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Page 1

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Comment

**\*593 THE VOLUNTARY CLEANUP AND  
PROPERTY REDEVELOPMENT ACT-THE  
LIMITS OF THE KANSAS BROWNFIELDS LAW**

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I. Introduction

The general economic decline in our country's urban areas has resulted in the shutdown of thousands of industrial manufacturing and processing sites, distribution centers, warehouses, and commercial outlets. Most developers and lenders view these properties merely as liability risks under Superfund [FN1] and its state analogues, [FN2] which impose strict and joint and several liability on all potentially responsible parties (PRPs) regardless of fault or causation. [FN3] Consequently, developers and lenders frequently refuse to reuse former industrial and commercial sites, opting instead to break ground in pristine areas previously untouched by industry. [FN4] As many as 450,000 such sites nationwide lay idle due to perceived environmental contamination. [FN5] These properties threaten the health and safety of the surrounding community and represent billions of unrealized tax dollars and lost wages. [FN6] This phenomenon is known as the "brownfields problem." [FN7] The sheer enormity of the brownfields problem has provoked the United States Conference of Mayors to declare the situation a national

emergency. [FN8]

States have taken the lead in addressing the brownfields problem through the enactment of voluntary cleanup laws. [FN9] These laws facilitate redevelopment of brownfields by providing liability protection in exchange for voluntary remediation based on flexible environmental standards. [FN10] In April 1997, the Kansas Legislature took its first step \*594 toward combating the brownfields problem by enacting the Voluntary Cleanup and Property Redevelopment Act. [FN11]

This Comment analyzes the Act and suggests possible amendments to improve the Act. Part II of this Comment explains the brownfields problem and examines its contributing factors. It provides a detailed discussion of the risks perceived by developers, lenders, and sellers in brownfields redevelopment. Part III presents recent federal and state responses to the brownfields problem. Part IV analyzes the provisions of the Act passed by the Kansas Legislature last spring. Finally, Part V discusses deficiencies in the Act and proposes ways to resolve them.

II. The Brownfields Problem

A. What Is a Brownfield?

A "brownfield" is defined as "abandoned or underutilized . . . land . . . where expansion or redevelopment is complicated, in part, because of known or [[[perceived]]] environmental contamination." [FN12] Brownfields sites may include former industrial facilities, abandoned warehouses, and other commercial property. [FN13] Brownfields may be as large as a giant steel-manufacturing plant sprawled over several hundred acres or as small as an old gas station on a one-acre plot. [FN14] While brownfields are

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generally considered an urban problem, [FN15] brownfields may be found in both small towns and large cities. [FN16]

\*595 The total number of brownfields remains unknown. [FN17] The Congressional Office of Technology Assessment recently estimated there may be “tens of thousands to 450,000” brownfields sites nationwide. [FN18] In Kansas alone, there may be hundreds of brownfields sites. [FN19] The magnitude of contamination is typically unknown as well because operations on these sites employed various techniques of waste generation, handling, and disposal before the advent of modern environmental laws. [FN20] One thing that is certain is brownfields have significant potential for redevelopment. [FN21]

Continued inactivity at brownfields sites is costly. Inner-city neighborhoods lose valuable employment opportunities when these once productive properties remain unused. [FN22] Brownfields also represent billions of unrealized tax dollars. [FN23] Depressed property tax revenues weaken the ability of cities to provide basic services such as public education. [FN24] In addition, brownfields pose serious but often undetected health risks to \*596 nearby residents and curious children. [FN25] Finally, brownfields contribute to high crime rates [FN26] and encourage further environmental abuse in the form of “midnight dumping.” [FN27]

Moreover, substantial costs result from shifting new commercial and industrial development to suburban or rural areas known as “greenfields.” [FN28] First, greenfields development devours previously pristine land. [FN29] This development also demands costly infrastructure expenditures. [FN30] For example, these areas generally lack public water and sewer systems. [FN31] Highways sufficient to service the additional traffic to greenfields sites must be newly constructed or developed from existing roads. [FN32] Public transportation is usually not a viable alternative. [FN33] Finally, the increase in traffic exacerbates stormwater, groundwater, and air pollution problems in greenfields areas. [FN34]

