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Some Overall Observations about the 1996 New York State Environmental Bond Act and a Closer Look at Title 5 and Its Approach to the "Brownfields" Dilemma

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LEGAL DEVELOPMENTS

SOME OVERALL OBSERVATIONS ABOUT THE 1996 NEW YORK STATE ENVIRONMENTAL BOND ACT AND A CLOSER LOOK AT TITLE 5 AND ITS APPROACH TO THE "BROWNFIELDS" DILEMMA

David L. Markell[*]

I. INTRODUCTION

Touted by proponents as a "bold and fiscally responsible initiative designed to attack the pressing problems that threaten to foul New York State's water and dirty its air,"[1] the $1.75 billion environmental bond act (1996 Act) approved by the state's voters in November 1996 is certain to have a significant impact for years to come on the state's environment, and on the shape of New York's environmental protection efforts.[2] The General Counsel of the Conference of

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[1] *Governor Proposes "Clean Water, Clean Air" Bond Act*, N.Y. EXECUTIVE CHAMBER PRESS RELEASE (June 6, 1996).

[2] The official title of the Act is Implementation of the Clean Water/Clean Air Bond Act of 1996 [hereinafter 1996 Bond Act]. N.Y. ENVTL. CONSERV. LAW §§ 56-0101 to 56-0611 (McKinney Supp. 1997) [hereinafter ECL]. It was signed into law by Governor Pataki in August 1996 and ratified by New York voters in November 1996.

Several helpful sources provide histories of New York's approaches to environmental protection. Three of the more comprehensive, recent sources are: 1) NELSON A. ROCKEFELLER INST. GOV'T, THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION: A 25TH ANNIVERSARY REVIEW (1996) [hereinafter A 25TH ANNIVERSARY REVIEW]; 2) *Outlook on 25 Years of the DEC: Environmental Officials Remember the Past and Provide a Blueprint for the Future of Environmental Regulations*, ALB. L. ENVTL. OUTLOOK (Spring 1996); and 3) Symposium, *25th Anniversary of the New York State Department of Environmental Conservation: Past and Future Challenges and Directions*, 7 ALB. L.J. SCI. & TECH. (forthcoming Spring 1997). *See also* N.Y. DEP'T ENVTL. CONSERVATION, OFF. PROGRAM & POL'Y ANALYSIS, THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION: A PROGRAM AND BUDGET HISTORY FISCAL YEARS 1983-1984

Mayors and Municipal Officials,[3] Donna M. C. Giliberto, has suggested that the 1996 Bond Act has the potential to be "heralded as the single most important environmental development in the State of New York since the 1965 Pure Waters Bond Act."[4] Larry Shapiro, a senior attorney with the New York Public Interest Research Group (NYPIRG), similarly characterized approval of the 1996 Bond Act as an "important moment in New York State's environmental history."[5]

Perhaps not surprisingly, given the substantial stakes and sums of money involved,[6] the debate over the 1996 Bond Act spawned energetic, well-funded efforts pro and con.[7] Advocates of the 1996 Bond Act included a wide array of environmental groups.[8] In a contest which saw more than its share of unlikely alliances, many of the state's premier business organizations supported enactment as well, including the Business Council,[9] which has been referred to as "the state's most influential business lobbying organization."[10] Supporters sought to convince the voters of the importance of the 1996 Bond Act as an investment in the future. The following

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THROUGH 1990-1991 (Oct. 1991) (discussing the Department of Environmental Conservation's [hereinafter DEC] appropriations relative to the Department's legislative mandates).

[3] The Conference of Mayors and Municipal Officials is a voluntary membership association which represents villages and cities in New York. *See* Donna M.C. Giliberto, *The Bond Act: Re-establishing the State-Local Partnership*, ALB. L. ENVTL. OUTLOOK (forthcoming Spring 1997) (manuscript at 3 n.1, on file with the ALB. L. ENVTL. OUTLOOK).

[4] *Id.* (manuscript at 8). Ms. Giliberto notes that the "devil is always in the details" and "[o]nly time will tell" whether the 1996 Bond Act meets the expectations many have set for it. *Id.*

[5] Larry Shapiro, *The Hard Work Lies Ahead—Implementation of the Bond Act*, ALB. L. ENVTL. OUTLOOK (forthcoming Spring 1997) (manuscript at 10, on file with the ALB. L. ENVTL. OUTLOOK).

[6] The 1996 Bond Act is the largest environmental bond act ever enacted in the state. *See infra* note 12 (tracing enactment of such bond acts over the past thirty years).

[7] Proponents of the 1996 Bond Act raised well over $1 million. *See* Sarah Metzgar, *State's Voters Approve Environmental Bond Act*, TIMES UNION (Albany, NY), Nov. 6, 1996, at A9. One opponent, Change-NY, raised over $400,000 for advertising against the 1996 Bond Act. *See id.*

[8] *See Governor Pataki Signs Clean Water, Clean Air Bond Act*, N.Y. EXECUTIVE CHAMBER PRESS RELEASE (Aug. 1, 1996) (listing 20 environmental groups that endorsed the 1996 Bond Act); *see also* Shapiro, *supra* note 5 (manuscript at 1) (noting that "[t]hose of us who work at NYPIRG were elated . . . when we received word that the Bond Act had been approved by New York State voters"). Mr. Shapiro notes that NYPIRG "put 1500 volunteers on the streets in key election districts . . . in a successful effort to inform voters about the merits of the . . . measure." *Id.*

[9] The Governor's August 1 press release reported that other supporters included the New York Conference of Mayors and the New York Association of Towns. *See Governor Pataki Signs Clean Water, Clean Air Bond Act*, *supra* note 8, at 1.

[10] Metzgar, *supra* note 7, at A16.

statement from the Governor's Office, contained in its memorandum in support of the 1996 Bond Act, captures many of the points made by the Act's advocates:

> The Clean Water/Clean Air Bond Act of 1996 is a bond act for our future. It will allow the state to make necessary commitments to undertake urgently needed environmental improvement projects that are vital to New York's future. This bond act is a necessary investment for solving pressing public health and environmental problems of growing concern to the people of the state. . . . The People of the State of New York understand the benefits that clean water and clean air provide and are committed to passing on to their children a cleaner and safer environment than the one they inherited. This bond act will help fulfill our responsibility to the future of our state's environment and the health of future generations.[11]

"Strange bedfellows" also found themselves aligned as opponents of the 1996 Bond Act, seeking to ensure its defeat at the polls. Liberal Democrats joined forces with fiscal conservatives such as Change-NY to argue that New York, already the nation's most heavily indebted state, could ill afford to incur additional indebtedness.[12] Some of these opponents touted an alternative "pay-as-you-

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[11] GOVERNOR'S MEMORANDUM, PROGRAM BILL #129R & 130R, at 6 (N.Y. 1996) [hereinafter PROGRAM BILL #129R & 130R].

[12] *See* Metzgar, *supra* note 7, at A16. Under the 1996 Bond Act as approved, revenues from the Real Estate Transfer Tax will be used to pay the debt service on the bonds. *See* Michael J. Bragman, Editorial, *The Trouble with Environmental Bonds*, N.Y. TIMES, Sept. 14, 1996, at A19.

The 1996 Bond Act is by no means the state's first experience with bonding for such purposes. As former DEC Executive Deputy Commissioner Gary Spielmann noted in a 1996 article published prior to the adoption of the 1996 Bond Act, "[t]o provide for environmental infrastructure, New York has relied heavily on debt-financed . . . programs." Gary Spielmann, *The Evolution of the DEC: Budget and Funding Sources, 1970-1995,* ALB. L. ENVTL. OUTLOOK, Spring 1996, at 21, 24. The state has actually been on a bond act per decade schedule. In 1965 the state enacted a $1 billion Pure Waters Bond Act to provide funding for construction and operation of municipal sewage treatment facilities. *See* N.Y. UNCONSOL. LAW §§ 7371-7373 (McKinney 1979); A 25TH ANNIVERSARY REVIEW, *supra* note 2, at 210. Seven years later, the state adopted the Environmental Quality Bond Act, which made available a total of $1.15 billion for various improvements to the environmental infrastructure in the state. *See* ECL §§ 51-0101 to 51-1105 (McKinney 1984 & Supp. 1997); *see also* A 25TH ANNIVERSARY REVIEW, *supra* note 2, at 202 (describing the Environmental Quality Bond Act of 1972). In the mid-1980s, the state enacted the Environmental Quality Bond Act of 1986. *See* ECL §§ 52-0101 to 52-0911 (McKinney Supp. 1997); A 25TH ANNIVERSARY REVIEW, *supra* note 2, at 164. Proceeds from this bond act were to be targeted primarily towards remediation of contaminated waste sites. *See* A 25TH ANNIVERSARY REVIEW, *supra* note 2, at 165. A portion of these funds were to be available to reimburse local governments for the cost of remediating municipal landfills.

go" approach to funding the environmental projects contemplated under the 1996 Bond Act.[13] As Michael J. Bragman, the Democratic Majority Leader of the New York State Assembly, put it: "The bond act would . . . add billions to New York State's already staggering debt. Dollar for dollar, New York already has significantly more debt than any other state. . . . [T]he pay-as-you-go approach is not only preferable, it is actually quite feasible."[14] Further, opponents highlighted the concern that the 1996 Bond Act would "fund pork-barrel projects."[15]

On November 6, 1996 New York voters approved the $1.75 billion Environmental Bond Act.[16] Roughly fifty-five percent of those voting "pull[ed] the 'yes' lever" in favor of the 1996 Bond Act.[17] The

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See id. ($100 million was made available for this purpose). In short, the 1996 Bond Act is the fourth environmental bond act to be enacted since 1965. In addition to the three earlier bond acts described in the text, an environmental bond act proposed in 1990, known as the 21st Century Environmental Quality Bond Act, was defeated at the polls by less than 100,000 votes. *See id.*; Giliberto, *supra* note 3 (manuscript at 5).

For a discussion of alternative mechanisms for financing environmental programs, see U.S. ENVTL. PROTECTION AGENCY, ALTERNATIVE FINANCING MECHANISMS FOR ENVIRONMENTAL PROGRAMS: STATE CAPACITY TASK FORCE THE ALTERNATIVE FINANCING MECHANISMS TEAM REPORT, FINAL DRAFT (1992). This report notes that while historically, the federal, state and local governments have shared responsibility for environmental protection, "[i]ncreasingly, . . . the responsibility of implementing, administering and enforcing federally mandated environmental programs has shifted to the states." *Id.* at 1.

In New York State, as former DEC Executive Deputy Commissioner Gary Spielmann, the Rockefeller Institute, and others have pointed out, a variety of sources of funding exist for environmental protection efforts. *See* A 25TH ANNIVERSARY REVIEW, *supra* note 2, at 6 (noting that the DEC administers more than 200 special revenue accounts, at a "steep price"). The State Revolving Fund (SRF), administered by the state's Environmental Facilities Corporation (EFC), is a major source of environmental infrastructure funding support. *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 649 (1994) [hereinafter NYCRR]; NYCRR tit. 21, § 2602 (1993). The SRF makes low-cost financing available to local governments to help make affordable a variety of environmental infrastructure projects. *See id.*; Terry Agriss, *Financing New York's Environmental Future,* ALB. L. ENVTL. OUTLOOK (forthcoming Spring 1997) (manuscript at 3, on file with the ALB. L. ENVTL. OUTLOOK); Giliberto, *supra* note 3 (manuscript at 3).

The Environmental Protection Fund (EPF), enacted in 1993, is one relatively new source of funding for environmental projects. *See* N.Y. STATE FIN. LAW § 92-S (McKinney Supp. 1997); STATE OF NEW YORK, ENVIRONMENTAL PROTECTION FUND (EFP) INFORMATION 5 (1994). This Fund establishes a dedicated revenue stream for a variety of environmental projects, such as landfill closures and municipal recycling activities. *See id.*

[13] *See* A. 11332, 219th Leg., 1996 Sess. (N.Y.); Metzgar, *supra* note 7, at A16 (citing State Assembly Majority Leader Bragman as a proponent of "pay-as-you-go").

[14] Bragman, *supra* note 12, at A19.

[15] Metzgar, *supra* note 7, at A16. Larry Shapiro, Senior Attorney for NYPIRG, has identified a series of steps the government should take to maximize accountability in the expenditure of funds, to minimize the possibility for the practice of "pork barrel" politics. *See* Shapiro, *supra* note 5 (manuscript at 1).

[16] *See* Metzgar, *supra* note 7, at A9.

[17] *See id.*

1996 Bond Act received a very different reception in various regions of the state. Perhaps the most vivid statistic was that seventy-seven percent of those voting in New York City voted in favor of the 1996 Bond Act, while a majority of voters in the rest of the state opposed it.[18]

The remainder of this introduction offers some observations about the 1996 Bond Act in connection with the ongoing debate over "unfunded mandates."[19] The introduction also identifies the major components of the 1996 Bond Act. The heart of this Article, Section II, focuses on one title of the 1996 Bond Act, Title 5, which covers the remediation of what have come to be known in New York and nationally as "brownfields" sites—that is, sites that are contaminated or suspected to be contaminated, and whose contamination is arguably deterring reuse or redevelopment.[20]

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[18] *See id.*

[19] *See* David L. Markell, *The Role of Local Governments in Environmental Regulation: Shoring Up Our Federal System*, 44 SYRACUSE L. REV. 885, 892-95 (1993) (summarizing local government perspectives on the issue of unfunded mandates and offering several suggestions for addressing this aspect of the federal-state-local relationship).

[20] The U.S. Environmental Protection Agency (EPA) has defined brownfield sites as "abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination." U.S. ENVTL. PROTECTION AGENCY, OFFICE OF SOLID WASTE AND RESPONSE, EPA/540/R-94/068, THE BROWNFIELDS ECONOMIC REDEVELOPMENT INITIATIVE: APPLICATION GUIDELINES FOR DEMONSTRATION PILOTS #2 (Sept. 1995) [hereinafter GUIDELINES].

