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{ REPORT
109-616

BROWNFIELDS: WHAT WILL IT TAKE TO
TURN LOST OPPORTUNITIES INTO
AMERICA'S GAIN?

NINTH REPORT

BY THE

COMMITTEE ON GOVERNMENT REFORM

together with

MINORITY VIEWS



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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, DC, September 6, 2006.

Hon. J. DENNIS HASTERT,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: By direction of the Committee on Government Reform, I submit herewith the committee's ninth report to the 109th Congress. The committee's report is based on a study conducted by its Subcommittee on Federalism and the Census.

TOM DAVIS,
Chairman.

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SEPTEMBER 6, 2006.—Committed to the Committee of the Whole House on the State
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Mr. TOM DAVIS, from the Committee on Government Reform
submitted the following

NINTH REPORT

together with

MINORITY VIEWS

On July 20, 2006, the Committee on Government Reform approved and adopted a report entitled, "Brownfields: What Will it Take to Turn Lost Opportunities Into America's Gain?" The chairman was directed to transmit a copy to the Speaker of the House.

I. EXECUTIVE SUMMARY

There are approximately 450,000 to 1 million brownfields sites across the Nation. These sites are often located in urban areas and sit on valuable pieces of property that would, if redeveloped, spur community economic development with new jobs, shopping and living choices. The U.S. Environmental Protection Agency's [EPA] Brownfields Program was established as an independent program with dedicated appropriations in 2002 legislation to fund redevelopment of these contaminated sites.

The EPA program reports a significant number of sites assessed and remediated utilizing Federal grant dollars. Numerous States instituted incentive programs over recent years, which spurred further brownfield remediation and redevelopment within their borders. Brownfields remediation and redevelopment reduces community blight, safeguards the local environment, and spurs economic revitalization of the communities in which these properties exist. There remains, however, a daunting portion of the Nation's brownfields untouched.

Chaired by Representative Michael R. Turner, the Subcommittee on Federalism and the Census [the "Subcommittee"] held a series of hearings to determine: (1) the state of brownfields redevelopment

across the country; (2) the effect of the Federal and numerous State brownfields programs on remediation and redevelopment; (3) and what further actions Congress could take to encourage more aggressive remediation and redevelopment efforts. The Subcommittee held five hearings on the matter, four of which are discussed in depth below.¹

On April 5, 2005, the Subcommittee held its first hearing regarding brownfield redevelopment. The hearing, entitled *Lands of Lost Opportunity: What Can Be Done to Spur Redevelopment at America's Brownfield Sites?*, focused on determining what progress has been made under the EPA program and what can be done to spur further redevelopment efforts.

During its *Brownfields and the Fifty States: Are State Incentive Programs Capable of Solving America's Brownfields Problem?* hearing on September 13, 2005, the Subcommittee explored the various types of State incentive programs, how well they work, and whether these programs, in conjunction with current Federal efforts, are enough to address the Nation's brownfields.

The Subcommittee staged three field hearings to gather local perspectives on the same questions asked during the first hearing. On May 16, 2005, the Subcommittee held its first field hearing on the issue, entitled *The Ohio Experience: What Can Be Done to Spur Brownfield Redevelopment in America's Heartland?*, in Cleveland, OH. The Subcommittee held its second field hearing, entitled *The Challenge of Brownfields: What are the Problems and Solutions in Redeveloping Pennsylvania's Lehigh Valley Communities?*, on October 25, 2005 in Bethlehem, PA. On March, 13, 2006, the Subcommittee held its third field hearing in Bridgeport, CT, entitled *The Connecticut Experience: What Can be Done to Spur Brownfield Redevelopment in the New England Corridor?* During these hearings, the Subcommittee closely examined the condition of brownfields in the hosting States as well as the combined State, local, and private sector efforts to address the issue.

II. BACKGROUND

A. DEFINING THE PROBLEM

Brownfields are “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”² According to the U.S. Government Accountability Office [GAO], there are an estimated 450,000 to 1 million abandoned or underutilized brownfield sites across the Nation.³ Often these areas are located in urban areas and, but for the presence of hazardous substances, are valuable pieces of property. Brownfields range in size from an abandoned gas station to an abandoned factory. Despite the prime location of many brownfield sites, developers often choose “greenfields,” also called “greenspace,” for development projects because of liability fears and the significant additional project cost to redevelop brownfields. Brownfields are thus left un-

¹ Final transcript of the fifth and final hearing, held Mar. 13, 2006 in Bridgeport, CT, unavailable at time of print.

² Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Public Law No. 96-510, §101(39), 94 Stat. 2767 (codified as amended at 42 U.S.C. §9601(39) (2006)).

³ Government Accountability Office, *Brownfield Redevelopment*, Report No. GAO-05-94, at 1 (2004).

touched, exacerbating community blight and resulting in depressed property values and decreased tax revenues.

B. MISSED OPPORTUNITIES

Redevelopment of brownfield sites not only reduces urban sprawl and preserves open greenspace, it also often has a domino effect on the surrounding community and economy. As Representative Stephanie Tubbs Jones explained, brownfields “are unused properties that can serve as businesses, homes, education facilities—the possibilities are endless. A brownfield today can be the economic engine for a city tomorrow.”⁴

For every acre of brownfields that is redeveloped, 4.5 acres of greenspace is saved.⁵ For every dollar Federal, State, and local governments spend on brownfields programs, communities see a return of almost \$2.50 in private investment.⁶ Further, with the new businesses and living spaces created by brownfield redevelopment projects comes numerous jobs—during the cleanup, development, and post-development phases—as well as improved or new infrastructure and transportation options.

C. LEGISLATIVE HISTORY

1. *The Comprehensive Environmental Response, Compensation, and Liability Act of 1980*

The EPA first addressed brownfields administratively in 1995 under the Superfund Program created by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [CERCLA].⁷ Congress established the Superfund Program for the cleanup of the Nation’s worst hazardous waste sites.⁸ By 2000, 92 percent of the sites listed on the Superfund National Priorities List [NPL] were either undergoing cleanup, removed from the NPL because cleanup was complete, or were removed from the list because remediation goals were achieved.⁹ The focus of the hazardous waste debate therefore turned to less seriously contaminated sites, i.e., brownfields.

The purpose of the EPA’s administrative Brownfields Program was to address sites contaminated with hazardous waste but which did not pose a serious enough threat to public health or to the environment to qualify for Superfund assistance under CERCLA. Beginning in 1997, Congress officially recognized the program with earmarked funding within the annual Superfund appropriation.

⁴*The Ohio Experience: What Can Be Done to Spur Brownfield Redevelopment in America’s Heartland?* Before the Subcommittee on Federalism and the Census of the House Committee on Government Reform, 109th Cong. 10 (2005) [hereinafter *Ohio Brownfields hearing*] [statement of Representative Stephanie Tubbs Jones].

⁵See JONATHAN P. DEASON, GEORGE WILLIAM SHERK, AND GARY A. CARROL, ENVIRONMENTAL AND ENERGY MANAGEMENT PROGRAM, THE GEORGE WASHINGTON UNIVERSITY, PUBLIC POLICIES AND PRIVATE DECISIONS AFFECTING THE REDEVELOPMENT OF BROWNFIELDS: AN ANALYSIS OF CRITICAL FACTORS, RELATIVE WEIGHTS AND AREAL DIFFERENTIALS at 5.3 (September 2001) (visited June 15, 2006) <http://www.gwu.edu/~eem/Brownfields/project_report/report.htm>.

⁶See COUNCIL FOR URBAN ECONOMIC DEVELOPMENT, BROWNFIELDS REDEVELOPMENT: PERFORMANCE EVALUATION 2, 28 (1999).

⁷Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Public Law No. 96–510, 94 Stat. 2767 (codified as amended 42 U.S.C. 9601 et seq. (2006)).

⁸See Congressional Research Service, *Brownfields and Superfund Issues in the 108th Congress*, Order Code IB10114, at i (2005).

⁹See id. at 5.

2. *The Brownfields Revitalization and Environmental Restoration Act of 2001*

In 2001, Congress passed the Brownfields Revitalization and Environmental Restoration Act of 2001 [2002 Brownfields Act].^{10 11} The 2002 Brownfields Act established a formal brownfields program within EPA with a total annual authorization through fiscal year 2006 of \$250 million. Specifically, the 2002 Brownfields Act authorizes \$200 million for: (1) assessment grants to characterize, assess, and conduct planning at brownfields sites; (2) a remediation grant program providing direct cleanup grants and revolving loan funds [RLF]; and (3) funding for technical assistance, training, and research. Of that \$200 million, the 2002 Brownfields Act authorizes \$50 million (or 25 percent of the appropriation if the appropriation is less than \$200 million) for the assessment and cleanup of low-risk sites contaminated by petroleum products. The 2002 Brownfields Act authorizes an additional \$50 million for carrying out § 128 of CERCLA (providing assistance to States in establishing or enhancing their voluntary cleanup programs [VCPs]).

a. Liability Relief Under the 2002 Brownfields Act

In addition to authorizing a dedicated stream of funding for brownfields remediation, perhaps more importantly, the 2002 Brownfields Act also addressed liability issues, which are of pre-eminent concern for brownfields owners and developers. Under CERCLA, generators of hazardous substances, transporters who selected the disposal site, and past and present owners of a brownfield site can all be held liable for contamination. Superfund liability for cleanup and related costs could also extend to parties who may not have been responsible for the activities that caused the site contamination. CERCLA allows these “potentially responsible parties” [PRPs] to sue other parties for contribution to the cleanup costs, which may result in subjecting hundreds of parties to Superfund liability for a single site.

This vast scheme of liability was an enormous disincentive to purchase, cleanup, and redevelop brownfields. The 2002 Brownfields Act addressed this impediment by limiting liability for owners in certain situations.

First, the act clarified the CERCLA “innocent landowner” defense by requiring the EPA to issue regulations defining the “all appropriate inquiry” required for a purchaser to be considered an innocent landowner.^{12 13}

Second, the 2002 Brownfields Act forbid the Federal Government from intervening at sites being cleaned up under a State VCP except in specific circumstances. EPA describes these programs as permitting “volunteers or private parties to initiate the identification and cleanup of sites through the use of less extensive administrative procedures. In some cases, these private parties can obtain

¹⁰ Small Business Liability Relief and Brownfields Revitalization Act, Public Law No. 107–118, 115 Stat. 2356 (codified as amended 42 U.S.C. 9601 et seq. (2006)) [hereinafter *2002 Brownfields Act*].

¹¹ Congress passed the *2002 Brownfields Act* on December 20, 2001. President George W. Bush signed the bill into law on January 11, 2002.

¹² See 42 U.S.C. § 9601 (35)(B)(ii). CERCLA creates a defense against liability for a landowner who unknowingly purchased contaminated land so long as the purchaser made “all appropriate inquiry” prior to the transaction.

¹³ Standards and Practices for All Appropriate Inquiry, 40 C.F.R. pt. 312 (2005).

some relief from future [S]tate liability for past contamination.”¹⁴ The 2002 Brownfields Act prevents Federal enforcement intervention except where (1) the State requests assistance; (2) the EPA determines contamination has or will migrate across State lines or onto federally-owned or -controlled property; (3) the EPA determines that a release or threatened release may present an imminent and substantial endangerment to the public health or welfare or the environment; or (4) the EPA, after consulting with the State, determines that newly discovered information, not previously known by the State, requires further remediation to protect public health, public welfare, or the environment.¹⁵

Finally, liability is limited for owners of land that is contaminated by adjoining property as well as for prospective purchasers of known contaminated property.¹⁶

b. Appropriations Under the 2002 Brownfields Act

While Congress authorized \$250 million per year for the Brownfields Program for fiscal years 2002 to 2006, it has yet to appropriate that level of funding. Overall, Congress appropriated the program only \$167.7 million in fiscal year 2003, \$171 million in fiscal year 2004, \$165 million in fiscal year 2005, and \$165 million in fiscal year 2006. The appropriation for fiscal year 2007 has yet to be enacted, but the House passed legislation on May 18, 2006 appropriating just \$163.2 million for the fiscal year.¹⁷ As the chart below details, in each of these fiscal years, Congress appropriated the full \$50 million for carrying out § 128 of CERCLA, relating to assistance to States for their VCPs, and appropriated only between \$115 million and \$121 million of the authorized \$200 million for carrying out § 104(k) of CERCLA, pertaining to brownfields revitalization funding.

¹⁴ U.S. Environmental Protection Agency, *EPA Issues Final Draft State Voluntary Cleanup Guidance* (Aug. 8, 1997) (last modified Mar. 14, 2006) <<http://www.epa.gov/swerosps/bf/html-doc/prepavcp.htm>>.

¹⁵ See 42 U.S.C. § 9628 (b)(1)(B).

¹⁶ See 42 U.S.C. § 9607(q), (r)(1).

¹⁷ Making appropriations for the Department of the Interior, environment, and related agencies for the fiscal year ending September 30, 2007, and for other purposes, H.R. 5386, 109th Cong. Title II.

Table. Brownfields Program Authorization versus Brownfields Program Appropriations						
	Amounts authorized in the Small Business Liability Relief and Brownfields Revitalization Act P.L. 107-118	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
		P.L. 108-7 ^b	P.L. 108-199 ^c	P.L. 108-447 ^d	P.L. 109-54 ^e	H.R. 5386 ^f
(Amounts shown below are as appropriated and do not reflect mandatory rescissions of the applicable year.)						
Brownfields Revitalization Funding ^g (for carrying out CERCLA § 104(k) (42 U.S.C. § 9604(k)))	\$200,000,000 ^a	\$90,500,000 (STAG) + \$27,200,000 (EPM) (H.R. Conf. Rep. No. 108-10)	\$93,500,000 (STAG) + \$27,500,000 (EPM) (H.R. Conf. Rep. No. 108-401)	\$90,000,000 (STAG) + \$25,000,000 (EPM) (H.R. Conf. Rep. No. 108-792)	\$90,000,000 (STAG) + \$25,000,000 (EPM) (H.R. Conf. Rep. No. 109-188)	\$89,100,000 (STAG) + \$24,637,000 (EPM) (H.R. Rep. No. 109-465)
Assistance to States for State Response Programs (for carrying out CERCLA § 128 (42 U.S.C. § 9628))	\$50,000,000	\$50,000,000	\$50,000,000	\$50,000,000	\$50,000,000	\$49,500,000
Total Program Funding^h	\$250,000,000	\$167,700,000	\$171,000,000	\$165,000,000	\$165,000,000	\$163,237,000

^a Of the \$200,000,000 authorized for carrying out CERCLA §104(k) (42 U.S.C. § 9604(k)), 25 percent must be used for site characterization, assessment, and remediation of facilities contaminated by petroleum or petroleum products.

^b FY2003 amounts shown do not reflect the mandatory 0.65 percent across-the-board rescission as required by P.L. 108-7.

^c FY2004 amounts shown do not reflect the mandatory 0.59 percent across-the-board rescission as required by P.L. 108-199.

^d FY2005 amounts shown do not reflect the mandatory 0.80 percent across-the-board rescission as required by P.L. 108-447.

^e FY2006 amounts shown do not reflect the mandatory 0.476 percent across-the-board rescission as required by P.L. 109-54 nor the 1.0 percent government-wide across-the-board rescission required by P.L. 109-148.

^f FY2007 amounts shown are as agreed to by the House on May 18, 2006. See H.R. 5386, 109th Cong. (2006).

^g Brownfields funding for carrying out § 104(k) is appropriated in two separate accounts: State and Territorial Assistance Grants (STAG) and Environmental Programs and Management (EPM).

^h Total program funding, including EPM funds, cannot exceed the overall \$250,000,000 authorization in P.L. 107-118.

D. THE EPA BROWNFIELDS PROGRAM

Through the Brownfields Program, EPA seeks to change its role from “regulatory hammer” to an enabler of economic development and environmental protection. The program currently has over 500 cities enrolled in the program, focusing on four main themes: protecting the environment, promoting partnerships, strengthening the marketplace, and sustaining reuse of redeveloped brownfields.

Between the administrative inception of the EPA’s Brownfields Program in 1995 and the enactment of the Brownfields Act in early 2002 (the act passed both legislative chambers in late 2001 but was signed by the President in January 2002), EPA awarded 437 assessment grants and 143 grants for establishing revolving loan funds to finance cleanups.¹⁸ From fiscal year 2003 to fiscal year 2006, after enactment of the 2002 Brownfields Act and the formal creation of the Brownfields Program, the EPA selected 628 assessment grants, 363 cleanup grants, 71 revolving loan fund grants, and 49 job training grants for a total of more than 1,100 grants.^{19 20}

Overall, the Brownfields Program, since its administrative inception in 1995, has touched 50 States and 40 Tribes.²¹ Further, the program has leveraged over \$8 billion in private investment for cleanup and redevelopment costs, supported assessments at over 8,300 properties, and created more than 37,500 jobs.²²

The EPA’s Brownfields Program does not exist alone, however. EPA works with 23 other Federal agencies for which redevelopment is part of their mission. Further, every State has a variation of a cleanup program—a VCP. The EPA “foster[s] more effective and efficient working relationships” with its State partners and encourages the cleanup of sites under VCPs through the use of non-binding, formal Memoranda of Agreement [MOAs].²³

¹⁸Federal Grants Wire, *Brownfields Assessment and Cleanup Cooperative Agreements (66.818)* (visited June 15, 2006) <http://www.federalgrantswire.com/brownfields_assessment_and_cleanup_cooperative_agreements.html>.

¹⁹See U.S. Environmental Protection Agency, *EPA Announces \$73.1 Million in National Brownfields Grants in 37 States and Seven Tribal Communities* (June 20, 2003) (last modified Mar. 14, 2006) <<http://www.epa.gov/brownfields/news/pr062003.htm>>; U.S. Environmental Protection Agency, *42 States, Puerto Rico, Five Tribes Share Record \$75.4 Million in Brownfields Grants* (June 15, 2004) (last modified Aug. 2, 2005) <<http://yosemite.epa.gov/opa/advpress.nsf/0/09DA59161288B3DD85256EB4004894D6?OpenDocument>>; U.S. Environmental Protection Agency, *75.9 Million in Brownfield Grants Announced* (May 10, 2005) (last modified May 20, 2006) <<http://www.epa.gov/brownfields/news/pr051005.htm>>; U.S. Environmental Protection Agency, *\$70 Million in Grants Brings Blighted Property Back to Life* (May 12, 2006) (last modified May 17, 2006) <http://yosemite.epa.gov/opa/advpress.nsf/names/hq_2006-5-12_brownsfield>.

²⁰See U.S. Environmental Protection Agency, *EPA Awards \$2 Million to Seven States for New Brownfields Job Training Grants in Ten Communities* (May 16, 2003) (last modified Mar. 14, 2006) <<http://www.epa.gov/brownfields/html-doc/pr051603.htm>>; U.S. Environmental Protection Agency, *42 States, Puerto Rico, Five Tribes Share Record \$75.4 Million in Brownfields Grants* (June 15, 2004) (last modified Aug. 2, 2005) <<http://yosemite.epa.gov/opa/advpress.nsf/0/09DA59161288B3DD85256EB4004894D6?OpenDocument>>; U.S. Environmental Protection Agency, *75.9 Million in Brownfield Grants Announced* (May 10, 2005) (last modified May 20, 2006) <<http://www.epa.gov/brownfields/news/pr051005.htm>>; U.S. Environmental Protection Agency, *EPA Announces \$2 Million in Brownfields Job Training Grants* (Dec. 22, 2005) (last modified Dec. 22, 2005) <<http://yosemite.epa.gov/opa/advpress.nsf/0/354601A5988960E0852570DF0065D4D7?OpenDocument>>.

²¹See Office of Brownfields Cleanup and Redevelopment (OBCR), *EPA’s Brownfields Program*, at 5 (March 2005) (on file).

²²See U.S. Environmental Protection Agency, *\$70 Million in Grants Brings Blighted Property Back to Life* (May 12, 2006) (last modified May 17, 2006) <http://yosemite.epa.gov/opa/advpress.nsf/names/hq_2006-5-12_brownsfield>.

²³U.S. Environmental Protection Agency, *State Voluntary Cleanup Programs* (last modified Mar. 23, 2006) <<http://www.epa.gov/compliance/cleanup/redevelop/state.html>>.

According to EPA, “Voluntary cleanup programs . . . are typically the State authority to address brownfields.”²⁴ These programs are vital to cleanup efforts, as evidenced by the estimated 53,000 sites currently enrolled in VCPs and the estimated 48,000 sites that have undergone remediation efforts in accordance with a VCP.²⁵ A MOA links EPA’s cleanup and enforcement efforts to its State partners’ efforts via a VCP. “Specifically, MOAs define EPA and [S]tate roles and responsibilities and include a general statement of EPA intent regarding certain sites cleaned up under the oversight of a VCP.”²⁶ Some MOAs also address sites subject to liability under the Resource Conservation and Recovery Act [RCRA] while some MOAs address sites undergoing cleanups under multiple EPA programs in accordance with EPA’s One Cleanup Program.^{27 28}

E. GAO REPORT

At the request of the Government Reform Committee Chairman Tom Davis and now Subcommittee Chairman Michael R. Turner, the Government Accountability Office [GAO] reviewed the EPA’s Brownfields Program and the general state of brownfields redevelopment across the Nation. GAO issued its report in December 2004.²⁹ Specifically, the report focused on (1) stakeholder views of the EPA’s contribution to brownfields cleanup and redevelopment; (2) EPA methodology of measuring program accomplishments; and (3) stakeholder views on how to improve or complement the EPA Brownfields Program.³⁰ GAO summarized its findings:

Stakeholders reported that EPA’s Brownfields Program provides an important contribution to site cleanup and redevelopment efforts by funding activities that might not otherwise occur. EPA grants typically support the initial stages of brownfield redevelopment and are important in that they fund activities and address sites—such as those with more complex cleanup requirements, less desirable locations, or liability or ownership issues—that private lenders and other government programs often do not, according to stakeholders. EPA’s site assessment grants provide recipients with seed money for identifying contamination and estimating cleanup costs, while the agency’s revolving loan fund grants provide funding for cleanup activities.