Brownfields redevelopment, on the other hand, offers several important advantages. Brownfield sites may employ existing infrastructures. [FN35]

Such sites typically have good public water and sewer services and established highways or mass transit systems. [FN36] Industries that relocate on \*597 brownfields rejuvenate downtown business districts both economically and aesthetically. [FN37] Brownfields redevelopment also creates employment opportunities in areas with typically high unemployment rates. [FN38]

## B. Causes of the Brownfields Problem

Despite these potential advantages, brownfields have remained undeveloped. [FN39] This reluctance to utilize brownfield sites may be due in part to high crime rates [FN40] or to the costs of renovating or demolishing existing buildings at these locations. [FN41] However, the most powerful deterrent to brownfields redevelopment is the threat of liability under the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). [FN42]

### 1. Overview of CERCLA and Its State Analogues

CERCLA originated in the wake of public outcry over the infamous Love Canal toxic waste incident in upstate New York. [FN43] In its rush to pass CERCLA, however, Congress created a law that is hardly “a model of statutory clarity.” [FN44]

\*598 CERCLA seeks to achieve two broad goals: (1) to clean up dangerous or potentially dangerous hazardous waste sites; and (2) to find parties to be held accountable for these cleanups. [FN45] The statute mandates imposition of liability whenever the government incurs costs in responding to a release, or threatened release, of “any hazardous substance.” [FN46] This liability may be imposed upon parties satisfying the broad definition of “potentially responsible parties” (PRPs). [FN47] The liability of PRPs includes response costs incurred by the federal government, response costs incurred by others, damages for injury to natural resources, and costs of health assessments. [FN48]

To establish liability, the plaintiff, which may be the government or a private party, must prove that: (1) the defendant is a PRP; (2) the cleanup site is a "facility" under CERCLA; (3) there is a release or a threatened release of a hazardous substance at the facility; (4) the plaintiff incurred response costs at the facility; and (5) the remedial actions undertaken by the plaintiff conform to the National Contingency Plan (NCP). [FN49] Courts have broadly interpreted what constitutes a release in order to serve the remedial purpose of CERCLA. For example, some courts have held that the presence of any detectable amount of hazardous substance is sufficient proof of disposal and release under CERCLA. [FN50] Other courts have found a release to have occurred merely where concentrations of hazardous substances exceed background levels. [FN51]

Most states have their own hazardous waste cleanup laws as well. [FN52] \*599 Under these laws, states may regulate sites that do not rise to the threshold for federal action. [FN53] For example, states often include petroleum products within the definition of a hazardous substance, [FN54] although petroleum is specifically excluded from the CERCLA definition. [FN55] In addition, states frequently target many more contaminated sites than are on the National Priority List (NPL). [FN56] Kansas, for example, has its own hazardous waste cleanup statute. [FN57] The Kansas law, however, employs the CERCLA definition of hazardous substances. [FN58] Nonetheless, the Kansas law is potentially more expansive than CERCLA because it grants broad authority to the Kansas Department of Health and Environment (KDHE) whenever it determines "that clean up of a site is necessary to protect the public health or the environment." [FN59] Thus, not only may KDHE take action as the lead state agency on the nine Kansas sites on the NPL, [FN60] but KDHE may also initiate cleanup activities when "necessary to protect the public health or the environment." [FN61] Upon such a determination, KDHE may expend funds from an environmental response fund created by the statute, [FN62] issue cleanup orders to PRPs, [FN63] enter into contracts to clean up the site, [FN64] and recover response costs from "persons responsible." [FN65] The term "responsible" is not statutorily defined. The common meaning of responsible would suggest that, unlike CERCLA which defines PRPs without regard to fault, [FN66] some level of

culpability must be established in order to hold a party liable under the Kansas law. [FN67] \*600 It is also possible that the legislature, in enacting the Kansas law against the backdrop of CERCLA, intended for the word responsible to carry the CERCLA meaning. This second possibility is more likely because liability under state codifications of CERCLA generally is imposed in a manner similar to federal CERCLA liability. [FN68]

