textsuperscript{242} These proposals differed slightly from EPA's proposal but similarly did not mandate any new EPA voluntary cleanup approval process. Since the Republican Party gained a majority in both houses of Congress in the fall of 1994, it began a substantial push to eliminate CERCLA's retroactive liability scheme.\textsuperscript{243} House Republicans also reportedly plan amendments to RCRA to ensure that RCRA and CERCLA better dovetail.\textsuperscript{244}

\begin{itemize}
\item Use may be used to establish cleanup levels); \S 502(d)(4) (explaining the national risk protocol to be used in determining the degree of cleanup required); \S 503(b) (noting the variables to be weighed in selecting remedies).
\item In another provision, EPA proposed that "bona fide purchasers" who cooperate with the government be provided special protections from future liabilities associated with a previously contaminated site. \textit{Id.} \S 403(a)(5)(C). For a definition of bona fide purchaser, see \textit{id.} \S 605(e)(39).
\item \textit{Id.} \S 201 (providing state program referrals and authorizations); id. \S 301(a)(1) (voluntary response provisions with stated purpose and objective of "promoting and encouraging the... development and expansion of State voluntary [cleanup] response programs").
\item \textit{Id.} \S 301(c).
\item Id.
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Much as EPA's response to its residual authority under CERCLA and RCRA has been to avoid creating a voluntary cleanup approval program, EPA's 1994 statutory proposals are notable for their limited scope. Despite acknowledging the need to reduce uncertainty to encourage industrial reuse, EPA only proposed to give states the option of creating such a program. EPA nowhere creates a federal approval alternative. EPA thus continues to avoid involving itself in voluntary cleanup approvals. The recent amendment proposals also fail to mandate state creation of such programs, so the proposals, if ever enacted into law, are likely to leave some cleanup volunteers without a government process by which cleanup proposals can be reviewed and approved.

EPA's recent Brownfields administrative initiatives run counter to its avoidance of cleanup approvals. These initiatives do not, however, mandate any particular EPA action. The new prospective purchaser guidance and nonbinding "no further action" designations are the most substantive steps EPA has taken to encourage cleanup volunteers. The issuance of these new policies when EPA and CERCLA are under attack shows yet again the influence of the political environment on agency choices.

245. See Browner Statement, supra note 68 (stating that fear of Superfund liability "discourages investment in industrial areas").
246. See supra notes 139-145 and accompanying text (discussing EPA's Brownfields Action Agenda and additional incentives intended to encourage reuse of older industrial areas).
247. One might look at EPA's recent efforts as confirmation of the importance of political pressure. EPA has faced substantial criticism for its alleged contribution to abandonment of rustbelt industrial sites. See supra note 6 and accompanying text (discussing such criticism). The limited administrative initiatives to approve some voluntary cleanups, particularly the Brownfields Initiative and the increased provision of "prospective purchaser" consent decrees with finality, are best seen as part of an EPA effort to respond to criticism by Congress and regulated entities. Several EPA officials with whom the author spoke said EPA realized it "had to do better" as the Superfund reauthorization process commenced. Author Interviews, supra note 97.
248. See supra notes 144-145 and accompanying text (describing EPA procedures for deleting sites from the CERCLIS).
249. See supra notes 160, 170-179, 197-198, 208 and accompanying text (discussing importance of political framework and climate on agency choices).
2. Recent State Initiatives Provide an Optional Feedback Mechanism for Cleanup Volunteers

Given EPA's backlog of unassessed contaminated sites,\textsuperscript{250} the much larger number of contaminated industrial and waste disposal sites that are not on the NPL,\textsuperscript{251} and particularly the failure of 1993 and 1994 efforts to amend CERCLA,\textsuperscript{252} numerous states in the last few years have sought to encourage private voluntary cleanups by creating procedures for government approval of private cleanup plans. These states' schemes differ substantially in content and triggering mechanisms.\textsuperscript{253}

New Jersey, under the state's Industrial Site Recovery Act ("ISRA"),\textsuperscript{254} has instituted an administrative initiative under which it will review and provide "memoranda of agreement" to

\textsuperscript{250} See supra note 11 (discussing EPA's backlog of unassessed contaminated sites).

\textsuperscript{251} See supra note 27 and accompanying text (discussing contaminated sites not on the NPL).

\textsuperscript{252} See supra notes 235-244 and accompanying text (discussing the failure of recent efforts to amend CERCLA).

\textsuperscript{253} See infra notes 254-264 and accompanying text (discussing approval programs of specific states); Appendix A (summarizing state cleanup approval programs).