While federal environmental programs, including the federal Superfund law and the Comprehensive Environmental Response, Compensation and Liability Act [hereinafter CERCLA], have spawned substantial literature, see, e.g., THOMAS W. CHURCH & ROBERT T. NAKAMURA, CLEANING UP THE MESS: IMPLEMENTATION STRATEGIES IN SUPERFUND (1993); ALLAN J. TOPOL & REBECCA SNOW, SUPERFUND LAW AND PROCEDURE (1992); *Frederick R. Anderson, Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261 (1985); Richard C. Belthoff, *Private Cost Recovery Actions Under Section 107 of CERCLA*, 11 COLUM. J. ENVTL. L. 141 (1986); Craig N. Johnston, *Superfund Reauthorization: Who Decides Who's Liable Under CERCLA?: EPA Slips a Bombshell into the CERCLA Reauthorization Process*, 24 ENVTL. L. 1045 (1994); Sharon L. McCarthy, Note, *CERCLA Cleanup Costs Under Comprehensive General Liability Insurance Policies: Property Damage or Economic Damage?*, 56 FORDHAM L. REV. 1169 (1988), relatively little attention has been paid to state environmental activities. *See* 1 ENVIRONMENTAL LAW INST., LAW OF ENVIRONMENTAL PROTECTION § 6.01[1] (Sheldon M. Novick et al. eds., 1994) (noting the almost total emphasis on federal environmental law found in treatises, law review articles, and popular publications); David L. Markell, *A How-to Guide to the Practice of Environmental Law*, 2 N.Y.U. ENVTL. L.J. 360, 364 (1993) (book review) (noting that the same is true for environmental case books including, by way of example, JOHN E. BONINE & THOMAS O. MCGARITY, THE LAW OF ENVIRONMENTAL PROTECTION (2d ed. 1992); ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW: CASES AND MATERIALS (3d ed. 1992); ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY (1992)); *see also* David L. Markell, *The Federal Superfund Program: Proposals For Strengthening The Federal / State Relationship*, 18 WM. & MARY J. ENVTL. L. n.27 (1993) [hereinafter Markell, *Federal Superfund*]. This is so despite the

One commentator has suggested that in recent years the issue of "unfunded governmental mandates" has been "'the number one intergovernmental issue in the United States due to the cumulative impact of state and federal mandates.'"[21] Environmental requirements contained in federal and state law are prominent among these mandates.[22] In the words of a resolution adopted by one local government, unfunded mandates represent a "'breach [of] the underlying principles of federalism which assume[] a working partnership and shared responsibilities between [sic] federal, state and local governments.'"[23] A 1993 report by the Environmental Protection Agency (EPA) expressed the sentiment that local concerns had reached a crisis stage: "We are going to see a revolution by local governments. They will say, 'EPA, if you want it done then do it yourself.'"[24]

The federal government responded to this locally-led insurrection by enacting, *inter alia*, the Unfunded Mandates Reform Act of 1995.[25] As its title suggests, this federal legislation is intended to

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central role states play in our federal system. *See* ENVIRONMENTAL LAW INST., REPORT TO THE OFFICE OF TECHNOLOGY ASSESSMENT, NEW STATE AND LOCAL APPROACHES TO ENVIRONMENTAL PROTECTION at iv (Aug. 1993) ("Many environmental laws and programs originate with state and local governments. These include innovative approaches to environmental regulation as well as other approaches used in lieu of, or as supplements to, regulatory mechanisms."); David L. Markell, *States as Innovators: It's Time for a New Look to our "Laboratories of Democracy" in the Effort to Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 348 (1994) (commenting on state approaches to environmental regulation) [hereinafter Markell, *States as Innovators*]; JAMES M. MCELFISH, JR. & JOHN PENDERGRASS, ENVTL. LAW INST., RESEARCH BRIEF NO. 2, REAUTHORIZING SUPERFUND: LESSONS FROM THE STATES 4 (Dec. 1993) (discussing state innovations in the Superfund arena).

[21] Markell, *supra* note 19, at 889 (quoting Dr. Bruce McDowell of the Advisory Commission on Intergovernmental Relations, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION (ICMA), ENVIRONMENTAL MANDATES TASK FORCE MEETING, MEETING NOTES, at 1 (Mar. 5, 1993)). *See also* Shelley Emling, *Mandates Drying Up County Funds Enough*, ATLANTA J. & CONST., Aug. 14, 1993, at B1 (stating that "[g]ripes about unfunded mandates are not new, but they're growing louder as the demands grow more costly").

[22] *See* Markell, *supra* note 19, at 886.

[23] *Id.* at 889 (quoting DEKALB COUNTY, GEORGIA, RESOLUTION (Aug. 10, 1993)).

[24] *Id.* at 888-89 (quoting U.S. ENVTL. PROTECTION AGENCY, LOCAL GOVERNMENT IMPLEMENTATION OF ENVIRONMENTAL MANDATES, FIVE CASE STUDIES, FINAL REPORT, at B32 (Aug. 1993)).

[25] 2 U.S.C. §§ 1501-1571 (Supp. I 1995). This Act is only one of many federal actions within the past few years intended to address the issue of unfunded mandates in one way or another. Another federal effort to respond to unfunded mandate concerns is the creation of a new revolving loan fund as an important element of the recently amended Safe Drinking Water Act. *See* Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, § 130, 110 Stat. 1613 (to be codified at 42 U.S.C. §§ 300j-12) (providing for the establishment of loan funds to aid municipalities in complying with federal regulations). *See also* Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (requiring, *inter alia*,

limit the imposition of unfunded federal mandates on state and local governments.[26] It does not bar unfunded mandates altogether. Instead, it imposes various requirements on a federal entity considering imposing a mandate.[27]

The 1996 Bond Act represents a response by the State of New York to this concern on the part of local governments that they are being saddled with environmental obligations without being provided adequate support to implement them. The 1996 Bond Act will funnel significant sums of money to local governments for purposes of developing or upgrading environmental infrastructure.[28] Conference of Mayors General Counsel Donna M.C. Giliberto indicated, in a recent article, that "cities and villages around New York State breathed a collective sigh of relief" when the voters approved the 1996 Bond Act.[29] After summarizing the frustration local government officials in New York have felt in recent years when responding to environmental mandates,[30] she stated that local government officials "view[] [the] Bond Act as a significant step toward . . . protecting local governments from burdensome unfunded environmental mandates."[31]

Elaborating on the financial relief she expects the 1996 Bond Act will provide local governments, Giliberto states:

> Once implemented, [the 1996 Bond Act] would provide local real property tax relief by targeting existing environmental mandates such as safe drinking water, sewage treatment

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congressional and General Accounting Office review of agency regulations); Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1994). *See generally* Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 96 (1997); Jeffrey S. Lubbers, Paperwork Redux: The (Stronger) Paper Reduction Act of 1995, 49 ADMIN. L. REV. 111 (1997); Symposium, *The Future of the American Administrative Process*, 49 ADMIN. L. REV. 1 (1997).

[26] *See* 2 U.S.C. § 1501(2). The statute also covers imposition of mandates on tribal governments. *See id.*

[27] *See id. See, e.g., id.* § 1532(a) (requiring that agencies considering imposition of mandates which "may result in the expenditure by State, local, and tribal governments, in the aggregate[] . . . of $100,000,000 or more . . . in any [one] year," prepare a written statement that, *inter alia*, assesses the benefits and costs of the proposed rule and the extent to which federal financial assistance is available to meet the costs of complying with the requirement). *See* Daniel E. Troy, *The Unfunded Mandates Act of 1995*, 49 ADMIN. L. REV. 139 (1997).

[28] While a significant portion of the 1996 Bond Act funds are to be provided to municipalities, some of the funds may be used for other purposes. *See, e.g.*, ECL § 56-0301 (McKinney Supp. 1997) (including state agency "environmental compliance assistance projects" on the list of potentially eligible projects).

[29] Giliberto, *supra* note 3 (manuscript at 5).

[30] *See id.* (manuscript at 1).

[31] *Id.* (manuscript at 5).

> plant upgrades, recycling centers, and landfill closures. Without the resources of the Bond Act, local governments would be required to comply with these federal and state mandates by continuing to rely on the local real property tax.[32]

Ms. Giliberto observes that "the majority of the programs funded with Bond Act proceeds are existing federal and state mandates."[33] She continues:

> The bottom line is, with or without the proceeds of the Bond Act, local governments are required to comply with these mandates. Without the Bond Act, communities would be forced to "go it alone," but by providing significant state resources to assist local government environmental compliance, the State of New York has eased the financial burden associated with these unfunded mandates and has taken an important step toward reestablishing its partnership with local governments.[34]

The 1996 Bond Act contains five main titles: (1) "Title 2—Safe Drinking Water Act Projects" ($355 million);[35] (2) "Title 3—Clean Water Projects" ($690 million);[36] (3) "Title 4—Solid Waste Projects" ($175 million);[37] (4) "Title 5—Environmental Restoration Projects" ($200 million);[38] and (5) "Title 6—Air Quality Projects" ($230 million).[39] The remainder of this Article focuses on Title 5, which provides funding to municipalities for remediation of "brownfields" sites.

II. TITLE 5 OF THE 1996 NEW YORK STATE CLEAN WATER/CLEAN AIR ACT: ENVIRONMENTAL RESTORATION PROJECTS

Despite its title, the reach of the $1.75 billion 1996 Bond Act extends beyond providing state funds to protect the state's water and air quality.[40] Title 5 of the 1996 Bond Act allocates a total of $200

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[32] *Id.*

[33] *Id.* (manuscript at 6).

[34] *Id.*

[35] ECL § 56-0201 (McKinney Supp. 1997).

[36] *Id.* §§ 56-0301 to 56-0311.

[37] *Id.* §§ 56-0401 to 56-0407.

[38] *Id.* §§ 56-0501 to 56-0511.

[39] *Id.* §§ 56-0601 to 56-0611.

[40] *See id.* §§ 56-0401 to 56-0407 (stating that Title 4 authorizes funds for municipal landfill and recycling projects); *id.* §§ 56-0501 to 56-0511 (stating that Title 5 authorizes funds for municipal projects remediating and restoring property).

million for "environmental restoration projects,"[41] which will result in the remediation of contaminated sites.[42] In the words of the memorandum submitted by the Governor's office in support of the 1996 Bond Act, Title 5 is "for clean-up of abandoned industrial sites. These 'brownfield' sites will then be used for open space or returned to productive use."[43]

The notion that a concerted effort is needed to remediate abandoned or underutilized industrial sites, more commonly known as brownfields sites, has become increasingly popular in recent years.[44] Last fall, President Clinton, for example, is said to have characterized brownfields redevelopment as one of his priorities.[45] Among many initiatives at the federal level, one recently proposed bill would provide $2 billion in tax incentives for cleaning up these sites.[46]

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[41] *Id.* § 56-0501. An environmental restoration project is defined as "a project to investigate or to remediate hazardous substances located on real property held in title by a municipality." *Id.*

[42] The 1996 Bond Act represents a substantial additional investment by the people of New York in the cleanup of contaminated properties. *See* Act of July 27, 1982, ch. 857, 1982 N.Y. Laws 2795 (creating a fund for remediation of inactive hazardous waste disposal sites). The 1986 Environmental Quality Bond Act (EQBA) provided in excess of $1 billion for the cleanup of inactive hazardous waste disposal sites. *See* ECL § 52-0103 (McKinney 1984 & Supp. 1997); Town of New Windsor v. Tesa Tuck, Inc., 919 F. Supp. 662, 667 n.2 (S.D.N.Y. 1996); *see also* STAFF REPORT TO THE CHAIRMAN OF THE NEW YORK STATE JOINT LEGISLATIVE COMMISSION ON TOXIC SUBSTANCES & HAZARDOUS WASTES, THE VOLUNTARY CLEANUP OF NEW YORK'S CONTAMINATED PROPERTY: BARRIERS & INCENTIVES 14 n.22 (Oct. 1994) [hereinafter BARRIERS & INCENTIVES] (stating that "$1.1 billion is now available for site cleanup").

[43] PROGRAM BILL # 129R & 130R, *supra* note 11, at 3. *See also* Robert S. Berger, *Brownfields: The New York Approach*, ENVTL. L. N.Y., Jan. 1995, at 1 (1995) (discussing the brownfields issue in New York and the state's plan for remediating contaminated properties). There has been a flurry of activity in many states and at the federal level to encourage redevelopment of contaminated properties. *See* Mark D. Anderson, *Investing in our Urban Industrial Areas: Encouraging the Voluntary Cleanup of Brownfields*, ALB. L. ENVTL. OUTLOOK, Summer/Fall 1996, at 44, 44 (discussing legislative initiatives aimed at alleviating the brownfields problem). A news report indicates that President Clinton has characterized brownfields redevelopment as "the 'most important thing' he is working on with the nation's mayors." *Clinton Outlines Major Environmental Initiatives in Stump Speech*, ENVTL. POL'Y ALERT, Sept. 11, 1996, at 34, 35 [hereinafter *Stump Speech*]. For a series of articles that discuss the issue of brownfields from a variety of perspectives, see ALB. L. ENVTL. OUTLOOK, Summer/Fall 1996.

[44] *See generally* ALB. L. ENVTL. OUTLOOK, Summer/Fall 1996 (providing various perspectives on recent initiatives to cleanup brownfields sites).

[45] *See Stump Speech*, *supra* note 43, at 35.

[46] *See House Democrat's Brownfield Measure Would Provide Credit, Tax-Exempt Bonds*, Env't Rep. (BNA) 2070 (Feb. 14, 1997). Similarly, President Clinton has proposed to alter the tax code to promote redevelopment of abandoned or underutilized industrial sites. *See Clinton Unveils Tax Incentive Plan to Restore 30,000 'Brownfield' Sites*, Env't Rep. (BNA) 2140 (Mar. 15, 1996) (stating that "[t]he tax incentive plan is expected to return 30,000 brownfields properties to productive use across the country and spur $10 billion in private investments").