²⁴ *Id.*

²⁵ See *The Reauthorization of the Brownfields Program—Successes and Future Challenges* Hearing before the Subcommittee on Water Resources and the Environment of the House Committee on Transportation and Infrastructure, 109th Cong. (June 8, 2006) (visited June 13, 2006) <<http://www.house.gov/transportation/water/06-06-08/Bodine.pdf>> (statement of Susan Parker Bodine, Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency).

²⁶ U.S. Environmental Protection Agency, *State Voluntary Cleanup Programs* (last modified Mar. 23, 2006) <<http://www.epa.gov/compliance/cleanup/redevelop/state.html>>.

²⁷ Resource Conservation and Recovery Act of 1976, Public Law No. 94-580, 90 Stat. 2795 (codified as amended 42 U.S.C. § 6901 et seq. (2006)).

²⁸ See *id.* See also U.S. Environmental Protection Agency, *One Cleanup Program* (last modified Apr. 18, 2006) <<http://epa.gov/oswer/onecleanupprogram/index.htm>>.

²⁹ See U.S. Government Accountability Office, *BROWNFIELD REDEVELOPMENT Stakeholders Report That EPA’s Program Helps to Redevelop Sites, but Additional Measures Could Complement Agency Efforts* GAO-05-94 (November 2004) [hereinafter *GAO Report*].

³⁰ See *GAO Report* at page 4. See also *Lands of Lost Opportunity: What Can Be Done to Spur Redevelopment at America’s Brownfield Sites?* Before the Subcommittee on Federalism and the Census of the House Committee on Government Reform, 109th Cong. 23 (2005) [hereinafter *Brownfield Overview hearing*] (statement of John Stephenson, Director, Natural Resources and Environment, U.S. Government Accountability Office).

However, EPA is often one of several funding sources for brownfield cleanup and redevelopment. All of the grant recipients we interviewed used EPA grants in conjunction with funding from [S]tate, local, and/or other [F]ederal sources to address brownfield sites. . . . [O]fficials in all 10 of the [S]tates we contacted reported that EPA assistance has been crucial to establishing and expanding the scope of their voluntary cleanup programs. These officials said that without EPA's grants, their voluntary cleanup programs would not have had the resources to undertake activities such as compiling [S]tate inventories of brownfield sites, performing limited brownfield site assessments, and developing needed guidance and information for program participants.

The performance measures EPA has used to date have provided information on accomplishments in some but not all key areas of the Brownfields Program, thereby limiting the agency's—and the Congress'—ability to determine the extent to which the program is achieving its goals. First, EPA's current brownfield performance measures do not fully address the program's central objectives. While EPA has reported to the Congress on the cumulative sites assessed, jobs generated, and cleanup and redevelopment funds leveraged by the program, the agency has not begun reporting data on grant recipients' activities to clean up and redevelop properties, which is one of its primary stated objectives. Second, EPA does not collect or report data on the assistance it provides to [S]tate voluntary cleanup programs. Although this is not one of the program's strategic objectives, these activities are a significant part of EPA's brownfield efforts, accounting for about one-third of the total program funds in each of fiscal years 2003 and 2004. Third, although EPA's overall mission is to protect human health and the environment, the agency has not yet developed measures to determine the extent to which the Brownfields Program helps reduce environmental risks. Acknowledging these limitations, in fiscal year 2004, EPA began collecting additional information—such as the number of acres ready to be reused—which agency officials believe will allow them to develop additional measures to gauge the program's achievements. Similarly, EPA is developing performance measures for voluntary cleanup programs, but the agency has not yet proposed that it include such measures in its performance reports. We are recommending that EPA continue its efforts to develop additional measures to gauge program achievements—especially those addressing the program's environmental and [S]tate voluntary cleanup aspects—and incorporate them into annual performance measures that are reported to the Congress.

Stakeholders identified three potential options for improving or complementing EPA's Brownfields Program. First, they suggested eliminating the provision in the Brownfields Act that, in effect, makes landowners who

purchased a brownfield site prior to January 2002 ineligible for EPA grant funding. While the Consolidated Appropriations Act for Fiscal Year 2004 temporarily suspended the eligibility date for that fiscal year, stakeholders asserted that the clause continues to discourage brownfield redevelopment by limiting program eligibility. Second, stakeholders suggested changes to address the underutilization of revolving loan funds. As of November 2004, grant recipients had loaned out less than \$29 million (about 17 percent) of the \$168 million in revolving loan fund grants awarded by EPA. According to stakeholders, the stringent technical and administrative requirements to establish a revolving loan fund have discouraged grant recipients from using the funds. While EPA officials maintain that provisions in the Brownfields Act eased administrative requirements, stakeholders believed that technical requirements continue to be the primary impediment to making loans. Additionally, stakeholder comments indicated that EPA could achieve greater results by giving priority to applicants with proven administrative expertise or to coalitions of agencies that could consolidate administrative functions and thereby produce economies of scale. Third, stakeholders believed that a [F]ederal tax credit, which would allow developers to offset a portion of their [F]ederal income tax with their remediation expenditures, could complement EPA's program by attracting developers to brownfield sites on a broader national basis.^{31 32}

The findings of the GAO report are discussed in further detail below.

III. HEARINGS

A. HEARING ON FEDERAL BROWNFIELD REDEVELOPMENT PROGRAMS AND THE STATUS OF BROWNFIELDS REDEVELOPMENT, APRIL 25, 2005

On April 25, 2005, the Subcommittee began its oversight of Federal brownfields redevelopment efforts. During the *Lands of Lost Opportunity: What Can Be Done to Spur Redevelopment at America's Brownfield Sites?* hearing, the Subcommittee heard from two panels of witnesses. On the Federal panel were Thomas Dunne, Deputy Assistant Administrator in the Office of Solid Waste and Emergency Response of the U.S. EPA; and John Stephenson, Director of the Natural Resources and Environment office within GAO. The Subcommittee also received testimony from the stakeholder community represented by the Honorable Don Plusquellic, mayor of the city of Akron, OH, and president of the U.S. Conference of Mayors; James E. Maurin, chairman of the International Council of Shopping Centers and board member of the Real Estate Roundtable; Jonathan Philips, senior director of Cherokee Investment

³¹*Id.* at 4–6 (citations omitted).

³²Section 1956 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users nullified the provision defining a bona fide prospective purchaser as a person that acquired ownership of land after the January 11, 2002 enactment date of the 2002 Brownfields Act. Acquisition date is no longer a factor in landowner eligibility for Brownfields Program grant funding. See Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law No. 109–59, § 1956, 119 Stat. 1144, 1515 (2005).

Partners, LLC; and Douglas L. Steidl, president of the American Institute of Architects.

At the center of the hearing were the results of GAO's report on the EPA Brownfields Program and the general state of brownfield redevelopment. The Subcommittee also explored ways of spurring further redevelopment outside of current Federal efforts.

EPA's Thomas Dunne launched the hearing with a description of the agency's multi-faceted Brownfields Program:

Assessment grants provide funding to inventory, characterize, assess, conduct planning and community involvement related to brownfields. Environmental site assessments provide the information that communities and property owners need to move forward with reuse. . . . Over the years, EPA has awarded hundreds of assessment grants, generally \$200,000 each, to communities large and small. The Brownfields Law expanded the eligibility to new entities such as redevelopment authorities and allowed additional assessment-related activities such as planning to be done by grant recipients. Over the past two years under the new law, EPA has awarded 270 assessment grants for \$67.9 million.

In addition, EPA has the authority to provide Targeted Brownfields Assessments. These single-property assessments are designed to help communities on a more direct basis, especially those lacking EPA assessment grants. EPA provided \$6.6 million for Targeted Brownfields Assessment in fiscal years 2003 and 2004.

Under its new authority, EPA may now provide direct cleanup grants of up to \$200,000 per site to public sector and non-profit property owners. In the past two years, EPA has awarded 143 cleanup grants for \$25.5 million. . . .

The Brownfields Program also supports property cleanup by providing grants to capitalize cleanup revolving loan funds. The Brownfields Revolving Loan Fund grants provide [S]tate and local governments with capital to make sub-grants or low or no interest loans to finance brownfields cleanup. Over the past two years, EPA has awarded 43 revolving loan fund grants for \$47.3 million.³³

In addition to assessment and cleanup grants, EPA also awards grants for brownfields job training, research, and technical assistance.³⁴ These grant dollars have "result[ed] in the placement of more than 1400 individuals with an average wage of \$13 an hour," Dunne reported.³⁵

³³ *Brownfield Overview hearing* at 10–11 (statement of Thomas Dunne, Deputy Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency).

³⁴ *See id.* at 12.

³⁵ *Id.*

In total, “EPA has awarded more than 480 brownfields grants in both fiscal year 2003 and fiscal year 2004 totaling more than \$145 million,” Dunne testified.^{36 37}

According to stakeholders, these funds, although generally not directly involved in redevelopment activities, “provide[] an important contribution to site cleanup and redevelopment by funding activities that might not otherwise occur,” testified John Stephenson.³⁸ Stakeholders believe these Federal dollars are important because they support the initial stages of remediation, providing “seed money for identifying contamination and estimating cleanup costs, while its revolving loan fund grants support cleanup activities.”³⁹ Additionally, Stephenson reported, EPA dollars often fund remediation activities of sites “with more complex cleanup requirements, less desirable locations, or liability or ownership issues—[sites] that private lenders and others often do not [underwrite.]”⁴⁰ State officials also emphasized the vital role EPA funds play in establishing or expanding State voluntary cleanup programs. “[W]ithout EPA’s grants, [State] voluntary cleanup programs would not have had the resources to undertake activities such as compiling [S]tate inventories of brownfield sites and performing site assessments,” Stephenson related.⁴¹

Despite the perceived success of the Brownfields Program and the positive remarks from the stakeholder community, GAO was unable to measure the actual impact of EPA funding for two reasons. First, GAO found that “the impact of EPA’s funding is difficult to isolate because it is often combined with funds from other sources.”⁴² Second, GAO determined EPA’s performance measures for the Brownfields Program are inadequate, limiting both EPA’s and Congress’ ability to gauge progress toward the major goals of the program.⁴³ Stephenson testified, “[W]hile EPA has reported the cumulative number of sites assessed, jobs generated, and amounts of cleanup and redevelopment funds leveraged by the program, the agency has not begun reporting data on grant recipients’ activities to clean up and redevelop properties—one of its primary stated objectives.”⁴⁴

³⁶*Id.* at 10.

³⁷Brownfields Job Training Grants are designed to ensure economically distressed communities benefit both from the environmental and economic development aspects of redevelopment projects. The EPA’s Brownfield Job Training Grants “address the issue of providing environmental employment and training for residents in communities impacted by Brownfields. EPA’s Brownfields Program is an organized commitment to help communities revitalize Brownfields properties both environmentally and economically, mitigate potential health risks, and restore economic vitality to areas where Brownfields exist.” U.S. Environmental Protection Agency, *Brownfields Job Training Pilots/Grants* (last modified Mar. 14, 2006) <<http://www.epa.gov/brownfields/job.htm%23abt>>.

Brownfields Job Training Grants are also designed to ensure an adequate workforce of trained environmental professionals exists. “EPA believes that workforce development and job training are the critical links between environmental cleanup and safe and sustainable community redevelopment. These efforts help to guarantee that brownfields cleanup and redevelopment have the trained workforce needed to revitalize contaminated properties, and that local community members have an opportunity to compete in the economic mainstream.” U.S. Environmental Protection Agency, *Workforce Development Fact Sheet* (last modified Mar. 14, 2006) <<http://www.epa.gov/brownfields/html-doc/wrkfrc2.htm>>.

³⁸*Brownfield Overview hearing* at 25 (statement of John Stephenson, Director of the Natural Resources and Environment, U.S. Government Accountability Office).

³⁹*Id.* at 26.

⁴⁰*Id.* at 25.

⁴¹*Id.* at 26.

⁴²*Id.*

⁴³*See id.*

⁴⁴*Id.*

Additionally, although it is not one of the primary objectives of the Brownfields Program, assistance to State VCPs represents approximately one-third of the program's fund expenditures. However, "EPA does not collect data on its assistance to [S]tate voluntary cleanup programs, for such activities as compiling inventories of brownfield sites, performing site assessments, and developing guidance for program participants," Stephenson reported.⁴⁵

Finally, GAO noted, "although EPA's overall mission is to protect human health and the environment, the agency has not yet developed measures to determine the extent to which the Brownfields Program helps reduce environmental risks."⁴⁶

In addition to describing the successes of the Brownfields Program, GAO reported that numerous stakeholders suggested a number of improvements or complements to the EPA program. Interviewees covered the range of possible stakeholders, from site assessment grantees and revolving loan recipients to developers, attorneys, nonprofit organizations, and State and local government officials.⁴⁷ GAO identified the three primary stakeholder suggestions: (1) eliminate the 2002 Brownfields Act provision making landowners who acquired a brownfield site prior to January 11, 2002 ineligible for Brownfield Program grant funds; (2) modify the RLF grant program to encourage greater program utilization by addressing the "stringent technical and administrative requirements to establish a revolving loan" and by "giving priority to applicants with proven administrative expertise or to coalitions of agencies that could consolidate administrative functions associated with establishing and managing a revolving loan fund and thereby produce economies of scale." and (3) complement the Brownfields Program by encouraging private investment through a Federal tax credit for remediation expenses.⁴⁸

According to GAO, stakeholders suggesting elimination of the Brownfields Program's eligibility date provisions argue that doing so would expand the impact of the program on redevelopment efforts, enabling those who purchased land prior to 2002 to obtain funds for remediation and redevelopment.⁴⁹ While Congress temporarily suspended this provision in the fiscal year 2004, fiscal year 2005, and fiscal year 2006 appropriations bills, stakeholders contend the clause continues to discourage redevelopment.⁵⁰ Stakeholders specifically cited the "many local governments that were actively addressing brownfields by acquiring these sites before the law was enacted [and now] have been penalized by the act's eligibility date."⁵¹ EPA and other organizations reported to GAO during its investigation that a number of brownfields grant applica-

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷*See id.* at 25.

⁴⁸*Id.* at 26.

⁴⁹*See id.* at 35.

⁵⁰*See id.* *See also* Making appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies for the fiscal year ending September 30, 2004, and for other purposes, Public Law No. 108-199, Title III, 118 Stat. 3, 408 (2004); Making appropriations for foreign operations, export financing, and related programs for the fiscal year ending September 30, 2005, and for other purposes, Public Law No. 108-447, Title III, 118 Stat. 2809, 3332 (2004); Making appropriations for the Department of the Interior, environment, and related agencies for the fiscal year ending September 30, 2006, and for other purposes, Public Law No. 109-54, Title II, 119 Stat. 499, 531 (2005).

⁵¹*Id.*

tions were denied in 2003 because of this eligibility restriction while numerous other applications were not submitted at all.⁵²

In 2005, Congress nullified the eligibility date provision in the 2002 Brownfields Act in the fiscal year 2006 reauthorization of surface transportation programs.⁵³

Nearly half of the stakeholders GAO interviewed addressed the issue of underutilization of RLF grants.⁵⁴ The 2002 Brownfields Act authorized grants to eligible units of government in the amount of \$1 million per entity.⁵⁵ Congress intended those grant funds “be used for capitalization of revolving loan funds;” funds which are then loaned to additional eligible entities as “assistance for the remediation of brownfield sites[.]”⁵⁶ Grant recipients may also provide assistance in the form of subgrants using RLF grant funds to eligible entities.⁵⁷ EPA guidance limits the amount of RLF funds issued as subgrants to 40 percent of the RLF grant award.⁵⁸

GAO’s investigation revealed that only 47 of 154 grantees issued loans for a total of 67 brownfields projects.⁵⁹ Grant recipients reported that a number of technical and administrative requirements play a large role in the underutilization of funds. “Managing a revolving loan fund requires a government or nonprofit entity to perform many of the functions of a commercial lending institution, including establishing interest rates and collateral requirements; processing and approving loans; and collecting loan payments .Y.Y. staff time and expertise are key to making these loans.”⁶⁰ Further, some grant recipients informed GAO that “EPA’s grants were not large enough to justify the time and effort required to establish a fund because it is frequently depleted after one or two loans are made.”⁶¹ Stakeholders suggest greater efficiency would result if EPA gave “priority to applicants with proven expertise or to coalitions of agencies that can consolidate administrative functions and thereby produce economies of scale.”⁶²

In addition to improvements to the EPA Brownfields Program, stakeholders also suggested to GAO that more financial incentives are necessary to attract private investment in redevelopment projects. A tax credit “could attract developers to brownfield sites on a broader national basis and enhance the [F]ederal, [S]tate, and local brownfields redevelopment efforts currently under way” by “allow[ing] developers to offset a portion of their [F]ederal income tax with remediation expenditures[.]”⁶³ A number of stakeholders cited the low-income housing and historic rehabilitation tax credits as successful stimulants to redevelopment and as a model for a brownfield redevelopment tax credit.⁶⁴

⁵² See *id.*

⁵³ See Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law No. 109–59, § 1956, 119 Stat. 1144, 1515 (2005).

⁵⁴ See *id.* at 36.

⁵⁵ See 42 U.S.C. § 9604(k)(1) (“Eligible Entity” defined); 42 U.S.C. § 9604(k)(4)(A)(ii) (\$1 million per grant authorized).

⁵⁶ 42 U.S.C. §§ 9604(k)(3)(A)(i), 9604(k)(3)(B).

⁵⁷ See 42 U.S.C. § 9604(k)(3)(B)(ii).

⁵⁸ See U.S. Environmental Protection Agency, *Proposal Guidelines for Brownfields Assessment, Revolving Loan Fund, and Cleanup Grants—Summary of Brownfields Grant Programs* (last modified Mar. 14, 2006) <<http://www.epa.gov/swerosps/bf/html-doc/10902jt2.htm>>.

⁵⁹ *Brownfield Overview hearing* at 36.

⁶⁰ *Id.* at 37.

⁶¹ *Id.* at 38.

⁶² *Id.* at 37.

⁶³ *Id.* at 38.

⁶⁴ See *id.*

EPA agreed with the findings of GAO's report and responded positively to the suggestions therein.⁶⁵ In response to GAO's identification of program weaknesses, Thomas Dunne testified, "EPA has developed a new data collection mechanism, the Property Profile Form, to collect information from site assessment, cleanup, and revolving loan fund grantees."⁶⁶ Dunne described the agency's efforts to collect data for program years 2003 and 2004 on a national basis.⁶⁷ EPA "believe[s] that this new data will enable EPA to tie program results with property-specific activities to better gauge brownfields program [sic] success."⁶⁸

In addition to its improvement of in-house performance measures, Dunne informed the Subcommittee that the agency is working with States and Tribes in developing performance measures that will tie performance to the number of acres remediated and made ready for reuse to gauge the impact of EPA funds on State voluntary cleanup programs.⁶⁹

Dunne also addressed stakeholder concerns regarding the date of eligibility grant provisions under the 2002 Brownfields Act, testifying that EPA promotes a change in the law:

EPA has requested a change to expand the number of brownfields sites eligible for funding under the Brownfields Assessment, Revolving Loan Fund and Cleanup grant provisions in the President's FY 2006 Budget. EPA has supported similar changes in the Consolidated Appropriations Act of Fiscal Years 2004 and 2005. Such a measure expands potential applicants for brownfields grants to include those owning properties acquired prior to the enactment of the Brownfields Law.⁷⁰

With regard to RLF grants, Dunne testified that "EPA is committed to improving revolving loan fund performance and ensuring that, if grant funds are not being used, those grant funds will be closed out or grantees will be required to transition old loan fund grants to the new Brownfields Law program authority."⁷¹

In response to the RLF-specific recommendations of GAO and stakeholders, Dunne testified the agency agreed that "efficiency and economies of scale often can be achieved by Revolving Loan Fund entities with proven track records that build upon administrative expertise."⁷² According to Dunne, "EPA has invited coalitions of eligible entities to pool their Revolving Loan Fund grant requests and submit a single grant application for consideration."⁷³ Further, the agency is "adjusting ranking criteria for Revolving Loan Fund applicants, giving more weight to ranking factors which demonstrate an applicant's ability to manage a fund and make loans."⁷⁴

⁶⁵ See *GAO Report* at 27.

⁶⁶ *Brownfield Overview hearing* at 7 (statement of Thomas Dunne, Deputy Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency).

⁶⁷ See *id.*

⁶⁸ *Id.*

⁶⁹ See *id.*

⁷⁰ *Id.* at 17.

⁷¹ *Id.* at 7.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

In response to stakeholders' suggestion of a Federal tax credit for brownfield remediation expenses, Dunne testified:

EPA's Brownfields Program serves as an innovative approach to environmental protection, spurring environmental cleanup, reducing neighborhood blight, generating tax revenues, and creating jobs. It has become increasingly clear, however, that successfully addressing brownfields in this country will require ever more interaction and collaboration among all levels of government, the private sector and non-governmental organizations.⁷⁵

"EPA is not in the tax policy business," Dunne concluded, "[b]ut certainly if [a tax credit] furthers the objectives of the brownfield program [sic], tax incentives would be a very viable tool to have."⁷⁶

In contrast with Dunne's careful statement, stakeholders voiced their adamant support for a Federal brownfield tax credit. According to Akron, OH Mayor Don Plusquellic, the Brownfields law, "[b]y providing money to do assessments, cleanup, enhancing [S]tate programs, and providing liability relief for innocent developers, has resulted in a tremendous boost in our efforts to redevelop these sites."⁷⁷ As a result, the "low-hanging" fruit—less seriously contaminated properties—have mostly been addressed.⁷⁸ Plusquellic testified "that most developers are not willing to touch" those sites that are more seriously contaminated and/or lie in less desirable locations.⁷⁹ "These are the sites that need those added incentives in order to make them competitive in the marketplace, especially if one is comparing it to a greenfield site."⁸⁰ Extra financial incentives will "turn negatives into positives"⁸¹ and "[t]he one thing that has been missing is a tax incentive that will really spur private sector investment to redevelop these sites," Plusquellic noted.⁸²

Douglas Steidl of the American Institute of Architects echoed Mayor Plusquellic's sentiment that the EPA program has created "noticeable results" but that more tools are necessary to address the widespread problem.⁸³ "[A]s the Government Accountability Office's . . . brownfields report . . . points out, there are far more brownfield sites requiring remediation than the U.S. EPA program could ever hope to address in our lifetimes. As a result, Federal legislation is needed to expedite site cleanup and foster economic development of former industrial properties," Steidl testified.⁸⁴ He concluded, "The AIA believes that Federal tax credits for the remediation expenditures at brownfields sites would provide the needed incentive to induce private parties to undertake the clean-up and rebuilding of these sites."⁸⁵

⁷⁵*Id.* at 19.