\textsuperscript{254} N.J.S.A. § 13:1K-6 to -11 (West Supp. 1995) (effective June 16, 1993). Under the ISRA, the owner or operator of an industrial facility must follow statutory procedure before transfer or closure. \textit{Id}. The owner or operator must notify the state of the impending action and must either seek approval of assessment and cleanups or deferral of cleanup until after transfer. \textit{Id}. The state verifies completion, and misrepresentation will void the agreement. Cleanup standards differ for residential and nonresidential uses. \textit{Id}. In New Jersey, the first statutory effort to encourage private cleanups of contaminated properties was the Environment Cleanup and Responsibility Act ("ECRA"). As initially structured, ECRA utilized a transactional trigger to compel private analysis of industrial sites and private commitment to remediate contamination. Under a broad definition of change of control or ownership of industrial real property, any such change triggered a disclosure and analysis obligation. The parties to such a transaction had to disclose their transaction, undertake an assessment of potential contamination that was reviewed and approved by New Jersey authorities, and ultimately commit, through an Administrative Consent Order ("ACO"), to remedy any contamination. Both the assessment process and the cleanup plan were reviewed and, after consultation and any necessary changes, approved by state authorities. Assessment and cleanup in accordance with approved plans terminated the liabilities of the parties to an ACO. See generally I. Leo Motiuk et al., \textit{New Jersey's Hazardous Site Remediation Program: The Year of Reform, in AVOIDING ENVIRONMENTAL LIABILITY 1993: RUNNING THE BUSINESS, STRUCTURING THE TRANSACTION, NEGOTIATING THE DEAL}, at 585 (PLI Corp. Law & Practice Course Handbook Series No. 832, 1993) (explaining ECRA and the 1993 reform, known as ISRA).

Despite ECRA's success in obtaining many commitments to cleanup contaminated industrial properties, the statute was criticized for deterring otherwise beneficial transactions and leading investors to avoid New Jersey real
private cleanup volunteers. Over 2000 volunteers have availed themselves of this approval process.\textsuperscript{255} Cleanup volunteers receive a "No Further Action" letter from the state when they complete a cleanup in accordance with their particular "memorandum of agreement."\textsuperscript{256} Developers pay state oversight costs, but in the event of a remedy failure or unexpected need for further work, a developer who did not cause the contamination has recourse to 50\% state funding of any additional cleanup costs.\textsuperscript{257}

By statute, Indiana in 1993 created a voluntary remediation program.\textsuperscript{258} Under this program, private cleanup proponents seek and receive government approval of cleanup plans. Cleanup plans must have "defined objective[s] and finite goal[s]."\textsuperscript{259} When cleanup is completed, the cleanup volunteer receives a post-cleanup "exoneration" in the form of a governor's covenant not to sue.\textsuperscript{260} Assuming the cleanup proponent fully disclosed all relevant conditions, this covenant will bar further state and private suits under Indiana hazardous waste laws.\textsuperscript{261} Although the statute does not explicitly resolve what happens in the event of a remedy failure, it appears that state authorities would either have to clean up contamination themselves or pursue other responsible parties who were not part of the Voluntary Remediation Agreement.

New York, Minnesota, and numerous other states are in the process of implementing administrative and statutory initia-

\textsuperscript{255} Telephone interview with Douglas Stewart, Bureau Chief of ISRA Program, New Jersey Department of Environmental Protection (Feb. 10, 1995) [hereinafter Stewart interview]. None of these sites have required multi-million dollar cleanups, but nothing in this new scheme precludes such a possibility. Id. As of the summer of 1995, approximately 3600 sites are in the program. See Appendix A, infra (summarizing state initiatives to address voluntary cleanups).

\textsuperscript{256} Stewart Interview, supra note 255.

\textsuperscript{257} Id. Because of New Jersey's enactment of ECRA, which required industrial purchasers or sellers to commit to cleanups of any contamination, purchasers of New Jersey industrial property between 1983 and 1993 are denied access to cost-sharing with the state for additional necessary cleanup costs. These volunteers can, however, still receive the limited protection and official guidance of a Memorandum of Agreement and a No Further Action letter. Id.

\textsuperscript{258} IND. CODE ANN. § 13-7-8.9 (Burns 1994) (effective July 1, 1993). Indiana received over two hundred cleanup inquiries and six actual proposals in the first three months following enactment of the statute. O'Reilly, supra note 12, at 64.

\textsuperscript{259} O'Reilly, supra note 12, at 57.

\textsuperscript{260} Id.

\textsuperscript{261} Id. at 58. Such a covenant does not bar private tort suits. Id. at 66.
tives (summarized in Appendix A) to encourage voluntary cleanups. These state schemes vary substantially in their scope and content.\textsuperscript{262} The majority of cleanups under state programs have occurred in the transactional context. While few state officials express desire for federal oversight of such programs, many concede that cleanup volunteers have been concerned with lingering potential federal liability.\textsuperscript{263} While state approvals cannot foreclose such liability, state officials assume that federal respect for federal-state comity and federal attention to only the most pressing risks will reduce the likelihood of federal intervention after state authorities review and approve voluntary cleanups.\textsuperscript{264}

These programs support the hypothesis of Part I: private parties will seek approval for voluntary cleanups where such approval will provide them with certainty and repose. The substantial response to these states' programs, especially in states offering substantial finality and repose, indicates pent-up demand for an approval process.\textsuperscript{265}

These recent state voluntary cleanup initiatives show a different dynamic at play at the state level than in federal efforts. State or local officials face many of the same difficulties and risks faced by federal officials who might review voluntary cleanup proposals. Scientific uncertainty coupled with possible government liability for cleanup failures make approval decisions inherently risky. State and local willingness to undertake such schemes, however, is rational given the particular incentives motivating state and local regulators, especially in states with an underutilized industrial infrastructure.