The scope of the problem is thought to be quite significant. A January 1996 study from The United States Conference of Mayors reports that, based on the Conference's survey, 39 cities that reported the presence of brownfields in their communities "identified more than 20,000 such properties or sites of multiple properties."[47] The report continues: "While these results do not allow for projections of total brownfields in the nation, the high counts of sites in this small sample of cities indicate the problem is a significant one."[48]

The abandonment of brownfields sites due to their potential contamination has been considered to be partially responsible for a litany of social ills that have befallen many urban areas in the United States, including declines in the tax base, reductions in employment opportunity and the presence of unattractive, underused or abandoned properties that contribute to an environment of despair rather than hope.[49] At the state level in New York, Charles E. Sullivan, Chief of the Department of Environmental Conservation's (DEC) State Superfund and Voluntary Cleanup Practice Group, summarized this perspective as follows: "Abandoned contaminated commercial and industrial properties, can constitute public health, safety, and environmental hazards. They drive down property values

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Facilitating cleanups of these properties by allowing parties to "privatize" the oversight function, at least in part, is another theme that has gained some measure of popularity in Massachusetts, among other states. *See* NATIONAL GOVERNORS' ASS'N, IDEAS THAT WORK: BUSINESS AND ENVIRONMENT 6 (1996). Other strategies urged by the Conference of Mayors include provision of government financial support to help fund cleanup activities. *See* Letter from the U.S. Conference of Mayors to President Clinton (Dec. 21, 1995), *reprinted in* U.S. CONF. OF MAYORS, IMPACT OF BROWNFIELDS ON U.S. CITIES: A 39-CITY SURVEY at app. (Jan. 25, 1996). For summaries of the innovations being explored as part of brownfields programs in Connecticut, Delaware, Michigan, Minnesota, Ohio, Pennsylvania and Virginia, see NATIONAL GOVERNORS' ASS'N, *supra*, at 2-20.

[47] U.S. CONF. OF MAYORS, IMPACT OF BROWNFIELDS ON U.S. CITIES: A 39-CITY SURVEY 1 (Jan. 25, 1996).

[48] *Id.* The U.S. General Accounting Office reports that the U.S. Conference of Mayors estimates that possibly over 425,000 brownfields sites exist throughout the United States. *See* U.S. GEN. ACCT. OFF., COMMUNITY DEVELOPMENT: REUSE OF URBAN INDUSTRIAL SITES 3 (June 1995).

States are in different stages of responding to the call for paying additional attention to these sites. Approximately 30 states have adopted or are considering voluntary cleanup programs to address brownfields sites. *See* Timothy G. Rogers, *Brownfields: The Benefits and Risks of Redevelopment of Contaminated Property*, ALI-ABA COURSE OF STUDY, Feb. 1997, at 4-5.

[49] *See* U.S. CONF. OF MAYORS, *supra* note 47, at 1-8.

and the local tax base, provide no employment to residents, and visually blight a community."[50]

Compounding the negative fallout associated with developers' decisions not to redevelop brownfields is the impact on greenfields—relatively pristine properties to which developers sometimes turn as an alternative to redeveloping brownfields. Quoting the DEC's Mr. Sullivan once again:

> The inability to reuse these brownfield sites leads to development pressure on pristine sites, "greenfield sites," in rural and suburban areas. The resulting suburban commercial/industrial sprawl results in costly local infrastructure construction, higher local taxes, and loss of precious open space and wildlife habitat. At the same time, our cities—which already have existing infrastructure—deteriorate.[51]

While not all observers are convinced that environmental issues—most notably issues concerning the existence of contamination or possible contamination—are a material factor contributing to the brownfields/greenfields phenomenon outlined above,[52] it seems clear that the drafters of the 1996 Bond Act were convinced such a link exists. The Governor's August 1, 1996 press release, for example, states that "[c]ities around the state are suffering from chronic disinvestment, often caused by the prevalence of contaminated properties."[53] A desire to create incentives for remediation of such sites, on the theory that such incentives would lead to properties being returned to productive use, thereby creating new jobs and other benefits, was an animating force for the creation of the $200 million "environmental restoration" fund in Title 5.[54]

Subpart A of this Section identifies the real estate properties potentially eligible for funding under the 1996 Bond Act's environmental restoration program.[55] Subpart B summarizes the

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[50] Charles E. Sullivan, Jr., *The Department of Environmental Conservation's Voluntary Remedial Program*, 8 ENVTL. L. N.Y. 7, 24 (1997) [hereinafter *Remedial Program*].

[51] *Id.* at 24.

[52] *See* Anne Rabe, *Brownfields: Compromised Cleanups?*, ALB. L. ENVTL. OUTLOOK, Summer/Fall 1996, at 37-43 (suggesting that other factors may play a more significant role in impeding redevelopment of industrial properties); Berger, *supra* note 43, at 12.

[53] *Governor Pataki Signs Clean Water, Clean Air Bond Act*, *supra* note 8, at 6.

[54] The perception that allowing industrial properties to lie fallow contributes to a wide variety of societal ills has led some to consider fundamental changes to the two major features of Superfund, notably its liability scheme and its approach to cleanup standards. *See* Letter from the U.S. Conference of Mayors to President Clinton, *supra* note 46, at app.

[55] *See infra* notes 58-80 and accompanying text.

mechanics of the program—the process the 1996 Bond Act establishes for parcelling out funds—and then examines its substantive elements.[56] Subpart C seeks to put Title 5 in context by comparing it to the approaches embodied in the two other major prongs of the state's program for remediating properties contaminated with hazardous wastes, the state's Title 13 Inactive Hazardous Waste Disposal Site Remedial program and its Voluntary Cleanup Program (VCP).[57]

A. *Sites Eligible for Funding Under the 1996 Bond Act's Environmental Restoration Program*

The 1996 Bond Act contains two threshold criteria for determining whether remediation of real property potentially may be funded under the Title 5 environmental restoration program. The first criterion deals with the identity of the site owner. By limiting eligibility for funding to environmental restoration projects, which the 1996 Bond Act defines as "project[s] to investigate or to remediate hazardous substances *located on real property held in title by a municipality,*"[58] the 1996 Bond Act authorizes the expenditure

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[56] *See infra* notes 81-130 and accompanying text.

[57] *See infra* notes 131-87 and accompanying text. The Title 13 program is contained in ECL §§ 27-1301 to 27-1321 (McKinney 1984 & Supp. 1997). The Voluntary Cleanup Program (VCP) is a program whose creation former New York Governor Mario Cuomo announced in an October 19, 1994 press release. *See* N.Y. EXECUTIVE CHAMBER PRESS RELEASE (Oct. 19, 1994) [hereinafter PRESS RELEASE (Oct. 19, 1994)]. The DEC issued an Organization and Delegation Memorandum initiating this program in December 1994. *See* N.Y. DEP'T ENVTL. CONSERVATION, ORGANIZATION AND DELEGATION MEMORANDUM NO. 94-32 (Dec. 1994) [hereinafter MEMO # 94-32]. The DEC has cited both Title 13 and the Department's overarching authority in ECL § 3-0301 as statutory authority for the VCP. *See* N.Y. Dep't of Envtl. Conservation, Model Voluntary Cleanup Program Agreement, at 1 (attached to MEMO # 94-32). In his press release, former Governor Cuomo indicated that he had "directed Commissioner Marsh to develop legislation to enhance this administrative program." PRESS RELEASE (Oct. 19, 1994), *supra*, at 1. DEC cleanup programs not covered in this Article include the oil spill response program under the Navigation Law and DEC's cleanup authorities under the Resource Conservation and Recovery Act [hereinafter RCRA]. *See* ECL §§ 27-0900 to 27-0925 (McKinney 1984 & Supp. 1997).

[58] ECL § 56-0101(7) (McKinney Supp. 1997) (emphasis added). Title 5 defines municipality as follows:

> For purposes of this title "municipality" shall have the same meaning as provided in subdivision twelve [sic] of section 56-0101 of this article, except that such term shall not refer to a municipality that generated, transported or disposed of, arranged for, or that caused the generation, transportation or disposal of hazardous substance located at real property proposed to be investigated or to be remediated under an environmental restoration project.

Id. § 56-0502.

Subdivision 15 of section 56-0101 defines a municipality as follows:

of environmental restoration funds solely for municipally-owned properties.[59]

The second threshold criterion for 1996 Bond Act environmental restoration project funding relates to site conditions rather than to identity of ownership.[60] Section 56-0505(2) bars use of 1996 Bond Act funds at sites the DEC has determined contain hazardous wastes that present a significant threat to human health or the environment.[61] This section prohibits the DEC from contracting for projects for "site[s] listed [as Class 1 or 2] in the registry of inactive hazardous waste sites under section 27-1305."[62] Class 1 and 2 sites are the most dangerous sites on the DEC's registry; by definition, they require cleanup in order to protect the public health or the environment.[63] Thus, only municipally-owned sites that do *not* pose a significant threat to human health or the environment due to the presence of hazardous waste are potentially eligible for 1996 Bond Act funding.[64]

> [A] local public authority or public benefit corporation, a county, city, town, village, school district, supervisory district, district corporation, improvement district within a county, city, town or village, or Indian nation or tribe recognized by the state or the United States with a reservation wholly or partly within the boundaries of New York state, or any combination thereof. In the case of aquatic habitat restoration projects, the term municipality shall include the state.

Id. § 56-0101(15).

[59] *See id.* § 56-0503(2).

[60] *See id.* § 56-0505.

[61] *See id.* § 56-0505(2).

[62] *Id.*; *see also id.* § 27-1305(4)(b)(1)-(2) (McKinney 1984 & Supp. 1997) (listing the classifications relating to each site's relative priority).

[63] A class "1" site is one which "is causing, or presents an imminent danger of causing, either irreversible or irreparable damage to the environment." NYCCRR tit. 6, § 375-1.8(2)(i)(b) (1996) [hereinafter NYCRR]. A class "2" site "constitutes a significant threat to the environment." *Id.* § 375-1.8(2)(ii).

[64] As noted elsewhere, many municipally-owned sites that pose a significant threat because of the presence of hazardous waste are eligible for 75% state funding under the 1986 Environmental Bond Act. *See* ECL §§ 27-1313, 52-0303 (McKinney 1984 & Supp. 1997), 56-0505(2) (McKinney Supp. 1997). Hazardous substances sites presenting a significant threat appear to be eligible for 1996 Bond Act funding. *See id.* § 56-0505(2) (prohibiting the use of 1996 Bond Act funds for remediating hazardous waste sites, but not for hazardous substance sites). A 1995 report from the DEC and the Department of Health (DOH) found 26 hazardous substances waste disposal sites which present a significant threat but do not qualify for attention under Title 13 because they contain hazardous substances but not hazardous wastes. *See* N.Y. DEP'T ENVTL. CONSERVATION & N.Y. DEP'T HEALTH HAZARDOUS SUBSTANCES WASTE DISPOSAL TASK FORCE, REPORT ON HAZARDOUS SUBSTANCE WASTE DISPOSAL SITE STUDY—FINAL REPORT 2, 3, 20 (June 1995) [hereinafter HAZARDOUS SUBSTANCE REPORT]. As the DEC has noted, "[t]he definition of a hazardous *substance* . . . is broader than that for hazardous waste and encompasses hazardous waste." *Id.* at 3. The report also indicated that between 135 and 192 additional hazardous substances sites "could likely pose a significant

The legislative history for the 1996 Bond Act is sparse, but the reasons for these limitations on the types of properties potentially eligible for 1996 Bond Act funding appear to be relatively straightforward.[65] The restriction that only municipally-owned sites are eligible for such funding likely stems, in part, from a concern that otherwise, the 1996 Bond Act could potentially run afoul of the New York State Constitution's bar against the government funding a private activity.[66] The 1996 Bond Act probably excludes sites that are eligible for cleanup under Title 13 because Title 13 already provides for state funding for remediation of municipally-owned sites that fall into this category.[67] As a result, the 1996 Bond Act's drafters likely felt that it was not necessary to include such sites under the 1996 Bond Act, and that it might create unnecessary overlap to do so.[68]

In addition to these threshold criteria, the 1996 Bond Act lists four criteria for prioritizing among eligible projects: (1) "the benefit to the environment realized by the expeditious remediation of the property;"[69] (2) "the economic benefit to the state by the expeditious remediation;"[70] (3) "the potential opportunity of the property proposed to be subject to such project to be used for public recreational purposes;"[71] and (4) "the opportunity for other funding

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threat." *Id.* at 20. Furthermore, the DEC has not evaluated some contaminated properties because the Department believes that such properties are being "actively managed by another [DEC] Division or Agency." *Id.* at 10. Sites which contain hazardous substances because of the "intended use" of such substances, not through waste disposal, were not considered (e.g., orchards containing pesticides). *See id.* at 12. In its 1994 amendments to Title 13, the State Legislature directed the DEC and DOH to conduct this study. *See* ECL § 27-1316(s) (McKinney 1984 & Supp. 1997). Part 371 of title 6 NYCRR defines "hazardous wastes," while Part 597 defines "hazardous substances." *See* NYCRR tit. 6, §§ 371.1 & 597.1 (1995).

[65] *See* PROGRAM BILL # 129R & 130R, *supra* note 11, at 3 (opining that the 1996 Bond Act allocates money "to municipalities for cleanup of abandoned industrial sites").

[66] *See* N.Y. CONST. art. VII, § 8 ("The money of the state shall not be given . . . in aid of any private . . . undertaking.").

[67] *See* ECL § 27-1313(5)(g) (McKinney Supp. 1997). *See generally* NYCRR tit. 6, § 375-3.1 (1995) (describing state funding for municipal hazardous waste remediation). Title 13 provides for a 75% state contribution to municipally-owned or operated sites that are Class 1 or 2 sites. *See* ECL § 27-1313(5)(g).

[68] The "law of unintended consequences" may be at work here if, as some fear, Title 13 funds are depleted in the near term. Exhaustion of the Title 13 funds would impair the DEC's ability to clean up municipally-owned sites that present a significant threat, while the DEC simultaneously would be relatively flush with funds to address properties that pose less concern. *See infra* notes 74-75 and accompanying text.

[69] ECL § 56-0505(1)(a) (McKinney Supp. 1997).

[70] *Id.* § 56-0505(1)(b).

[71] *Id.* § 56-0505(1)(c).

sources to be available for the remediation."[72] The 1996 Bond Act states explicitly that, as might be expected, sites which are not likely to be remediated without 1996 Bond Act funding should receive higher priority for such funding than other sites.[73] While the 1996 Bond Act does not offer similar explicit direction concerning the other three criteria listed above, it seems likely that the DEC will rank projects that promise relatively greater environmental, economic and recreational benefit higher on the queue for 1996 Bond Act funding than sites that appear to rank lower under these criteria.[74]

In sum, the 1996 Bond Act's environmental restoration program is targeted at sites that are municipally-owned, that will not be addressed under the traditional Title 13 cleanup program, and whose cleanup with 1996 Bond Act financial support will produce the greatest environmental, economic or recreational benefit. Defining the universe of potentially eligible sites in this way is sensible in several respects. Establishing a clear line between the 1996 Bond Act program and the traditional Title 13 program will minimize confusion for municipal site owners and the DEC staff about the identity of the state remediation program for which properties qualify, thereby minimizing time spent wrestling with such issues. The priorities for establishing the queue of eligible sites seem sensibly drawn to encourage the most effective use possible of 1996 Bond Act funds.