⁷⁶*Id.* at 46.

⁷⁷*Id.* at 53 (statement of the Honorable Don Plusquellic, mayor of the City of Akron, OH, and president of the U.S. Conference of Mayors).

⁷⁸*Id.* at 52.

⁷⁹*Id.* at 53.

⁸⁰*Id.*

⁸¹*Id.* at 53.

⁸²*Id.* at 54.

⁸³*Id.* at 124 (statement of Douglas L. Steidl, president of the American Institute of Architects).

⁸⁴*Id.*

⁸⁵*Id.* at 131.

James Maurin of the Real Estate Roundtable also praised the contribution of the Brownfields Program but likewise noted that further incentives such as a tax credit are necessary to attract private developers:

In recent years, changes in Federal laws have successfully addressed many of the barriers that inhibited private sector efforts to clean up and redevelop contaminated sites. As the threat of excessive environmental liability recedes, the remaining problem with most well located brownfield sites is a fairly simple one: Money. Other things being equal, it costs more to clean up and redevelop a brownfield than it does simply to buy and develop a Greenfield.⁸⁶

“Real estate development, like any other business venture, will invest in projects only where the economic [sic] justify it [I]f the numbers don’t add up, it is very difficult to proceed with the project,” Maurin testified.⁸⁷ Additionally, Maurin stated, “[T]here are continuing concerns among some investors and lenders about the uncertainties associated with this type of development. For that reason, in some cases, the availability of a relatively small number of additional dollars . . . can be the difference between a ‘Go’ and a ‘No go’ decision by the project investors.”⁸⁸

Maurin voiced support for the Brownfield Revitalization Act of 2005 (H.R. 4480 in the 108th Congress), stating, “[T]ax credits would be available for up to 50 percent of remediation costs, including both demolition costs and the cost of cleaning up petroleum contamination.”⁸⁹ Maurin suggested that a carefully crafted tax credit will strike a balance between attracting private capital investment and preventing market distortion. “As with the low-income housing tax credit program, the private sector would still provide much of the necessary funds for cleanup, but the availability of tax credits could tip the scales in favor of proceeding with a project rather than passing over an otherwise promising site,” Maurin told the Subcommittee.⁹⁰

Additionally, Maurin endorsed expanding the tax credit to benefit activities not allowed under the 2002 Brownfields Act. First, the proposed legislation would permit parties a tax credit for funds expended on petroleum contamination. The current tax provisions for expensing brownfield remediation costs uses the CERCLA definition of “hazardous substance,” from which petroleum is excluded, Maurin explained.⁹¹ Consequently, parties may not expense the costs of addressing certain materials, petroleum among them. According to Maurin:

Congress made the decision that it did not want the [F]ederal Superfund used to clean up certain types of substances While the decision not to authorize the spending of [F]ederal funds on these types of cleanups had significance for the administration of the Superfund program, the same rationale does not apply to a statute intended to

⁸⁶*Id.* at 60 (statement of James E. Maurin, chairman of the International Council of Shopping Centers and board member of the Real Estate Roundtable).

⁸⁷*Id.* at 65.

⁸⁸*Id.* at 64.

⁸⁹*Id.* at 72.

⁹⁰*Id.*

⁹¹*See id.* at 75.

provide a tax incentive to private parties cleaning up brownfield properties.⁹²

“[T]he problem created by this approach is that it assumes that the CERCLA definition of the term is broad enough to encompass all types of toxic materials that might be found at a brownfield site. That is not the case,” Maurin explained.⁹³ He continued:

While it may make sense not to authorize the use of [F]ederal funds under the Superfund program to clean up petroleum and pesticides, these substances often have to be cleaned up at brownfield sites before those properties can be returned to beneficial use. There is no reason not to extend the same type of tax incentive to a private party who is cleaning up petroleum waste or pesticide residues on a brownfield site as to one who is cleaning up other types of contaminants.⁹⁴

“Similarly, Superfund money was not to be spent cleaning up the interior of buildings,” Maurin testified.⁹⁵ “Congress did not . . . [impose] this limitation because it believed that contaminated interiors did not require cleanups. Rather, Congress believed that the use of the limited funds set aside for Superfund cleanups should be prioritized to deal with contamination that had escaped into the general environment.”⁹⁶ Because the current tax law relies upon the CERCLA provisions, parties may not expense the removal of hazardous materials inside buildings such as asbestos or lead paint. Maurin notes, however, that “brownfield restoration often involves the cleanup of existing buildings on the property. Expensing costs to clean up buildings would give developers more reason to invest in brownfield properties.”⁹⁷

Discussing the issue of a tax credit from a “bottom line” approach, Jonathan Philips of Cherokee Investment Partners characterized the tax credit as enabling “developers to attract more capital with the equity created by that credit and revitalize otherwise economically marginal projects.”⁹⁸ Philips informed the Subcommittee that a transferable tax credit would “dramatically accelerate the rate at which brownfield sites are revitalized in America,” and, in conjunction with certain other tax provisions, has “the potential to prompt cleanup of more brownfield sites in the next 5 years than in the last 50 years combined.”⁹⁹

Turning to a discussion of current liability provisions, the Subcommittee noted that the brownfields problem is “a [F]ederally created problem[;] . . . the issue of . . . brownfields being areas where a potentially responsible party or a landowner has disincentives for its redevelopment . . . [is because] our current laws and regulations actually encourage abandonment[.]”¹⁰⁰ Both Stephen-

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 77.

⁹⁵ *Id.* at 75.

⁹⁶ *Id.* at 77.

⁹⁷ *Id.*

⁹⁸ *Id.* at 83 ((statement of Jonathan Philips, senior director of Cherokee Investment Partners, LLC).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 42 (statement of Subcommittee Chairman Michael R. Turner).

son and Dunne agreed.¹⁰¹ “Those liabilities were created in fact by Federal law,” Stephenson testified.¹⁰²

The 2002 Brownfields Act, though, has changed the landscape of remediating contaminated properties. The law now encourages the redevelopment of sites that would otherwise have been abandoned due to Superfund liability. According to Dunne:

[B]y and large, we are dealing with abandoned properties or . . . with private property owners who have this site who—because of the liability—do not want to let go of the site.

That has changed because of [the 2002 B]rownfields [Act]. There are people now that are willing to come in as prospective purchasers and take this property over and redevelop it if they [are assured] that they are not going to be liable like they would be under a Superfund project.¹⁰³

These prospective purchasers undertaking remediation are generally new parties with little to no knowledge of the nature or extent of contamination on a site, however. Chairman Turner opined that in many instances, bringing the original property owners into the remediation planning would expedite the process. “[T]heir knowledge could be very important for our [redevelopment] success,” Turner noted.¹⁰⁴ The Subcommittee questioned Dunne on existing mechanisms or incentives to bring those parties to the table for cooperative rather than punitive purposes. Dunne testified that there are no incentives for the original property owner to participate in the planning process and stated further, “[W]e don’t have anything under the statute that is going to relieve them of the liability.”¹⁰⁵

B. HEARING ON STATE BROWNFIELD REDEVELOPMENT INITIATIVES
AND PROGRAMS, SEPTEMBER 13, 2005

On September 13, 2005, the Subcommittee held its second hearing in Washington, DC on brownfields redevelopment. At the *Brownfields and the Fifty States: Are State Incentive Programs Capable of Solving America’s Brownfields Problem?* hearing, the Subcommittee explored the various types of State incentive programs, how well they work, how they may be improved, and whether these programs, in conjunction with current Federal efforts, are enough to address the Nation’s brownfields. Specifically, the Subcommittee reviewed the programs and incentives offered by four States: Pennsylvania, Ohio, Illinois, and Michigan. Additionally, the Subcommittee solicited ideas from practitioners and stakeholders to spur further brownfield redevelopment.

Discussing these issues were nine witnesses divided in two panels. Charles Bartsch, senior policy analyst at the Northeast-Mid-

¹⁰¹ See *id.* (statements of Thomas Dunne, Deputy Assistant Administrator in the Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency and John Stephenson, Director of the Natural Resources and Environment, Government Accountability Office).

¹⁰² *Id.* (statement of John Stephenson, Director of the Natural Resources and Environment, U.S. Government Accountability Office).

¹⁰³ *Id.* at 44 (statement of Thomas Dunne, Deputy Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency).

¹⁰⁴ *Id.* (statement of Subcommittee Chairman Michael R. Turner).

¹⁰⁵ *Id.* at 45 (statement of Thomas Dunne, Deputy Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency).

west Institute opened the discussion with an overview of State programs. Presenting the State government perspective were Kathleen McGinty, secretary of the Pennsylvania Department of Environmental Protection; John Magill, director of the Ohio Department of Development Office of Urban Development; Douglas Scott, director of the Illinois Environmental Protection Agency; and Andrew Hogarth, chief of the Michigan Department of Environmental Quality Remediation and Redevelopment Division. The Subcommittee also received testimony from the stakeholder community, represented by Robert Colangelo, executive director of the National Brownfields Association; Jonathan Philips, senior director of Cherokee Investment Partners, LLC; Kevin Matthews, director of Association & Governmental Relations, AIG Environmental; the Honorable David Cartmell, mayor of the city of Maysville, KY, and president of the Kentucky League of Cities; and Charles Houder, director of Acquisitions, Preferred Real Estate Investments, Inc.

Charles Bartsch of the Northeast-Midwest Institute developed the first national analysis of State programs in 2001.¹⁰⁶ “Encouraged by passage of the [F]ederal Small Business Liability Relief and Brownfield Revitalization Act in January 2002, all [S]tates now have brownfield or voluntary cleanup programs [VCPs] in place, to offer some type of liability relief to those wishing to remediate and reuse brownfield sites,” Bartsch testified.¹⁰⁷ He continued, “States are putting many different—but equally effective—approaches in place to bring the resources together to meet the diverse challenges of brownfield reuse.”¹⁰⁸

Summarizing the primary issue of the hearing, Bartsch reported, “funding gaps are a primary deterrent to site and facility reuse; however, creatively crafted and carefully targeted incentives and assistance can help advance cleanup and reuse activities and achieve significant community benefits.”¹⁰⁹ The four general categories of State programs, according to Bartsch, are tax incentives, targeted financial assistance programs, direct financing, and other innovative solutions such as site assessment cost offsets or risk-limiting.¹¹⁰

Bartsch reported that 23 States offer tax incentives including tax credits and abatements. “These programs have worked by helping with a project’s cash flow, by allowing resources and project revenue to be used for brownfield purposes such as site cleanup rather than for tax payments.”¹¹¹ “State and Federal tax incentives historically have been used to channel investment capital and promote economic development in areas that have needed it, and brownfield targeting is a natural evolution of this type of program,” Bartsch testified.¹¹²

Existing tax incentives cover such categories as remediation expenses, property income, job creation, and historic preservation.¹¹³

¹⁰⁶ See *Brownfields and the 50 States: Are State Incentive Programs Capable of Solving America’s Brownfields Problem?* Before the Subcommittee On Federalism and the Census of the House Committee on Government Reform, 109th Cong. 10 (2005) [hereinafter *State Incentive Programs hearing*] (statement of Charles Bartsch, senior policy analyst at the Northeast-Midwest Institute).

¹⁰⁷ *Id.* at 11.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 9.

¹¹⁰ See *id.* at 8–9.

¹¹¹ *Id.* at 8.

¹¹² *Id.*

¹¹³ See *id.* at 8.

The key, according to Bartsch, is to ensure “State incentives are allowed to work in full partnership with Federal incentives and are not limited or constrained by recapture or penalty provisions.”¹¹⁴

Bartsch also testified that “[c]apital gaps remain the biggest barrier to brownfield reuse, and 22 States have worked to address this issue by putting some sort of financing incentives in place such as loans or grants to reduce initial cash needs.”¹¹⁵ Such incentives, Bartsch continued, “can be used to increase the lender’s comfort with projects by offering guarantees to limit their risk of potential losses, or they can ease the borrower’s cash flow by plugging critical capital holes or offsetting brownfield costs, and these types of incentives can be critical to small sites.”¹¹⁶

In addition to indirect financial incentives, some States also offer direct financial assistance such as offsetting the costs of site assessments.¹¹⁷ Bartsch characterizes these programs “as a way to leverage private investment while limiting public spending”¹¹⁸ These programs, Bartsch testified, “represent an important maturation in brownfield public-private partnerships.”¹¹⁹

“Governments at all levels can find creative ways to help overcome reuse challenges. However, brownfield reuse will only succeed if [S]tate efforts can be complemented by [F]ederal initiatives—such as cleanup credits, historic tax incentives, and targeted program funding—in a true inter-governmental partnership,” Bartsch concluded.¹²⁰

Robert Colangelo offered testimony both from the perspective of a private developer and as the executive director of the National Brownfield Association. According to Colangelo, “[S]tate brownfield programs offer three levels of assistance: liability relief, financial incentives, and technical assistance. Most developers who purchase impaired properties have to rely heavily on the liability relief offered through [S]tate voluntary cleanup programs.”¹²¹ State assurances of liability relief provide developers with “the ability to secure debt financing to be used for site acquisition.”¹²²

While praising State programs for the benefits of liability relief, Colangelo opined, “Technical assistance and financial incentives, while great ideas, are often impractical for most private developments It is my experience that most financial incentives go directly to cities or non-profit development corporations and indirectly flow to private sector projects.”¹²³ Further, Colangelo testified, “The limited amount of program funds or technical assistance that is available to the private sector comes at a great cost and often requires an intense investment of time and the use of expensive consultants to help navigate through program eligibility requirements”¹²⁴ “Most developers will pass on a brownfield

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *See id.*

¹¹⁸ *Id.* at 9.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 15.

¹²¹ *Id.* at 88 (statement of Robert Colangelo, executive director of the National Brownfields Association).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

site rather than take a chance on a project that will only work if government incentives are secured,” he concluded.¹²⁵

Echoing Mayor Plusquellic in an earlier hearing, Colangelo testified that the “low-hanging fruit” was all but gone, leaving “cities . . . with the harder, more complicated brownfield sites . . . [T]hese sites will require meaningful government incentives if the public sector is to continue to attract private sector investment and developer interest.”¹²⁶ Most State programs, however, provide little cost benefit to private developers, Colangelo told the Subcommittee. “The exception to this rule is the use of Tax Increment Financing [TIF] and [S]tate Tax Credit programs.”¹²⁷

Colangelo’s organization, the National Brownfield Association [NBA], analyzed State brownfields and voluntary cleanup programs.¹²⁸ The analysis resulted in a position paper, recommending program elements that best encourage cleanup activities.¹²⁹ Colangelo offered the NBA’s recommended “key program elements” for State programs:

For government incentives to be meaningful to the private sector, programs should:

- Be easy to understand and administer
- Apply to a wide type of projects
- Allow flexibility in the use of funds
- Provide funding to be meaningful and that is cost beneficial to the application process and project size
- Allow for unused funds to be transferred or refunded[.]¹³⁰

Currently, no single State program incorporates all elements but “a number of [S]tates have been creative in developing specific program elements that work well,” according to Colangelo.¹³¹ “When designing incentive programs, we encourage you to consider the [report] recommendations provided in this paper and support the creation of a [F]ederal brownfield Tax Credit Program that would allow for demolition and remediation expenses to earn a [F]ederal tax credit,” Colangelo testified.¹³²

Jonathan Philips of Cherokee Investment Partners provided the Subcommittee with an inventory of State program elements that, in his view as a private sector redeveloper, have encouraged brownfields redevelopment. Philips testified that a number of States operate grant programs that assist with the characterization of site contamination or assistance in planning end-use of remediated properties. “[T]hese types of initiatives are important and undoubtedly help move some lightly contaminated sites toward productive use;” however, “for some more difficult sites, informational-

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 89.

¹²⁸ *See id.*

¹²⁹ *See id.* *See generally id.* at 90–94; National Brownfield Association, What Works: An Analysis of State Brownfield and Voluntary Cleanup Programs (visited May 1, 2006) <http://www.brownfieldassociation.org/NBA_Program_Analysis.pdf>.

¹³⁰ *Id.* at 89 (statement of Robert Colangelo, executive director of the National Brownfields Association).

¹³¹ *Id.*

¹³² *Id.*

type programs may not make the difference in determining whether the site is remediated and brought back into productive use,” Philips cautioned.¹³³

Philips also touted the use of “one-stop shopping” tactics adopted by a number of States. These programs streamline the permit process and make a “real difference in the rate at which brownfield sites are remediated.”¹³⁴ The speed at which redevelopers can obtain permits can sometimes mean the difference between productive cleanup and reuse of a site and leaving a site to sit idle.¹³⁵

Additionally, States have utilized their “considerable latitude to determine the applicable cleanup standards for a particular site based on the type of expected reuse.”¹³⁶ This often can result in lower costs and quicker project turn-around. As States adjust their cleanup standards on a case-by-case basis for sites registered in a voluntary cleanup program, “many [S]tates will couple voluntary cleanup programs with ‘no further action’ letters that provide developers with some certainty concerning future liability.”¹³⁷ Philips cautioned, however, that “[d]ue to the overlay of [F]ederal environmental laws, these types of liability protections are inherently limited in their scope and applicability.”¹³⁸ At the same time, he noted, “[b]y helping to manage risk . . . these types of [S]tate programs inherently improve the economics of more difficult brownfield transactions.”¹³⁹

Philips also testified to the effectiveness of financial incentive programs. State revolving loan funds or loan guarantee programs, “by directly providing low-cost capital[,] can make a critical difference between projects that are mothballed and projects that are remediated and revitalized.”¹⁴⁰ Many States also now provide “loan guarantees and other assurances in an effort to attract investors and lenders to transactions that would normally be considered too risky.”¹⁴¹ General obligation bonds are also effective for a number of States as “a tool that can go a long way toward helping close the cost and risk gap between brownfield development and greenfield development.”¹⁴²

Tax increment financing has also proved useful as “a powerful driver for brownfield remediation and revitalization,” according to Philips.¹⁴³ “At least 48 [S]tates have now enacted some form of tax increment financing legislation that permits municipalities or county governments to assist with the financing of redevelopment infrastructure projects by capturing future increases in tax revenues that are expected to flow as a result of the redevelopment project,” Philips reported.¹⁴⁴ “However, only a small handful of these TIF

¹³³ *Id.* at 101 (statement of Jonathan Philips, senior director of Cherokee Investment Partners, LLC).

¹³⁴ *Id.* at 102.

¹³⁵ *See id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 103.

¹⁴¹ *Id.*

¹⁴² *Id.* at 104.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 103.

programs make remediation expenditures eligible for funding,” he advised.¹⁴⁵

Kevin Matthews of AIG Environmental testified to the success of one particular financial incentive mentioned by both Robert Colangelo and Jonathan Philips—environmental insurance:

Environmental insurance is not the silver bullet for Brownfields redevelopment. However, it is one of the “tools in the tool chest” that helps to lead to a successful cleanup and redevelopment because it often helps to address some of the greatest concerns of Brownfields redevelopment—environmental liability and uncertainties concerning the cleanup.¹⁴⁶

Matthews related AIG Environmental’s experience with the Massachusetts brownfield program: Massachusetts established a fund from which the Commonwealth would make brownfield redevelopment loan guarantees.¹⁴⁷ Massachusetts “quickly learned . . . that capital for Brownfields is available. However, what stymied Brownfields redevelopment was the fear of environmental liability from historic contamination and the concern that cleanup costs could exceed the clean-up cost estimate.”¹⁴⁸

The Commonwealth determined environmental insurance addressed those redevelopment barriers and entered a partnership with AIG Environmental.¹⁴⁹ The Commonwealth’s pooled funds were then opened to subsidizing environmental insurance premiums for policies addressing liability and cost over-run concerns.¹⁵⁰

Pollution Legal Liability insurance addresses the first concern—liability—by answering the questions, “What if a Pollution Condition is found that no one else knew was there? What if the government requires more cleanup of a known Pollution Condition after providing a ‘No Further Action’ letter? What if there is a toxic tort law suit?”¹⁵¹

Cleanup Cost Cap insurance addresses the second concern—cost over-runs—by capping a developer’s remediation costs and answers the question, “[W]hat if the cleanup of the site cost [sic] more than expected?”¹⁵² This insurance covers cost overruns developers may encounter in a brownfields project, “greatly assist[ing] developers as they plan their project.”¹⁵³

Matthews also educated the Subcommittee about Voluntary Party Liability Exemption [VPLE] insurance. This “innovative” insurance “allows the [S]tate to give full releases of liability to prospective purchasers of Brownfield sites for known groundwater contamination at the site that is being cleaned up using natural attenuation,” Matthews testified.¹⁵⁴ Explaining the mechanics of VPLE insurance, Mathews stated, “If that remedial approach fails,

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 117 (statement of Kevin Matthews, director of Association & Governmental Relations, AIG Environmental).

¹⁴⁷ *See id.* at 118.

¹⁴⁸ *Id.*

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

¹⁵¹ *Id.* at 119.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 120.

the State . . . can look to the policy to cover the costs of cleaning up that ground water up to the limits of the policy.”¹⁵⁵

As a testament to the success of environmental insurance use in brownfields redevelopment, Matthews reported that, over the years, Massachusetts invested \$4.8 million in environmental insurance for 259 projects.¹⁵⁶ Those projects cost \$145 million in cleanup but yielded 25,000 jobs and \$2.1 billion in private investment.¹⁵⁷ “The ratio, based upon the stated number[s]—for every \$1 dollar of Commonwealth Funds used to subsidize environmental insurance[,] \$458 has been leveraged in investment and cleanup of sites,” Matthews testified.¹⁵⁸

In examining specific examples of successful State brownfield programs, the Subcommittee first turned to Pennsylvania’s brownfield program and incentives. Pennsylvania Department of Environmental Protection Secretary Kathleen McGinty summarized the four primary reasons for her State’s achievements:

[F]irst and foremost, clear, predictable, reliable remediation standards that are geared toward the future land use of the site; second, clear, thorough and effective liability relief for the successful performance of those cleanup standards; third, money . . . in three categories: site assessment, site remediation, but then also especially site infrastructure improvement so that that site is pad ready, ready for redevelopment. . . .