State and local regulators can provide substantial political and economic benefits to their polity by providing regulated entities with certainty and repose. Regulated entities desire such certainty and repose, and will prefer to site businesses in jurisdictions offering a more certain regulatory environment.\textsuperscript{266}

\textsuperscript{262} See Appendix A, infra (summarizing state cleanup approval programs).

\textsuperscript{263} Id.

\textsuperscript{264} O'Reilly, supra note 13; Stewart interview, supra note 255.

\textsuperscript{265} See supra notes 36-38, 254-255 and accompanying text (discussing number of responses to state procedures for approving private cleanup plans); Appendix A, infra (summarizing state initiatives to address voluntary cleanups).

\textsuperscript{266} Despite the preference for a certain political or legal environment, regulated entities' consideration of other variables may trump a decision to site a facility in the jurisdiction offering certainty regarding environmental obligations and liabilities. See Howard A. Stafford, \textit{Environmental Protection and Industrial Location}, 75 \textit{Annals Am. Geographers} 227 (1985) (finding, based on
State and local officials differ from their federal counterparts in one significant respect: the decision to site a facility on a Brownfield site in a particular state provides tangible benefits to that state in the form of increased tax revenues, increased employment, increased real property values and real property taxes, and a physically and environmentally more attractive setting for local residents and businesses. A federal official would be indifferent to such a siting decision, provided the business remained in the United States. Thus, state and local officials have positive incentives that apparently exceed the administrative costs and risks of such voluntary cleanup approval programs. It is unsurprising that Minnesota, Indiana, and New Jersey, states with substantial numbers of Brownfield sites, have led in creating comprehensive voluntary cleanup programs.

C. Federal Involvement Is Still Necessary Despite State Voluntary Cleanup Approval Initiatives

The question that remains is whether any federal involvement in voluntary contamination cleanup approvals is necessary. This section concludes that while state and local implementation of such programs is likely and should be harnessed to further the goal of contamination cleanups, political dynamics make lax cleanups a risk unless some federal oversight remains. Such federal oversight of state voluntary cleanup approvals enhances the likelihood that cleanup techniques and levels will be appropriate from a scientific and health perspective.

empirical survey, that "manufacturers are asking for clarity and fairness, not a license to pollute," but also concluding that while private entities consider environmental factors in siting decisions, traditional non-environmental factors such as markets, labor and materials remain predominant). Stafford also finds that while a general regulatory climate is considered by industry, site-specific environmental factors play a much more substantial rule in siting decisions. Id. at 233-34, 238; see also Ian King et al., Industrial Blackmail: Dynamic Tax Competition and Public Investment, 26 CANADIAN J. ECON. 590, 591 (1993) (modeling dynamics of site-specific interjurisdictional siting battles).

267. See generally NEW LIFE, supra note 12, at 41-49 (detailing successful efforts to finance the cleanup and development of environmentally damaged industrial sites).


269. That there is an objectively correct level of cleanup is, of course, open to debate. Professors Richard Revesz and Alvin Klevorick appear to question whether such a cleanup decision can ever be objectively correct, given the many
threat of both federal and state-mandated cleanups also would enhance the likelihood of cleanups and increase property values.

Over the last decade, scholars have debated and analyzed the merits of federal instead of state-led administration of environmental laws. The first wave of scholarship followed decades of lax private and state protection of the environment and concluded that federal protection was necessary, based on two primary justifications. The first was historical: states had done little, so federal activity was necessary to protect citizens and the environment. The more frequent rationale was that states provided lower levels of environmental protection than actually desired by a state's citizens because of interstate competition for business. This rationale for federal regulation is usually referred to as the "race-to-the-bottom" or "race-to-laxity" scenario. The federal government under this theory acts to fulfill states' true preferences by eliminating harmful competition.

Recently, in separate papers, Professors Richard Revesz and Alvin Kleverick challenge this scenario. Revesz shows that states forced to adopt federal standards where they would have

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271. GRAD, supra note 270, at 9-10 (noting the failure of grant-in-aid efforts to ensure state and local enforcement of environmental standards).