Several potential "downsides" stemming from the 1996 Bond Act criteria deserve to be "flagged." The general nature of the criteria may present the DEC with a difficult challenge in performing the politically-charged task of dispensing funds and rejecting some municipal applicants, if there prove to be more eligible sites than the 1996 Bond Act is able to address. DEC's early promulgation of regulations containing the "rules of the game" (procedural and substantive) for obtaining state monies could at least help to ameliorate this concern. A second point is that DEC may not necessarily possess specific expertise related to some of these criteria (e.g., determinations of the relative economic benefit to be produced by remediation of various properties). The Department will need to

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[72] *Id.* § 56-0505(1)(d).

[73] *See id.*

[74] The DEC has announced that it "is developing a 'priority ranking system' to determine which projects have the greatest potential of meeting the criteria." N.Y. DEP'T ENVTL. CONSERVATION, 1996 CLEAN WATER/CLEAN AIR BOND ACT DRAFT CRITERIA DEVELOPMENT INFORMATION 12 (1996).

decide whether to create such expertise in-house, or to obtain such expertise through relationships with other agencies (or other parties).

At least three potential drawbacks that stem from the relatively confined jurisdiction of the 1996 Bond Act's environmental restoration program warrant mention. The drafters' decision to render Class 1 and 2 sites ineligible for funding potentially could have the paradoxical environmental protection result of providing state funds for the clean up of sites that pose relatively insignificant risks while sites that pose far greater threats go unaddressed. The DEC, the State Superfund Management Board and some members of the environmental community have suggested that the funding allotted for the Title 13 program is running out, with considerable cleanup work still remaining to be done.[75]

It is not clear whether new legislation will, in fact, be forthcoming in the near future to address this apparent shortfall in funding for

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[75] Although the agency's thinking on the exact time frame has shifted, the DEC has reported on numerous occasions that New York's Superfund will be exhausted within the next couple of years, leaving a substantial number of sites still requiring and awaiting cleanup. *See, e.g., Key Lawmaker Charges Superfund 'Sold Out', Pataki Environmentalists Cut Bond Deal That Excludes Superfund*, INSIDE EPA'S SUPERFUND REP., Sept. 18, 1996, at 7 [hereinafter *Key Lawmaker Charges Superfund 'Sold Out'*] (discussing the DEC's announcement that funding for the Superfund Program will be exhausted in the near future). The State Board charged with overseeing the State Superfund program, the State Superfund Management Board, created by ECL § 27-1319 (McKinney 1984 & Supp. 1997), has reached the same conclusion. *See* STATE SUPERFUND MGMT. BD., 11TH ANNUAL EVALUATION: NEW YORK STATE HAZARDOUS WASTE SITE REMEDIATION PROGRAM 3 (Jan. 1, 1997) [hereinafter 11TH ANNUAL EVALUATION] (indicating that the Board now anticipates that "EQBA funding will be fully committed by the third quarter of the 1998/99 State Fiscal Year"). In addition, the Board notes that the state "is now confronted with an estimated current shortfall of $1.5-$1.8 billion to complete the remedial program. There are insufficient funds to remediate all the known sites, let alone any new sites that will be discovered in the next few years." *Id.* at 5. *See also* BARRIERS & INCENTIVES, *supra* note 42, at 14 (stating that "[b]y all accounts, the task of remediating the Registry sites threatens to overwhelm the resources allocated for this purpose," and noting that in 1993, the DEC anticipated that it would have sufficient funds to clean up only 480 of the 760 Class 2 sites requiring remediation and that the DEC estimated that it would require an additional $1.6 billion to remediate all 760 sites identified at that time). Anne Rabe, Executive Director of the Citizens' Environmental Coalition, is cited as having reservations about the 1996 Bond Act because "'[i]t doesn't address the problem of toxic waste dumps in New York or the ailing Superfund program, which is about to go bankrupt.'" Elsa Brenner, *Environmental Bill: The Pros and Cons*, N.Y. TIMES, Oct. 20, 1996, at 13WC-11.

The failure to have the 1996 Bond Act replenish the Superfund is said to have caused controversy among environmental groups when those groups considered whether to endorse the 1996 Bond Act. Some groups supported the 1996 Bond Act only on Governor Pataki's promise that he would address the issue of Superfund through a funding proposal that was due in November, 1996. *See Key Lawmaker Charges Superfund 'Sold Out,' supra*, at 7; *Environmentalists May Drop Support for Bonds Without Superfund Plan*, INSIDE EPA'S SUPERFUND REP., Oct. 2, 1996, at 17.

remediation of Title 13 sites. One report indicates that industry is likely to vigorously contest steps to accumulate the necessary funds through increased taxation and fees.[76] Intuitively, the November 1996 enactment of a $1.75 billion Environmental Bond Act will likely complicate efforts to replenish the State Superfund, regardless of the need for an infusion of funds.[77]

In sum, at least a possibility exists that exhaustion of Title 13 monies for "significant threat" sites will leave the state in the unenviable position of being unable to fund remediation of sites that pose a truly substantial threat to the environment and the people living nearby, while being relatively awash with funds to address sites that pale in comparison in terms of environmental threat. This outcome would be directly contrary to the theme that permeates much of the discussion today about future directions of environmental policy—notably, that we should be prioritizing among problems and pursuing the worst risks first.[78]

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[76] *See Superfund Financing Takes Center Stage in New York Environmental Debate*, INSIDE EPA'S SUPERFUND REP., Mar. 6, 1996, at 19 (reporting that "[i]ndustry groups . . . dismiss any additional industry-based fees as economically detrimental").

[77] The State Superfund Management Board noted that bonding, in particular, was less likely to be available to replenish these funds. *See* 11TH ANNUAL EVALUATION, *supra* note 75, at 8. One reviewer of an early draft of this Article disagreed with the assertion in the text. She suggested that the 1996 Bond Act might enhance prospects for replenishing the Superfund by focusing greater attention on the need for cleanups of contaminated sites.

[78] *See, e.g.*, U.S. ENVTL. PROTECTION AGENCY, SAB-EC-90-021, REDUCING RISK: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION 1 (1990) (maintaining that environmental protection efforts should "assess the range of environmental problems of concern and then target protective efforts at the problems that seem to be the most serious"); Markell, *States as Innovators*, *supra* note 20, at 366 (discussing efforts to "prioritize among environmental concerns and address such concerns comprehensively"). Justifications other than enhanced environmental protection, of course, have been offered to support investing funds in remediating brownfields. *See* GUIDELINES, *supra* note 20, at 1-2 (discussing restoring economic vitality to brownfield areas as one such justification); Berger, *supra* note 43, at 1, 13 (providing economic relief to municipalities that acquire brownfields through tax foreclosure).

In its report on sites containing hazardous substances, the DEC projected that the state's share of cleanup costs at sites posing a significant threat, but not containing hazardous wastes, would be in the range of $342-$432 million. *See* HAZARDOUS SUBSTANCE REPORT, *supra* note 64, at 20. Spending the $200 million in environmental restoration funds available through the 1996 Bond Act on these sites seemingly would ameliorate this concern.

In its 1991 effort to rank risks, EPA Region 2, which covers New York State, ranked Superfund sites, active RCRA sites, and municipal solid waste sites from a series of perspectives, including human health (cancer and non-cancer), ecological effects, and economics/welfare effects. *See* U.S. ENVTL. PROTECTION AGENCY REGION 2, RISK RANKING PROJECT REGION 2: COMPARATIVE RISK RANKING OF THE HEALTH, ECOLOGICAL, AND WELFARE EFFECTS OF TWENTY-SEVEN ENVIRONMENTAL PROBLEM AREAS: OVERVIEW REPORT 8 (June 1991). Risks for different sites varied by category. For example, the Region ranked Superfund and RCRA sites as "very high" in terms of non-cancer health effects, and ranked municipal

The decision of the drafters of the 1996 Bond Act to limit eligible sites to those owned by municipalities raises at least two potential sets of issues. First, it almost certainly will cause the transfer of some properties from private to municipal ownership in order to make them eligible for state cleanup-related funding. These transfers to municipal ownership, which would not occur absent the 1996 Bond Act, may raise a series of issues.[79] A second possible downside is that certain properties which would otherwise place high up on the list for funding based on the 1996 Bond Act's four criteria (*i.e.*, remediation would produce significant positive economic, environmental or recreational benefits and likely would not occur otherwise) will not qualify because they are not municipally-owned.[80] This outcome, again, would be contrary to the notion that we should be targeting our efforts and resources to the problems

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solid waste sites as "medium." *See id.* at 26. The combined ranking was "high" for the Superfund and RCRA sites, and medium for municipal solid waste sites. *See id.* at 40.

[79] Among other possibilities, these transfers may burden local taxpayers under various scenarios. For example, in acquiring a property a municipality would potentially be subject to common law and/or statutory liability due to its status as the owner for contamination present on the property or migrating from it. *See, e.g.*, 42 U.S.C. §§ 9601(20)(D), 9607(a)(1) (1994); ECL § 27-1313(5)(a) (McKinney Supp. 1997). It appears that the 1996 Bond Act process requires a municipality to take title to property (and subject itself to these potential liabilities) without enabling the municipality simultaneously to receive the major "carrots" for participation—*i.e.*, a guarantee of state funding of up to 75% of the investigation and remediation costs, and a release from state liability and indemnification from common law liability. Among other features, the DEC appears to contemplate that municipalities that receive a grant to investigate a site may later have their applications for funding to remediate the site rejected. *See, e.g.*, N.Y. DEP'T ENVTL. CONSERVATION, DRAFT TECHNICAL ADMINISTRATIVE GUIDANCE MEMORANDUM (TAGM) AND ASSOCIATED DOCUMENTS—BROWNFIELDS PROGRAM, CLEAN WATER/CLEAN AIR BOND ACT OF 1996 ENVIRONMENTAL RESTORATION PROJECTS BROWNFIELDS PROGRAM: QUESTIONS AND ANSWERS 2 (undated) [hereinafter TAGM AND ASSOCIATED DOCUMENTS] (stating that "there is no guarantee that a grant will be approved for remediation of the same site [for which an investigation grant has been approved and provided]"). The structure of the release contained in the 1996 Bond Act appears to limit this concern to some extent. Section 56-0509(1)(a) makes the release effective upon compliance with the terms of a state assistance contract involving performance of an "environmental restoration project." ECL § 56-0509(1)(a)(i) (McKinney Supp. 1997). Either an investigative study or a remedial project appears to qualify as an "environmental restoration project" (the 1996 Bond Act does not include a definition of the term in its definition section, but this seems a reasonable reading of the Title as a whole and it was the reading provided by the DEC staff during a meeting of the Environmental Enforcement Advisory Committee on March 20, 1997 attended by the author). As a result, a municipality may receive a release from liability upon completion of an investigative study under a state assistance contract. Presumably, the cost of such a study typically will be fairly nominal, especially compared to the cost of remediation. Further limiting the scope of the municipality's exposure is the state's contribution of up to 75% of the cost of the investigation. *See* ECL § 56-0503(1).

[80] *See* ECL § 56-0505(1)(a)-(d) (listing the four criteria that determine eligibility for state assistance).

posing the greatest risks or providing the "greatest return" on our investment.

B. Procedural and Substantive Requirements for Obtaining Funding Under Title 5 of the 1996 Bond Act[81]

1. Procedural Requirements

The 1996 Bond Act makes the state's environmental regulatory agency, the DEC, the gatekeeper for approving participation in the environmental restoration program and the dispenser of 1996 Bond Act funds.[82] As might be expected, given that only municipally-owned sites are eligible for state funding under the 1996 Bond Act, only municipalities may receive funds under the 1996 Bond Act.[83] The 1996 Bond Act imposes several obligations on a municipality interested in securing state financial support for an environmental restoration project.[84]

A municipality must enter into a formal, enforceable contract with the DEC, in which the DEC may commit to pay up to seventy-five percent of the cost of the project.[85] The municipality must make a series of commitments to obtain such funds.[86] It must commit to undertake the needed work at the site; to "proceed expeditiously"; and to involve the public in developing plans to remediate the

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[81] The DEC has issued a series of draft guidance documents that provide additional information on the process for applying for funding for Title 5 and the contents of the program. *See* Memorandum from Michael J. O'Toole, Jr., Director, Division of Envtl. Remediation, N.Y. Dep't of Envtl. Conservation, to Regional HWRE/SE (undated) (on file with the *Albany Law Review*). The draft guidance documents include an application form, a Procedures Handbook, a municipal resolution, and a state assistance contract. *See id.*

[82] *See id.*

[83] *See* ECL § 56-0503(1).

[84] *See id.* § 56-0503(2)(e)-(i).

[85] *See id.* § 56-0503(1). This 75% state contribution toward municipal site remediation is not unique to the 1996 Bond Act. The 1986 EQBA authorizes the DEC to reimburse municipalities for up to 75% of their costs for municipally-owned or operated Class 1 or 2 inactive hazardous waste disposal sites. *See id.* § 27-1313(5)(g) (McKinney Supp. 1997); NYCRR tit. 6, § 375-3.1(a)(4) (1995). A recent article indicates that New Jersey adopted a law in November 1996 that would enable developers which remediate certain sites to be reimbursed by the state for up to 75% of their costs. *See New Jersey Law to Reimburse Developers Up to 75 Percent of Cleanup Costs*, ENVTL. POL'Y ALERT, Dec. 4, 1996, at 14; Municipal Landfill Site Closure, Remediation & Redevelopment Act of 1996, 1996 N.J. Laws 124.

