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Cities and Superfund: Encouraging Brownfield Redevelopment

Hope Whitney*

Abandoned industrial sites known as "brownfields" have created severe environmental problems across the United States, affecting public health and the livability of urban neighborhoods. This article starts from the basic proposition that cities—not private parties, not states, and not the federal government—are in the best position to cleanup contaminated properties within their borders. It explores the disincentives that federal Superfund law gives cities to cleanup these sites and the trouble cities have under this law recovering costs of cleanup from responsible parties. Absent congressional overhaul of Superfund, this article recommends state law solutions to supplement federal law. It shows how California's Polanco Redevelopment Act has given redevelopment agencies the ability to recover all their costs of cleanup from responsible parties and how it has enabled cities in California to cleanup brownfields within their borders.

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INTRODUCTION

A. The City of Emeryville

The City of Emeryville, California, has a fascinating and shady past. The young Earl Warren once called Emeryville “the rottenest city on the Pacific Coast,” back when the city was infamous for its gambling and corrupt politicians—and back when the city was nicknamed “Butchertown” for its many slaughterhouses and tanneries. In fact, wealthy owners of the city’s slaughterhouses, racetrack, and gaming clubs orchestrated Emeryville’s incorporation in 1896, in order to form a town government they could control, which would not harass their businesses, and which would assure them a low tax rate for a city that was dominated almost entirely by a manufacturing district. Indicating the temperament of the citizenry, Emeryville celebrated its incorporation with bonfires in the street and “impromptu jollification meetings.”

Corruption, slaughterhouses, heavy industry, rail yards, industrial dye, paint and pigment plants, and pesticide manufacturing are Emeryville’s legacy. When in operation, the slaughterhouses and the tanneries dumped huge amounts of offal and refuse into San Francisco Bay on a daily basis, and noxious odors were overwhelming even in communities miles away. Sherwin Williams—a paint and pigment manufacturer that operated in Emeryville for over 70 years—revealed its attitude to environmental issues with a huge electric sign that ran along the entire 320-foot roofline of its three-story building. The sign featured a can pouring neon paint over a globe, across which the words “Cover the Earth” flashed on and off.

1. The city covers 1.2 square miles and is centrally located on the eastern shore of the San Francisco Bay, west of Oakland and Berkeley, in Alameda County.
3. Warren, later Chief Justice of the United States, was, at the time, the District Attorney of Alameda County. His determination to shut down Emeryville’s illegal gambling dens and liquor industry probably helped him garner the law and order vote, contributing to his election as Governor of California, before he became Chief Justice of the United States. Prohibition ended, so Warren was ultimately unsuccessful in shutting down Emeryville’s illegal industries, and Emeryville maintained its distinction as the vice capital of the East Bay. Donald Hausler, Prohibition in Emeryville, in EARLY EMERYVILLE REMEMBERED 260, 261-62 (Emeryville Historical Society ed., 1997) (hereinafter EMERYVILLE REMEMBERED).
4. Donald Hausler, Emeryville’s Incorporation, in EMERYVILLE REMEMBERED, supra note 3, at 71; see id. at 220, for remarks about the low tax rate.
5. Id. at 72-73 (citing an OAKLAND ENQUIRER article from 1896).
7. Donald Hausler & Paul Herzoff, SWP Cover the Earth, in EMERYVILLE REMEMBERED, supra note 3, at 162.
Not surprisingly, “virtually all former industrial and commercial property in Emeryville has real or perceived environmental risk,”\(^8\) including shallow groundwater contamination.\(^9\) While the city government has cleaned up its act—it is no longer run by a corrupt police chief out of a restaurant and bar\(^10\)—the city is left with a legacy of contaminated properties unsafe to live on and not as easily cleaned up as its politics.

Like many past industrial centers across the United States, Emeryville’s social fabric suffers from its earlier industrial uses. Emeryville was the sort of town in which walking from the east side to the west side required walking over railroad tracks and sometimes stepping through a parked freight train. The path to individual economic prosperity has been equally difficult to navigate. According to the 2000 census, thirteen percent of Emeryville’s citizens are living in poverty, and its median family income is $10,000 less than Alameda County as a whole.\(^11\) Emeryville High School scored two out of ten among similar schools in the state of California, ten being the best and one being the worst.\(^12\) Fifty-eight percent of Emeryville’s residents are people of color.\(^13\)

Unlike other decaying industrial cities, Emeryville has adopted an entrepreneurial attitude and has been able to remedy an astonishing number of its social and economic problems in a little more than a