272. Stewart, supra note 270, at 1211-12, 1217-19 (detailing factors that may deter state and local governments from providing high environmental protection). Under this theory, if one state responded to local political pressure for a safer environment, mobile businesses would relocate to jurisdictions offering a less rigorous and less costly regulatory environment. Id. Through a process of regulatory competition, no state would protect its environment to the extent actually preferred in the absence of the interjurisdictional competition. Id.

chosen less protective standards will generally be forced to compensate by reducing other regulatory protections to remain competitive in attracting business.\textsuperscript{274} Revesz also argues that given different states' preferences for varying degrees of environmental protection, a uniform federal standard can lead some states to be worse off overall, considering all of their regulatory choices, than in the absence of a federal standard.\textsuperscript{275} Nevertheless, neither Revesz nor Klevorick disputes that a race to the bottom resulting in lowered standards of environmental protection sometimes occurs; instead, they argue against taking away states' power over their own regulatory priorities based on a race-to-the-bottom rationale.\textsuperscript{276}

Revesz and Klevorick, while questioning the validity of the race-to-the-bottom justification for federal regulation, leave unresolved whether different political dynamics at the state and federal level might nonetheless in particular contexts lead one to favor a federally imposed standard over state choice.\textsuperscript{277} This Article argues that such a comparison of state and federal political

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\textsuperscript{274} Revesz, \textit{supra} note 269, at 1226-27, 1245-46. Revesz does not, however, argue that a polity cannot remove an issue from interjurisdictional bargaining. Such a decision might cause ripple effects for other regulatory and tax choices, but that impact does not undercut the political option of a majority of national legislators imposing a federal rule on all states, provided such a choice is within the authority of the federal government. \textit{See United States v. Lopez, No. 93-1260, 1995 WL 238424} (U.S. Apr. 26, 1995) (striking down federal regulation of gun-free zones near schools on grounds of insufficient proof of an interstate commerce nexus).

\textsuperscript{275} \textit{Id.} at 1211, 1229-33. Revesz argues further that states competing for business would have to modify their mix of regulatory amenities if subjected to a uniform federal rule, and might have to sacrifice areas valued more by state citizens. \textit{Id.} at 1245-47.

\textsuperscript{276} Revesz argues that allowing interjurisdictional competition and state regulatory discretion "can be expected to produce an effective allocation of industrial activity among the states." \textit{Id.} at 1212. He concedes a race to the bottom will sometimes occur. \textit{Id.} at 1231-32. \textit{See} Klevorick, \textit{supra} note 269, at 7-12 (reviewing arguments regarding benefits and harms of uniform federal standards).

\textsuperscript{277} \textit{See} Revesz, \textit{supra} note 269, at 1223 (arguing that race-to-the-bottom arguments are distinct from "public choice" arguments that "political processes at the state level undervalue environmental benefits"). Professor Klevorick's statement of this point differs slightly, asserting that in the end, any justification for federal over state regulation must be rooted in an argument that there are "shortcomings in the internal political systems" of the competing jurisdictions. Klevorick, \textit{supra} note 269, at 15. He says such a justification requires one to examine the argument "for uniformity . . . at the level of the decisionmaking process. . . . If the process is flawed, if relevant information is not considered or if particular views are deliberately ignored, then an argument can be made that the government is intentionally tilting the playing field." \textit{Id.} at 13-14.
\end{footnotesize}
dynamics is essential to decide how to allocate implementation responsibilities for a CAP scheme. Given a national political goal of cleaning contaminated sites at PRP expense, legislators seeking to reach that goal must consider the particular preferences and incentives of local and federal officials in connection with contamination cleanups and siting decisions.

As shown above, state or local governments are more likely to create such programs because of localized benefits that do not accrue to federal regulators. Scholars of political dysfunction, however, have shown how interest group pressures exerted on officials by regulated entities can lead to decisions more likely to reflect not the "public good," but concentrated interest group desires. Industrial pollution sources or businesses making siting decisions involving contaminated sites have substantial incentives to participate politically, while the many citizens bearing widely dispersed costs of polluting activity or inadequate cleanups have far weaker incentives to act collectively and participate in the consent decree or administrative cleanup approval process. Those citizens' views, even if widely shared, may simply go unheard. At the federal level, some reason exists to believe that dispersed citizen voices will be heard. National environmental groups such as the Natural Resources Defense Council, the Environmental Defense Fund, and the Sierra Club Legal Defense Fund are most active at the federal level. To at least a limited extent, such groups may counteract political dys-

278. See Becker, supra note 157, at 375 (concluding that "groups can more readily obtain subsidies when they are small relative to the number of taxpayers").

279. See Mancur Olson, The Logic of Collective Action: Public Goods and The Theory of Groups 28-29 (1971) (arguing that small groups with common interests tend to more effectively achieve shared goals than large groups lacking a mechanism to coerce them to act collectively); James E. Krier, The Tragedy of the Commons, Part Two, 15 Harv. J.L. & Pub. Pol'y 325, 331 (1992) ("[G]roups interested in disrupting the environment generally have a comparative organizational or lobbying advantage over groups interested in preserving it."); Stewart, supra note 270, at 1213-14 (arguing that interests favoring economic development are usually better represented than those favoring environmental quality); William Fischel, Fiscal and Environmental Considerations in the Location of Firms in Suburban Communities 25-26 (1973) (unpublished Ph.D. thesis, Princeton University) (in developing empirical and modeling analysis of siting decisions, citing sources observing a substantial reduction in citizen interest in sources of pollution once surveyors move a few blocks from polluting source).

function by giving voice to citizens' widely but weakly held preferences for environmental protection and may counteract political dysfunction caused by unequal access to the political process.281

Lax approvals by local officials are also a risk because of the particular incentives of such officials. The environmental regulatory climate is a minor factor for industry decisionmakers comparing jurisdictions, with wage and location playing a much more significant role.282 When it comes to actual siting decisions, however, the regulatory or environmental risks a particular site poses are significant factors for industry. Even if industry may not actually make decisions based on environmental factors, local officials feel pressure to attract or at least not lose business to neighboring jurisdictions.283 While environmental protection is one of the values voters consider, low tax rates, sufficient tax revenues to satisfy the electorate's desire for government services and crime protection, and high levels of employment also remain important measures of political success.284 Local officials who fail to play what few cards they have to attract or retain industry do so at their political peril.