## 2. Risks Perceived by Developers and Purchasers

Potential developers and purchasers of brownfield sites face many uncertainties regarding their responsibilities under CERCLA and its state analogues. First, developers and purchasers cannot predict at the outset whether they will be subject to state or federal regulation. A brownfield site may contain contaminants that are subject only to state law and contaminants that are regulated under both state and federal law. [FN69] The determination of whether state or federal oversight applies is often "made well into the site assessment process, making it difficult to anticipate the regulatory requirements before substantial funds" are devoted to the project. [FN70] Following the determination concerning state versus federal oversight, further confusion may arise as to which regulatory program applies. Thus, developers risk spending large sums of money to satisfy regulatory requirements that may be inapplicable.

Developers and purchasers also must contend with the risk of assuming liability for all previous contamination of the property. Since the enactment of CERCLA, federal courts have expanded the reach of liability beyond the face of the statute. [FN71] CERCLA imposes liability on PRPs in section 107(a) without specifying the nature of the liability. [FN72] Nonetheless, courts have construed this liability as being strict, [FN73] joint and \*601 several, [FN74] and retroactive. [FN75] While these statutory interpretations are intended to remediate contaminated sites, their effect is to stagnate brownfields redevelopment. The strict liability standard, for example, has the potential to impose liability on parties without regard to culpability, but based merely on their ownership interest in a brownfields site. [FN76] The joint and

several liability scheme encourages the government to seek all response costs from a single “deep pocket” defendant such as a current developer of a site, rather than the actual owner who caused the contamination. [FN77] The retroactive application of CERCLA threatens to impose liability on developers for contamination, not only in the recent past, but long before the enactment of CERCLA. [FN78]

Section 107(b) provides three affirmative defenses to liability, none of which usually will shield brownfields developers and purchasers. A PRP may escape liability by showing by a preponderance of the evidence that the release of a hazardous substance was caused solely by an act of God, an act of war, or an act or omission of an unrelated third party. [FN79] The act of God defense [FN80] generally will not protect a developer from liability because this defense is reserved only for “‘exceptional’ natural phenomena,” which are narrowly interpreted. [FN81] In addition, any alleged act of God must not be foreseeable and must be the sole cause of the release. [FN82] The act of war defense usually will be unavailable because it is narrowly construed to require extraordinary government involvement in the operation of the site. [FN83] A fourth potential defense, the so-called innocent-owner defense, [FN84] might appear to offer better protection to prospective brownfields developers. In theory, this defense provides a \*602 statutory escape from liability for a purchaser who conducts a thorough investigation of a site and mistakenly concludes that it is clean. [FN85] Courts, however, have proven very reluctant to grant an innocent-owner exception, either because the prepurchase investigation was deemed incomplete [FN86] or because the owner did not take sufficient action to mitigate the spread of contamination once it was discovered. [FN87] Nonetheless, this defense is expressly inapplicable to a brownfields purchaser because such a purchaser seeks to clean up known or perceived environmental contamination while limiting liability. [FN88] Given the insufficiencies of these statutory defenses, potential brownfields developers risk assuming enormous liability under CERCLA's strict and joint and several liability scheme. This liability could easily exceed the value of the property itself and might even exceed the developer's net worth. [FN89]