[86] *See* ECL § 56-0503(2)(e)-(f) (McKinney Supp. 1997).

property.[87] With respect to the public's role, the municipality must, at a minimum, provide a forty-five day period for submission of written comments on the draft remedial plan and hold a public hearing if the "affected community" raises "substantive issues" concerning the draft plan.[88] The municipality must provide "technical assistance if so requested by members of the affected community."[89]

2. Substantive Ground Rules

The 1996 Bond Act establishes basic substantive ground rules to govern environmental restoration projects as well. The two main ground rules fall under the general concepts of cleanup standards and liability.

a. Cleanup Standards

The DEC's approach to the issue of "how clean is clean" is likely to be of central importance in the ultimate success or failure of the

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[87] *See id.* Another issue involves a municipality's obligation to reimburse the state. This issue may arise in at least two contexts. First, it arises in the context of the nature of a municipality's obligation to recover funds from the parties responsible for the contamination. *See* TAGM AND ASSOCIATED DOCUMENTS, *supra* note 79, at 3. One difference between the 1996 Bond Act and Title 13 in this area is that Title 13 requires municipalities that receive state funding to make all reasonable efforts to recover government expenditures from responsible parties, while the 1996 Bond Act does not include such a requirement. *Compare* NYCRR tit. 6, § 375-3.2 (1995) (requiring the municipality to identify responsible parties and seek payment from them) *with* TAGM AND ASSOCIATED DOCUMENTS, *supra* note 79, at 3 (noting that a municipality "would not be required" to recover state costs but "may be asked to assist the State in such recovery by providing information gathered as a result of the project").

Second, it arises in connection with a municipality's obligations if it sells or leases the property. *See* TAGM AND ASSOCIATED DOCUMENTS, *supra* note 79, at 3; ECL § 56-0503(2)(c)-(d). The DEC has attempted to provide some additional information on the nature of a municipality's obligation to share with the DEC the proceeds of the municipality's sale or leasing of the site. *See* TAGM AND ASSOCIATED DOCUMENTS, *supra* note 79, at 3. Under some circumstances, state funding appears to create a form of state equity in the property. *See* ECL § 56-0503(2)(d) (requiring, for example, that a municipality give to the state 50% of the proceeds from the sale of property, once certain costs are reimbursed).

[88] ECL § 56-0503(2)(f). The 1996 Bond Act does not provide guidance on the details of such assistance (e.g., the level of assistance, who qualifies, the number of parties who may qualify, etc.). *Cf.* CERCLA, 42 U.S.C. § 9617 (1994) (discussing public participation in a federal remedial action plan); National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.155 (1996) (discussing community relations requirements under CERCLA); NYCRR tit. 6, § 375-1.5 (1995) (detailing the DEC's citizen participation requirements under the inactive hazardous waste disposal site program).

[89] ECL § 56-0503(2)(f).

Title 5 environmental restoration program.[90] This issue has proved vexing in other cleanup programs at both the federal and state levels.[91] At least three possible answers to the "level of cleanup" issue are possible. First, there is the notion of returning a property to pre-release conditions.[92] In many situations, this will be the most stringent approach.[93] Second, there is the idea that a site should be cleaned up so that it may be used for any purpose.[94] Because concentrations are lowest for residential property use, adoption of this approach often will mean that a site will be cleaned up in order that it may be used for residential purposes.[95] Finally, there is the concept that a site should be cleaned up for industrial or commercial use; cleanup standards for these uses typically are relatively relaxed.[96]

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[90] This issue was one of the most contentious during the negotiations over the terms of the 1996 Bond Act. *See 'Brownfields' Provision of Bond Act Coming Under Fire*, GLENS FALLS POST STAR (N.Y.), June 20, 1996, at B9 (indicating that the 1996 Bond Act "provisions attracting the most fire concern so-called brownfields rehabilitations . . . [and that] several environmentalists said [Governor] Pataki's proposal would create lower cleanup standards [than are used] under the state's Superfund program").

[91] For an overview of the issue of cleanup standards at the federal level, see John Pendergrass, *Use of Institutional Controls as Part of a Superfund Remedy: Lessons From Other Programs*, 26 ENVTL. L. REP. 10109 (1996). *See also* ORIN KRAMER & RICHARD BRIFFAULT, CLEANING UP HAZARDOUS WASTE: IS THERE A BETTER WAY? 25-27 (1993) (discussing various cleanup standards and the costs involved); Markell, *Federal Superfund, supra* note 20, at 14-15 (discussing the controversy over "how clean is clean" in relation to the reauthorization of CERCLA).

At least some degree of consensus seems to have emerged concerning the issue of type of cleanup—the view that permanent remedies that actually destroy the waste are to be preferred over containment remedies that isolate the waste appears to have won out, although to some degree the increasing popularity of institutional and engineering controls represents a move in the opposite direction. *See, e.g.*, 42 U.S.C. § 9621(b) (1994) (maintaining that remedial actions that permanently reduce pollutants are the preferred treatment); NYCRR tit. 6, § 375-1.10(c)(5) (1995) (ranking remedial technologies from most to least preferred); ENVIRONMENTAL LAW & REGULATION IN NEW YORK § 9.23.6 (William R. Ginsberg & Philip Weinberg eds., 1996) [hereinafter Ginsberg] (discussing a preference for permanent solutions in New York's regulation of the cleanup of waste).

[92] *See* NYCRR tit. 6, § 375-1.10(b) (1995) (stating that restoring a site to pre-disposal condition is the goal of the program).

[93] *See* Casey Scott Padgett, *Selecting Remedies at Superfund Sites: How Should "Clean" Be Determined?*, 18 VT. L. REV. 361, 368 (1994) (noting that returning property to its pre-release condition tends to be far more costly than containment or control).

[94] *See id.* at 399 (suggesting that CERCLA currently assumes "unrestricted" future use).

[95] *See* U.S. ENVTL. PROTECTION AGENCY, OFFICE OF SOLID WASTE AND ENERGY RESPONSE, LAND USE IN THE CERCLA REMEDY SELECTION PROCESS, DIR. NO. 9355.7-04, at 3, 7 (1995) (noting that residential use poses the greatest potential for human exposure).

[96] *See id.* at 7 (noting that industrial use standards allow higher levels of contaminants to remain in the soil after cleanup).

The 1996 Bond Act's coverage of the cleanup standards issue is quite brief. The 1996 Bond Act simply adopts the cleanup standards approach that the DEC already applies in its inactive hazardous waste disposal site program under Article 27, Title 13 of the Environmental Conservation Law. The 1996 Bond Act provides that "[t]he remediation objective of an environmental restoration project shall meet the same standard for protection of public health and the environment that applies to remedial actions undertaken pursuant to section 27-1313 of this chapter."[97] This brief reference to section 27-1313 is not likely to resolve the issue of cleanup standards. As an article on the Federal Superfund program put it, this is "[o]ne of the most contentious issues surrounding the reauthorization of Superfund" and Title 13 has by no means put this issue to rest.[98] Two commentators have anticipated that confusion will be created by the 1996 Bond Act's language, noting that "[u]nder the Bond Act, sites must be cleaned to the level set forth in . . . [Title 13], regardless of intended future use. While the DEC may believe it has the authority to impose risk-based remediation standards upon cleanups conducted under the Bond Act, this provision implies otherwise."[99]

A second source of possible controversy concerning cleanup standards is that the Title 13 standards that are intended to apply to 1996 Bond Act sites were crafted for sites that present a "significant threat" to the environment.[100] The obvious query for 1996 Bond Act sites will be how much cleanup is needed, particularly for the 1996 Bond Act sites where concentrations of wastes do not rise

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[97] ECL § 56-0505(3) (McKinney Supp. 1997).

[98] *Different Standards for Industrial Use?* ENVTL. FORUM, Nov.-Dec. 1993, at 34 (involving a four person debate on different cleanup standards for industrial use). For a summary of criticisms of New York's approach to cleanup standards, see BARRIERS & INCENTIVES, *supra* note 42, at 15. The DEC Part 375 regulations establish a goal of cleanup to pre-release conditions, but also contemplate that cleanups that simply eliminate the significant threat posed by a site will suffice in some cases, providing as follows:

> The goal of the program for a specific site is to restore that site to pre-disposal conditions, to the extent feasible and authorized by law. At a minimum, the remedy selected shall eliminate or mitigate all significant threats to the public health and to the environment presented by hazardous waste disposed at the site . . . .

See NYCRR tit. 6, § 375-1.10(b) (1995).

Some reviewers of an early draft of this Article disagreed with the notion that cleanup standards under Title 13 are unclear, suggesting that the DEC has established and applied clear cleanup levels relatively consistently through its implementation of the state Superfund program.

[99] Terresa Bakner & Sara Potter, *New York State Initiatives to Achieve Brownfields Redevelopment*, ALB. L. ENVTL. OUTLOOK, Summer/Fall 1996, at 5, 11 (citation omitted).

[100] *See* ECL § 27-1313(3)(b)(i) (McKinney 1984).

to the level of presenting a significant threat. Because many 1996 Bond Act sites are unlikely to pose a significant threat,[101] this is not simply a theoretical question.[102] In short, the brevity of the 1996 Bond Act's treatment of the cleanup standards issue may not necessarily translate into clarity when it comes to determining the level of cleanup needed for 1996 Bond Act sites.

Two issues related to cleanup standards that deserve separate mention are the notions of institutional controls and engineering controls, and the applicability of permitting to the remediation process established by Title 5. The municipality, as well as any successors in title, and lessees will be bound to implement and maintain any "engineering and/or institutional controls" which the DEC deems necessary.[103] The 1996 Bond Act specifically lists deed restrictions as one form of institutional control and indicates that, if such restrictions are required, the municipality shall have them "recorded and indexed as declarations of restrictions in the office of the recording officer of the county or counties where the real property subject to such environmental restoration project is located in the manner prescribed by article nine of the real property law."[104]

A final feature relating to site remediation and cleanups which holds considerable potential benefit for the municipality is the 1996 Bond Act's exemption of the municipality and any successor in title from state or local permits for activities that are part of the remedial action and are conducted on the property subject to the action.[105] As is the case under the federal Superfund Law, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and New York State's Superfund Law, contained in Article 27, Title 13 of the Environmental Conservation Law, the 1996 Bond Act dispenses with the need to obtain a permit for remedial

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[101] As noted above, hazardous waste sites that present a significant threat are not eligible for funding under the 1996 Bond Act program. *See supra* notes 60-64 and accompanying text. Hazardous substance sites that present such a threat are eligible for cleanup under the 1996 Bond Act. *See* ECL § 56-0505 (McKinney Supp. 1997).

[102] The DEC is currently struggling with this issue under its VCP. *See infra* notes 150-87 and accompanying text (discussing the DEC's VCP). In his recent article, Charles Sullivan, Chief of the DEC's Voluntary Cleanup Program Practice Group, notes that "[t]he Department is in the process of articulating a third remedial component: addressing onsite contamination that is readily remediable but does not yet cause significant impacts." *Remedial Program, supra* note 50, at 26.

[103] *See* ECL § 56-0503(2)(g).

[104] *Id.* § 56-0503(2)(i).

[105] *See id.* § 56-0503(2)(j).

activity, but it requires compliance with the substantive requirements that would be contained in such permits.[106]

b. Liability

The second major issue traditionally associated with remediation programs involves the scope of liability—essentially the question of what types of parties fall within the liability net and the extent of their legal exposure. The 1996 Bond Act requires the state to make "all reasonable efforts" to recover state funds expended for environmental restoration projects.[107] It requires a municipality selling a property to a responsible party to deposit the portion of the proceeds constituting the "state assistance provided to the municipality . . . plus accrued interest and transaction costs,"[108] into the state's environmental restoration account.[109] The goal of these provisions undoubtedly is to prevent expenditure of state funds, notably the state assistance payments of up to 75% of project costs, from producing a private windfall, especially to a responsible party (*e.g.*, a party who was involved in disposal of the hazardous substances that were the subject of the cleanup).

No doubt because of the perception that the breadth of the Title 13 and CERCLA liability nets discourage reuse of sites, the 1996 Bond Act casts its net of liability more narrowly.[110] The 1996 Bond Act

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[106] *See id.*; *see also* CERCLA, 42 U.S.C. § 9621(e) (1994); NYCRR tit. 6, § 375-1.7 (1995). The DEC's VCP chief Sullivan discusses the role of the State Environmental Quality Review Act (SEQRA) in his Nov. 25, 1996 memorandum. *See* Charles E. Sullivan, Jr., The Department of Environmental Conservation's Voluntary Cleanup Program (Nov. 25, 1996); *see also* ECL § 8-0101 to 8-0117 (McKinney 1984 & Supp. 1997).

[107] *See* ECL § 56-0507(2) (McKinney Supp. 1997).

[108] *Id.* § 56-0505(4). A municipality retains the right to maintain ownership of the property and use it for "public purposes." *See id.* It is not clear whether the phrase "public purposes" is intended to limit a municipality's ability to use such property. The legislative history is silent on the question.

[109] *See id.* The 1996 Bond Act indicates that if a municipality disposes of property before the DEC is satisfied that the project's remediation objective has been attained, the municipality "shall be liable to ensure that such objective is attained within the time called for in the state assistance contract." *Id.* § 56-0505(5).

[110] *See* CERCLA, 42 U.S.C. § 9607(a) (1994); ECL § 27-1313(4) (McKinney 1984); NYCRR tit. 6, § 375-1.3(u) (1995). Congress's approach to liability, and EPA's strategy in this area, continues to evolve. *See, e.g.*, Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996, Pub. L. No. 104-208, § 2501-02, 110 Stat. 3009 (amending CERCLA, 42 U.S.C. § 9620(E) and (F), to provide new statutory protection for lenders). For a summary of the evolution of EPA's views on providing relief to prospective purchasers, see Rogers, *supra* note 48, at 1-3 (comparing the EPA's 1989 and 1995 guidance documents covering prospective purchasers). *See also* Guidance on Agreements with Prospective Purchasers of Contaminated

expressly exempts four types of parties from liability for remedial costs: municipalities that "undertake . . . environmental restoration project[s] and comply[ ] with the terms . . . of the[ir] contract" with the DEC for such a project,[111] and successors in title, lessees and lenders.[112] This exemption is subject to the proviso that "such successor in title, lessee, or lender did not generate, arrange for, transport, or dispose, and did not cause the generation, arrangement for, transportation, or disposal of any hazardous substance located at such property, and did not own such property."[113]

The 1996 Bond Act's authors' presumed intention with this section was to shield these parties from liability which they were concerned might attach if the liability principles of CERCLA and Title 13 applied.[114] The authors nevertheless made clear that piercing of this shield would be appropriate—*i.e.*, the exemption from liability for municipalities, successors in title, lenders, and lessees would not apply—in four situations, providing as follows:

> Subdivision one of this section shall not apply to relieve any municipality, successor in title, lessee, or lender from liability arising from:
>
> (a) failing to implement such project to the department's satisfaction or failing to comply with the terms and conditions of the contract;
>
> (b) fraudulently demonstrating that the cleanup levels identified in or to be identified in accordance with such project were reached;
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> (c) causing the release or threat of release at the property subject to such project of any hazardous substance after the effective date of such contract; or

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Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34792, 34794 (1995).