Fourth and key, time is money. So the extent to which we can streamline permitting and put a thumb on the scale for brownfield redevelopment such that a brownfield either does not need an individual permit, or it would receive priority attention in the permitting process has been a key for us.¹⁵⁹

McGinty also noted the contribution of two improvements to the program in the prior 18 months. First, the Pennsylvania Department of Environmental Protection and EPA entered a Memorandum of Understanding, which creates one cleanup policy.¹⁶⁰ The second recent improvement was the expansion of the State program to include remediation of greyfields, or abandoned mine sites.¹⁶¹

The Subcommittee next reviewed Ohio’s brownfields redevelopment program, the \$200 million bond-funded Clean Ohio Revitalization Fund.¹⁶² The program was born of a task force effort to address the issues of city cores: brownfields were identified as the number one challenge for these areas.¹⁶³ Ohio has granted \$97 million to 94 assessment and remediation projects since 2002.¹⁶⁴ “These 94 grants are expected to leverage more than \$731 million

¹⁵⁵ *Id.*

¹⁵⁶ *See id.* at 118.

¹⁵⁷ *See id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 16 (statement of Kathleen McGinty, secretary of the Pennsylvania Department of Environmental Protection).

¹⁶⁰ *Id.* at 16.

¹⁶¹ *See id.*

¹⁶² *See id.* at 22 (statement of John Magill, director of the Ohio Department of Development Office of Urban Development).

¹⁶³ *See id.*

¹⁶⁴ *See id.*

in new investment,” reported John Magill, director of the State’s Department of Development, Office of Urban Development.¹⁶⁵

Magill emphasized the importance of a partnership between Federal and State governments in redeveloping the Nation’s brownfields. “A combination of private and public resources leads to projects with an economic and environmental return. In Ohio, we are fortunate to be able to support projects of both State and Federal resources.”¹⁶⁶ Specifically, he noted, “[M]y office administers a U.S. EPA Brownfield Revolving Loan Fund. To date, we have made two loans, with two more expected to close this fall.”¹⁶⁷ He further acknowledged the EPA “for their support and flexibility to meet the needs of our borrowers” in the success of that partnership.¹⁶⁸

In yet another example of a successful redevelopment program, the Subcommittee learned how Illinois utilizes funds in a variety of ways in addressing brownfields. Illinois provides a number of financial incentives to supplement cleanup costs and provides site assessments, redevelopment loans, and technical expertise.¹⁶⁹ Douglas Scott, director of the Illinois Environmental Protection Agency highlighted the importance of brownfield redevelopment programs for the Subcommittee:

Obviously there is an environmental benefit to cleaning up areas that have contamination or are abandoned; there is certainly a community benefit in reclaiming property to put it back into productive use to either support new businesses and generate new tax revenue, or to become recreational land. There is a benefit to helping to reduce sprawl not just by putting a particular property back into use, but also by spurring other inner-city development and protecting farmland.

We have seen in recent years a renaissance of cities, and brownfield redevelopment certainly augments that trend.¹⁷⁰

“[B]rownfield redevelopment at its heart is a real estate transaction, and just as in any development, there are associated costs. In these cases, the environmental considerations may be very large, but other costs, such as infrastructure, may be reduced,” Scott told the Subcommittee.¹⁷¹ He continued, “It is essential for us to do those things that entice private developments to the sites by providing the conditions and incentives that make these sites attractive, or at least comparable to Greenfield areas . . . State and local governments alone can’t make this happen.”¹⁷²

Scott also relayed the importance of non-financial incentives to brownfield redevelopment efforts. Illinois engages in a comprehensive risk-based remediation process, which focuses on future reuse; operates a voluntary cleanup program with “well-established proce-

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 23.

¹⁶⁷ *Id.* at 23.

¹⁶⁸ *Id.* at 23.

¹⁶⁹ *See id.* at 40 (statement of Douglas Scott, director of the Illinois Environmental Protection Agency).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 40–41.

dures,” maintains partnerships with other government agencies, non-profits, and trade associations; and provides site assessment and technical assistance for remediation projects.¹⁷³ Further, Scott highlighted the State’s Memorandum of Understanding with EPA, which provides redevelopers some liability relief. When Illinois issues a “No Further Remediation” letter, the Memorandum of Understanding with EPA states that “except in very narrow circumstances . . . [Illinois’s] NFR letter will also end Federal involvement.”¹⁷⁴

Turning to Andrew Hogarth of the Remediation and Redevelopment Division of the Michigan Department of Environmental Quality, the Subcommittee learned of that State’s three-prong approach to brownfield redevelopment: financial incentives, State funding for site cleanup, and liability relief.¹⁷⁵

Real, personal, and State and local income taxes associated with properties in specific areas of Michigan are fully eliminated through tax credits.¹⁷⁶ The State also offers single-business tax credits for demolition, environmental cleanup, and other remediation costs.¹⁷⁷ “Since June 2000, this program has awarded more than \$273 million in single business tax credits, which we believe has generated more than \$3.8 billion of private investment in distressed areas,” reported Hogarth.¹⁷⁸

Additionally, the State offers tax increment financing. “Under Michigan’s Brownfield Redevelopment Financing Act, brownfield redevelopment authorities across the State are able to capture local taxes and school taxes to reimburse developers for cleanup-related costs,” Hogarth testified.¹⁷⁹ “As developers develop a site and increase the value of their property, the additional increment in tax—not property tax—is captured by the brownfield authorities and used to reimburse the developer for their expenses,” he explained.¹⁸⁰ “Since 1996, more than \$300 million in tax increment financing has been approved for more than 80 projects throughout the State,” Hogarth reported.¹⁸¹

Hogarth testified that Michigan also finances some redevelopment efforts through cleanup grants and loans as well as direct spending.¹⁸² The State provided \$122 million in grants and loans for approximately 300 projects since 1992.¹⁸³ The State spent another \$585 million over 17 years for the investigation, cleanup, and monitoring of more than 1,600 brownfield sites.¹⁸⁴

While the financial figures are impressive, Hogarth testified that the most important redevelopment stimulus in Michigan was a change in the liability laws.¹⁸⁵ “In 1995, we went from a liability situation where anyone that bought a piece of contaminated property, whether they caused the contamination or not . . . [was] lia-

¹⁷³ *Id.* at 41.

¹⁷⁴ *Id.*

¹⁷⁵ *See id.* at 60 (statement of Andrew Hogarth, chief of the Michigan Department of Environmental Quality Remediation and Redevelopment Division).

¹⁷⁶ *See id.*

¹⁷⁷ *See id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *See id.*

¹⁸³ *See id.*

¹⁸⁴ *See id.*

¹⁸⁵ *See id.*

ble for it, to where they would not be liable for it in the future if they did a baseline environmental assessment,” Hogarth explained.¹⁸⁶ A new property owner is thus free from liability for existing contamination if they obtain and submit to the State a baseline environmental assessment.¹⁸⁷ Between 1995 and 2005, Michigan processed 8,600 baseline environmental assessments for 8,600 contaminated parcels that were transferred to new hands, which Hogarth opined would not have otherwise occurred.¹⁸⁸

Hogarth also emphasized that Michigan’s “cleanup standards are risk-based and land-use-based, which helps assure that unnecessary cleanup expenditures are not made.”¹⁸⁹

A number of barriers to brownfield redevelopment remain, Hogarth told the Subcommittee.¹⁹⁰ First, liability remains a deterrent to redevelopment.¹⁹¹ “Many potential property transactions fail due to the inability of the buyer to resolve liability under RCRA, and to some extent CERCLA,” Hogarth told the Subcommittee.¹⁹² While his State’s MOA with EPA addresses CERCLA enforcement, Hogarth testified, “[T]he inability of a prospective purchaser to resolve RCRA liability remains a substantial hurdle.”¹⁹³ According to Hogarth, additional impediments to brownfield redevelopment include:

[U]nrealistic expectations on the part of the developer and the buyer or seller, lack of comprehensive planning by communities, lack of sufficient site characterization, overwhelming predevelopment costs, lack of startup funds for small businesses, and lack of State and local government resources.¹⁹⁴

“We will not be able to provide the funding we have at the State level in the future,” Hogarth concluded.¹⁹⁵

A number of witnesses on both panels touched upon the daunting number of unremediated brownfields remaining despite State efforts. While “well-designed State programs are a critical component of this Nation’s efforts to revitalize lands[,] . . . they are not sufficient to solve this Nation’s brownfield problem in our lifetime,” Jonathan Philips testified.¹⁹⁶

“State and local governments have been very creative in utilizing all of the myriad resources that they have financially to try to assist with these sites,” Douglas Scott reported, “but it is pretty clear . . . that the number of sites isn’t being lessened to the rate that any of us would like to see.”¹⁹⁷ More money is the answer according to Scott:

More grant dollars to States and municipalities to specifically target site assessment, infrastructure and cleanup

¹⁸⁶ *Id.*

¹⁸⁷ *See id.* at 60–61.

¹⁸⁸ *See id.* at 61.

¹⁸⁹ *Id.*

¹⁹⁰ *See id.*

¹⁹¹ *See id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 95 (statement of Jonathan Philips, senior director of Cherokee Investment Partners, LLC).

¹⁹⁷ *Id.* at 41 (statement of Douglas Scott, director of the Illinois Environmental Protection Agency).

are needed. More sites have been put into play, for example, by simply not forcing loan guarantees of Section 108 and making more grant money available.

In addition, more funds under the Brownfield Revitalization Act would help tremendously as I'm sure . . . [Illinois is] not the only State that has more sites than . . . funds, and more dollars for Superfund site cleanup that are under the Federal guidelines are also needed.¹⁹⁸

"But money is only part; the rest must come from tax credits and other targeted incentives to the private sector to bring them into these sites," Scott concluded.¹⁹⁹

Philips similarly testified that a "national transferable credit would be a powerful and fitting complement to State efforts."²⁰⁰ Philips noted the success of Federal tax credits in development areas other than brownfields, suggesting the model should be extended to brownfields. The "tax credit for rehabilitating historic structures that Congress created in 1976 . . . has stimulated more than \$33 billion in private investment, with over 325,000 housing units."²⁰¹ The success of this program, Philips testified, is, "First, it is uniform across the Nation, and; second, it works in tandem with State programs to drive more historic sites from underwater to above-water status."²⁰²

Applying this mechanism to brownfields makes sense, Philips opined. According to Philips, a transferable tax credit in particular is valuable because it "could be leveraged early in a project, thus allowing a pioneering developer to attract some of the riskiest capital with the equity created by the forward sale of the credit."²⁰³ This form of tax credit would follow the model of the historic rehabilitation tax credit, according to Philips, and would be "a logical extension" of prior Federal brownfield efforts.²⁰⁴

Echoing both Philips and Scott, Secretary McGinty testified that "tax credits . . . [are] absolutely essential . . . especially to underwrite the purchase of insurance that can backstop remediation costs."²⁰⁵

John Magill likewise testified about the benefits of tax credits. "In active markets, brownfield reinvestment is more likely to occur at a lower public cost and with greater likelihood of success."²⁰⁶ Not all brownfield markets are active enough to see this formula, however. "Public policy is able in a variety of ways to affect the vibrancy of a brownfield market," Magill told the Subcommittee.²⁰⁷ "Ohio believes tax credits can be a tool to attract additional private sector investment by enabling developers to offset costs by using or assigning credit. That is why we encourage Congress to continue

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 96 (statement of Jonathan Philips, senior director of Cherokee Investment Partners, LLC).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 23 (statement of Kathleen McGinty, secretary of the Pennsylvania Department of Environmental Protection).

²⁰⁶ *Id.* (statement of John Magill, director of the Ohio Department of Development Office of Urban Development).

²⁰⁷ *Id.*

to explore additional flexible brownfield tools which are performance-based, enabling local citizens to seek tangible results.”²⁰⁸

“Access to additional sources of Federal dollars through the tax credits or increased resources at U.S. EPA are crucial to stretching State funding to undertake additional local projects,” Magill concluded.²⁰⁹

Second to the need for money, according to the panelists, is the need for further liability relief. Douglas Scott endorsed the brownfields tax credit bill, introduced as H.R. 4480 in the 108th Congress, and further endorsed the additional provisions therein “mak[ing] more certain the lines of liability and possible exposure to future or reopened claims would help tremendously to make these sites more insurable and more bankable.”²¹⁰ “[O]ne of the major stumbling blocks [for developers] is the uncertainty of future liability, which is another factor that makes it more desirable to locate to a greenfields,” Scott reported.²¹¹

Secretary McGinty also noted the need for further liability relief. Despite the full and effective liability relief in some Federal programs pursuant to the Commonwealth’s MOA with EPA, there is still potential liability under other Federal programs. Additionally, “[Pennsylvania’s] understanding with EPA is a paper processing agreement” in which EPA agrees “to process . . . in real time their statues and responsibilities as we do, too, on priority sites.”²¹² While this agreement is “[v]ery helpful, . . . we need to make the next step to full liability relief,” McGinty testified.²¹³ “If we could move from what has been an important beginning in our Memorandum of Understanding with EPA to full and effective Federal and State liability relief, that would add the certainty that investors and developers need,” she concluded.²¹⁴

Andrew Hogarth also touched upon Federal liability as a remaining obstacle in brownfields redevelopment. “Federal liability continues to be a problem. Many potential property transactions fail due to the inability of the buyer to resolve liability under RCRA, and to some extent [under] CERCLA,” he testified.²¹⁵ While Michigan has a MOA with EPA addressing most liability concerns, “RCRA liability remains a substantial hurdle” to redevelopment efforts, Hogarth reported.²¹⁶

Agreeing with the panelists on the need for liability relief, Chairman Turner noted that H.R. 4480 tied the remediation tax credit with liability relief by requiring remediating parties to enter a State VCP, thereby “hook[ing] into those liability relief provisions.”²¹⁷ Inquiring whether State officials thought this mechanism “would be an effective liability release,”²¹⁸ Turner noted, “If the State voluntary cleanup program bar of enforcement release is suf-

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 41 (statement of Douglas Scott, director of the Illinois Environmental Protection Agency).

²¹¹ *Id.*

²¹² *Id.* at 16 (statement of Kathleen McGinty, secretary of the Pennsylvania Department of Environmental Protection).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 61 (statement of Andrew Hogarth, chief of the Michigan Department of Environmental Quality Remediation and Redevelopment Division).

²¹⁶ *Id.*

²¹⁷ *Id.* at 81 (statement of Subcommittee Chairman Michael R. Turner).

²¹⁸ *Id.*

ficient, if you are finding it is successful in giving people the confidence to enter into a program, then we wouldn't have to reinvent the wheel," Turner stated.²¹⁹

John Magill responded in support of such a liability relief provision. "I think this is a good place to start because it is known . . . do not reinvent the wheel and create new mechanisms. . . . If it fails, you can make changes. You don't create something new and tinker with that."²²⁰ Magill warned, though, "The only caveat would be that in some States that the voluntary cleanup program does not cover all cleanups. Brownfields are a wider perspective."²²¹

Douglas Scott likewise responded, testifying that kind of liability relief provision "will help greatly because you really are just plugging in a new piece to something that exists, rather than creating a new program."²²² Scott also included a warning, however, noting, "In order for it accomplish all of the things . . . that we are trying to do and that you are trying to do, it is going to need to be a little bit more broadly based than the MOUs have been to date."²²³

Charles Bartsch testified, "What is good about using the State voluntary cleanup programs . . . is it really does provide a recognized mechanism to provide some assurance to the community at large that these things are proceeding properly."²²⁴ To the extent existing programs are not broad enough to cover all brownfields projects, Bartsch stated, "Each [S]tate has a program in place, and I think what we saw after the passage of the national brownfields law a couple of years ago, the States will be able to then change [their programs] to better fit the Federal structure that is laid out."

Turning from the liability relief component of the Federal tax credit proposal, the Subcommittee sought input from the panel's private developers on the ability of a tax credit to provide extra capital. Specifically, the Subcommittee questioned the utility of a recoverable subsidy versus a non-recoverable subsidy.²²⁵

Chairman Turner noted that State incentive programs vary: "[T]here are some programs that provide recapturing grants, revolving loan funds, etc.; others provide direct subsidy . . . [that] is not recoverable."²²⁶ Turner questioned whether a recoverable subsidy could jeopardize the economic viability of a project. If a government can recover the subsidy provided to the redeveloping party, then the process in many complex cleanup projects "of acquiring . . . and remediating the property when compared to the cleaned value prior to complete redevelopment is still going to be a negative proposition. In other words, you're still going to have a negative value when you add in the cost of acquisition and remediation prior to the redevelopment."²²⁷ The proposed Federal tax credit "is a straight subsidy. We're not seeking to recover the

²¹⁹ *Id.*

²²⁰ *Id.* at 82 (statement of John Magill, director of the Ohio Department of Development Office of Urban Development).

²²¹ *Id.*

²²² *Id.* at 83 (statement of Douglas Scott, director of the Illinois Environmental Protection Agency).

²²³ *Id.*

²²⁴ *Id.* (statement of Charles Bartsch, senior policy analyst at the Northeast-Midwest Institute).

²²⁵ *See id.* at 165 (statement of Subcommittee Chairman Michael R. Turner).

²²⁶ *Id.*

²²⁷ *Id.*

funds. Do you think that is an essential element . . . to redevelop the brownfields?”²²⁸

Robert Colangelo responded first, “[O]ne of the most difficult things to secure is your debt financing on a project, and through this tax credit bill, I think it would bring additional comfort to banks and the lending community so that you would have lesser lines on equity.”²²⁹

In agreement with Colangelo, Jonathan Philips testified, “[A] tax credit . . . could be a forward sale situation where you can create equity, and that chunk of equity could then be leveraged to either attract more equity or to attract debt capital, and that is critical to everybody[.]”²³⁰ Philips noted that the benefit of that equity would be particularly helpful “to a smaller entity because . . . it doesn’t start the clock of the return investment until . . . you deploy that capital later in the project.”²³¹

Kevin Matthews reported, however, that based on his experience with those States that subsidize environmental insurance for brownfield projects versus those States that offer a tax credit for insurance costs, “The subsidies are far more successful.”²³² Using Massachusetts as an example, Matthews testified:

[Y]ou can directly see [the difference between credits and subsidies] in Massachusetts. When they first opened the program, they offered a 50 percent subsidy toward the premium of environmental insurance. Due to budget cutbacks, they had to reduce that subsidy to 25 percent at one point in time. The number of sites coming into the program dropped by 50 percent when they cut the subsidy by that amount, so it is directly corollary.²³³

Echoing the other panelists, Charles Houser testified, “[T]he size of the incentives that can be offered by the Federal or State government . . . are typically not the difference maker in us deciding whether a site works or doesn’t work, with the exception of tax credits.”²³⁴ “Tax credits, certainly the historical tax credit program has been a difference maker. That is probably the single incentive program that has the ability to tip the scale in undertaking a development project,” Houser told the Subcommittee.²³⁵

C. FIELD HEARINGS ON THE PARTNERSHIP BETWEEN FEDERAL AND STATE BROWNFIELD PROGRAMS, MAY 16, 2005, AND OCTOBER 25, 2005

The Subcommittee staged two field hearings on brownfields redevelopment during the first session of the 109th Congress. On May 16, 2005, the Subcommittee held a hearing in Cleveland, OH, entitled *The Ohio Experience: What Can Be Done to Spur Brownfield Redevelopment in America’s Heartland?* On October 25, 2005, the Subcommittee held a hearing in Bethlehem, PA, entitled *The Chal-*

²²⁸ *Id.*

²²⁹ *Id.* (statement of Robert Colangelo, executive director of the National Brownfields Association).

²³⁰ *Id.* (statement of Jonathan Philips, senior director of Cherokee Investment Partners, LLC).

²³¹ *Id.*

²³² *Id.* at 166 (statement of Kevin Matthews, director of Association & Governmental Relations, AIG Environmental).

²³³ *Id.*

²³⁴ *Id.* (statement Charles Houser, director of acquisitions, Preferred Real Estate Investments, Inc.)

²³⁵ *Id.*

lenge of Brownfields: What are the Problems and Solutions in Redeveloping Pennsylvania's Lehigh Valley Communities? These field hearings focused on Federal brownfields programs and State efforts as well as explored ways to enhance those Federal/State partnerships.

Two panels of witnesses at the May 16 hearing in Ohio presented the views of Federal, State, and local government stakeholders, as well as private developers and remediated site users. Joseph Dufficy, Chief of the Brownfields and Early Action Section at the U.S. Environmental Protection Agency Region V Office; Amy Yersavich, manager of the Voluntary Action Program of the Ohio Environmental Protection Agency; the Honorable Frank Sarosy, mayor of the Village of Fairport Harbor, OH; the Honorable Daniel Pocek, mayor of the city of Bedford, OH; Tracy Nichols, assistant director for Economic Development at the Cuyahoga County, OH, Department of Development; and Casey Stephens, manager of Public Services and Brownfield Coordinator at the city of Toledo, OH, Division of Environmental Services testified to the government perspective on the first panel. The Subcommittee received testimony from industry stakeholders on the second panel, which consisted of Alex Machaskee, president and publisher of the Plain Dealer; Todd Davis, chief executive officer of Hemisphere Development LLC; Thomas Stone, executive director of the Mt. Pleasant NOW Development Corp.; Barry Franz, P.E., BCEE, P.G., principal engineer of Civil & Environmental Consultants, Inc.; and Craig Kasper, chief executive officer of Hull & Associates, Inc.