Furthermore, uncertain cleanup standards and costs compound potential brownfields developers' fear of exposure to CERCLA liability; it is nearly impossible to predict the required level or cost of a cleanup under CERCLA. [FN90] Section 121 requires a detailed assessment of each individual site in order to set a cleanup standard. [FN91] This assessment process is long [FN92] and expensive. [FN93] Before a cleanup standard can be established, however, it must comply with the standard of other federal and state environmental laws that are “applicable or relevant and appropriate,” [FN94] \*603 only adding to the confusion and complexity of predicting cleanup standards and costs. [FN95] Simply identifying “relevant and appropriate” laws is difficult even for “the most highly trained CERCLA personnel” and is “a frequent source of litigation.” [FN96] Once a “relevant and appropriate” law has been identified, it often increases cleanup costs unnecessarily. For example, the Resource Conservation and Recovery Act (RCRA) [FN97] may be a “relevant and appropriate” federal statute. [FN98] Some commentators have asserted that while CERCLA's corrective goals require only standards that are reasonably related to risks presented at the site, RCRA's preventative philosophy imposes much higher standards. [FN99] This apparent conflict, these commentators argue, results in standards that “‘point inexorably toward even more expensive cleanups--in almost total disregard of whether there will be any [increased] health/environmental benefits at a site.’” [FN100] Thus, unpredictable and potentially excessive cleanup standards and costs may further deter brownfields redevelopment.

Finally, potential brownfields developers fear lack of finality and administrative delays. Even if a developer completes a CERCLA cleanup, nothing prevents a second enforcement action upon the subsequent discovery of other contamination. [FN101] Developers also worry that administrative delays will threaten the viability of their projects. [FN102] A CERCLA cleanup can span many years. [FN103] That period can render an initially viable brownfields project inefficient and undesirable. [FN104]

### 3. Risks Perceived by Lenders

Lenders' perception that they face serious risks for lending on contaminated property is perhaps the most significant obstacle to \*604 brownfields redevelopment. Section 101(20) of CERCLA expressly exempts from liability "a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." [FN105] In the landmark case of *United States v. Fleet Factors Corp.*, [FN106] however, the Eleventh Circuit held a lender may be liable for contamination caused by its borrower "if [the lender's] involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose." [FN107] The Fleet Factors court's narrow interpretation of CERCLA's secured creditor exemption "sent shockwaves through the lending community." [FN108] In response, the Environmental Protection Agency (EPA) promulgated a rule clarifying the scope of the exemption. [FN109] The rule allowed lenders to investigate, monitor, and inspect facilities; engage in workout activities; and foreclose on collateral if they diligently sought to divest themselves of it. [FN110] However, the D.C. Circuit vacated the rule in 1994, holding that the EPA lacked authority to define the liability of a class of defendants. [FN111] As a matter of policy, the EPA and the Justice Department continued to follow the rule, but the rule lacked the force of law. [FN112] Lenders, nonetheless, continued to fear liability under the narrow view of the secured creditor exemption taken by Fleet Factors. [FN113] Some lenders opted to abandon collateral industrial properties rather than foreclose on them for fear of environmental liability. [FN114] A majority of lenders simply stopped making \*605 loans in areas containing industrial property altogether. [FN115] Because lenders are "the traditional sources of capital for factory rehabilitation and renovation for startup companies," [FN116] this constriction of credit clearly channeled development away from brownfields. [FN117]

In late 1996, Congress passed the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996. [FN118] The Act greatly clarifies CERCLA's secured creditor exemption. [FN119] A lender must "actually participat[e] in the management or operational affairs of a vessel" in order to lose the exemption

and risk liability under CERCLA. [FN120] Merely "having the capacity to influence, or the unexercised right to control" does not exceed the scope of the exemption. [FN121] While the Act seemingly offers lenders increased protection, it is not an absolute shield from environmental liability. First, the Act does not eliminate the possibility of lender liability. Rather, it continues to impose liability on lenders that violate "what still might be considered uncertain parameters." [FN122] Second, the Act offers no protection from lender liability under the numerous state analogues to CERCLA and other state environmental laws. [FN123] Most brownfields fall under the jurisdiction of these state laws. [FN124] Therefore, the threat of lender liability remains a serious obstacle to brownfields redevelopment.