[111] ECL § 56-0509(1)(a)(i) (McKinney Supp. 1997).

[112] *See id.* This liability exemption includes statutory or common law liability to the state and statutory liability to "any person." *See* ECL § 56-0509(1)(a).

[113] *Id.* § 56-0509(1)(a)(ii); *see also* Bakner & Potter, *supra* note 99, at 7 (stating that "[t]he Bond Act provides for a qualified release of municipalities and their successors in title").

[114] In the *Estate of William S. Lasdon*, then DEC Executive Deputy Commissioner, Langdon Marsh, held that CERCLA case law may be applied in cases under Title 13. Executive Deputy Commissioner Marsh noted

> There are few cases that have been decided under ECL § 27-1313 or its implementing regulations . . . . However, the relevant portion of their provisions relating to the identification of "responsible parties" are virtually identical to those found in [CERCLA]. Therefore, the decisional law which interprets the CERCLA provisions may be applied . . . .

Estate of William S. Lasdon, No. W3-006-8101, 1994 N.Y. ENV LEXIS 8, at *13 (N.Y. Dep't of Envtl. Conservation Mar. 1, 1994).

> (d) changing such property's use from the intended use as identified in the contract pursuant to section 56-0503 to a use requiring a lower level of residual contamination unless the additional remedial activities are undertaken which shall meet the same standard for protection of public health and the environment that applies to remedial actions undertaken pursuant to 27-1313 of this chapter so that such use can be implemented with sufficient protection of public health and the environment.[115]

The 1996 Bond Act's inclusion of "reopener" conditions represents another relatively limited fracture in the shield from liability.[116] Section 56-0509(4) provides that two of the four parties, the municipality and the successor in title (if any), are on the hook to a limited degree if 1) conditions on the site "are not sufficiently protective of human health for its current use,"[117] and 2) the concern is "due to environmental conditions . . . unknown to the [DEC] as of the effective date of such contract or due to information received . . . after the [DEC's] approval of such project's final engineering report and certification."[118] In particular, the 1996 Bond Act makes the municipality and successor in title responsible to "take such emergency measures [as] are necessary to maintain sufficient protection of human health for such property's current use until such conditions are addressed."[119] The 1996 Bond Act charges the DEC with responsibility for ultimately returning the property to a "condition sufficiently protective of human health" in such circumstances, thereby limiting the exposure of the municipality and successor in title.[120]

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[115] ECL § 56-0509(2)(a)-(d); *see also* Bakner & Potter, *supra* note 99, at 9 (detailing when the Act authorizes the DEC to require further remedial activity). The 1996 Bond Act places the burden on municipalities and successors in title, lessees, and lenders to prove that hazardous substances were not disposed of on the property after they became involved in order to qualify for this liability exemption, providing that "any person seeking the benefit of this subdivision [56-0509(1)] shall bear the burden of proving that a cause of action, or any part thereof, is attributable solely to hazardous substances present in or on such parcel before the effective date of such contract [between the DEC and the municipality]." ECL § 56-0509(1)(b).

[116] "The term 'reopener' refers to a circumstance which provides an exception to the qualified release of liability developers receive from the State in exchange for remediating a brownfield." Bakner & Potter, *supra* note 99, at 8.

[117] ECL § 56-0509(4).

[118] *Id.*

[119] *Id.*

[120] *See id.* This reopener is narrower than that typically provided under the DEC's Title 13 program or CERCLA. *See id.* § 27-1313(5)(a) (McKinney Supp. 1997); *see also* CERCLA, 42

Perhaps the most remarkable provision in Title 5 of the 1996 Bond Act is the section committing the state to indemnify these four categories of parties under certain circumstances.[121] The 1996 Bond Act provides these parties with a qualified release from statutory and common law liability to the state and a similarly qualified release from statutory liability to other persons.[122] Presumably to address the possibility of common law tort liability to such other persons (e.g., neighbors), section 56-0509(3) provides that the state will indemnify and defend these four categories of parties from common law-based causes of action, as follows:

> The state shall indemnify and save harmless any municipality, successor in title, lessee, or lender indentified [sic] in paragraph (a) of subdivision one of this section in the amount of any judgment, or settlement, obtained against such municipality, successor in title, lessee or lender in any court for any common law cause of action arising out of the presence of any hazardous substance in or on property at anytime before the effective date of a contract entered into pursuant to this title.[123]

While the legislative history is silent, this provision reflects the 1996 Bond Act proponents' determination to take extraordinary steps to address fears that they must have believed lenders, lessees, and others share about potential liability associated with sites containing hazardous substances. As is discussed in more detail in Subpart C below, this provision, like the liability release discussed above, represents a much different approach to promoting site cleanups than that embodied in New York State's Title 13, addressing inactive hazardous waste disposal sites.[124]

A final issue in the 1996 Bond Act, alluded to above but which deserves brief mention in its own right, is that of change of use. The 1996 Bond Act requires parties contemplating a "change of use" of a property remediated under the 1996 Bond Act to provide the DEC

U.S.C. § 9622(f) (1994).

[121] *See* ECL § 56-0509(3) (McKinney Supp. 1997). One aspect of this extraordinary provision that may receive judicial attention at some point is whether it is consistent with the Constitutional ban on state monies being used "in aid of any private . . . undertaking." N.Y. CONST. art. VII, § 8.

[122] *See supra* notes 111-12 and accompanying text; *see also* ECL § 56-0509(1)(a).

[123] ECL § 56-0509(3).

[124] *See infra* notes 131-87 and accompanying text (detailing similarities and differences among the 1996 Bond Act, Title 13, and the VCP); *see also* ECL §§ 27-1301 to 27-1321 (McKinney 1984 & Supp. 1997) (discussing inactive hazardous waste disposal sites).

with advance notice of at least 60 days.[125] The law defines "change of use" broadly to include, *inter alia*: (1) activities "not consistent with restrictions placed upon the use of the property[;]"[126] (2) activities that may "prevent or interfere significantly with a proposed, ongoing, or completed project;"[127] (3) activities that "expose the public health or the environment to a significantly increased threat of harm or damage at such property[;]"[128] or (4) "transfer of title to all or part of [the] property."[129] The 1996 Bond Act empowers the DEC to provide the person giving notice with a written determination that the proposed change of use "will not be authorized, together with the reasons for such determination," if the DEC Commissioner makes the judgment that the "use is prohibited pursuant to this section."[130] The section does not, in fact, identify which changes of use the DEC may prohibit. It is likely that the DEC will construe this section to empower it to prohibit changes of use that the Department believes will: (1) jeopardize the integrity of the remedy; (2) be inconsistent with the cleanup at the site (e.g., residential use at a property cleaned up to commercial levels); or (3) otherwise pose a risk to human health or the environment.

C. Preliminary Thoughts on the 1996 Bond Act's Place Within New York's Troika of Inactive Hazardous Waste Disposal Site Cleanup Programs[131]

The Governor and Legislature were by no means writing on a blank slate when they approved the 1996 Bond Act, nor were the people of New York when they voted in favor of it. Instead, New York has a longstanding program devoted to remediating contaminated inactive hazardous waste disposal sites, referred to sometimes as the Title 13 program because it is contained in Article

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[125] *See* ECL § 56-0511(1) (McKinney Supp. 1997). Environmental Conservation Law section 27-1305(3)(b) and NYCRR tit. 6, §§ 375-1.2(f), 375-1.3(v) and 375-1.6 address "changes of use" at sites handled under the inactive hazardous waste disposal site program. *See also* ECL § 27-1305 commentary at 334-35 (McKinney Supp. 1997); N.Y. REAL PROP. LAW § 316(b) (McKinney Supp. 1997).

[126] ECL § 56-0511(2) (McKinney Supp. 1997).

[127] *Id.*

[128] *Id.*

[129] *Id.* § 56-0511(3)(i).

[130] *Id.* § 56-0511(2).

[131] RCRA, covering hazardous waste, and the Navigation Law, covering petroleum-related incidents, contain additional cleanup authority not covered in this section. *See* RCRA, 42 U.S.C. §§ 6901-6992k (1994); ECL §§ 27-0900 to 27-0920 (McKinney 1984 & Supp. 1997); N.Y. NAV. LAW §§ 170-197 (McKinney 1989 & Supp. 1997).

27, Title 13 of the state's Environmental Conservation Law.[132] Further, in 1994, following a course pursued by many states nationwide, New York created a "Voluntary Cleanup Program."[133] As suggested above, presumably the Legislature and Governor were mindful of the existence and nature of these programs when they structured the 1996 Bond Act environmental restoration program. This section traces some of the more significant similarities and differences among Title 5 of the 1996 Bond Act, Title 13, and the VCP in terms of three key elements: (1) the universe of sites covered; (2) cleanup standards; and (3) scope of liability.[134]

1. A Summary of the Title 13 Program[135]

Title 13 jurisdiction to clean up contaminated sites has been confined over the years to sites containing hazardous wastes that

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[132] *See* ECL §§ 27-1301 to 27-1321 (McKinney 1984 & Supp. 1997). New York's law was adopted in 1979, preceding the federal Superfund statute, CERCLA, 42 U.S.C. §§ 9601-9675 (1994).

[133] *See* MEMO # 94-32, *supra* note 57. In testimony the author provided in a hearing sponsored by the State Legislative Commission on Toxic Substances and Hazardous Wastes, he raised the issue of how best to structure the state's environmental remediation laws to maximize their effectiveness, including whether a separate voluntary cleanup law was needed. *See* Statement of David L. Markell, Assistant Professor, Albany Law School Before the Legislative Commission on Toxic Substances and Hazardous Wastes on Voluntary Environmental Cleanup and Economic Development: What Should Be Done for New York? 5 (Nov. 21, 1994).

[134] Because this Article focuses on state-administered programs, it does not cover CERCLA or EPA's evolving "brownfields"-related efforts, even though these programs also relate to contaminated sites. *See* CERCLA, 42 U.S.C. §§ 9601-9675; GUIDELINES, *supra* note 20, at 2. As some commentators have observed, individuals interested in developing a comprehensive understanding of the state's remedial efforts must become familiar with these programs as well. *See, e.g.*, Ginsberg, *supra* note 91, § 9.15 ("Title 13 . . . has always been [ ] used by New York only as an adjunct to CERCLA in the state's efforts to remediate its most significant inactive hazardous waste disposal sites . . . ."); *see also* ENVTL. POL'Y ALERT 11 (Mar. 12, 1997) (discussing the EPA's interaction with state voluntary cleanup programs). This Article also does not cover the oil spill response program administered by the DEC under the Navigation Law. *See* N.Y. NAV. LAW §§ 170-197 (McKinney 1989 & Supp. 1997) (regulating oil spill prevention, control and compensation). In addition to the three elements listed in the text, the discussion of DEC's VCP program also addresses the issue of citizen participation under the various programs. *See infra* notes 183-87 and accompanying text.

[135] For a more complete discussion of Title 13, see Ginsberg, *supra* note 91, §§ 9.15-9.33; David L. Markell & Dolores A. Tuohy, *Some Thoughts on Running a Superfund Enforcement Program: A State Perspective*, NAT'L ENVTL. ENFORCEMENT J. 3 (Nov. 1990); *see also* HAZARDOUS SUBSTANCE REPORT, *supra* note 64 (containing an overview of the Title 13 program, as well as a collection of legislative history and other relevant documents).

For a summary of listed sites and the status of the remedial action at those sites, see N.Y. DEP'T ENVTL. CONSERVATION, REMEDIAL ACTION REPORT (July 1996).

present a significant threat to the environment.[136] Of the three types of unremediated sites that the DEC places on its Title 13 registry of inactive hazardous waste disposal sites, only Class 1 and Class 2 sites qualify for cleanup.[137] Class 1 sites present "an imminent danger" and require "immediate action."[138] Class 2 sites pose a "[s]ignificant threat to the public health or environment" for which "action [is] required."[139] In contrast, Class 3 sites contain hazardous wastes but do "not present a significant threat to the public health or environment" and therefore, according to Title 13, "action may be deferred."[140] In sum, only sites that contain "hazardous wastes" and that present a significant threat to public health or the environment fall within the ambit of the Title 13 cleanup program.[141]

Cleanup standards under Title 13 are identical to those adopted in the 1996 Bond Act since, as noted above, the 1996 Bond Act simply adopts the Title 13 approach.[142] The clarity of these standards (or lack thereof) is discussed above.[143] Some observers view the Title

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[136] *See* ECL § 27-1305(4)(1)-(5) (McKinney Supp. 1997) (describing the sites eligible for cleanup under Title 13); *see also* HAZARDOUS SUBSTANCE REPORT, *supra* note 64, at 1 ("If the waste disposed at a site is *not* a . . . hazardous waste under the DEC's hazardous waste management regulatory program's regulations, the site may *not* be remediated using State Superfund monies.").

[137] *See* ECL § 27-1305(4) (McKinney 1984 & Supp. 1997).

[138] ECL § 27-1305 (4)(b)(1) (McKinney 1984).

[139] *Id.* § 27-1305 (4)(b)(2).

[140] *Id.* § 27-1305 (4)(b)(3). Title 13 lists a total of five types of sites. Class 4 and 5 sites are already remediated, with Class 4 sites continuing to require maintenance, and Class 5 sites having completed the remedial process. *See id.* § 27-1305(4)(b) (McKinney Supp. 1997). The DEC also has administratively created an additional category of sites, known as Class 2A sites. These are sites which the DEC has identified but for which the DEC has not yet developed information necessary to place the site into one of the five statutory categories. *See* N.Y. DEP'T ENVTL. CONSERVATION, DIVISION OF HAZARDOUS WASTE REMEDIATION TAGM, PRIORITY RANKING SYSTEM FOR CLASS 2 INACTIVE HAZARDOUS WASTE SITES (Dec. 16, 1992); NYCRR tit. 6, § 375-1.8 (1995); *see also* N.Y. DEP'T ENVTL. CONSERVATION, NEW YORK STATE HAZARDOUS WASTE SITE REMEDIAL PLAN 5 (July 1996) (discussing the investigation and reclassification of Class 2A sites).