Two panels at the October 25, 2005, Pennsylvania hearing represented groups with interests similar to those in the Ohio hearing. The first panel consisted of Abraham Ferdas, Director of the Hazardous Site Cleanup Division at the U.S. Environmental Protection Agency Region III Office; Eugene DePasquale, deputy secretary for Community Revitalization and Local Government Support of the Pennsylvania Department of Environmental Protection [DEP]; Jim Seif, vice president of Corporate Relations at PPL Corp.; Paul Schoff of Feinberg and Schoff, LLP, and chief executive officer of Brownfield Realty, Ltd.; and Robert Colangelo, executive director of the National Brownfield Association. Kerry Wrobel, president of Lehigh Valley Industrial Park, Inc.; Chad Paul, Jr., chief executive officer of Ben Franklin Technology Partners; Ray Suhoki, president and chief operating officer of the Lehigh Valley Economic Development Corp.; and Stephen Donches, president of the National Museum of Industrial History presented their views as developers and remediated site users on the second panel.

Both the Ohio and Pennsylvania hearings focused initially on the relationship between the Federal, State, and local governments. In particular, stakeholders praised the efforts of the EPA region offices for fostering better interaction between the Federal Government and State and local governments, and for taking steps to ease the redevelopment process. While improved government relationships and redevelopment processes have been helpful, they do not address what stakeholders emphasized as the biggest obstacle to redevelopment efforts—the gap between the vast number of existing brownfields, the often tough economic conditions in which they exist, and the limited public resources to address these conditions. Witnesses concluded that the Federal Government needs to induce

private sector interest in redeveloping brownfield sites. Clarifying and expanding existing liability protections, as well as creating more financial incentives—including Federal tax credits—would address the greatest barriers to private investment in remediation and redevelopment projects.

Joseph Dufficy of the EPA Region 5 office testified that the agency’s program is successful. “As of March 2005, EPA and its grant recipients have performed more than 6,800 assessments. Brownfield grantees have leveraged \$6.6 billion in cleanup and redevelopment dollars, leveraging more than 30,000 jobs.”²³⁶ Dufficy emphasized that much of the success of this story is due to partnerships with States. “EPA . . . partners with [S]tates to develop Memoranda of Agreement [MOAs] that clarify program roles and responsibilities. EPA has signed 22 MOAs . . . Here in Region 5, we have MOAs with all 6 [S]tates and have maintained close partnerships with them since the inception of the Brownfield Program.”²³⁷ According to Dufficy, “These partnerships are an integral part of our success[;]”²³⁸ and continuing that success “will require ever more interaction and collaboration among all levels of government, the private sector and non-governmental organizations.”²³⁹

Chad Paul of Ben Franklin Technology Partners similarly praised partnership as crucial to successful brownfields redevelopment projects. Specifically in the case of his organization’s redevelopment projects, Paul testified, “[P]artnership is what makes it work because we don’t have all the resources that we need under our umbrella. The fact that we work with the university, with the city, with all of the other economic development organizations in a partnership . . . has been the secret to our success.”²⁴⁰

According to Kerry Wrobel of Lehigh Valley Industrial Park [LVIP], his company’s campuses, built on redeveloped brownfield sites, would not be possible without the work of the multiple levels of partners. Further, Wrobel testified, partnerships must cross all levels of government. For the LVIP VII site, county governments provided matching dollars for roads and other infrastructure while municipal government and economic development corporations also heavily participated in the site redevelopment.²⁴¹

Representative Steven C. LaTourette similarly noted the importance of intergovernmental partnerships. The closure of Diamond Shamrock in Fairport Harbor, OH in the 1960s shook the community, leaving a void of 70,000 jobs and a massive brownfield site as its legacy.²⁴² “That really is the key to this [redevelopment project -] . . . partnerships and everybody pulling in the same direction.”²⁴³ As a result, the project will result in “an exciting mixed

²³⁶ *Ohio Brownfields hearing* at 10 (statement of Joseph Dufficy, Chief of the Brownfields and Early Action Section at the U.S. Environmental Protection Agency Region V Office).

²³⁷ *Id.* at 15.

²³⁸ *Id.*

²³⁹ *Id.* at 17.

²⁴⁰ *The Challenge of Brownfields: What Are the Problems and Solutions in Redeveloping Pennsylvania’s Lehigh Valley Communities?* Before the Subcommittee on Federalism and the Census of the House Committee on Government Reform, 109th Cong. 130 [hereinafter *Pennsylvania Brownfields hearing*] (2005) (statement of Chad Paul, Jr., chief executive officer of Ben Franklin Technology Partners).

²⁴¹ *Id.* at 132.

²⁴² See *Ohio Brownfields hearing* at 75, 6 (statement Representative Steven C. LaTourette).

²⁴³ *Id.* at 75.

use” of residential and business properties as well as retail outlets and a golf course.²⁴⁴

While government and private sector stakeholders avow the relationship between the EPA and the State governments is key to continued success in addressing the Nation’s brownfields problem, those partnerships are only helpful when you have a redeveloper willing to take on a project. Liability concerns remain a significant barrier to enticing private redevelopment, Eugene DePasquale of the Pennsylvania DEP told the Subcommittee:

The reality is that brownfield redevelopment is difficult—both from a perception standpoint and a cost standpoint. Many developers are still hesitant to tackle a brownfield remediation project without strong assurances with regard to resolution of legal liabilities, controlling remediation costs and access to investment capital. Without liability protection, developers, local redevelopment authorities and businesses are hesitant to consider any form or ownership or even redevelopment partnership. Banks and other institutions are unlikely to finance these projects.²⁴⁵

The 2002 Brownfields Act, according to Paul Schoff, however, provided a way for the Federal Government to bow out of enforcement actions on brownfield sites enrolled in a VCP (an occurrence called “overfiling”) unless the State requests Federal action, there is an imminent and substantial danger to health or the environment, or where new contamination information requires further remediation.²⁴⁶ As a result, States now use their VCPs to assuage liability fears.

Todd Davis of the private redevelopment firm Hemisphere Development LLC described the State programs as “gaining in popularity because they allow private parties to initiate cleanups and work cooperatively with [S]tate agencies, thus avoiding some of the costs and delay that would likely occur if the sites were subject to enforcement-driven programs.”²⁴⁷

Echoing Davis’s sentiment, Robert Colangelo of the National Brownfields Association testified in a later hearing, “[S]tate programs provide liability relief, financial incentives and technical assistance. Most developers who purchase impaired properties have come to rely heavily on the liability relief offered through [S]tate voluntary cleanup programs[.]”²⁴⁸

²⁴⁴ *Id.*

²⁴⁵ *Pennsylvania Brownfields hearing* at 46 (statement of Eugene DePasquale, deputy secretary for Community Revitalization and Local Government Support of the Pennsylvania Department of Environmental Protection).

²⁴⁶ *Id.* at 60–61 (statement of Paul Schoff of Feinberg and Schoff, LLP, and chief executive officer of Brownfield Realty, Ltd.).

²⁴⁷ *Ohio Brownfields hearing* at 97 (statement of Todd Davis, chief executive officer of Hemisphere Development LLC).

²⁴⁸ *Pennsylvania Brownfields hearing* at 74 (statement of Robert Colangelo, executive director of the National Brownfield Association).

The 2002 Brownfields Act restricted overfiling on brownfield sites enrolled in State programs only in CERCLA enforcement cases, however. “EPA is free to pursue claims and enforcement under Federal environmental laws such as RCRA, TSCA and the like,” Paul Schoff explained.^{249 250}

That remaining liability proved to be a lingering deterrent to development projects in Pennsylvania, and, in 2004, the Commonwealth and EPA entered a one-of-its-kind MOA, DePasquale reported.²⁵¹ The Pennsylvania-EPA MOA created a “one-stop shop”²⁵² through which Pennsylvania can now “give developers limited comfort with respect to associated [F]ederal liabilities.”²⁵³ That MOA “covers Federal involvement where CERCLA, RCRA and TSCA legislation is implicated and clarifies how sites remediated under Act 2[, Pennsylvania’s VCP,] may also satisfy requirements for these three key Federal environmental laws.”²⁵⁴

Deputy Secretary DePasquale testified that while Pennsylvania is happy to be the only State in the country with this type of broad-ranging MOA because of the competitive advantage it creates, “the reality is that we think every State in the country should at some point have that agreement with EPA so that we can move projects forward across the country on brownfields.”²⁵⁵

According to Colangelo, Pennsylvania’s program is one of the “strongest” in the country and most “innovative” because of the level of liability relief site owners can secure.²⁵⁶ “[I]t is so important that . . . [States] can offer a broad range of brownfield sites, such as RCRA, CERCLA and TSCA [impacted sites] to be included under the brownfield program.”²⁵⁷ Echoing DePasquale, Colangelo concluded the Pennsylvania “MOA is a model that other States will start to emulate.”²⁵⁸

Even as other States explore similar MOAs these agreements will only provide developers with “limited comfort with respect to

²⁴⁹ *Id.* at 57 (statement of Paul Schoff of Feinberg and Schoff, LLP, and chief executive officer of Brownfield Realty, Ltd.).

²⁵⁰ “RCRA” refers to the Resource Conservation and Recovery Act of 1976. Public Law No. 94–580, 90 Stat. 2795 (codified as amended 42 U.S.C. § 6901 et seq. (2006)). According to EPA, RCRA gave the agency “cradle-to-grave” authority to control the “generation, transportation, treatment, storage, and disposal of hazardous waste.” “RCRA also set forth a framework for the management of non-hazardous wastes. The 1986 amendments to RCRA enabled EPA to address environmental problems that could result from underground tanks storing petroleum and other hazardous substances. RCRA focuses only on active and future facilities and does not address abandoned or historical sites.” U.S. Environmental Protection Agency, Resource Conservation and Recovery Act (last modified June 12, 2006) <<http://www.epa.gov/region5/defs/html/rcra.htm>>. “TSCA” refers to the Toxic Substance Control Act. Public Law No. 94–469, 90 Stat. 2003 (codified as amended 15 U.S.C. § 2601 et seq. (2006)). The Toxic Substances Control Act [TSCA] of 1976 was enacted by Congress to give EPA the ability to track the 75,000 industrial chemicals currently produced or imported into the United States. EPA repeatedly screens these chemicals and can require reporting or testing of those that may pose an environmental or human-health hazard. EPA can ban the manufacture and import of those chemicals that pose an unreasonable risk. U.S. Environmental Protection Agency, Toxic Substances Control Act (last modified Apr. 14, 2006) <<http://www.epa.gov/region5/defs/html/tsca.htm>>.

²⁵¹ See *Pennsylvania Brownfields hearing* at 43 (statement of Eugene DePasquale, deputy secretary for Community Revitalization and Local Government Support of the Pennsylvania Department of Environmental Protection).

²⁵² *Id.*

²⁵³ *Id.* at 46.

²⁵⁴ *Id.* at 57 (statement of Paul Schoff of Feinberg and Schoff, LLP, and chief executive officer of Brownfield Realty, Ltd.).

²⁵⁵ *Id.* at 43 (statement of Eugene DePasquale, deputy secretary for Community Revitalization and Local Government Support of the Pennsylvania Department of Environmental Protection).

²⁵⁶ *Id.* at 72 (statement of Robert Colangelo, executive director of the National Brownfield Association).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

associated [F]ederal liability,” DePasquale warned.²⁵⁹ The Pennsylvania-EPA MOA applies only to the “joint processing of applications. It does not mean that [F]ederal liability can be relieved by successful participation in the [S]tate brownfields program. To provide the assurances that are necessary to developers, these efforts need to progress to genuine liability relief as opposed only to joint processing of applications,” DePasquale told the Subcommittee.²⁶⁰

Asked whether there is “a need for additional legislation to enable EPA to . . . [enter similar MOAs] on a routine basis so that the 2002 Small Business Liability Relief and Revitalization Act would recognize that both EPA and the States are encouraged to have a broader MOA,”²⁶¹ stakeholders responded that the value of liability release to site owners and developers was incalculable.

Paul Schoff of Brownfield Realty, Ltd. testified that agreements comparable to the Pennsylvania-EPA MOA would be a critical asset in a developer’s tool box:

[B]efore the MOU or MOA came into effect, you still had the concern that, “Gee, if it was something covered by RCRA or TSCA . . . the legislation which was passed in January 2002 is not going to cover it.” So you still have that potential risk. In the back of your mind you are thinking, “Well, the EPA could still come in and do this. They could come in, they could do an overfiling, they could say, ‘Alright, we know you are under the Pennsylvania program, but under our auspices, now, we don’t think that meets muster.’” To have that one-stop shop is critical from the private sector’s standpoint . . . to know that you have complete protection, that you only have to deal with the agency on a one-time basis.²⁶²

Colangelo expanded upon Schoff’s statement, suggesting a number of brownfield sites remain undeveloped because of fear of the lingering potential liability:

According to our research, there is about \$4 to \$6 trillion of industrial property in the United States and corporations own about 40 percent of that [W]e estimate that somewhere between 20 to 50 percent of it is environmentally impaired. And those sites aren’t coming to market because of this reason [T]he next evolution for the brownfield market is dealing with this liability relief for liability clarity for the potentially responsible parties and . . . the key there is, I think we all agree in polluter pays, the question is how much and there is a whole group of companies out there that are willing to voluntarily clean up their properties to the suggested standards through the State voluntary cleanup programs if they can get off the hook and right now, we have a double standard. A developer or prospective purchaser can buy a property, enter it

²⁵⁹ *Id.* at 46 (statement of Eugene DePasquale, deputy secretary for Community Revitalization and Local Government Support of the Pennsylvania Department of Environmental Protection).

²⁶⁰ *Id.*

²⁶¹ *Id.* at 80 (statement of Subcommittee Chairman Michael R. Turner).

²⁶² *Id.* at 82 (statement of Paul Schoff of Feinberg and Schoff, LLP, and chief executive officer of Brownfield Realty, Ltd.).

into the program, clean it up to the standard, get liability relief, but the property owner can't.²⁶³

Todd Davis simply stated, "Congress . . . should take all actions within its power to clarify liability issues and create more attractive and sustainable financial incentives to encourage investment in brownfield redevelopment."²⁶⁴

"[T]he issue . . . of finality and liability release, if you don't have that, you are not only not going to get developers, you are not going to get anybody to finance the projects, either," Stephen Donches emphasized.²⁶⁵

To clarify and expand the liability provision would remove a barrier for many brownfield redevelopment projects. Schoff recommended the simplest solution to achieve this result:

[A]mend the 2002 legislation to include protection under all Federal environmental laws, not just under CERCLA. . . . [F]or CERCLA not to include petroleum, . . . the vast majority of brownfields out there have some petroleum contamination, some petroleum constituent . . . CERCLA doesn't touch that. That is RCRA and other Federal environmental statutes.

If the 2002 legislation were to be amended to include protection for under all Federal environmental statutes, I think that would go a long way toward easing a lot of people's fears and putting their fears to rest once and for all."²⁶⁶

Beyond liability issues, stakeholders all expressed concern over lack of adequate funds for brownfields redevelopment. According to Todd Davis, "Current estimates place the cost of cleaning up the Nation's brownfields at \$650 billion."²⁶⁷

While loosening spending restrictions on EPA funds would free more money for remediation and redevelopment activities, it would not expand the pool of available funds. "Public and private resources for brownfields assessment and remediation are limited—just one more deterrent for would-be developers. Therefore, Congress must create a viable broad-based economic incentive to make significant, measurable progress in tackling brownfield sites," Todd Davis told the Subcommittee.²⁶⁸ Similarly, Barry Franz testified, "[B]rownfields redevelopment is complex and costly as compared to the greenfield property. Economic incentives are necessary to spur this redevelopment."²⁶⁹

While assessment and remediation costs "carry a big price tag of brownfields," Craig Kasper advised, "other issues exist . . . that can be just as critical to a successful development. Demolition, up-

²⁶³ *Id.* at 83 (statement of Robert Colangelo, executive director of the National Brownfield Association).

²⁶⁴ *Ohio Brownfields hearing* at 88 (statement of Todd Davis, chief executive officer of Hemisphere Development LLC).

²⁶⁵ *Pennsylvania Brownfields hearing* at 131 (statement of Stephen Donches, president of the National Museum of Industrial History).

²⁶⁶ *Id.* at 82–83 (statement of Paul Schoff of Feinberg and Schoff, LLP, and chief executive officer of Brownfield Realty, Ltd.).

²⁶⁷ *Ohio Brownfields hearing* at 90 (statement of Todd Davis, chief executive officer of Hemisphere Development LLC).

²⁶⁸ *Ohio Brownfields hearing* at 94 (statement of Todd Davis, chief executive officer of Hemisphere Development LLC).

²⁶⁹ *Id.* at 102 (statement of Barry Franz, P.E., BCEE, P.G., principal engineer of Civil & Environmental Consultants, Inc.).

grading infrastructure, and environmental are just a few examples.”²⁷⁰ Kasper urged, “Consideration to all critical activities necessary for redevelopment should be considered as eligible cost on[]sites that are ultimat[ly] cleaned up and, of course, with an approved State program.”²⁷¹

Expounding upon the arguments of Davis, Franz, and Kasper, Thomas Stone advised, “Securing significant funding to return brownfields to productive use should be a major part of this country’s initiative to strengthen America’s cities.”²⁷²

“As time goes on, fewer easy-to-develop brownfield sites are available, and so cities are going to be left with the harder, more complicated sites and these have to have financial incentives to attract private sector investment,” Colangelo advised the Subcommittee.²⁷³ Because these sites are so complicated, States are limited in how attractive they can make such redevelopment opportunities appear. States “can’t . . . tackle brownfields alone,” Colangelo testified.²⁷⁴ He concluded, redeveloping the Nation’s brownfields “requires a partnership with the private sector. And the government’s role . . . is best as a facilitator and the administrator of programs that reduce risk and attract private investment.”²⁷⁵

“[T]he private sector has to be the leader in getting these deals done. . . . [T]here’s a limited amount of grant dollars that will ever be available for brownfield redevelopment,” Todd Davis likewise informed the Subcommittee.²⁷⁶

EPA’s Joseph Dufficy testified similarly:

[N]otwithstanding all of the efforts [of] the Federal, State, [and] local units of government, we will never be able in the public sector to clean up the hundreds of thousands of sites that are out there. The only way that will happen is with significant increases in funding and influences from the private sector.²⁷⁷

Echoing Robert Colangelo, Amy Yersavich of the Ohio EPA noted that “the need is now . . . [for] some of the higher hanging fruit, some of the more complicated sites that maybe need a little push.”²⁷⁸ “Encouraging private developers to take on brownfield redevelopment projects at sites with large amounts of contamination or where complex cleanup is needed” remains a large obstacle, said Yersavich.²⁷⁹ Unfortunately, she testified, “Most government brownfield incentives are available only to local governments or other public entities.”²⁸⁰ Therefore, “a tax credit that would en-

²⁷⁰ *Id.* at 113 (statement of Craig Kasper, chief executive officer of Hull & Associates, Inc.).

²⁷¹ *Id.*

²⁷² *Id.* at 100 (statement of Thomas Stone, executive director of the Mt. Pleasant NOW Development Corp.).

²⁷³ *Pennsylvania Brownfields hearing* at 73 (statement of Robert Colangelo, executive director of the National Brownfield Association).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Ohio Brownfields hearing* at 120 (statement of Todd Davis, chief executive officer of Hemisphere Development LLC).

²⁷⁷ *Id.* at 8 (statement of Joseph Dufficy, Chief of the Brownfields and Early Action Section at the U.S. Environmental Protection Agency Region V Office).

²⁷⁸ *Id.* at 68 (statement of Amy Yersavich, manager of the Voluntary Action Program of the Ohio Environmental Protection Agency).

²⁷⁹ *Id.* at 21.

²⁸⁰ *Id.* at 21–22.

courage the private sector to increase their brownfields redevelopment work . . . would provide a tremendous boost to . . . urban core and small town revitalization efforts,” Yersavich concluded.²⁸¹

Tracy Nichols of the Cuyahoga County Department of Development noted that, in the past, her organization provided funds only to municipal governments and to non-profit organizations. “As our economy worsened and cities were hard hit and did not have funds available to go out and buy brownfields to redevelop them, we changed our program to give funding directly to developers and to offer them a forgivable loan. Once that happened, we saw a huge increase.”²⁸²

Two of the key obstacles to development are “lack of available capital and financial incentives, such as tax deferrals, abatement and/or credits . . . [but they are] common to both greenfield and brownfield development efforts,” testified Barry Franz.²⁸³ A tax credit for the extra costs incurred developing a brownfield would aid in reaching the often cited goal of “evening the playing field.”

Based on his experience with State tax credits, Craig Kasper also expressed his belief that tax credit would create a valuable incentive for private developers:

More than 20 [S]tates already use some form of tax incentives to encourage brownfield reuse; additional [F]ederal incentives could enhance these programs and provide additional resources to promote economic development and re-investment opportunities in blighted areas. In addition, tax incentives that focus specifically on environmental cleanup of contaminated properties—when coupled with other economic development tools—have the ability to generate renewed interest in brownfield versus greenfield development. Furthermore, developing tax or other financial incentives that would provide a funding tool to help cover the costs associated with assessment, securing environmental liability insurance and conducting demolition could go a long way toward promoting and encouraging new brownfield development in critical regions of Ohio and the Midwest.²⁸⁴

Comparatively, Kerry Wrobel told the Subcommittee the tax credit proposed by “the Brownfields Revitalization Act of 2005 . . . would add another weapon to our arsenal,” filling a critical gap in brownfields redevelopment incentives.²⁸⁵ Wrobel continued:

We can provide local tax incentives, we can provide State funding, we can provide Federal funding. If we can also provide Federal tax incentives, that is a missing link that at the moment we cannot provide. As you know, we cannot provide Federal grants directly to private business, so that is a hole in our incentive program and another form of assistance for those taking the risk—it truly is a risk to step

²⁸¹ *Id.*

²⁸² *Id.* at 67 (statement of Tracy Nichols, assistant director for Economic Development at the Cuyahoga County, OH, Department of Development).

²⁸³ *Id.* at 108 (statement of Barry Franz, P.E., BCEE, P.G., principal engineer of Civil & Environmental Consultants, Inc.).

²⁸⁴ *Id.* at 117 (statement of Craig Kasper, chief executive officer of Hull & Associates, Inc.).