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9. Id.
10. Laura Barnoski, Town House, in EMERYVILLE REMEMBERED, supra note 3, at 276 (quoting police chief John LaCoste, explaining that he filled the void of City Manager and that he dealt with businessmen who would not normally meet with the chief of police); see also Larry Spears, Emeryville Boom: Whole City is One Big Redevelopment Area, OAKLAND TRIB., Oct. 1, 1989 (referring to the ousting of political baron John LaCoste and to the Town House where he once ran the town), available at http://www.themartingroup.com/pages/headlines/redeveloped.html (last visited Nov. 26, 2002).
13. The 2000 census gave respondents the opportunity to report membership in more than one racial or ethnic group. The fifty-eight percent figure was derived by subtracting from 100 the 41.6 percent of respondents who identified themselves as white and not Hispanic. For ethnicity data, see U.S. Census Bureau, American Factfinder: Basic Facts database, at http://factfinder.census.gov/bfi/_lang=en_vt_name=DEC_2000_PL_U_QTPLgeo_id=16000US0622594.html (last visited Jan. 28, 2003).
decade. Since completing its general plan in 1987 and adopting an aggressive cleanup and redevelopment program, the city has encouraged businesses such as Trader Joe's, IKEA, Marriott, Circuit City, Chiron, Sybase, and Pixar Animation Studios to locate within its boundaries. In addition to the cleaner businesses and industries that have moved to Emeryville, there are other indicators of the city's new prosperity. The city has built new senior housing and residential units. Emeryville High School's low score of two out of ten in 2001 was actually an improvement over its score of one in 1999, although a drop from its score of four out of ten in 2000. Perhaps even more telling is that Emeryville now has a parking problem—so many people are coming to its shops, restaurants, residential developments, and businesses that it is difficult to find parking on what were once abandoned industrial through-ways.

In winter 2002, the first phase of Emeryville's "Bay Street" redevelopment area became officially open for business, having created 350 construction jobs and an estimated 1,500 to 2,000 permanent jobs. The Bay Street redevelopment included the old Sherwin-Williams lot. Once a symbol of Emeryville's industrial legacy, with its flashing neon sign, the parcel is now cleaned up and ready to welcome diverse uses and new economic activity to the city. Bay Street includes a hotel, a mixed-use pedestrian shopping district, apartments above the stores, and a movie theater within walking distance. Bay Street is already being referred to as Emeryville's city center, demonstrating how impressive Emeryville's redevelopment projects have been, even in the midst of the Bay Area's regional economic downturn. As Emeryville City Attorney Michael Biddle says, "What slow economy?"
Bay Street—now home to a mixed use shopping and residential district—was a “brownfield,” as are most other former industrial sites in Emeryville. Congress defines brownfields as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”\(^2\) They are “properties with active potential for redevelopment or reuse that lie fallow due to actual or perceived contamination.”\(^2\) Over 500,000 brownfields sites in the United States lie underutilized and ignored,\(^2\) posing health risks\(^3\) and impeding the revitalization of inner city neighborhoods, which were once important centers of industrial activity. The mere presence of brownfields encourages businesses to move elsewhere and contributes to an atmosphere of poverty and hopelessness within afflicted neighborhoods.\(^4\)

The brownfields issue has caught the attention of national environmental policymakers for three reasons.\(^5\) First, developers,
politicians, activists, and residents have begun to see the potential for brownfield redevelopment to bring about the revitalization of urban neighborhoods, which would otherwise remain a burden on local economies. Brownfields are commonly found at commercially desirable locations. Abandoned manufacturing sites, rail yards, warehouses, auto repair shops, gas stations, and dry cleaners are often located on prime real estate near city centers, accessible by rail, water, highways, and freeways. Emeryville, for example, happens to be the last exit on the freeway before crossing the Bay Bridge to San Francisco. There is money to be made by cities: the U.S. Conference of Mayors estimates that developing the nation’s brownfields could bring in $878 million to $2.4 billion in tax revenues to cities annually and create nearly 550,000 new jobs.