Low-cost contamination cleanups are a tempting card for such officials. This option is especially attractive because the possible risks of lax cleanups are difficult to prove and may only

281. See Revesz, supra note 269, at 1223-24 & nn.36-37 (noting that environmental groups may be more effective at the federal level); Stewart, supra note 270, at 1213-15 (noting the advantages for environmental groups that advocate on the national instead of the local level).


283. Been, supra note 273, at 512-14; King, supra note 266, at 590-91 (noting recent firm-specific incentive packages); Fischel, supra note 279, at 18-20; see also Thomas J. Lueck, Lower Budgets Don't Cut Flow of Tax Breaks; Businesses Get Millions to Stay in New York, N.Y. TIMES, July 5, 1995, at A1 (discussing the grant of substantial tax breaks to businesses that stay in New York despite the city's fiscal straits and substantial cuts in education and social services, but also describing other jurisdictions' dwindling enthusiasm for further tax breaks to attract business).

284. See Riley E. Dunlap & Rik Scarce, Trends: Environmental Problems and Protection, 55 PUB. OPINION Q. 651, 653, 668 (1991) (reporting 47% of respondents, with 13% percent undecided, would accept a higher rate of unemployment so industry could better protect the environment, but noting the importance of other traditional factors).
materialize years later, if ever. In contrast, the other main variable that can be manipulated by local officials, tax breaks for industry, will create a more immediately felt (although dispersed) burden when offset by tax increases. Federal officials would generally be indifferent to interjurisdictional competitive pressures.\textsuperscript{285}

An additional benefit of federal oversight is a simple reviewing or checking function. Even if state or local officials try to make appropriate cleanup decisions, additional federal review would reduce the chance of error going unremedied. From the volunteer's viewpoint, complete closure of potential liability from both state and federal governments would be reassuring and encourage voluntary cleanups.

These explanations for why federal political processes are less likely to dysfunction than state processes seem much like the traditional "race-to-the-bottom" scenario, but are in fact different. In the "race-to-the-bottom" scenario, states know their true political preferences, but interstate competition forces states to disregard them. The political dysfunction explanation instead focuses on the process by which officials ascertain political preferences and ultimately act on them. The skewing of local political choices caused by concentrated pressure on local officials by parties interested in a particular cleanup and threatening to go elsewhere is absent at the federal level. As noted above, the participation of national environmental groups at the federal level also increases the likelihood of voice being given to citizen concerns. The question at the federal level is more likely to be what level of cleanup is sufficiently protective of public health and the environment. Nevertheless, federal flexibility and deference to allow states some latitude to choose cleanup levels and methods is appropriate, given the different economic and environmental preferences of the various state and local governments.

To ensure adequately protective cleanups, threshold federal approval of state voluntary cleanup approval programs involving substantial cleanups should be required, with possible federal appellate review of challenged state cleanup decisions. In

\textsuperscript{285} Even at the federal level, the threat of location abroad remains a concern, especially after the recent enactment of the North American Free Trade Agreement. The number of relocation threats, however, are fewer at the federal level. State officials confront threats both of industrial migration abroad and to other jurisdictions within the United States.
addition, where states choose not to implement CAP schemes, the federal government should itself provide CAP approvals. 286

CONCLUSION

The current CERCLA and RCRA schemes fail to encourage voluntary cleanups of contaminated sites, thereby contributing to abandonment of industrial infrastructure and continued exposure to risks from contaminants. The explanation for this failure is found both in relevant statutory instructions and in bureaucratic preferences and incentives. Congress failed to anticipate the preferences and incentives of agency officials and of regulated entities and to modify the statutory schemes accordingly. Contrary to the common hypothesis that agencies will seize opportunities to expand, however, EPA resisted expanding its activities to provide guidance to cleanup volunteers. Other factors particular to the adjudicatory task of reviewing cleanup proposals overcame any possible general bureaucratic propensities to expand an agency's budget and regulatory domain.