[141] *See* ECL § 27-1305(4)(b)(1)-(5) (McKinney 1984).

[142] *See supra* notes 97-99 and accompanying text (discussing the Bond Act's adoption of the Title 13 cleanup standards).

[143] *See supra* notes 97-99 and accompanying text (noting the lack of consensus regarding Title 13 cleanup standards). Some close observers of the DEC's Title 13 program are confident that through its implementation efforts the Department has created a clear set of standards. *See* GOVERNOR'S MEMORANDUM, PROGRAM BILL # 46, § 27-1411 (N.Y. 1996) [hereinafter PROGRAM BILL 46].

13 cleanup standards as more stringent than the cleanup standards being used in the VCP discussed below.[144]

Finally, on the issue of scope of liability and, related, releases from liability, the DEC's approach under Title 13 program is more restrictive than the Department's position under the 1996 Bond Act or the VCP.[145] The statute's reference to liability is quite limited, providing simply that the DEC shall "determine which persons are responsible . . . according to applicable principles of statutory or common law liability" and "[s]uch person[s] shall be entitled to raise any statutory or common law defense."[146] As a general matter, some commentators have criticized Title 13's approach to defining responsible parties and labelled it confusing: "[t]he determination of who may be a liable party under the statute . . . is not an entirely straightforward matter . . . . This [the ECL § 27-1313(4)] deference to general principles was misplaced when it was conceived and continues to be a source of uncertainty to regulators and the regulated community alike."[147] For purposes of this Article, the salient point is that it is clear that Title 13's liability net is wider than the liability net created under the 1996 Bond Act. For example, a municipality that owns a site falls within the Title 13 liability net,[148] while the 1996 Bond Act provides municipalities with a qualified exemption from liability.[149]

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[144] *See, e.g., Voluntary Environmental Cleanup and Economic Development: What Should Be Done For New York State? Hearing Before the Legislative Commission on Toxic Substances and Hazardous Wastes* (Nov. 21, 1994) (testimony of Joshua Cleland, Environmental Associate, Scenic Hudson, Inc.) [hereinafter Cleland Testimony] (stating that the VCP "*lowers* cleanup standards for contaminated sites in New York State . . . [and adding that] [t]he hidden agenda of the voluntary cleanup program is to weaken New York's hazardous waste cleanup program at the expense of its citizens and the long-term quality of its resources."); Rabe, *supra* note 52, at 38 (stating that the VCP "weaken[s] cleanup levels").

[145] *See supra* notes 110-24 and accompanying text (discussing liability under the 1996 Bond Act); *see also infra* notes 166-80 (commenting on liability under the VCP).

[146] ECL § 27-1313(4) (McKinney 1984).

[147] Ginsberg, *supra* note 91, §§ 9.17, 9.17.3.

[148] *See* NYCRR tit. 6, § 375-1.3(u)(1) (1995) (defining the term responsible party to include the owner of a site); Ginsberg, *supra* note 91, § 9.17.4 (defining responsible parties as potentially including municipalities).

[149] *See supra* Part II (discussing the qualified liability exception for municipalities in the 1996 Bond Act). Few administrative or judicial decisions have interpreted the Title 13 definition of responsible party. In one administrative decision, then DEC Executive Deputy Commissioner, Langdon Marsh, held that CERCLA case law may be applied in cases under Title 13. *See Estate of William S. Lasdon*, No. W3-006-8101, 1994 N.Y. ENV LEXIS 8, at *13 (N.Y. Dep't of Envtl. Conservation Mar. 1, 1994); *see also supra* note 114 (discussing this case).

A detailed discussion of the liability of the other parties receiving a qualified release under the 1996 Bond Act (lenders, successors-in-title, and assigns) under the common law and under CERCLA-based case law is beyond the scope of this Article. *See* CERCLA, 42 U.S.C. § 9607

2. A Summary of the DEC's "Voluntary Cleanup Program" (VCP)[150]

More than two years after its initiation in 1994, the DEC's Voluntary Cleanup Program remains in the "development stage," in the words of one of the DEC architects of the program.[151] The

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(1994) (containing CERCLA's liability scheme). In the fall of 1996, Congress amended this liability scheme's treatment of lenders in the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (subtitle E of the Omnibus Consolidated Appropriations Act). For a discussion of this Act, see William N. Buzbee, *CERCLA's New Safe Harbors for Banks, Lenders, and Fiduciaries*, 26 ENVTL. L. REP. 10656 (Dec. 1996).

[150] For more comprehensive discussions of the DEC's VCP, see Brownfields Subcommittee of the Hazardous Site Remediation Committee, *Summary of Voluntary Cleanup Agreements Issued by the New York Department of Environmental Conservation Under the Voluntary Cleanup Program*, N.Y. ENVTL. LAW., Fall 1996, at 17 [hereinafter *Summary*]; Michael W. Peters, *A Practical Guide for Participants in New York's Voluntary Cleanup Program For "Brownfields,"* ALB. L. ENVTL. OUTLOOK, Summer/Fall 1996, at 27; *Remedial Program*, *supra* note 50, at 17. For a collection of articles discussing New York's VCP, see *Outlook on Brownfields: Urban Cure or Fields of Dreams?*, ALB. L. ENVTL. OUTLOOK, Summer/Fall 1996.

[151] *See Remedial Program*, *supra* note 50, at 30 (stating the VCP "remains in the development stage"); *see also* Ginsberg, *supra* note 91, § 9.31.3 (stating that the DEC's VCP "is in a state of flux"); David A. Munro, *The Challenge of Contaminated Properties for Municipalities: Potential Liabilities and Creative Approaches to Problems They Pose*, 1996 N.Y.S. BAR ASS'N. ENVTL. L. SECTION FALL MEETING 17 (characterizing the VCP as "evolutionary in nature"); Peters, *supra* note 150, at 36 (noting that the DEC's VCP is in a "state of evolution").

While beyond the scope of this Article on the 1996 Bond Act, two issues that go to the legal bona fides of the Program at least warrant mention. First, there is the question of whether the DEC's chosen vehicle for administering this Program—essentially a series of guidance documents that have been revised frequently over the past couple of years—is appropriate, or whether the DEC should engage in formal rulemaking to establish parameters, both procedural and substantive, for the Program. *If* the VCP requires treatment as a rule, SAPA obligates the DEC to follow a formal "notice and comment" rulemaking process. *See* PATRICK J. BORCHERS & DAVID L. MARKELL, NEW YORK STATE ADMINISTRATIVE PROCEDURE AND PRACTICE § 4.2 (1995). Among other steps, the DEC would be obligated to draft a proposed rule containing the VCP, publish it in the State Register for comment, consider and respond to the significant comments, and publish the final version of the regulation. *See* N.Y. A.P.A. LAW § 202(1)-(8) (McKinney 1996 & Supp. 1997). In short, if the VCP is in fact a rule, it would be unenforceable in its current form. Perhaps this is one reason why the VCP provides that agreements entered into under it are enforceable as a matter of contract. *See* Sullivan, *supra* note 106, at 1. For a more in-depth discussion of the rulemaking process and the more fundamental question of what constitutes a rule, see BORCHERS & MARKELL, *supra*, §§ 4.1-4.23.

The second fundamental issue concerning the VCP involves whether it possibly could run afoul of constitutional limitations on agency authority. *See id.* § 5.3. Under the separation of powers doctrine, the legislature must provide sufficient direction to administrative agencies. Otherwise, a delegation of legislative authority is overly broad. *See id.* The validity of agency actions is also circumscribed by agencies' obligation to act within the scope of their delegated authority. *See id.* As Borchers & Markell pointed out elsewhere, the Court of Appeals' decision in *Boreali v. Axelrod*, 517 N.E.2d 1350 (N.Y. 1987), "marks an important, but seldom

evolving quality of the VCP no doubt stems in part from its being an administrative creation. The VCP is based on general statutory enactments, rather than a specific statutory enactment, and the DEC has not issued regulations to clarify the scope of this program or the nature of the Department's legal authority in administering or shaping it.[152] Enactment of the 1996 Bond Act should cause the DEC and others to reassess the VCP—at least at a conceptual level, the 1996 Bond Act's Title 5, Title 13 and the VCP should be part of a "seamless web" in terms of their jurisdiction and approaches to addressing sites.[153] Among other questions, the issue of jurisdiction of the VCP should be reevaluated in light of the enactment of the 1996 Bond Act, as should central substantive and procedural elements of the VCP, such as its approach to cleanup standards, the scope of liability (including releases) and opportunities for public participation.

In terms of jurisdiction, for example, the VCP overlaps with the 1996 Bond Act. In the latest DEC document describing the VCP available as this Article was going to press, the Chief of the DEC's VCP, Charles Sullivan, indicates that the universe of sites eligible for treatment under the VCP is quite broad.[154] Mr. Sullivan states that the VCP "covers any contaminated property located in the State," unless the federal government has lead responsibility for

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crossed, border between permissible regulation and impermissible policy making." *See* BORCHERS & MARKELL, *supra*, § 5.3. At some point, in short, the issue may be raised whether the DEC has adequate guidance from the Legislature to have embarked on the VCP.

[152] *See* Bakner & Potter, *supra* note 99, at 7 (stressing that the VCP is only "an administrative policy and . . . does not have the force of a statute or regulation"). One commentator notes that "New York's [Voluntary Cleanup] program has evolved informally, without benefit of a statutory or regulatory scheme." Munro, *supra* note 151, at 15. Along the same lines, another commentator observed that the VCP "is not set forth in any formal regulatory process and apparently will remain as simply a part of the DEC's exercise of its discretionary authority applied on a case-by-case basis." Berger, *supra* note 43, at 13 (footnote omitted); *see also Summary, supra* note 150, at 17 (noting that the VCP "is not based on any specific statutory authority"). As noted above, the Model VCP Agreement attached to the DEC Organization and Delegation Memorandum formally inaugurating the VCP, references Title 13 and section 3-0301 of the Environmental Conservation Law as sources of statutory authority. *See* MEMO # 94-32, *supra* note 57, at 1.

A number of VCP-type bills have been offered in the Assembly and Senate over the past few years, but none have been enacted. For example, the Senate passed The Voluntary Remediation Act of 1995, S. 3848, 218th Leg., 1st Sess. (N.Y. 1995), the Assembly passed the Environmental Opportunity Zone Act of 1996, A. 9855, 219th Leg., 2d Sess. (N.Y. 1996), and the Governor proposed PROGRAM BILL # 46 (June 1995).

[153] The Brownfields Subcommittee reports finalization of thirty-two VCP agreements "since the program's inception through the end of September 1996." *Summary*, *supra* note 150, at 18.

[154] *See* Sullivan, *supra* note 106, at 1.

remediating the property.[155] Thus, it is likely that the vast majority of municipally-owned sites may be addressed under either the VCP or under the 1996 Bond Act.[156] Similarly, the VCP overlaps with the Title 13 program. Many sites for which cleanup action is required under the Title 13 program—i.e., a Class 1 or 2 site[157]—may also be handled under the VCP. The only exception is that "responsible parties" are "ineligible" to participate in the VCP for such sites, among others.[158]

In sum, enactment of the 1996 Bond Act provides the occasion to revisit the universe of sites which should be handled under the VCP. The overlapping jurisdiction of the three state remedial programs,[159] combined with the apparently differing approaches they take to cleanup standards and liability,[160] discussed below, highlights the importance of conducting such an appraisal in the

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[155] *Id.*

[156] *See Summary, supra* note 150, at 18.

[157] *See* ECL § 27-1305(4)(b)(1)-(5) (McKinney 1984 & Supp. 1997) (detailing various site classifications).

[158] Mr. Sullivan defines a responsible party to be a "party responsible under law to remediate contamination disposed on or released from a property." Sullivan, *supra* note 106, at 1. He continues that a "non-PRP" includes the present owner "if that owner purchased the property in an already contaminated condition and is not otherwise a PRP with respect to the contamination's remediation." *Id.*

The DEC document indicates that responsible parties are not eligible to participate in the VCP for the following types of properties:

> A class 1 or 2 Registry site[;] a TSDF subject to corrective action or closure under permit or order issued under the Department's hazardous waste management regulatory ("RCRA") program[;] a TSDF operating under interim status under the RCRA program that is subject to enforcement action leading to the issuance of an order containing a corrective action schedule . . .[;] [or any property that] is subject to any other "enforcement action" requiring the PRP to remove or remediate a hazardous substance. For this purpose, an "enforcement action" commences against a PRP:
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> under state law, upon issuance of a notification of violation or upon commencement of enforcement under Article 71 of the Environmental Conservation Law or upon issuance of any notification under Article 27, Title 13 of the Environmental Conservation Law that the PRP is a PRP for the property in question or upon issuance of an accusatory instrument under the Criminal Procedure Law.
>
> under federal law the purpose of which includes requiring the subject of the action to remove or remediate hazardous substance, upon issuance of any notification that requires the removal or remediation of hazardous substances that is issued pursuant to federal law.

Id. at 1-2.

[159] *See supra* notes 154-58 and accompanying text (noting the circumstances in which municipal sites may be covered by more than one program).

[160] *See supra* notes 145-49 and accompanying text (discussing Title 13 liability standards); *supra* notes 111-24 and accompanying text (discussing Bond Act liability standards); *infra* notes 166-80 and accompanying text (discussing VCP liability standards).

near future to ensure that the state is acting in a consistent and equitable way in addressing contaminated properties.