Second, environmental policymakers have focused their attention on brownfields because of the influence of citizens on the political process. Environmental justice, which has become an important force in environmental policymaking, demands the cleanup of brownfields, whose contamination puts inner city residents—often low-income and minority—at risk. The extent of contamination is often unknown, representing an undetected or underappreciated threat in many communities. Brownfields reflect systematic problems related to residential segregation, where low socioeconomic status and membership in a racial minority group correlates with increased exposure to environmental toxics. Bodies such as the National Environmental Justice Advisory Council’s Waste and Facility Siting Subcommittee have recognized the close nexus between the brownfields phenomenon and


environmental justice, asserting that redevelopment must be sensitive to environmental justice issues.\textsuperscript{33}

Third, environmentalists and "smart growth"\textsuperscript{34} advocates see recycling urban land as one way to combat suburban sprawl and its environmental impacts. Development at the suburban fringe—on "greenfields"—consumes agricultural land, destroys natural habitat, and uses a disproportionate share of municipal resources.\textsuperscript{35} Building industrial and commercial facilities on greenfields requires that roads, sewers, schools, and residences be developed anew, which will require the formation of new units of government formed to levy the taxes to pay for them.\textsuperscript{36} Commuters driving to homes in the suburbs consume more gasoline than urban residents and cause congestion, which in turn leads to the combustion of more fossil fuels and poor air quality.\textsuperscript{37}

In contrast, brownfield sites already have much of the development infrastructure in place, potentially saving fiscal and environmental resources, although such savings have not been quantified. Endangered species are normally located on greenfields, not brownfields.\textsuperscript{38}

\textsuperscript{33} EPA, NATIONAL ENVIRONMENTAL JUSTICE ADVISORY, REPORT ON PUBLIC DIALOGUES (1995), available at http://www.epa.gov/swerosps/ej/html-doc/pub01.htm (last visited Feb. 4, 2003). The environmental justice aspects of the brownfields issue are complicated. Residents are understandably concerned when contaminated sites are cleaned up and redeveloped, and new polluting industries locate in their neighborhoods. In addition, risk-based cleanups often impose on residents the unwelcome decision of either having sites cleaned up to lower levels than standards ordinarily required for residential use, or else not having the sites cleaned up at all. See McWilliams, supra note 31, at 722–23; David B. Hawley, Book Note, The Brownfields Property Reuse Act of 1997: North Carolina Creates An Additional Incentive to Reclaim Contaminated Properties, 76 N.C. L. REV. 1015,1052 n.28 (1998) (summarizing conflicting views over whether brownfield redevelopment and environmental justice are fully compatible); see also Paul D. Flynn, Book Note, Finding Environmental Justice Amongst Brownfield Redevelopment, 19 VA. ENVTL. L. J. 463 (2000).

\textsuperscript{34} See Smart Growth Networks, Smart Growth Online, at http://www.smartgrowth.org/about/default.asp (last visited Feb. 4, 2003), for an explanation of smart growth and its principles, which include: (1) Create a Range of Housing Opportunities and Choices; (2) Create Walkable Neighborhoods; (3) Encourage Community and Stakeholder Collaboration; (4) Foster Distinctive, Attractive Places with a Strong Sense of Place; (5) Make Development Decisions Predictable, Fair and Cost Effective; (6) Mix Land Uses; (7) Preserve Open Space, Farmland, Natural Beauty and Critical Environmental Areas; (8) Provide a Variety of Transportation Choices; (9) Strengthen and Direct Development Towards Existing Communities; (10) Take Advantage of Compact Building Design. Id.


\textsuperscript{36} Hoffman & Coler, supra note 21, at 433.


\textsuperscript{38} Roughly forty-five percent of all non-urbanized land in California, as much as 41.9 million acres, have been designated critical habitat for endangered or threatened species. David Smith, Briefly BILD: An Update from the Building Industry Legal Defense Foundation, August 2001. This industry newsletter is the only source available for cumulative figures on critical habitat. Most estimates are based upon Fish and Wildlife Service figures for individual listed
redevelopment can potentially slow new greenfield development, protecting open space and the species that depend upon it.

In short, many view brownfield redevelopment as a cure for a variety of ills. It creates jobs and profits, increases tax revenue for cities, generates individual income, and brings new resources and opportunities to disadvantaged communities, while at the same time cleaning up and protecting the environment. As former EPA Administrator Carol Browner said in 1997, brownfield redevelopment can restore "hope, opportunity and jobs to communities and neighborhoods that are saddled with the presence of old, abandoned industrial sites." Unfortunately, while brownfield redevelopment is desirable for city governments, communities, and environmentalists, attracting individual developers to these brownfield sites is not easy.