Congress or EPA should create a CAP scheme to further statutory goals by encouraging voluntary cleanups. A CAP scheme would offer substantial finality and repose to cleanup volunteers, and would provide benefits to the government, regulated entities, and society as a whole. Such a scheme would also address jurisprudential objections to the current regulatory schemes. Administration of a CAP scheme should be offered to states, which have shown greater interest in providing such a service than has the federal government and which also most directly receive the benefits of industrial site cleanups. The federal government should remain involved by providing review of

286. One reader of an early draft of this Article posited that states might surrender CAP implementation if the federal government were willing to bear this obligation. Such surrender is rational if a state wished to avoid new administrative obligations. However, if states can avoid budgetary depletion through a fee system or charge for oversight costs, state agencies might seek programmatic expansion. See supra notes 160-208 and accompanying text (discussing budgetary expansion hypothesis but questioning the sufficiency of the hypothesis in light of other factors also considered by agency officials). Furthermore, under other environmental statutory schemes such as the Clean Air Act and RCRA, states have fought hard to retain implementation responsibilities. States generally avoid taking over contentious and politically risky "dredge and fill" decisions under the Clean Water Act. While state behavior is difficult to predict, as long as states have some latitude to implement a CAP scheme, with some deference given by EPA officials acting as appellate reviewers of disputed cleanup decisions, then states should still seek to retain CAP obligations. Legislation allowing states with approved CAP schemes to receive Superfund dollars would especially encourage state implementation of approval programs.
state CAP schemes, appellate review of disputed cleanup decisions, and an alternative federal approval process if a state declines to create such a program. The current federal regulatory schemes' broad liabilities have beneficial impacts, but the interminable nature of those liabilities deters voluntary contamination cleanups and violates jurisprudential notions that law should be discoverable, or at least offer those regulated the possibility of repose.
### Table 1

**Survey of State Voluntary Cleanup Programs**

<table>
<thead>
<tr>
<th>State</th>
<th>Title of program; date enacted</th>
<th>Statutory Basis; regulations</th>
<th># of sites</th>
<th>Application Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>Voluntary Cleanup Program; 1993</td>
<td>administratively created from existing law; no regs.</td>
<td>130, 45</td>
<td>none</td>
</tr>
<tr>
<td>Colorado</td>
<td>Voluntary Cleanup &amp; Redevelopment Program; July 1, 1994</td>
<td>COLO. REV. STAT. ANN. §§ 25-16-303 to 311 (West Supp. 1994); no regs.</td>
<td>17, 8</td>
<td>$2,000</td>
</tr>
<tr>
<td>Delaware</td>
<td>informal, formal program is forthcoming</td>
<td>S.B. 40 to amend DEL. CODE ANN. tit. 7, §§ 9103-9108 (1995)</td>
<td>13, 2</td>
<td>$5,000</td>
</tr>
<tr>
<td>Illinois</td>
<td>Pre-Notice Site Cleanup Program; 1989</td>
<td>ILL. ANN. STAT. ch. 415, § 5/22.2(m), (n) (Smith-Hurd Supp. 1995); forthcoming regs</td>
<td>500, 50</td>
<td>$5,000 or 1/2 costs⁶</td>
</tr>
<tr>
<td>Indiana</td>
<td>Voluntary Remediation Program; July, 1993</td>
<td>Ind. Code Ann. § 13-7-8.9 (Burns Supp. 1994); guidance documents</td>
<td>41, 1</td>
<td>$1,000</td>
</tr>
<tr>
<td>Iowa</td>
<td>informal program</td>
<td>IOWA CODE ANN. § 455E5(5) (West 1990); no regs</td>
<td>35, INA</td>
<td>no</td>
</tr>
<tr>
<td>Kansas</td>
<td>Voluntary Cleanup Program¹; Jan., 1995</td>
<td>KAN. STAT. ANN. § 65-3452a, § 65-3401 (1992); no regs</td>
<td>5, 0</td>
<td>$200</td>
</tr>
</tbody>
</table>