The VCP is the only program of the three to adopt a clear position with respect to the role of land use in addressing the issue of cleanup standards.[161] The VCP comes down squarely on the side of considering likely uses of the property in determining cleanup standards, noting that, for example, "[i]f the volunteer contemplates using the site for industrial/commercial purposes, it will be required to clean up to a level consistent with the safe use of the property for those purposes . . . ."[162] Thus, under the VCP, the DEC may approve a cleanup that does not permit residential use of the property. As a safeguard, the Department will require the party conducting the cleanup to place appropriate deed restrictions on the property.[163] Various commentators have observed, as noted above, that Title 13's approach to the role of land use in selecting cleanup standards, adopted by the 1996 Bond Act, provides less certainty.[164] In sum, the DEC appears to be taking a more land use-driven approach to cleanup standards in its VCP than it is taking under Title 13 or under the 1996 Bond Act.[165]

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[161] Perhaps because of its evolving character, there is less than complete agreement concerning the actual substantive content of the VCP. For example, a leader of one active environmental group states that "[t]he administratively-created [VCP] program is somewhat of a mystery to the environmental community. It is unclear . . . if cleanup levels are always consistent with State Superfund." Rabe, *supra* note 52, at 41 (stating that the VCP "weaken[s] cleanup levels"). The Brownfields Subcommittee Report, under the heading "Flexible Cleanup Standards," notes that the VCP agreement "will identify site specific cleanup standards that take into account the specific use of the property," *Summary, supra* note 150, at 17, and that the DEC's approach to determining cleanup standards under the VCP may vary depending on whether the cleanup is being conducted under the Navigation Law or the Environmental Conservation Law. *See id.* at 19.

[162] Charles E. Sullivan, N.Y. Dep't Envtl. Conservation Voluntary Cleanup Program 2 (undated) [hereinafter Sullivan II]. Mr. Sullivan's Nov. 25, 1996 memorandum similarly provides that the cleanup objective is that the property be made "safe for the contemplated use." Sullivan, *supra* note 106, at 2.

[163] *See* Sullivan II, *supra* note 162, at 2 (noting that volunteers must implement institutional controls, including deed restrictions, that the state deems necessary to allow the contemplated use).

[164] *See supra* notes 97-99 and accompanying text (addressing the ambiguity regarding Title 13 and Bond Act cleanup standards). Not all parties agree that the VCP approach represents a step in the right direction. *See, e.g.*, Cleland Testimony, *supra* note 144, at 2-3 (stating that the VCP "lowers cleanup standards for contaminated sites in New York State . . . [and adding that] [t]he hidden agenda of the voluntary cleanup program is to weaken New York's hazardous waste cleanup program at the expense of its citizens and the long-term quality of its resources."); Rabe, *supra* note 52, at 42 (stating that the VCP "weaken[s] cleanup levels").

[165] The VCP also is less stringent than Title 13 in that the VCP contemplates that non-PRPs need not remediate wastes that have migrated from the site. *See* Sullivan, *supra* note 106, at 2. Their responsibility is limited to addressing the "on-site source only." *Id.* Regardless of

Issues concerning the type of liability release parties will receive for participating in the VCP remain somewhat unsettled. Two commentators have observed that "[c]urrently, the breadth of reopener provisions in a particular agreement is subject to negotiation."[166]

The VCP's "rules" for participation and governing liability releases appear to have three essential components, governing: 1) who can participate;[167] 2) the scope of the release from liability provided upon completion of a cleanup;[168] and 3) related to item number 2, the nature of the "reopener" qualifying the release.[169] Anyone is eligible to clean up a property under the VCP, except for "responsible parties" for certain properties as discussed above.[170]

Under the VCP, upon satisfactory completion of the cleanup, the DEC will issue a letter:

> declaring that the Department agrees that the volunteer has cleaned the site to the previously agreed-upon cleanup level and that, barring an event triggering a reopener, the Department does not contemplate further action needing to be taken at the site. It [the Department] will also release the volunteer from further past contamination remediation liability, subject to the reopeners.[171]

The type of release the DEC provides varies depending on whether the volunteer is a PRP. The DEC Voluntary Cleanup Program Chief, Charles Sullivan, explains the different treatment accorded each group as follows:

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which policy position is preferable, the point is that the level and degree of cleanup required varies depending on the program involved, even though the types of waste present, or the degree of risk they pose, may be identical. A conscious decision by the state to use its different remediation oriented programs as "laboratories" might explain operating separate programs on parallel tracks. There does not appear to be any indication, however, that systematic experimenting is underway or the motivating force for the different approaches.

[166] Bakner & Potter, *supra* note 99, at 9.

[167] *See* Sullivan, *supra* note 106, at 1-2.

[168] *See id.* at 3-4.

[169] *See id.* (including changing the site's uses, fraudulently obtaining a release, discovering unknown contamination after the agreement was executed, and realizing that the response action agreed upon is not sufficiently protective); *see infra* notes 172-76 (discussing the reopener provision).

[170] *See supra* note 158 (defining "PRP" and listing the situations in which PRPs are barred from participating in the VCP).

[171] Sullivan, *supra* note 106, at 3. Under the VCP policy, the DEC also provides a release to all non-PRP volunteers covering natural resource damages. *See id.* Mr. Sullivan notes that "the volunteer's successors and assigns (except the site's PRPs) benefit from the release . . . . Also, the reopener affects only the volunteer, successor, or assign which owns or operates the property at the time of the reopening, and thereafter." *Id.* at 4.

> While the qualified release covers onsite *and* offsite remedial responsibilities arising out of past contamination, with respect to a non-PRP volunteer, cleaning up the onsite contamination triggers the release; and with respect to [a] PRP volunteer, cleaning up on-site contamination and addressing offsite impacts trigger the release.[172]

Liability is re-opened (*i.e.*, the release is not effective) in four situations: (1) the Department determines that the cleanup does not allow the contemplated use of the site to occur because the cleanup is not sufficiently protective;[173] (2) use of the site is changed, necessitating a more stringent cleanup;[174] (3) "the volunteer fraudulently obtains the release;"[175] or (4) there were "unknown" environmental conditions at the site at the time the DEC executed the voluntary agreement.[176]

On balance, the VCP generally appears to be somewhat less "developer-friendly" than the 1996 Bond Act in terms of liability protection, although a party's judgment as to which program is preferable may depend on site-specific conditions. For example, under the 1996 Bond Act, if the DEC determines that a cleanup was "not sufficiently protective" to allow safe use of the property, at most the DEC will require the released party to "take such emergency measures [as] are necessary to maintain sufficient protection of human health for such property's current use until such conditions are addressed."[177] The DEC will bear the responsibility of returning the property to a "condition sufficiently protective of human health."[178] In contrast, under the VCP the volunteer bears this entire responsibility on its own.[179] The indemnification for common law actions the state provides under the 1996 Bond Act is another sign that the 1996 Bond Act is more developer-friendly in this area

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[172] *Id.* at 3.

[173] *See id.* at 3.

[174] *See id.* (discussing changes in the site's contemplated use by the volunteer or its successor).

[175] *Id.*

[176] *See id.* Some commentators have argued that these reopeners greatly limit the value of a release provided under the VCP. *See, e.g.*, Bakner & Potter, *supra* note 99, at 7.

[177] ECL § 56-0509(4) (McKinney Supp. 1997). This approach under the 1996 Bond Act applies only to a municipality or a successor-in-title. *See id.*

[178] *See supra* notes 116-24 and accompanying text (discussing the 1996 Bond Act's reopener provisions).

[179] *See supra* note 173 and accompanying text.

than the DEC's VCP policy.[180] It also appears that a release may become effective under the 1996 Bond Act upon completion of an investigation, while the DEC provides releases under the VCP only upon satisfactory completion of the remediation itself. And, finally, the state provides a release under the 1996 Bond Act, while the VCP release is provided only by the DEC.

While neither Title 13 nor the NYCRR Part 375 regulations address the issue of releases, the DEC's intention was probably to structure the VCP to be more "developer-friendly" than Title 13 for "non-PRP" volunteers. The VCP releases non-PRP volunteers for off-site contamination even if the volunteer leaves that contamination unremediated.[181] Because, as noted above, the DEC relies, in part, on Title 13 for its statutory authority for the VCP program, at least for Class 2 sites, the DEC presumably would argue that it has the authority under the Title 13 program to adopt this relatively "developer-friendly" approach.[182] It has not, however, clearly enunciated a policy to do so.

Finally, the VCP appears to be more developer-friendly in terms of public participation, at least for non-Class 2 sites, than is the case under either Title 13 or the 1996 Bond Act. Under the VCP, the DEC must provide the public with notice of a voluntary agreement by publishing a notice in the Environmental Notice Bulletin.[183] The DEC will give the public an opportunity to comment on work plans.[184] Additional opportunities may be included as well.[185] The 1996 Bond Act appears to contemplate a greater level of public involvement than for non-Class 2 VCP cites.[186]

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[180] *See, e.g.*, Bakner & Potter, *supra* note 99, at 7 (concluding that "the release contained in the Bond Act is more comprehensive than that offered by the DEC"). Bakner and Potter continue, however, that even the 1996 Bond Act reopeners are counterproductive, stating that "[t]he benefits that could be achieved by returning brownfield sites to productive use will not be realized fully until the reopener provisions are eliminated." *Id.* at 8. They suggest that "[r]eopener provisions effectively squelch the enthusiasm of developers to clean up brownfields and return the sites to productive use." *Id.* at 9. They suggest that other than in two situations--the developer either 1) obtained a release through fraudulent means, or 2) failed to perform the cleanup as required under the agreement--"reopeners should not be utilized." *See id.*

[181] *See* Sullivan, *supra* note 106, at 2.

[182] The DEC also relies on Environmental Conservation Law section 3-0301, among other sources of authority. *See* ECL § 3-0301 (McKinney 1984 & Supp. 1997).

[183] *See* Sullivan, *supra* note 106, at 2.

[184] *See id.*

[185] *See* Peters, *supra* note 150, at 33 (discussing the notice and comment period for the VCP).

[186] *See supra* notes 88-89 and accompanying text (discussing citizen participation under the 1996 Bond Act); *see also* ECL § 56-0503(2)(f).

On the one hand, there is obviously a logical basis for the VCP's decision that more extensive citizen involvement is appropriate for more seriously contaminated sites (Class 2 sites) than for relatively uncontaminated sites addressed under the VCP. On the other hand, because of the VCP's land use-based focus, public participation seemingly would be more important in the remedy selection process for VCP sites than for 1996 Bond Act or Title 13 sites.[187] Similarly, some properties addressed under the 1996 Bond Act will probably not pose a significant threat to either the environment or people, while certain properties covered under the VCP will pose such a threat, even if the latter properties have not been designated as Class 2 sites under the DEC's Title 13 program. Intuitively, it would seem more important to encourage public involvement for sites which pose a significant threat if not addressed properly. Therefore, the difference in treatment of VCP and 1996 Bond Act sites seems to warrant reconsideration.

III. CONCLUSIONS

The $1.75 billion 1996 Bond Act represents a substantial state commitment to financially support a wide variety of environmental projects. The $200 million Title 5 environmental restoration program represents a significant additional down payment by the state on remediating contaminated sites. It seems clear that the animating concern of the authors of Title 5 was to promote redevelopment of these sites. The state's commitment to indemnify municipalities and other, specified parties in connection with common law actions relating to hazardous substances at the sites,[188] combined with the creation of the $200 million fund, evinces the high priority the Act's authors give to such redevelopment. The inclusion of more generous exemptions from liability than are contained in either of the state's two ongoing remedial programs, Title 13 or the VCP, is further evidence of the strength of this commitment.[189]

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[187] To the extent that the DEC adopts identical cleanup approaches under the two programs, there does not appear to be a logical basis for affording the public less opportunity to participate under the VCP program than exists under the 1996 Bond Act program.

[188] *See supra* notes 121-24 and accompanying text (detailing the indemnification provisions of the 1996 Bond Act).

[189] *See supra* notes 111-24 and accompanying text (discussing the Bond Act liability provisions); *supra* notes 145-49 and accompanying text (detailing Title 13 liability standards); *supra* notes 166-80 and accompanying text (discussing the VCP liability standards).

Whether this bundle of incentives will prove effective in achieving the authors' goal of promoting the redevelopment of contaminated sites cannot yet be gauged, of course. Five possible stumbling blocks are 1) whether municipalities and developers will find the amount of time required to complete the process created under the 1996 Bond Act worth the investment, especially given the "window of opportunity" character of some development projects and the nature and structure of the process itself; 2) whether municipalities will be wary of incurring potential liability for a contaminated property (by taking ownership) within a structure that requires municipalities to take ownership prior to the state's making a decision as to whether to provide a qualified liability release, indemnification protection, and seventy-five percent of the investigation and remediation costs;[190] 3) whether the cleanup standards issue will work itself out in a way that allows for timely remediation acceptable to developers and neighbors alike (one facet of this issue will be whether the seemingly less stringent cleanups allowed under the VCP will cause municipalities and others to favor that Program and avoid the 1996 Bond Act); 4) whether the reimbursement provisions upon sale or lease of the property will limit municipal interest;[191] and 5) whether, as some commentators suggest, even the relatively relaxed liability "reopeners" will create a level of uncertainty sufficient to deter municipal participation in the program.[192]

A sixth issue is whether environmental concerns are as significant a factor in redevelopment as some suggest. While virtually everyone seems to be on the brownfields bandwagon at this point in terms of its upside as a tool to provide redevelopment of urban landscapes, some observers suggest that environmental issues are not of central importance to whether brownfields sites are redeveloped or allowed to deteriorate. In other words, there is the question of whether providing state funds for remediation of properties will inexorably lead to the hoped for redevelopment-related benefits that purport to exist at the end of the remediation rainbow.

Among the other "issues to watch" are two that bear one final mention. First, there is the possibility that, from an environmental protection standpoint, the state will have "shot itself in the foot" by barring use of the $200 million environmental restoration fund for

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[190] *See supra* note 79.

[191] *See supra* note 87.

[192] *See supra* notes 110-24 and accompanying text (discussing the Bond Act's liability and reopener provisions).

hazardous waste sites that pose a significant threat.[193] Depletion of the Title 13 Superfund may create a situation that should give pause to all—the state will be busy spending its money remediating relatively uncontaminated properties while simultaneously being unable to address sites that pose truly significant threats to the environment or citizens of the state.

Second, from a "good government" perspective, enactment of yet another law to address remediation of contaminated sites should provide the impetus for a reappraisal of the "architecture" of the state's legal authorities intended to address these sites. Considerable overlap exists now among the state's three-pronged approach to dealing with hazardous waste sites. Inconsistency in approach and inequity of result are the likely offspring of the current regime. Time invested by the DEC decision makers, legislative officials and the Governor's office, as well as interested members of the business and environmental communities, confronting these issues would be time well spent.

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[193] *See supra* notes 76-78 and accompanying text (commenting on the ineligibility of Bond Act funds for use at state Superfund sites that pose significant threats to the environment).