C. Barriers to Brownfield Cleanup and Redevelopment

The barriers to brownfield redevelopment fall into two well-documented categories: (1) cost and financing hurdles, and (2) legal and regulatory concerns. First, brownfield redevelopment costs money and is risky. The Bay Street property in Emeryville required roughly $1 million in site assessments before soils engineers and environmental consultants could ascertain the extent of the contamination and before any cleanup could be contemplated. Developers will not buy—and banks will not finance—properties where the extent of the contamination is unknown, which is why many federal and state brownfield programs make funding available solely for site assessments. Even after assessments are complete, doubts about the reliability of projected

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species, and are thus independently verifiable, but the newsletter also estimates about 29 million acres of critical habitat for listed salmon species, figures which are unavailable elsewhere. The 45 percent figure is found by taking the ratio of total critical habitat to U.S. Census figures for total land area of urbanized areas in California subtracted from total land area of California. See U.S. Census Bureau, at http://quickfacts.census.gov/qfd/states/06000.html (last visited February 7, 2003) (155,973 square miles in California – 6034.3 urban square miles = 149,938.7 square miles of non-urban land of which 65,470 square miles are critical habitat).


40. See Robertson, supra note 20, at 1082-95, for a complete review of brownfield redevelopment barriers.

41. Interview with Michael Biddle, City Attorney, City of Emeryville, in Emeryville, November 3, 2000 (on file with author).

42. See, e.g., Small Business Liability Relief and Brownfield Revitalization Act, supra note 20, at Subtitle A (providing federal budget authorization for site characterizations and assessments); Charles Bartsch & Bridget Dorfman, Brownfields State of the States – 2000 Report: What's Happened in the 50 States this Year?, NORTHEAST-MIDWEST INSTITUTE, October 7, 2000 (reviewing state funding programs and their purposes).
cleanup costs continue to discourage many developers and their lenders from investing in brownfield projects.43

In addition, costs associated with the actual development of brownfields are twenty percent to sixty percent higher than comparable greenfields projects at the urban fringe.44 Urban development projects almost always incur higher costs due to limitations on space, transportation of materials, and timing flexibility.45 Developers also consider the real or perceived risk of community opposition to their projects as an additional cost of development.46 There are generally no unhappy neighbors to oppose building on greenfields where no previous development exists.

Favorable market conditions alone might mitigate the increased costs of brownfield redevelopment. Unfortunately, there are also legal and regulatory hurdles that keep developers away from such sites. Environmental statutes like the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and their state law counterparts impose liability on previous and current owners of contaminated property, regardless of fault. As a result, these laws have been severely criticized for hindering redevelopment.47 Even when developers are willing to risk liability, the regulatory environment creates another barrier to brownfield redevelopment. Unclear cleanup standards and the redundant approvals required from multiple agencies tax even the most patient developers and keep those with less technical and legal expertise away for good.48

Just as significantly, owners are often reluctant to sell, fearful of their own liability for as yet undetermined cleanup costs. Such owners often decide it is cheaper and less risky to "mothball" a site—fencing it off, paying the property taxes, and trying to forget about it.49 Many owners who only suspect contamination dodge potential liability by removing

43. Robertson, supra note 20, at 1085.
44. EDITH M. PEPPER, STRATEGIES FOR PROMOTING BROWNFIELD REUSE IN CALIFORNIA 4 (California Center for Land Recycling, ed., 1998); see also McWilliams, supra note 31, at 735.
45. See CHARLES BARTSCH & ELIZABETH COLLATON, COMING CLEAN FOR ECONOMIC DEVELOPMENT 4-5 (1996) (comparing greenfield and brownfield redevelopment costs); see also Porter, supra note 26, at 63 (discussing higher building costs in the inner city).
46. See PEPPER, supra note 44, at 3–6.
48. Many programs designed to promote brownfield redevelopment are focused solely on streamlining the regulatory requirements of the brownfield programs. See Bartsch & Dorfman, supra note 42.
49. See PEPPER, supra note 44, at 5.
their property from the market completely rather than performing site assessments, which must be reported if positive for contamination.\(^{50}\)

Many state and federal programs attempt to remove these barriers to brownfield redevelopment one at a time, by offering incentives for voluntary cleanups, grants for site assessments, technical assistance to developers, etc.\(^{51}\) These efforts have enjoyed some success, but none of them address all of the obstacles that can arise during the cleanup and redevelopment of even a single parcel. Additionally, federal programs, like the "Superfund"\(^{52}\) itself, were created to remediate the largest and the worst toxic sites. However, since brownfield sites can be as small as abandoned gas stations,\(^{53}\) these programs often operate at the wrong scale to assist redevelopment. Even with these programs, companies are still unwilling to invest in or to sell contaminated properties.\(^{54}\) Thus, brownfields remain a problem without a clear solution.