¹The information presented in Appendix A is based on research and interviews conducted by or directed under the supervision of the author with state officials during the summer of 1995.
<table>
<thead>
<tr>
<th>State</th>
<th>Title of program; date enacted</th>
<th>Statutory Basis; regulations</th>
<th># of sites$</th>
<th>Application Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maine</td>
<td>Voluntary Clean-up Program; June, 1993</td>
<td>ME. REV. STAT. ANN. tit. 38, § 343-E (West Supp. 1994); no regs</td>
<td>45, 23</td>
<td>$500</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Clean Sites Initiative; Oct., 1994</td>
<td>MASS. ANN. LAWS ch. 21E, § 3A(j) (Law Co-op Supp. 1995); no regs., more by policy</td>
<td>5-7, 3</td>
<td>$6,000</td>
</tr>
<tr>
<td>Michigan</td>
<td>does not have a defined, separate program Voluntary Investigation &amp; Cleanup Program; 1988</td>
<td>H.R. 4596, 88th Leg., Reg. Sess. (1995); no regs. MNN. STAT. ANN. §§ 115B.17(14), 115B.175 (West Supp. 1995); guidance documents</td>
<td>INA</td>
<td>no</td>
</tr>
<tr>
<td>Montana</td>
<td>Voluntary Cleanup &amp; Redevelopment Act; April, 1995</td>
<td>SB 0382 (1995 passed); no regs.</td>
<td>INA</td>
<td>no</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Remedial Action Plan Monitoring Program; Jan. 1, 1995</td>
<td>NEB. REV. STAT. § 81-15, 181-188 (1994); regs. not allowed</td>
<td>2, 0</td>
<td>$5,000</td>
</tr>
<tr>
<td>New York</td>
<td>Voluntary Cleanup Program; Oct., 1994</td>
<td>an administrative program, no statutory basis§ N.C. GEN. STAT. §§ 130A-310.8 to 310.9 (1992); regs-NC ADMIN CODE Title 15A, subchap. 13C, 0100-0300</td>
<td>8, 8</td>
<td>no</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Voluntary Cleanup Program; 1987</td>
<td></td>
<td>55-60, 2</td>
<td>not presently§</td>
</tr>
<tr>
<td>Ohio</td>
<td>Voluntary Action Program; 1994</td>
<td>OHIO REV. CODE ANN. § 3746.01-99 (Anderson Supp. 1995); forthcoming regs</td>
<td>INA, 1</td>
<td>no</td>
</tr>
<tr>
<td>Oregon</td>
<td>Voluntary Cleanup Program; 1990</td>
<td>OR. REV. STAT. § 465.325 (1992); no regs. TENN. CODE ANN. § 68-212-224 (Supp. 1994); forthcoming regs.</td>
<td>120, 23</td>
<td>$5,000</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Voluntary Cleanup Oversight &amp; Assistance Program; May, 1994</td>
<td></td>
<td>55, INA</td>
<td>$5,000</td>
</tr>
<tr>
<td>Texas</td>
<td>pilot program, formal program is effective on Sept. 1, 1995</td>
<td>citation not yet available; no regs. yet</td>
<td>104, INA</td>
<td>$1,000</td>
</tr>
<tr>
<td>Virginia</td>
<td>still being developed only a pilot program Independent Remedial Action Program; July, 1993</td>
<td>WASH. REV. CODE ANN. §§ 70.105D.030, 70.040(4) &amp; (5) (West Supp. 1995); regs-chap. 173-340 WAC (1990)</td>
<td>6, 0</td>
<td>$5000 or 1%</td>
</tr>
<tr>
<td>Washington</td>
<td>Land Recycling Program; May, 1994</td>
<td>WIS. STAT. ANN. § 144.765 (West 1994); no regs. yet</td>
<td>22-23, 0</td>
<td>$5,000§</td>
</tr>
<tr>
<td>State</td>
<td>Transactional setting</td>
<td>Usual type of contamination</td>
<td>Type of future use planned</td>
<td>Political impetus for voluntary program</td>
</tr>
<tr>
<td>------------</td>
<td>-----------------------</td>
<td>-----------------------------</td>
<td>-----------------------------</td>
<td>----------------------------------------</td>
</tr>
<tr>
<td>California</td>
<td>above 50%</td>
<td>variable</td>
<td>variable</td>
<td>state agency</td>
</tr>
<tr>
<td>California</td>
<td>frequently</td>
<td>INA</td>
<td>variable</td>
<td>INA</td>
</tr>
<tr>
<td>Colorado</td>
<td>majority</td>
<td>variable</td>
<td>recreational, retail</td>
<td>real estate community, lawyers</td>
</tr>
<tr>
<td>Delaware</td>
<td>majority</td>
<td>lead, petroleum</td>
<td>commercial/industrial</td>
<td>state agency</td>
</tr>
<tr>
<td>Illinois</td>
<td>frequently</td>
<td>cleaning solvents</td>
<td>variable-parking lot to nursery school</td>
<td>INA</td>
</tr>
<tr>
<td>Indiana</td>
<td>60-70%</td>
<td>TCE, metals, petroleum</td>
<td>continuing use-com/ind., strip malls</td>
<td>business and industry representatives</td>
</tr>
<tr>
<td>Iowa</td>
<td>minority</td>
<td>TCE, coal tar</td>
<td>continuing use</td>
<td>INA</td>
</tr>
<tr>
<td>Kansas</td>
<td>minority</td>
<td>metals, TPH, chlor. solvents</td>
<td>continuing use-industrial</td>
<td>state agency, business community</td>
</tr>
<tr>
<td>Maine</td>
<td>almost all</td>
<td>petroleum, coal tar, PERC</td>
<td>commercial/industrial</td>
<td>banking association, state agency</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>all</td>
<td>petroleum, chlor. solvents</td>
<td>continuing use</td>
<td>state agency, general consensus</td>
</tr>
<tr>
<td>Michigan</td>
<td>minority</td>
<td>variable</td>
<td>INA</td>
<td>lenders, business</td>
</tr>
<tr>
<td>State</td>
<td>Transaction Setting</td>
<td>Usual Type of Contamination</td>
<td>Type of Future Use Planned</td>
<td>Political Impetus for Voluntary Program</td>
</tr>
<tr>
<td>---------------</td>
<td>---------------------</td>
<td>---------------------------------------------</td>
<td>---------------------------------------------</td>
<td>----------------------------------------</td>
</tr>
<tr>
<td>Minnesota</td>
<td>majority</td>
<td>no LUST sites, dry cleaning solvents, lead, TPH, VOC's</td>
<td>continuing use-com./ind.</td>
<td>developers, lenders</td>
</tr>
<tr>
<td>Missouri</td>
<td>9 of 11</td>
<td>INA</td>
<td>variable</td>
<td>mining industry</td>
</tr>
<tr>
<td>Montana</td>
<td>minority</td>
<td>variable</td>
<td>residential commercial</td>
<td>INA</td>
</tr>
<tr>
<td>Nebraska</td>
<td>1 of 2</td>
<td>asbestos, CTC</td>
<td>industrial, residential</td>
<td>n.f.a. letter, BFP-limited liab.</td>
</tr>
<tr>
<td>New Jersey</td>
<td>majority</td>
<td>petroleum</td>
<td>INA</td>
<td>governor, industry</td>
</tr>
<tr>
<td>New York</td>
<td>majority</td>
<td>low level wastes</td>
<td>INA</td>
<td>industry</td>
</tr>
<tr>
<td>North Carolina</td>
<td>majority</td>
<td>chemicals, metals</td>
<td>residential, com./ind.</td>
<td>INA</td>
</tr>
<tr>
<td>Ohio</td>
<td>INA</td>
<td>INA</td>
<td>INA</td>
<td>governor, industry</td>
</tr>
<tr>
<td>Oregon</td>
<td>majority</td>
<td>industrial, retail, parks</td>
<td>INA</td>
<td>industry</td>
</tr>
<tr>
<td>Tennessee</td>
<td>difficult to determine majority</td>
<td>VOC's, TPH, PERC, TPH, lead, solvents, arsenic metals, solvents</td>
<td>continuing use-com./ind.</td>
<td>business community</td>
</tr>
<tr>
<td>Texas</td>
<td>majority</td>
<td>continuing use-com./ind., residential</td>
<td>state agency-saw other states' programs industry</td>
<td>state agency-saw other states' programs industry</td>
</tr>
<tr>
<td>Virginia</td>
<td>majority</td>
<td>continuing use-transportation-related</td>
<td>INA</td>
<td>state agency, lenders, real estate community</td>
</tr>
<tr>
<td>Washington</td>
<td>usually</td>
<td>petroleum, metals, VOC's, solvents</td>
<td>INA</td>
<td>municipalities</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>majority</td>
<td>petroleum</td>
<td>INA</td>
<td>municipalities</td>
</tr>
</tbody>
</table>