#### 4. Risks Perceived by Sellers

Fear of environmental liability may decrease not only the demand for brownfield sites, but the supply of such property being offered for sale as well. An owner of supposedly contaminated land generally is unwilling to put the property on the market because a prospective purchaser might discover the contamination and report it to the government. [FN125] Even if an owner was able to sell the contaminated property, the \*606 owner risks being held liable for the costs of a cleanup occurring years later. The Fourth Circuit has held, for example, that even nonculpable past owners of a site are liable for CERCLA cleanup costs if the contamination was present during their ownership and passively moved through the site. [FN126] Theoretically, the owner could obtain a comprehensive indemnification agreement from the purchaser for all future environmental liabilities. [FN127] Such an agreement, however, would not protect the owner from liability to the government or third party claimants. [FN128] Given these risks, owners of brownfields have little incentive to offer their land for sale in a dismal market in which similar forces steer potential purchasers [FN129] and lenders [FN130] away from brownfields transactions.

### III. Responses to the Brownfields Problem

#### A. Federal Responses

##### 1. EPA Action

In January 1995, the EPA announced the “Brownfields Action Agenda.” [FN131] This program consists of a range of ambitious activities to attack the brownfields problem. First, the EPA removed 28,000 sites from “CERCLIS,” a database of potentially hazardous waste sites. [FN132] These sites had been screened and determined to be of no further federal interest. [FN133] Nonetheless, the CERCLIS listing of these sites had deterred developers. [FN134] Perhaps the most significant element of the agenda involves a guidance document on prospective-purchaser agreements that identifies the circumstances under which the EPA will enter into an \*607 agreement and covenant-not-to-sue. [FN135] This document broadens an earlier guidance document issued in 1989. [FN136] Under the 1995 guidance document, a prospective-purchaser agreement may be appropriate if four criteria are satisfied: (1) an EPA enforcement action must be ongoing or anticipated at the site; (2) a direct cleanup or indirect economic benefit must result; (3) operation of the site must not aggravate contamination and must not pose health risks to individuals or the community; and (4) the prospective purchaser must be financially viable. [FN137] An agreement made in accordance with the guidance document could release a prospective purchaser from civil liability to state and federal government regarding existing contamination. [FN138] The agreement would not apply to liability for releases caused by the prospective purchaser. [FN139] Therefore, the guidance document primarily attempts to alleviate concern over retroactive liability. [FN140]

The 1995 guidance document is unlikely to have a significant impact on the brownfields problem for three reasons. First, the number of sites potentially affected by the document is small in comparison to the total number of brownfields sites. [FN141]

Second, the memorandum does not have the force of law. [FN142] Thus, prospective purchasers cannot predict what kind of agreement they will actually obtain or how long the negotiation process may last. [FN143] Finally, the prospective purchaser remains potentially liable in cost recovery or contribution actions by third parties. [FN144]

##### 2. Congressional Action

Congress has sought to address the brownfields problem largely by facilitating participation in state voluntary cleanup programs. [FN145] As part of the current Superfund reform debate, several bills have been proposed to amend CERCLA. [FN146] These bills have two common features. First, \*608 they frequently provide financial assistance to enhance state voluntary cleanup programs. [FN147] Senate Bill 8, for example, offers \$25 million in grants over a five year period to “qualifying state voluntary response programs.” [FN148] Under this bill, each state could receive at least \$250,000 to establish or expand a “qualifying state voluntary response program.” [FN149] To qualify, a state program must contain the following six elements: (1) opportunities for technical assistance for participants; (2) adequate opportunities for public participation, “including prior notice and opportunity for comment in appropriate circumstances, in selecting response actions;” (3) streamlined procedures to expedite voluntary cleanups; (4) mechanisms to ensure cleanups are completed and will protect human health and the environment; (5) mechanisms to approve cleanup plans; and (6) certification from the state that the cleanup is complete. [FN150]

Second, recent federal brownfields proposals provide releases from federal environmental liability for participation in certified state voluntary cleanup programs. House Resolution 990, for example, establishes a process by which the EPA certifies state voluntary cleanup programs. [FN151] To be certified, state programs must: (1) cover only non-NPL sites; (2) provide for “good faith” public participation prior to the participant's release from liability; (3) provide a mechanism for reopeners for fraud and misrepresentation, “significant” changes in scientific standards, changes in the use of the site,