²⁸⁵ *Pennsylvania Brownfields hearing* at 88 (statement of Kerry Wrobel, president of Lehigh Valley Industrial Park, Inc.).

on and develop and put one's equity into a brownfield site.²⁸⁶

Joseph Dufficy likewise characterized a Federal tax credit as a useful tool in brownfields redevelopment:

I've been doing this for about as long as anybody in Federal Government and what brownfields need is as many tools in the toolbox as you can possibly get. The issue at hand is largely real estate transactions. That's really what a brownfield is. And anything that can impact whether a real estate transaction can go forward is what we really need.²⁸⁷

Jim Seif testified that even a small impact can tip the scales for a brownfield project. Whether the tax relief is on the Federal, State, or local level, that relief might result in a "few more dollars added [to the deal]. And when you are dealing with a decision between this piece of land or that piece, \$12.50 can swing a deal. It can be the lubrication needed to make a decision go faster and the tax element is always part of a deal."²⁸⁸

From a developer's perspective, Todd Davis explained, "[I]f you shift the incentive to private marketplace and you come up with a self-implementing private tax program, and you're doing it as a percentage of cleanup costs, cleanup costs defined by . . . however the final definition comes down, then you can actually raise those limits of private investment and shift the pace dramatically."²⁸⁹

Davis also testified that while a tax credit would not spur industrial redevelopment, it would make reuse of properties and investment in those sites more attractive:

Historically, [F]ederal, [S]tate, and local policies have done little to spur industrial redevelopment. Rehabilitation tax credits offered during the mid-1970s provided incentives to invest in real estate and redevelopment. These tax incentives helped stem the exodus of businesses from long-established neighborhoods and made reuse more economically attractive. However, these tax advantages effectively vanished under the 1986 tax code revisions. . . . As a result, investors turned to potentially more lucrative sources of return, such as Wall Street, and many rehabilitation projects failed to materialize. Limited tax relief, allowing current deductibility or remedial costs, offers little incentive to would be brownfields redevelopers or property owners.²⁹⁰ (citations omitted)

Davis further explained that the utility of current Federal tax credits for brownfield redevelopment "has not been meaningful due to significant limitations placed in [F]ederal programs."²⁹¹ Con-

²⁸⁶ *Id.*

²⁸⁷ *Ohio Brownfields hearing* at 74 (statement of Joseph Dufficy, Chief of the Brownfields and Early Action Section at the U.S. Environmental Protection Agency Region V Office).

²⁸⁸ *Pennsylvania Brownfields hearing* at 78 (statement of Jim Seif, vice president of Corporate Relations at PPL Corp.).

²⁸⁹ *Ohio Brownfields hearing* at 125 (statement of Todd Davis, chief executive officer of Hemisphere Development LLC).

²⁹⁰ *Ohio Brownfields hearing* at 95 (statement of Todd Davis, chief executive officer of Hemisphere Development LLC).

²⁹¹ *Id.*

sequently, Davis advised the Subcommittee, “any proposed tax credit program should not only be limited only to the most distressed urban areas, as significant brownfields are a problem in every community; the tax credits should be freely transferable; and the tax credits should provide a substantial enough incentive to encourage investment in complex transactions.”²⁹²

Tracy Nichols also expressed support for a Federal tax credit “as long as the credits are available for all brownfield sites and not limited to areas of poverty.”²⁹³ “Brownfields clearly impact the inner ring suburbs as well as [t]he larger urban metropolitan areas,” she explained, and “tax credits would make more funds available for the sites which have been very difficult to remediate due to the high cost of the remediation.”²⁹⁴

While Davis and Nichols both opined a Federal tax credit should not be limited to distressed communities, other stakeholders suggested securing redevelopment funds from private investors is most difficult in economically distressed areas.

“Our problem is attracting investments to invest into the central city area,” Casey Stephens, brownfield coordinator for the city of Toledo, told the Subcommittee.²⁹⁵ Stephens testified to Toledo’s success in “cleaning up contaminated and industrial sites and getting them back into reuse,” but noted they “found that there are certain areas of the city that have been left behind. And those areas of the city are the central city area that are most impacted by brownfield locations located therein.”²⁹⁶ “Toledo has found that accessing cleanup funds is not as much of an issue as encouraging investment in low-income neighborhoods where the residents don’t have disposable income[.]”²⁹⁷

More incentives are necessary to incite interest in brownfield sites in the economically distressed areas, Stephens said. “Developers and businesses have invested and redeveloped many desirable brownfield sites within Toledo, the ‘low-hanging fruit,’ as it were. But our problem is attracting investment into the areas most impacted by brownfield, especially in a weak market location.”²⁹⁸ “So the city of Toledo supports anything that the Federal Government can do to help attract private investment into the central city areas,” Stephens testified.²⁹⁹ “Toledo believes that additional incentives must be in place to stimulate central city investment in brownfield sites. These additional incentives should not be considered a subsidy to urban areas by suburban and rural districts. The suburban fringe cannot prosper without a strong urban core,” Stephens continued.³⁰⁰ “[Y]ou can’t have a strong suburban area without a strong core area. And we feel that anything we can do to attract . . . private investment, into the central city, into the core area will go a long way in strengthening our whole regional economy,” Stephens concluded.³⁰¹

²⁹² *Id.*

²⁹³ *Id.* at 54 (statement of Tracy Nichols, assistant director for Economic Development at the Cuyahoga County, OH, Department of Development).

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 57 (statement of Casey Stephens, manager of Public Services and Brownfield Coordinator at the city of Toledo, OH, Division of Environmental Services).

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 64–65.

²⁹⁸ *Id.* at 63.

²⁹⁹ *Id.* at 57.

³⁰⁰ *Id.* at 63–64.

³⁰¹ *Id.* at 67.

Ray Suhocki of the Lehigh Economic Development Corp. related concerns similar to Casey Stephens. Suhocki testified that there are “approximately 100 brownfield sites in the Lehigh Valley [region of Pennsylvania],”³⁰² the majority of which are located within “smaller, generally poorer municipalities.”³⁰³ These sites “are not all as famous and large as . . . the LVIP [Lehigh Valley Industrial Park] project,” Suhocki told the Subcommittee, “but they are very important [projects] and each one of those [sites] . . . are typically within an urban setting and . . . the tax credit will help those kinds of properties be returned to use[.]”³⁰⁴

Stakeholders voiced support for tax incentives for other redevelopment expenditures as well. Echoing statements of earlier witnesses, Deputy Secretary DePasquale and Kerry Wrobel emphasized the importance of environmental insurance.³⁰⁵

Environmental insurance provides a backstop against an unanticipated rise in remediation and redevelopment costs or against unexpected additional costs. These insurance policies are extremely costly, however, and a tax credit for the premiums would be a valuable incentive to private developers. DePasquale explained:

Fixed prices provide an incentive to move forward with redevelopment. [Environmental insurance] helps developers prepare budgets and attain financing because it removes the worries that financial institutions have when lending toward contaminated properties. A [F]ederal tax credit would enable developers to purchase the insurance they need to guarantee fixed pricing in remediation. The insurance guarantees that remediation costs to the developer will not exceed a set amount. The tax credit puts the insurance costs within reach and provides assurances needed to move ahead with cleanup, removing a hurdle that developers face when confronted by the decision to take on revitalizing abandoned industrial sites.³⁰⁶

The Commonwealth believes this incentive is so important to encouraging redevelopment efforts that the legislature “is considering legislation . . . that would create a program for the purchase of certain types of environmental liability insurance, and for grants to pay the costs of those premiums,” DePasquale reported.³⁰⁷

As an alternative to a tax credit for environmental insurance premiums, Kerry Wrobel suggested permitting the use of Revolving Loan Fund moneys to purchase environmental insurance. “Environmental insurance premiums for brownfield sites can reach seven figures. Equally challenging, the environmental insurance premium must be paid at the time of land acquisition, before land sales can generate revenue for an organization,” Wrobel testified.³⁰⁸ “A grant from the Revolving Loan Fund could provide critical assistance

³⁰² *Pennsylvania Brownfields hearing* at 133 (statement of Ray Suhoki, president and chief operating officer of the Lehigh Valley Economic Development Corporation).

³⁰³ *Id.* at 109.

³⁰⁴ *Id.* at 133.

³⁰⁵ *See id.* at 48 (statement of Eugene DePasquale, deputy secretary for Community Revitalization and Local Government Support of the Pennsylvania Department of Environmental Protection); *id.* at 91 (statement of Kerry Wrobel, president of Lehigh Valley Industrial Park, Inc.).

³⁰⁶ *Id.* at 47 (statement of Eugene DePasquale, deputy secretary for Community Revitalization and Local Government Support of the Pennsylvania Department of Environmental Protection).

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 91 (statement of Kerry Wrobel, president of Lehigh Valley Industrial Park, Inc.).

early in the project's life and, once again, offset a premium cost not experienced in greenfield development.”³⁰⁹

Deputy Secretary DePasquale also expressed support for tax free bond financing:

Many developers still lack the capital to undertake brownfield ventures. Investors are reluctant to commit money for projects when the return on their investment could be years away. Congresswoman Hart has introduced two pieces of legislation designed to support redevelopment of old industrial sites common to western Pennsylvania. One bill would give tax-exempt status on bonds used to help finance the cleanup of brownfields. That currently is not the case. Bonds provide developers and businesses with the access to capital they need to clean up the sites. The other bill would allow businesses or developers to build savings accounts free of taxation for the cleanup of such sites. The tax advantages would apply only if the money is spent on remediation. The savings accounts would be the business equivalent of Individual Retirement Accounts [IRAs]. Congress should examine both of these bills as a means to enhance support for brownfield remediation.³¹⁰

Explaining the importance of bonding at the State level, Stephen Donches testified, “[I]nfrastructure funding, both onsite and offsite, is critical and [it is critical] to get that into play early on.”³¹¹ In the redevelopment of the Bethlehem Steel brownfield site, Donches reported redevelopers “were fortunate to have the county . . . push for a bond issue that resulted in some \$13 million for a road that gets into the [redeveloped] area . . . but even with early support . . . [it] has taken a long time” to complete the infrastructure.³¹² “[I]t won’t do any good to have a remediation plan and go through the whole process if you can’t get to the site,” Donches concluded.³¹³

In addition to clarifying liability provisions and providing more funds for cleanup through new incentives, stakeholders stressed the importance of minimizing the time businesses spend securing the proper permits for redevelopment.

Deputy Secretary DePasquale argued that “all [F]ederal departments should streamline permitting to favor redevelopment of brownfields.”³¹⁴ “Providing incentives and ensuring liability are essential,” DePasquale told the Subcommittee, “But streamlining the process is critical to ensure that these sites remain competitive on the open market. The faster we move brownfield sites through the regulatory process, the quicker we reclaim these sites and clean up communities.”³¹⁵

³⁰⁹ *Id.* at 87.

³¹⁰ *Id.* at 47 (statement of Eugene DePasquale, deputy secretary for Community Revitalization and Local Government Support of the Pennsylvania Department of Environmental Protection).

³¹¹ *Id.* at 131 (statement of Stephen Donches, president of the National Museum of Industrial History).

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.* at 47 (statement of Eugene DePasquale, deputy secretary for Community Revitalization and Local Government Support of the Pennsylvania Department of Environmental Protection).

³¹⁵ *Id.*

Ray Suhocki explained that the administrative burden involved in a redevelopment project often results in greater project cost and loss of time because “[m]ulti-layered regulatory programs . . . often times require numerous approvals from multiple agencies and departments within agencies.”³¹⁶ Suhocki praised the Pennsylvania Brownfields Action Team [BAT] program, which facilitates the review and approval process. The BAT “created a single-point-of-contact approach . . . All permits, plans, reports and submittals required to demonstrate compliance under [S]tate environmental laws go through one point of contact. That contact is responsible for facilitating the review and approval process that ultimately reduces the cost and time to complete projects.”³¹⁷ Suhocki recommended a similar approach be adopted by the Federal Government through the MOAs between States and the EPA. By appointing in the MOA one point of contact for projects requiring both State and Federal approval, “a ‘one-stop-shop’ can be established where both agencies agree to one lead agency and one point of contact that is responsible for facilitating all review and approvals required to comply with both [S]tate and [F]ederal environmental laws.”³¹⁸

In his review of the “the good, the bad, and the ugly” of brownfields redevelopment, Todd Davis identified the time consumed by administrative processes as “the bad.”³¹⁹ “In part, due to the way the regulatory process is implemented, at least from a developer’s perspective, the deals are still very difficult and it takes way too long to get them done. In many cases, Ohio brownfield deals are simply economically unviable without significant subsidy.”³²⁰ “The ugly,” testified Davis, “is the thought of brownfield redevelopment in Ohio without significant subsidy . . . I applaud your effort in coming up with a creative brownfield tax credit strategy, which from my perspective is the only way to get a meaningful shift of capital from a private perspective into brownfield redevelopment, not only in Ohio, but throughout the country.”³²¹

Thomas Stone of the Mt. Pleasant NOW Development Corp. also cited administrative burdens as a stumbling block for redevelopment projects. The time delay caused by administrative burdens, Stone said, can make or break a deal.³²² “[W]hen we tell [investors] basically there’s a time horizon of . . . 18 months to 2 years before we could even potentially clean the site, they’re saying, thanks but no thanks.”³²³ “Businesses are looking at when they want to put in a new store, where they want to create a facility. They’re just looking for the available site,” Stone told the Subcommittee, “[s]o if we can only present them with the opportunity of, well, in 2 years we might have something available for you, then we continually miss these opportunities.”³²⁴

³¹⁶ *Id.* at 114 (statement of Ray Suhoki, president and chief operating officer of the Lehigh Valley Economic Development Corp.).

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Ohio Brownfields hearing* at 85 (statement of Todd Davis, chief executive officer of Hemisphere Development LLC).

³²⁰ *Id.*

³²¹ *Id.*

³²² *See id.* at 121 (statement of Thomas Stone, executive director of the Mt. Pleasant NOW Development Corp.).

³²³ *Id.*

³²⁴ *Id.*

To address this barrier to private investment, Deputy Secretary DePasquale suggested the Federal Government “keep[] in mind that we have to level the playing field” and that “a streamlined permitting process for priority brownfield districts at the Federal level” is one way government can “continue to work at ways to equalize that playing field.”³²⁵ “[I]f people that are investing feel that they are going to have too long a time of getting their permitting up or the funding will be too difficult to achieve, they simply will not invest in those sites, so we all have to work together to come to that common ground,” DePasquale concluded.³²⁶

IV. FINDINGS AND RECOMMENDATIONS

A. FINDINGS

1. EPA Brownfields Program assessment, cleanup, job training, research, and technical assistance grants are perceived as successful, but the actual impact is difficult to determine.

According to stakeholders, EPA funds “provide[] an important contribution to site cleanup and redevelopment by funding activities that might not otherwise occur,” testified John Stephenson of GAO.³²⁷ Despite the perceived success of the Brownfields Program and the positive remarks from the stakeholder community, Stephenson reported GAO was unable to measure the actual impact of EPA funding for two reasons. First, GAO found that “the impact of EPA’s funding is difficult to isolate because it is often combined with funds from other sources.”³²⁸ Second, GAO determined EPA’s performance measures for the Brownfields Program are inadequate, limiting both EPA’s and Congress’ ability to gauge progress toward the major goals of the program.³²⁹ EPA reports raw numbers of site assessments, funds leveraged, and jobs generated, but the agency is unable to report on one of the program’s stated objectives—grantees’ cleanup and redevelopment activities. Additionally, while it is not one of the primary objectives of the Brownfields Program, assistance to State voluntary cleanup programs represents approximately one-third of the program’s fund expenditures. However, “EPA does not collect data on its assistance to [S]tate voluntary cleanup programs, for such activities as compiling inventories of brownfield sites, performing site assessments, and developing guidance for program participants.”³³⁰ Finally, GAO noted, “although EPA’s overall mission is to protect human health and the environment, the agency has not yet developed measures to determine the extent to which the Brownfields Program helps reduce environmental risks.”³³¹

EPA agreed with the GAO report findings and responded positively to the suggestions therein.³³² Thomas Dunne of EPA testified that the agency developed a new data collection mechanism to col-

³²⁵ *Pennsylvania Brownfields hearing* at 43 (statement of Eugene DePasquale, deputy secretary for Community Revitalization and Local Government Support of the Pennsylvania Department of Environmental Protection).

³²⁶ *Id.*

³²⁷ *Brownfield Overview hearing* at 25 (statement of John Stephenson, Director of the Natural Resources and Environment, U.S. Government Accountability Office).

³²⁸ *Id.* at 26.

³²⁹ *See id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *See GAO Report* at 27.

lect more detailed data from its revolving loan fund grantees.³³³ EPA designed this new mechanism to enable the agency to correlate program results with grantee performance in order to measure programmatic success.³³⁴ Dunne also reported that the agency is working with administrators of State and tribal programs to develop performance measures that will link program performance to the number of acres remediated and ready for reuse to gauge the impact of EPA funds on State voluntary cleanup programs.³³⁵

2. *The EPA Brownfields Program revolving loan fund is underutilized.*

GAO reported that nearly half of the stakeholders interviewed reported the underutilization of revolving loan fund grants.³³⁶ GAO's investigation revealed that only 47 of 154 grantees issued loans for a total of 67 brownfields projects.³³⁷ GAO further reported, "As of November 2004, grant recipients had loaned out less than \$29 million (about 17 percent) of the \$168 million in revolving loan fund grants awarded by EPA."³³⁸ Stakeholders reported the primary reason for underutilization is the special technical or administrative requirements of administering a fund. "Managing a revolving loan fund requires a government or nonprofit entity to perform many of the functions of a commercial lending institution, including establishing interest rates and collateral requirements; processing and approving loans; and collecting loan payments . . . staff time and expertise are key to making these loans."³³⁹ Further, some grant recipients stated, "EPA's grants were not large enough to justify the time and effort required to establish a fund because it is frequently depleted after one or two loans are made."³⁴⁰

Stakeholders suggest greater efficiency would result if EPA gave "priority to applicants with proven expertise or to coalitions of agencies that can consolidate administrative functions and thereby produce economies of scale."³⁴¹ Stakeholders specifically noted:

[G]rant recipients with in-house technical expertise, such as economic development or regional planning agencies, were more likely to have financial expertise or experience administering other revolving loan funds and were therefore in a better position to set up a fund. Grant recipients that partnered with other [S]tate or local agencies to obtain technical expertise also were successful in this regard. Two revolving loan fund grant recipients also reported that grant recipients who hired contractors to manage the administrative aspects of the revolving loan fund have been

³³³ See *Brownfield Overview hearing* at 7 (statement of Thomas Dunne, Deputy Assistant Administrator in the Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency).

³³⁴ See *id.*

³³⁵ See *id.* (statement of John Stephenson, Director of the Natural Resources and Environment, U.S. Government Accountability Office).

³³⁶ See *id.* at 36.

³³⁷ See *id.*

³³⁸ See *GAO Report* at 5.

³³⁹ *Brownfield Overview hearing* at 37 (statement of John Stephenson, Director of the Natural Resources and Environment, U.S. Government Accountability Office).

³⁴⁰ *Id.* at 38.

³⁴¹ *Id.* at 37.

successful at establishing a fund framework and were better positioned to make loans.³⁴²

Dunne testified that “EPA is committed to improving revolving loan fund performance and ensuring that, if grant funds are not being used, those grant funds will be closed out or grantees will be required to transition old loan fund grants to the new Brownfields Law program authority.”³⁴³

Dunne further testified that EPA agreed that “efficiency and economies of scale often can be achieved by Revolving Loan Fund entities with proven track records that build upon administrative expertise.”³⁴⁴ Accordingly, “EPA has invited coalitions of eligible entities to pool their Revolving Loan Fund grant requests and submit a single grant application for consideration.”³⁴⁵ Further, the agency is “adjusting ranking criteria for Revolving Loan Fund applicants, giving more weight to ranking factors which demonstrate an applicant’s ability to manage a fund and make loans.”³⁴⁶

3. *Congress authorized \$250 million per year from fiscal year 2002 through fiscal year 2006 for the Federal Brownfields Program. Congress has yet to appropriate the full authorized level of funding, yet even the authorized level of funding is insufficient for the task.*

A number of witnesses in this series of hearings touched upon the daunting number of unremediated brownfields remaining, despite State revitalization efforts. While “well-designed State programs are a critical component of this Nation’s efforts to revitalize lands[,] . . . they are not sufficient to solve this Nation’s brownfield problem in our lifetime,” Jonathan Philips testified.³⁴⁷

Many States have “more sites than . . . funds,” testified Douglas Scott.³⁴⁸ “State and local governments have been very creative in utilizing all of the myriad resources that they have financially to try to assist with these sites.”³⁴⁹ He continued, “It is pretty clear . . . that the number of sites isn’t being lessened to the rate that any of us would like to see.”³⁵⁰ However, “money is only part; the rest must come from tax credits and other targeted incentives to the private sector to bring them into these sites,” Scott concluded.³⁵¹

John Magill also warned the subcommittee that State dollars are not enough to address the brownfields problem alone. “Access to additional sources of Federal dollars through the tax credits or increased resources at U.S. EPA are [sic] crucial to stretching State funding to undertake additional local projects.”³⁵²

³⁴² U.S. Government Accountability Office, *Brownfield Redevelopment*, Report No. GAO-05-94, at 23 (2004).

³⁴³ *Id.* at 7 (statement of Thomas Dunne, Deputy Assistant Administrator in the Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency).

³⁴⁴ *Id.* at 18.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *State Incentive Programs hearing* at 95 (statement of Jonathan Philips, senior director of Cherokee Investment Partners, LLC).

³⁴⁸ *Id.* at 41 (statement of Douglas Scott, director of the Illinois Environmental Protection Agency).

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.* at 23 (statement of John Magill, director of the Ohio Department of Development Office of Urban Development).