SUPERFUND INCENTIVES

1995
1. Only a pilot program.
2. Covenant-not-to-sue program began in October of 1994, voluntary program started a year earlier.
4. Voluntary Remediation Act of 1996, bill #46, to be introduced in the legislature by the Governor’s office.
5. The first number represents the sites presently in the program, while the second number identifies those sites that have been "resolved" (either cleaned up or found to require no clean up).
6. Whichever is less.
7. Volunteer must also pay $5000 “participation fee.”
8. North Carolina’s voluntary program is completely state-funded, but changes are being developed which will require that volunteers post financial assurances before clean up and then reimburse the state for its oversight costs.
9. Application fee is still tentative.
10. Volunteer must pay $5000 up front, state will provide refund if oversight costs less than $5000, but will require another $5000 once initial $5000 is used.
11. 2% of total remediation costs with $15,000 cap.
12. Includes refinancing transactions.
13. Future use planned for the site is a key factor in determining the level of cleanup, can involve use of deed restrictions.
14. State approval of cleanup is for specified land use only.
15. Municipalities pushed for voluntary program because they were frequently taking over contaminated property.
16. Program is dependent on work of licensed site professionals (LSPs). If LSP met reasonable standard of care and additional contamination were nevertheless later found, state could be liable.
17. Minnesota has a calibrated system of possible written assurances for volunteers, ranging from technical assistance approval letters with no liability protection to certificates of completion that provide full liability protection for non-responsible parties.
18. Reopeners required in context of subsequent new information, fraud, negligent conduct, or a new release.
19. In the event of a remedy failure or unexpected need for further work, a party who did not cause the contamination has recourse to 50% state funding of the additional cleanup costs.
20. Covenant-not-to-sue does not protect volunteer against liability for future contamination or errors in the cleanup. LSPs bear large burden of responsibility as in Massachusetts program.
21. New information and additional contamination reopeners.
22. New information reopener, n.f.a. letter does not resolve liability issues.
23. Superfund Memorandum of Agreement with regional EPA would involve EPA recognition of state clean up approvals. This recognition provides assurances to volunteers that the EPA will not become involved in state-approved sites unless there is an emergency threat to human health or the environment.
24. While advocating federal recognition of state voluntary programs, interviewed officials oppose any single, required federal program that would eliminate the present diversity of state programs.
25. Reopeners if scientific standards change, if there is a change in site use from that specified in the cleanup agreement, or in the context of new information, or remedy failure.
26. In Montana, however, voluntary cleanup sites have been minimally contaminated and thus federal involvement is unlikely.