Likewise, Thomas Stone advised the subcommittee: “Securing significant funding to return brownfields to productive use should be a major part of this country’s initiative to strengthen America’s cities.”³⁵³

4. *The high cost of brownfields cleanup remains a significant deterrent to private sector investment in brownfield redevelopment.*

Throughout this series of hearings, witnesses frequently expressed concern over a lack of adequate funds for brownfields redevelopment. According to Todd Davis, “Current estimates place the cost of cleaning up the Nation’s brownfields at \$650 billion.”³⁵⁴ “There’s only so much, there’s a limited amount of grant dollars that will ever be available for brownfield redevelopment,” Davis testified.³⁵⁵ “Public and private resources for brownfields assessment and remediation are limited—just one more deterrent for would-be developers. Therefore, Congress must create a viable broad-based economic incentive to make significant, measurable progress in tackling brownfield sites,” Davis concluded.³⁵⁶

EPA’s Joseph Dufficy similarly warned,

[N]otwithstanding all of the efforts [of] the Federal, State, [and] local units of government, we will never be able in the public sector to clean up the hundreds of thousands of sites that are out there. The only way that will happen is with significant increases in funding and influences from the private sector.³⁵⁷

Douglas Steidl of the American Institute of Architects testified that while the EPA program has created “noticeable results,” more tools are necessary to address the widespread brownfield problem.³⁵⁸ “[T]here are far more brownfield sites requiring remediation than the U.S. EPA program could ever hope to address in our lifetimes. As a result, Federal legislation is needed to expedite site cleanup and foster economic development of former industrial properties.”³⁵⁹

Amy Yersavich of the Ohio EPA noted that of the hundreds of thousands of remaining brownfield sites, it is the more complicated sites that require the most need; it is the “higher hanging fruit, some of the more complicated sites that maybe need a little push.”³⁶⁰

Akron, OH Mayor Don Plusquellic agreed, testifying the “low-hanging” fruit—less seriously contaminated properties—have mostly been addressed.³⁶¹ It is those sites that are more seriously contaminated and/or lie in less desirable locations “that most developers are not willing to touch. These are the sites that need those

³⁵³ *Ohio Brownfields hearing* at 100 (statement of Thomas Stone, executive director of the Mt. Pleasant NOW Development Corp.).

³⁵⁴ *Id.* at 90 (statement of Todd Davis, chief executive officer of Hemisphere Development LLC).

³⁵⁵ *Id.* at 120.

³⁵⁶ *Id.* at 94.

³⁵⁷ *Id.* at 8 (statement of Joseph Dufficy, Chief of the Brownfields and Early Action Section at the U.S. Environmental Protection Agency Region V Office).

³⁵⁸ *Brownfield Overview hearing* at 124 (statement of Douglas L. Steidl, president of the American Institute of Architects).

³⁵⁹ *Id.* at 124–125.

³⁶⁰ *Ohio Brownfields hearing* at 68 (statement of Amy Yersavich, manager of the Voluntary Action Program of the Ohio Environmental Protection Agency).

³⁶¹ *Brownfield Overview hearing* at 52 (statement of the Honorable Don Plusquellic, mayor of the city of Akron, OH, and president of the U.S. Conference of Mayors).

added incentives in order to make them competitive in the marketplace, especially if one is comparing it to a greenfield site,” according to Plusquellic.³⁶² Extra financial incentives will “turn negatives into positives”³⁶³ and “[t]he one thing that has been missing is a tax incentive that will really spur private sector investment to redevelop these sites,” Plusquellic noted.³⁶⁴

Robert Colangelo echoed both Yersavich and Plusquellic. The “low-hanging fruit” is all but gone, leaving “cities . . . with the harder, more complicated brownfield sites . . . [T]hese sites will require meaningful government incentives if the public sector is to continue to attract private sector investment and developer interest.”³⁶⁵

“Encouraging private developers to take on brownfield redevelopment projects at sites with large amounts of contamination or where complex cleanup is needed” remains a large obstacle, reported Yersavich.³⁶⁶ Unfortunately, she testified, “Most government brownfield incentives are available only to local governments or other public entities.”³⁶⁷ Consequently, stakeholders repeatedly advised the subcommittee that the Federal Government needs to induce private sector interest in redeveloping brownfield sites.

Charles Bartsch suggested the most effective way to encourage an influx of private investment is through tax incentives. “State and Federal tax incentives historically have been used to channel investment capital and promote economic development in areas that have needed it, and brownfield targeting is a natural evolution of this type of program.”³⁶⁸

According to GAO’s investigation, a number of stakeholders likewise suggested a tax credit “could attract developers to brownfield sites on a broader national basis and enhance the [F]ederal, [S]tate, and local brownfields redevelopment efforts currently under way” by “allow[ing] developers to offset a portion of their [F]ederal income tax with remediation expenditures[.]”³⁶⁹ These stakeholders also cited the low-income housing tax credit and the historic rehabilitation tax credit as successful stimulants to redevelopment.³⁷⁰

James Maurin of the Real Estate Roundtable concluded, “As the threat of excessive environmental liability recedes, the remaining problem with most well located brownfield sites is a fairly simple one: Money. Other things being equal, it costs more to clean up and redevelop a brownfield than it does simply to buy and develop a Greenfield.”³⁷¹ Supportive of a Federal tax credit, Maurin told the subcommittee, “As with the low-income housing tax credit program, the private sector would still provide much of the necessary funds

³⁶² *Id.* at 52–53.

³⁶³ *Id.* at 53.

³⁶⁴ *Id.* at 54.

³⁶⁵ *State Incentive Programs hearing* at 87 (statement of Robert Colangelo, executive director of the National Brownfields Association).

³⁶⁶ *Ohio Brownfields hearing* at 21 (statement of Amy Yersavich, manager of the Voluntary Action Program of the Ohio Environmental Protection Agency).

³⁶⁷ *Id.* at 21–22.

³⁶⁸ *State Incentive Programs hearing* at 8 (statement of Charles Bartsch, senior policy analyst at the Northeast-Midwest Institute).

³⁶⁹ *Brownfield Overview hearing* at 38 (statement of John Stephenson, Director of the Natural Resources and Environment, U.S. Government Accountability Office).

³⁷⁰ *See id.*

³⁷¹ *Id.* at 60 (statement of James E. Maurin, chairman of the International Council of Shopping Centers and board member of the Real Estate Roundtable).

for cleanup, but the availability of tax credits could tip the scales in favor of proceeding with a project rather than passing over an otherwise promising site.”³⁷²

Charles Houder agreed, “Tax credits, certainly the historical tax credit program has been a difference maker. That is probably the single incentive program that has the ability to tip the scale in undertaking a development project.”³⁷³

Jonathan Philips likewise testified that a “national transferable credit would be a powerful and fitting complement to State efforts.”³⁷⁴ Philips noted the success of tax credits in development areas other than brownfields, suggesting the model should be extended to brownfields. The “tax credit for rehabilitating historic structures that Congress created in 1976 . . . has stimulated more than \$33 billion in private investment, with over 325,000 housing units.”³⁷⁵ The success of this program, Philips testified, is, “First, it is uniform across the Nation, and; second, it works in tandem with State programs to drive more historic sites from underwater to above-water status.”³⁷⁶ This form of tax credit would be “a logical extension” of prior Federal brownfield efforts, Philips opined.³⁷⁷ A transferable tax credit would “dramatically accelerate the rate at which brownfield sites are revitalized in America” and, in conjunction with certain other tax provisions, has “the potential to prompt cleanup of more brownfield sites in the next 5 years than in the last 50 years combined,” Philips testified.³⁷⁸

A tax credit, Robert Colangelo told the subcommittee, “would bring additional comfort to banks and the lending community so that you would have lesser lines on [sic] equity.”³⁷⁹ Jonathan Philips explained, “[A] tax credit . . . could be a forward sale situation where you can create equity, and that chunk of equity could then be leveraged to either attract more equity or to attract debt capital, and that is critical to everybody.”³⁸⁰ According to Philips, the benefit of that equity would be particularly helpful “to a smaller entity because . . . it doesn’t start the clock of the return investment until—or at least a portion of it until you deploy that capital later in the project.”³⁸¹

Barry Franz summarized the issue for the subcommittee. Two of the key obstacles to development are “lack of available capital and financial incentives, such as tax deferrals, abatement and/or credits . . . [but these obstacles are] common to both greenfield and brownfield development efforts,” testified Barry Franz.³⁸² A tax credit for the extra costs incurred developing a brownfield would

³⁷² *Id.*

³⁷³ *State Incentive Programs hearing* at 166 (statement of Charles Houder, director of acquisitions, Preferred Real Estate Investments, Inc.).

³⁷⁴ *Id.* at 96 (statement of Jonathan Philips, senior director of Cherokee Investment Partners, LLC).

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Brownfield Overview hearing* at 83 (statement of Jonathan Philips, senior director of Cherokee Investment Partners, LLC).

³⁷⁹ *State Incentive Programs hearing* at 165 (statement of Robert Colangelo, executive director of the National Brownfields Association).

³⁸⁰ *Id.* (statement of Jonathan Philips, senior director of Cherokee Investment Partners, LLC).

³⁸¹ *Id.*

³⁸² *Ohio Brownfields hearing* at 108 (statement of Barry Franz, P.E., BCEE, P.G., principal engineer of Civil & Environmental Consultants, Inc.).

aid in reaching the often phrased goal of “evening the playing field.”

5. *Liability fears remain a significant deterrent to private sector investment in brownfield redevelopment.*

Second to the need for money in encouraging further redevelopment efforts, according to the panelists, is the need for further liability relief.

Andrew Hogarth testified, “Federal liability continues to be a problem. Many potential property transactions fail due to the inability of the buyer to resolve liability under RCRA, and to some extent [under] CERCLA.”³⁸³ While Michigan has a MOA with the EPA addressing most liability concerns, “RCRA liability remains a substantial hurdle” to redevelopment efforts, Hogarth reported.³⁸⁴

“[O]ne of the major stumbling blocks [for developers] is the uncertainty of future liability, which is another factor that makes it more desirable to locate to greenfields,” Douglas Scott told the subcommittee.³⁸⁵ Any Federal legislation that would “make more certain the lines of liability and possible exposure to future or reopened claims would help tremendously to make these sites more insurable and more bankable,” Scott opined.³⁸⁶

One method of clarifying the lines of liability is to tie any liability relief to the State voluntary cleanup programs. Tying Federal liability relief to State VCPs “will help greatly because you really are just plugging in a new piece to something that exists, rather than creating a new program,” Scott testified.³⁸⁷ While a number of States have negotiated this framework tying their VCPs to Federal liability through an MOA with the EPA, Scott told the subcommittee, legislation clarifying liability relief will “need to be a little bit more broadly based than the MOUs have been to date.”³⁸⁸

Secretary McGinty echoed Douglas Scott and noted the need for broader liability relief than is provided through MOAs. Despite the full and effective liability relief in some Federal programs under Pennsylvania’s MOA with EPA, there is still potential liability under other Federal programs. While the MOA is “[v]ery helpful . . . we need to make the next step to full liability relief,” McGinty testified.³⁸⁹ “If we could move from what has been an important beginning in our Memorandum of Understanding with EPA to full and effective Federal and State liability relief, that would add the certainty that investors and developers need,” she concluded.³⁹⁰

John Magill also supported tying Federal liability relief to State VCPs. “[It] is a good place to start because it is . . . not reinvent[ing] the wheel and creat[ing] new mechanisms,” he testified.³⁹¹ Further, Magill testified, “It also then allows for a piloting operation. If it fails, you can make changes. You don’t create some-

³⁸³ *State Incentive Programs hearing* at 61 (statement of Andrew Hogarth, chief of the Michigan Department of Environmental Quality Remediation and Redevelopment Division).

³⁸⁴ *Id.*

³⁸⁵ *Id.* at 41 (statement of Douglas Scott, director of the Illinois Environmental Protection Agency).

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 83.

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 16 (statement of Kathleen McGinty, secretary of the Pennsylvania Department of Environmental Protection).

³⁹⁰ *Id.* at 17.

³⁹¹ *Id.* at 82 (statement of John Magill, director of the Ohio Department of Development Office of Urban Development).

thing new and tinker with that.”³⁹² Magill warned, however, “The only caveat would be that in some States that the voluntary clean-up program does not cover all cleanups. Brownfields are a wider perspective.”³⁹³

According to Charles Bartsch, “What is good about using the State voluntary cleanup programs . . . is it really does provide a recognized mechanism to provide some assurance to the community at large that these things are proceeding properly.”³⁹⁴ To the extent existing programs are not broad enough to cover all brownfields projects, Bartsch echoed Magill, arguing, “Each state has a program in place, and . . . [similar to] what we saw after the passage of the national brownfields law a couple of years ago, the States will be able to then change [their programs] to better fit the Federal structure that is laid out.”³⁹⁵

In addition to deterring private investment in redevelopment projects, liability concerns are also a disincentive for responsible parties to participate in the planning and redevelopment process. Parties undertaking remediation are generally new parties with little to no knowledge of the nature or extent of contamination on a site. Bringing the original property owners into the remediation planning would expedite the process, according to Chairman Turner because “their knowledge could be very important for . . . [redevelopment] success.”³⁹⁶ However, there are no incentives to bring these parties to the table. “[W]e don’t have anything under the statute that is going to relieve them of the liability,” testified Dunne.³⁹⁷

Brownfields are a “[F]ederally created problem . . . a potentially responsible party or a landowner has disincentives for redevelopment . . . [because] our current laws and regulations actually encourage abandonment,” noted Chairman Turner.³⁹⁸ John Stephenson agreed, testifying, “Those liabilities were created by Federal law.”³⁹⁹

Creating an “incentive for the original responsible polluter to participate” is “another key component” to any new Federal brownfield legislation, testified Mayor Plusquellic.⁴⁰⁰ Without any incentive, property owners will continue mothballing brownfield sites, he concluded:

It makes sense to hold the companies who are responsible for contaminating the land to also make them clean up the land. However, as a result, we have many “mothballed” sites. Something needs to be done to motivate the holder

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.* at 83 (statement of Charles Bartsch, senior policy analyst at the Northeast-Midwest Institute).

³⁹⁵ *Id.*

³⁹⁶ *Brownfield Overview hearing* at 44 (statement of Subcommittee Chairman Michael R. Turner).

³⁹⁷ *Id.* at 45 (statement of Thomas Dunne, Deputy Assistant Administrator in the Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency).

³⁹⁸ *Id.* at 42 (statement of Subcommittee Chairman Michael R. Turner).

³⁹⁹ *Id.* (statement of John Stephenson, Director of the Natural Resources and Environment, U.S. Government Accountability Office).

⁴⁰⁰ *Id.* at 54 (statement of the Honorable Don Plusquellic, mayor of the city of Akron, OH, and president of the U.S. Conference of Mayors).

of that land to at least assess the property and begin to clean it up.⁴⁰¹

Todd Davis testified that many responsible parties want to clean up their contaminated sites but are afraid of opening themselves up to liability. Making an example of a company with a large brownfield site in Ohio, Davis told the Subcommittee the responsible party did not contaminate the property with any negligence or mal-intent:

[The company] was created in the twenties, thirties, forties, which preceded most of the environmental laws. They didn't perceive at the time that they were doing anything that was out of the ordinary in terms of ordinary business. But, after the advent of the Super Fund [sic], obviously, the cost associated with redeveloping . . . fell onto their laps, and appropriately so.

I think that what you find as we negotiate now with people trying to unlock brownfield opportunities is that, especially in big companies, they're still very, very hesitant, because they're afraid to . . . open up the information publicly.⁴⁰²

Davis testified that there are a number of corporations whose "intentions are pure and they want to do what's right for the community and they want to see the site remediated."⁴⁰³ However, "[B]ecause there's a lack of predictability, there's a significant lack of people who understand how to go through this mine field of different funding and the legal and demolition and environmental issues all at the same time, that their experiences are mixed."⁴⁰⁴ It is "not about leveling the playing field, it's about helping the playing field. It's tilting the playing field so that it's such a good deal for companies and communities to do brownfield redevelopment, that it's not an issue. People want to be doing this," Davis concluded.⁴⁰⁵

6. *Certain hazardous substances, such as petroleum products, are ineligible for funding under present brownfields programs. Additionally, the cleanup of building interiors is ineligible for funding under current law.*

Additional incentives for private investment in remediation can be created by expanding the list of eligible activities on which Federal dollars may be used. Stakeholders throughout the series of subcommittee oversight hearings urged Congress to expand the definition of eligible brownfield remediation activities.

For example, current Federal tax provisions for expensing brownfield remediation costs use the CERCLA definition of a "hazardous substance," from which petroleum is excluded, James Maurin testified.⁴⁰⁶ Consequently, parties may not expense the costs of addressing certain materials, petroleum among them. How-

⁴⁰¹ *Id.*

⁴⁰² *Ohio Brownfields hearing* at 119–120 (statement of Todd Davis, chief executive officer of Hemisphere Development LLC).

⁴⁰³ *Id.* at 120.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Brownfield Overview hearing* at 75 (statement of James E. Maurin, chairman of the International Council of Shopping Centers and board member of the Real Estate Roundtable).

ever, Paul Schoff testified, “the vast majority of brownfields out there have some petroleum contamination, some petroleum constituent.”⁴⁰⁷ Maurin explained the rationale for the exclusion:

Congress made the decision that it did not want the [F]ederal Superfund used to clean up certain types of substances While the decision not to authorize the spending of [F]ederal funds on these types of cleanups had significance for the administration of the Superfund program, the same rationale does not apply to a statute intended to provide a tax incentive to private parties cleaning up brownfield properties.⁴⁰⁸

“[T]he problem created by this [tax code] approach is that it assumes that the CERCLA definition of the term is broad enough to encompass all types of toxic materials that might be found at a brownfield site. That is not the case,” Maurin testified.⁴⁰⁹ Maurin argued:

While it may make sense not to authorize the use of [F]ederal funds under the Superfund program to clean up petroleum and pesticides, these substances often have to be cleaned up at brownfield sites before those properties can be returned to beneficial use. There is no reason not to extend the same type of tax incentive to a private party who is cleaning up petroleum waste or pesticide residues on a brownfield site as to one who is cleaning up other types of contaminants.⁴¹⁰

Schoff recommended Congress “amend the 2002 legislation to include protection under all Federal environmental laws, not just under CERCLA.”⁴¹¹ “If the 2002 legislation were to be amended to include protection for under all Federal environmental statutes, I think that would go a long way toward easing a lot of people’s fears and putting their fears to rest once and for all,” Schoff concluded.⁴¹²

“Similarly, Superfund money was not to be spent cleaning up the interior of buildings,” Maurin testified.⁴¹³ “Congress did not . . . [impose] this limitation because it believed that contaminated interiors did not require cleanups. Rather, Congress believed that the use of the limited funds set aside for Superfund cleanups should be prioritized to deal with contamination that had escaped into the general environment.”⁴¹⁴ Because the current tax law relies upon the CERCLA provisions, parties may not expense the removal of hazardous materials inside buildings such as asbestos or lead paint. Maurin notes, however, that “brownfield restoration often involves the cleanup of existing buildings on the property. Expensing

⁴⁰⁷ *Pennsylvania Brownfields hearing* at 82–83 (statement of Paul Schoff of Feinberg and Schoff, LLP, and chief executive officer of Brownfield Realty, Ltd.).

⁴⁰⁸ *Brownfield Overview hearing* at 75 (statement of James E. Maurin, chairman of the International Council of Shopping Centers and board member of the Real Estate Roundtable).

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 77 (statement of James E. Maurin, chairman of the International Council of Shopping Centers and board member of the Real Estate Roundtable).

⁴¹¹ *Pennsylvania Brownfields hearing* at 82–83 (statement of Paul Schoff of Feinberg and Schoff, LLP, and chief executive officer of Brownfield Realty, Ltd.).

⁴¹² *Id.*

⁴¹³ *Brownfield Overview hearing* at 75 (statement of James E. Maurin, chairman of the International Council of Shopping Centers and board member of the Real Estate Roundtable).

⁴¹⁴ *Id.* at 77.

costs to clean up buildings would give developers more reason to invest in brownfield properties.”⁴¹⁵

Craig Kasper also advised the subcommittee of the need to expand the list of activities eligible for Federal incentives. “Consideration to all critical activities necessary for redevelopment should be considered as eligible cost on[]sites that are ultimately cleaned up,” Kasper urged.⁴¹⁶ “While assessment and remediation costs “carry a big price tag of brownfields, other issues . . . exist that can be just as critical to a successful development. Demolition, upgrading infrastructure, and environmental are just a few examples,” he concluded.⁴¹⁷

7. *Environmental insurance provides financial assurance to investors in brownfield redevelopment projects and is thus an advisable component of redevelopment projects. The use of Federal grant funds is limited and grantees may not currently use Federal dollars on environmental insurance premiums.*

Stakeholders voiced support for the expansion of Federal incentives to redevelopment expenditures other than actual remediation costs. In particular, stakeholders repeatedly cited the importance of environmental insurance.⁴¹⁸ Environmental insurance provides a backstop against an unanticipated rise in remediation and redevelopment costs or against unexpected additional costs. These insurance policies are extremely costly, however, and a tax credit for the premiums would be a valuable incentive to private developers.

Explaining the importance of environmental insurance, Kevin Matthews of AIG Environmental testified:

Environmental insurance is not the silver bullet for Brownfields redevelopment. However, it is one of the “tools in the tool chest” that helps to lead to a successful cleanup and redevelopment because it often helps to address some of the greatest concerns of Brownfields redevelopment—environmental liability and uncertainties concerning the cleanup.⁴¹⁹

8. *Many States have incentive programs for brownfields cleanup. These programs may serve as models for reform of Federal programs.*

Every State in the Union administers some variation of a brownfield voluntary cleanup program. These programs are the cornerstone of remediation and redevelopment and must be allowed to work in tandem with Federal programs and incentives. The key to expansive remediation, according to Charles Bartsch, is to ensure “State incentives are allowed to work in full partnership with Fed-

⁴¹⁵ *Id.* at 77.

⁴¹⁶ *Ohio Brownfields hearing* at 113 (statement of Craig Kasper, chief executive officer of Hull & Associates, Inc.).

⁴¹⁷ *Id.*

⁴¹⁸ *See State Incentive Programs hearing* at 17 (statement of Kathleen McGinty, secretary of the Pennsylvania Department of Environmental Protection); *Pennsylvania Brownfields hearing* at 47 (statement of Eugene DePasquale, deputy secretary for Community Revitalization and Local Government Support of the Pennsylvania Department of Environmental Protection); *id.* at 91 (statement of Kerry Wrobel, president of Lehigh Valley Industrial Park, Inc.).

⁴¹⁹ *Id.* at 117 (statement of Kevin Matthews, director of Association & Governmental Relations, AIG Environmental).

eral incentives and are not limited or constrained by recapture or penalty provisions.”⁴²⁰

“Governments at all levels can find creative ways to help overcome reuse challenges. However, brownfield reuse will only succeed if [S]tate efforts can be complemented by [F]ederal initiatives—such as cleanup credits, historic tax incentives, and targeted program funding—in a true inter-governmental partnership,” Bartsch concluded.⁴²¹

According to Joseph Dufficy, “These partnerships [with States] are an integral part of our success.”⁴²² “EPA . . . partners with [S]tates to develop Memoranda of Agreement (MOAs) that clarify program roles and responsibilities.”⁴²³ Continuing the agency’s success, Dufficy testified, “will require ever more interaction and collaboration among all levels of government, the private sector and non-governmental organizations.”⁴²⁴

Douglas Scott explained the importance of the cooperation between the States and EPA to redevelopers. Under the MOA between the State of Illinois and EPA, when Illinois issues a “No Further Remediation” letter, the MOA with the EPA states that “except in very narrow circumstances . . . [Illinois’s] NFR letter will also end Federal involvement.”⁴²⁵

In Pennsylvania, Kathleen McGinty testified that under its agreement with the EPA there is now one cleanup policy for purposes of both the Commonwealth’s and the Federal Government’s purposes. “[W]hen Pennsylvania says it is clean pursuant to EPA’s standards, it is clean for State and Federal liability purposes,” McGinty testified.⁴²⁶ Eugene DePasquale noted, however, the agreement between Pennsylvania and EPA applies only to the “joint processing of applications.”⁴²⁷ The MOA “does not mean that [F]ederal liability can be relieved by successful participation in the [S]tate brownfields program. To provide the assurances that are necessary to developers, these efforts need to progress to genuine liability relief as opposed only to joint processing of applications.”⁴²⁸ Even as other States explore similar MOAs, these agreements will only provide developers with “limited comfort with respect to associated [F]ederal liability,” DePasquale concluded.⁴²⁹

Asked whether there is “a need for additional legislation to enable EPA to [enter similar MOAs] on a routine basis so that the 2002 Small Business Liability Relief and Revitalization Act would recognize that both EPA and the States are encouraged to have a broader MOA,”⁴³⁰ stakeholders responded that the value of liability release to site owners and developers was invaluable. Stephen

⁴²⁰ *Id.* at 8 (statement of Charles Bartsch, senior policy analyst at the Northeast-Midwest Institute).

⁴²¹ *Id.* at 15.

⁴²² *Ohio Brownfields hearing* at 15 (statement of Joseph Dufficy, Chief of the Brownfields and Early Action Section at the U.S. Environmental Protection Agency Region V Office).

⁴²³ *Id.*

⁴²⁴ *Id.* at 17.

⁴²⁵ *State Incentive Programs hearing* at 41 (statement of Douglas Scott, director of the Illinois Environmental Protection Agency).

⁴²⁶ *Id.* at 16 (statement of Kathleen McGinty, secretary of the Pennsylvania Department of Environmental Protection).

⁴²⁷ *Pennsylvania Brownfields hearing* at 46 (statement of Eugene DePasquale, deputy secretary for Community Revitalization and Local Government Support of the Pennsylvania Department of Environmental Protection).

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.* at 80 (statement of Subcommittee Chairman Michael R. Turner).

Donches emphasized, “[T]he issue . . . of finality and liability release, if you don’t have that, you are not only not going to get developers, you are not going to get anybody to finance the projects, either.”⁴³¹

Robert Colangelo likewise detailed the need for additional liability relief:

According to our research, there is about \$4 to \$6 trillion of industrial property in the United States and corporations own about 40 percent of that [W]e estimate that somewhere between 20 to 50 percent of it is environmentally impaired. And those sites aren’t coming to market because of this reason [T]he next evolution for the brownfield market is dealing with this liability relief for liability clarity for the potentially responsible parties and . . . the key there is, I think we all agree in polluter pays, the question is how much and there is a whole group of companies out there that are willing to voluntarily clean up their properties to the suggested standards through the State voluntary cleanup programs if they can get off the hook and right now, we have a double standard. A developer or prospective purchaser can buy a property, enter it into the program, clean it up to the standard, get liability relief, but the property owner can’t.⁴³²

9. *Successful redevelopment of brownfields sites requires accommodating private investors’ time schedules that may be derailed by regulatory burdens and administrative processes.*

In addition to clarifying liability provisions and providing more funds for cleanup through new incentives, stakeholders stressed the importance of minimizing the time businesses spend securing the proper permits for redevelopment. Ray Suhocki explained that the administrative burden involved in a redevelopment project often results in greater project cost and lost time because “[m]ulti-layered regulatory programs . . . often times require numerous approvals from multiple agencies and departments within agencies.”⁴³³

In particular, Suhocki praised the Pennsylvania Brownfields Action Team [BAT] program, which facilitates the review and approval process. The BAT “created a single-point-of-contact approach All permits, plans, reports and submittals required to demonstrate compliance under [S]tate environmental laws go through one point of contact. That contact is responsible for facilitating the review and approval process that ultimately reduces the cost and time to complete projects.”⁴³⁴ Suhocki recommended a similar approach be adopted by the Federal Government through the MOAs between States and the EPA. By appointing in the MOA one point of contact for projects requiring both State and Federal approval, “a ‘one-stop-shop’ can be established where both agencies agree to one lead agency and one point of contact that is respon-

⁴³¹ *Id.* at 131 (statement of Stephen Donches, president of the National Museum of Industrial History).

⁴³² *Id.* at 83 (statement of Robert Colangelo, executive director of the National Brownfield Association).

⁴³³ *Id.* at 114 (statement of Ray Suhoki, president and chief operating officer of the Lehigh Valley Economic Development Corp.).

⁴³⁴ *Id.*

sible for facilitating all review and approvals required to comply with both [S]tate and [F]ederal environmental laws.”⁴³⁵

Jonathan Philips touted the use of “one-stop shopping” tactics adopted by a number of States. These programs streamline the permit process and make a “real difference in the rate at which brownfield sites are remediated.”⁴³⁶ The speed at which redevelopers can obtain permits can sometimes mean the difference between productive cleanup and reuse of a site and leaving a site to sit idle, Philips explained.⁴³⁷

Similarly, Thomas Stone of the Mt. Pleasant NOW Development Corp. explained time delay caused by administrative burdens can make or break a deal. “Businesses are looking at when they want to put in a new store, where they want to create a facility. They’re just looking for the available site. So if we can only present them with the opportunity of, well, in 2 years we might have something available for you, then we continually miss these opportunities.”⁴³⁸

The number of administrative hurdles also factors into a developer’s decision to proceed under Federal procedures or under a State’s voluntary program. “[W]e struggle sometimes with the acceptance of the State’s Voluntary Action Program versus the Federal Memorandum of Agreement [MOA],” Craig Kasper told the committee.⁴³⁹ “For example, a volunteer in Ohio who chooses to remediate a brownfield must go through an arduous administrative process to gain Federal Acceptance on a cleanup the State would have accepted with fewer administrative hurdles,” Kasper explained.⁴⁴⁰

David Cartmell, mayor of Maysville, KY, stressed that a missing link in the Federal brownfields programs is the streamlining of the process by which EPA issues a “clean bill of health.”⁴⁴¹ In Maysville’s case, this missing link continues interfering with the redevelopment of a major brownfield site. The city redeveloped at least one major site on its own and has a party interested in purchasing the site for reuse. The deal is not complete, however, because the city has waited for 10 years on a release of liability from the EPA, testified Cartmell.⁴⁴² “[A]s a city, we have used every smart growth tool available to us. We have planning and zoning, we have stopped growth beyond our urban services boundary. But we need help with streamlining this process.”⁴⁴³

To address this barrier to private investment, Pennsylvania’s Eugene DePasquale argued that “all [F]ederal departments should streamline permitting to favor redevelopment of brownfields.”⁴⁴⁴ “Providing incentives and ensuring liability are essential,” DePasquale told the committee, “[b]ut streamlining the process is

⁴³⁵ *Id.*

⁴³⁶ *State Incentive Programs hearing* at 102 (statement of Jonathan Philips, senior director of Cherokee Investment Partners, LLC).

⁴³⁷ *See id.*

⁴³⁸ *Ohio Brownfields hearing* at 121 (statement of Thomas Stone, executive director of the Mt. Pleasant NOW Development Corp.).

⁴³⁹ *Id.* at 112 (statement of Craig Kasper, chief executive officer of Hull & Associates, Inc.).

⁴⁴⁰ *Id.*

⁴⁴¹ *State Incentive Programs hearing* at 122 (statement of the Honorable David Cartmell, mayor of the city of Maysville, KY, and president of the Kentucky League of Cities).

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Pennsylvania Brownfields hearing* at 47 (statement of Eugene DePasquale, deputy secretary for Community Revitalization and Local Government Support of the Pennsylvania Department of Environmental Protection).

critical to ensure that these sites remain competitive on the open market. The faster we move brownfield sites through the regulatory process, the quicker we reclaim these sites and clean up communities.”⁴⁴⁵

DePasquale suggested the Federal Government “keep[] in mind that we have to level the playing field” and that “a streamlined permitting process for priority brownfield districts at the Federal level” is one way government can “continue to work at ways to equalize that playing field.”⁴⁴⁶ If investors “feel that they are going to have too long a time of getting their permitting up or the funding will be too difficult to achieve, they simply will not invest in those sites, so we all have to work together to come to that common ground,” he concluded.⁴⁴⁷

10. Tax exempt redevelopment bonds have provided needed extra capital at the State level.

Numerous States utilize bonds to raise capital for directly financing redevelopment projects. According to Charlie Bartsch, these “direct brownfield financing efforts . . . directly match resources to needs usually in places where the private sector may fear to tread.”⁴⁴⁸ Ohio, for instance, funded its \$200 million Clean Ohio Fund through bonds.⁴⁴⁹ From that fund, “Ohio has granted \$97 million to 94 projects to cleanup and assessment activities” since 2002.⁴⁵⁰

Local governments have also experienced success raising redevelopment funds through bonds. Cuyahoga County, OH funded its brownfields redevelopment assistance by issuing a brownfield redevelopment bond in 1998. Tracy Nichols reported, “Since 1998, 21 projects have been funded, 6 projects are cleaned up with a new end user open onsite, over 1,400 jobs have been created or retained, and \$562,000 in new annual property taxes have been generated, even with two projects partially tax abated.”⁴⁵¹

Pennsylvania DEP Secretary Kathleen McGinty characterized legislative efforts offering “tax-exempt financing, tax-free financing of brownfield sites . . . are key.”⁴⁵² While Pennsylvania utilizes these financing tools at the State level, Pennsylvania is “pushing up against . . . [the] State volume cap, and to the extent that tax-free bond financing opportunity could be shared with the private sector, that would help . . . substantially,” McGinty told the Subcommittee.

B. RECOMMENDATIONS

1. EPA should continue to revise and upgrade its tracking mechanisms and performance measures for Brownfields grants so that the actual impact of this funding can be monitored.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* at 43.

⁴⁴⁷ *Id.*

⁴⁴⁸ *State Incentive Programs hearing* at 8 (statement of Charles Bartsch, senior policy analyst at the Northeast-Midwest Institute).

⁴⁴⁹ *See id.* at 22 (statement of John Magill, director of the Ohio Department of Development Office of Urban Development).

⁴⁵⁰ *Id.*

⁴⁵¹ *Ohio Brownfields hearing* at 40 (statement of Tracy Nichols, assistant director for Economic Development at the Cuyahoga County, OH, Department of Development).

⁴⁵² *State Incentive Programs hearing* at 8 (statement of Kathleen McGinty, secretary of the Pennsylvania Department of Environmental Protection).

2. EPA should move forward with revising the technical and administrative requirements for establishing a revolving loan fund. Applicants with proven administrative expertise or coalitions of organizations that could produce economies of scale should be rewarded. Technical expertise should be provided to organizations whose capabilities hinder revolving loan fund utilization.

3. Congress should re-authorize the EPA Brownfields Program beyond fiscal year 2006 and appropriate the full authorized level of funding. Congress should consider additional programming and funding for brownfield remediation.

4. A Federal tax credit would be the most useful incentive in attracting financial investment in brownfields redevelopment projects. Useful models are the low-income housing tax credit and the historic rehabilitation tax credits.

5. Congress should further clarify circumstances in which a party may be subject to future liability. The scope of liability relief available by operation of a MOA between a State VCP and the EPA should be broadened to include relief from CERCLA, RCRA, and TSCA. Congress should also provide additional incentives in order to encourage a responsible party to participate in the remediation process.

6. Congress should expand the eligibility provisions of current Federal programs and incentives to include additional hazardous substances, the cleanup of building interiors, and other remediation and redevelopment project costs.

7. Congress should expand the eligibility provisions of current Federal brownfields programs and incentives to include the purchase of environmental insurance. Any new Federal incentives should be designed to include such costs.

8. Effective State programs should be reviewed as models for reforming existing Federal programs and establishing new ones.

9. EPA should streamline its administrative process and create administrative partnerships with other Federal agencies to reduce administrative burden and delay.

10. Congress should explore expanding the use of existing tax exempt redevelopment bonds to environmental remediation projects.

MINORITY VIEWS OF HON. HENRY A. WAXMAN, HON. TOM LANTOS, HON. CAROLYN B. MALONEY, HON. ELIJAH E. CUMMINGS, HON. WM. LACY CLAY, HON. DIANE E. WATSON, AND HON. BRIAN HIGGINS

We have serious concerns regarding the report issued by the majority entitled, "Brownfields: What Will it Take to Turn Lost Opportunities Into America's Gain?" We too believe that cleaning up brownfields sites in urban areas is an important goal. We also strongly agree with the report's recommendation that the existing brownfields program should be fully funded, which we view as the most important step that must to be taken to enhance the program's effectiveness.

However, the report also makes recommendations that we cannot support, such as recommendations that would have the effect of shifting responsibility for cleaning up contaminated sites from the polluters to the taxpayers, enacting a Federal tax credit for brownfields redevelopment that could subsidize polluters, and diluting the program's effectiveness by expanding the types of activities that are eligible for funding under the brownfields program. Additionally, the report makes claims about barriers to brownfields redevelopment without an adequate factual record of support. For these reasons, we oppose the majority's issuance of this report.

Lack of Funding is the Primary Constraint on the Brownfields Program

While the report supports full funding of the brownfields program, it neglects to acknowledge that failure of the Bush administration and the Republican Congress to fully fund this program has severely limited its effectiveness.

Appropriations for the brownfields program have consistently fallen far short of its \$250 million annual authorization under the Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Act) that was signed into law on January 11, 2002.¹ The report recognizes the funding shortfalls and one of its recommendations, which we strongly support, is to fully fund the program.

However, the report fails to discuss the administration's role in requesting inadequate funding for the program, or how the persistent funding shortfalls have impacted program effectiveness. For example, the administration's fiscal year 2007 budget request for the portion of brownfields program that funds assessment grants, remediation grants, and technical assistance is only \$89 million, as opposed to the \$200 million authorized. This is 56 percent less than authorized under the Brownfields Act.²

¹Public Law 107-118.

²Office of Management and Budget, *Fiscal Year 2007 Budget of the U.S. Government* (February 2006).

These grant programs provide significant assistance to participants seeking to clean up sites that are identified and deemed qualified. The result of this persistent underfunding is that more than two-thirds of the roughly 700 annual grant applications have gone unfunded during each of the past two budget cycles. The administration's failure to request, and Congress' failure to provide, adequate funding to cover the substantial majority of current applications sharply limits the impact of the program.

The highest priority for improving the effectiveness of the brownfields program is to provide the funding necessary to carry it out. Unfortunately, the bulk of the report's findings are focused on other perceived shortcomings of the program and other measures to expand its impact.

Specifically, the report's findings and recommendations appear to be centered on two issues addressed in more detail below: reducing liability for clean-up costs, including for responsible parties; and providing Federal tax credits for clean up activities. Under each of these proposed approaches, the Federal Government could end up paying for cleanup instead of the responsible polluters. In addition, these alternative approaches would subsidize polluters and developers to conduct activities with no prioritization for spending, far less assurance of program outcomes, and no requirements for community involvement in the remediation process.

Findings and Recommendations on Liability Undermine the Long-standing Principle of "Polluter Pays"

Both the body of the report and its findings repeatedly claim that liability fears are a significant deterrent to investments in cleaning up brownfields sites. The findings cite to testimony stating that current landowners who are not the polluters, as well as the polluters that created the contamination, are deterred from cleaning up their sites due to outstanding liability concerns. In response, the report recommends that Congress "clarify" liability for parties and "provide additional incentives" for responsible parties (i.e., polluters) to participate in the clean ups. We have serious concerns both about the factual support for these findings and the recommendations.

In the Brownfields Act, Congress identified several clear categories of activities and parties that are not liable for clean up costs, including innocent prospective purchasers who did not pollute the site. While stating that liability concerns deter innocent landowners from participating in cleanups, the report does not identify or document any specific circumstances under which non-responsible parties might be found liable for cleanup costs. Thus, while the report repeatedly cites liability concerns as a key barrier to cleanups, there is no evidence, apart from general statements in testimony, as to whether this is the case, the extent of any such problem, and if there is a problem, whether it stems from misinformation or an actual shortfall in the law.

Responsible parties, i.e. the polluters, are currently legally liable for clean up costs, so it is questionable that "liability" fears are preventing them from participating in the remediation of a site. Moreover, it is also unclear how their liability can be "clarified" without shifting the costs of cleanup from the responsible parties to the tax-

payer. In fact, as the report indicates elsewhere, with respect to responsible parties, several of the witnesses were not calling for clarification about when such parties are liable. Rather, the witnesses were calling for liability relief as an inducement for responsible parties to participate in cleanups.

In short, this report can be read as supporting liability relief for responsible parties, an idea we strongly oppose. Such a premise overturns the long-established principle that, where the polluter can be identified, the polluter, not the taxpayers, should pay for cleaning up contaminated sites. Congress recently reaffirmed this principle on a bipartisan basis with its near-unanimous passage of the 2002 Brownfields Act. We strongly oppose any effort to overturn this tenet of environmental law and shift the costs of cleaning up pollution from the polluters to the public.

Furthermore, the report points to State voluntary control programs as a mechanism for providing liability relief. As discussed below, state voluntary programs vary in their requirements for cleanups. Thus, the report's recommendation to provide liability relief to responsible parties that clean up a site to State specifications, even if it does not meet Federal standards, may have the effect of allowing higher levels of pollution to remain at the sites. In such cases, the recommendation for liability relief is in actuality a recommendation to loosen clean up standards as an inducement for responsible parties to participate in brownfields remediation. Again, the practical effect is to let the polluters off the hook for cleaning up some portion of their pollution, while leaving communities to bear the burden of that pollution. We do not support changes to the Brownfields Act that would produce that outcome.

Tax Credits Could Shift Costs from Polluters to Taxpayers

The report and findings emphasize that more money is needed to support clean up activities at the large number of brownfields sites. We agree with this assessment, as noted above. In response, the majority recommends enactment of a Federal tax credit for brownfields redevelopment projects. There may well be some circumstances in which a targeted Federal tax credit for certain brownfields redevelopment activities would be beneficial.

However, the report does not explicitly recommend that such tax credits should be limited to innocent parties, and by recommending additional "incentives" for polluters, the report suggests the contrary. We are concerned that such Federal tax credits would simply be another vehicle for shifting the cleanup costs from the polluters to taxpayers.

In addition, if not carefully targeted, a tax credit could be an extremely expensive and less effective tool for cleaning up brownfields. For example, proposed legislation would provide up to \$1 billion annually in tax credits for brownfields activities.³ Under an expansive brownfields tax credit, the public would be paying for clean up activities with no ability to prioritize projects and much more limited oversight of such projects.

³H.R. 4480 § 2.

Expansion of Activities Eligible for Brownfields Support Would Further Dilute Limited Funding

The majority also recommends substantially expanding the types of activities that are eligible for funding under the brownfields program, such as including coverage of environmental insurance and cleanup of building interiors. The program, however, is already experiencing a severe shortage of funds, and has insufficient funding to cover the majority of current project applications. Absent a dramatic increase in program funding, expanding the range of eligible activities would likely make it even more difficult to fund an adequate number of projects on an annual basis. Moreover, the current program targets what Congress has judged to be the highest priority and highest impact activities of the program. Expanding the list of eligible activities could dilute the program's effectiveness. While the majority believes these activities would benefit from the creation of a tax credit subsidy, the costs associated with a tax credit that also covered the expanded set of activities could be prohibitive.

State Voluntary Cleanup Programs Vary in Quality and Effectiveness

The majority recommends that "effective State programs should be reviewed as models for Federal programs." We certainly agree with the general observation that States have produced many valuable policy innovations and often serve as models for Federal programs. It is entirely unclear, however, which elements of State brownfields voluntary cleanup programs the majority is recommending be adopted by the Federal Government.

More importantly, we are concerned that the report's findings and recommendations fail to discuss how State brownfields voluntary cleanup programs vary in their quality, effectiveness, and limitations. For example, only 22 States have MOU agreements with EPA that establish agreed-upon elements of State programs and the circumstances under which EPA agrees to defer to State oversight of cleanup efforts.⁴ In addition, different States often have different standards to determine site compliance with regulations. Thus, adoption of some States' approaches could allow higher levels of pollution to remain at sites, or could provide for little or no public participation in the decisionmaking process.

⁴ U.S. EPA, Memoranda of Agreement [MOAs] on State Voluntary Cleanup Programs [VCPs] (updated July 5, 2006) (online at: <http://www.epa.gov/brownfields/html-doc/statemoa.htm>).

Conclusion

In conclusion, the minority believes the report does not make the case for several of its recommendations to substantially alter the current brownfields program. In particular, the minority strongly opposes recommendations to shift the costs of brownfields cleanups from the responsible polluters to affected communities and all Federal taxpayers.

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