D. Cities can Overcome the Barriers to Brownfield Redevelopment

Cities possess a powerful tool for overcoming barriers to selling, buying, and financing redevelopment of contaminated properties: the power of eminent domain. In theory, cities like Emeryville should be able to use their eminent domain power to force owners to sell at market rate and to assemble parcels of land large enough to make the cost of cleanup pay off.\(^{55}\) Whether a brownfield is lying idle because of an unwilling seller, a lack of financing, or a cautious community of developers, cities may use this tool to correct for market failures—a traditional use of the eminent domain power.

This is the strategy taken by Emeryville. The city exercised its eminent domain power to acquire the old Sherwin-Williams property—Bay Street—upon which the new Emeryville downtown is being built.\(^{56}\) Emeryville is not the only small to medium-sized city in America with contaminated industrial property within its borders. There are undoubtedly other entrepreneurial cities situated in strong regional real estate markets. Yet Emeryville is one of the few whose acquisition and

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50. See McWilliams, supra note 31, at 716.
51. See Brownfields Economic Redevelopment Initiative, supra note 25; see also Brownfields State of the States, supra note 42.
52. See infra Part II.A.
54. Robertson, supra note 20, at 1119.
55. See Porter, supra note 26, at 62 for discussion of why assembling small parcels into meaningful sites is difficult in inner cities. Using the power of eminent domain, cities can overcome this problem.
56. See infra Part III.B.
cleanup strategy has successfully cleaned up so many sites so quickly.\textsuperscript{57} Nationally, Emeryville is known as an example of what city governments can do and should be doing for their towns.\textsuperscript{58}

This article offers one explanation of other cities’ unwillingness or inability to follow Emeryville’s example. An Emeryville-like eminent domain acquisition and cleanup strategy is too risky and too costly for most cities. Even assuming similar legal and technical expertise and similarly favorable market conditions, cities outside of California operate in a legal context that places an Emeryville-like redevelopment strategy out of reach. As explained more fully in Part II, the federal Superfund law, or CERCLA, which governs cost recovery for cleaning up contamination nationally, prevents a city from recovering all of the costs of investigating, acquiring, and remediating a contaminated brownfield site. This obstacle results from the statute’s treatment of municipalities as private actors for purposes of cost recovery; private plaintiffs, in contrast to state and federal governments, cannot recover all their costs. Thus, cities outside California often are forced to choose between pursuing a redevelopment policy that loses money and letting the properties lay idle.

Judicial interpretation of the interaction of state eminent domain law with CERCLA may present an even greater obstacle to using an Emeryville-like strategy. When cities acquire property “voluntarily,” through the use of their eminent domain power, courts might treat the cities like property owners who are responsible for the contamination under CERCLA. This interpretation would force cities to pay up front for the cleanup and then sue any previous owners (who happen still to be around and solvent) for these previous owners’ “severable”\textsuperscript{59} shares of the contamination. This is an arrangement very few cities can afford. A court in the Northern District of California has decided that cities acquiring properties by eminent domain should not be treated like a responsible party,\textsuperscript{60} but it is not clear that all courts facing the issue would decide similarly. Part III of this article explores this dilemma, arguing that exercise of eminent domain power should never make a city responsible up front for the cleanup costs of the acquired property.

Part IV argues that courts should treat cities, or, at the very minimum, redevelopment agencies, as “states” under CERCLA, granting them a stronger cost-recovery cause of action. Barring such an interpretation in the courts or a revision of the law in Congress, Part V


\textsuperscript{58} 147 CONG. REC. S3879–02, 3891 (April 25, 2001) (statement of Sen. Boxer).

\textsuperscript{59} See infra note 84 and accompanying text.

explains how state laws can accomplish what the federal laws do not. California has stepped in to address CERCLA's legal pitfalls, enabling cities like Emeryville to use eminent domain to acquire contaminated sites. Unlike federal Superfund law, California's Polanco Act gives cities the ability to recover the entire of their cleanup costs from responsible parties. In the U.S. Conference of Mayors annual survey of cities, the most frequently cited impediment to brownfield redevelopment was a lack of cleanup funds.\(^6\) Still, only a few other states have statutes similar to California, and Part V notes their similarities and differences to the Polanco Act.

Like many cities, Emeryville evaluated the costs and benefits of taking the lead in transforming defunct industrial sites into engines of economic growth. The Polanco Act mitigated the costs, essentially tipping the scales in favor of acquisition and cleanup, enabling Emeryville to pursue a bold brownfield redevelopment strategy. Until other states, or Congress, enact laws comparable to California's Polanco Act, the scales will tip the other way for cities in similar circumstances. Facilitating the use of the eminent domain power of cities to clean up brownfield sites within their borders is an important next step in the national environmental cleanup policy. Congress and state governments should follow California's example.

Now that a large percentage of the highly contaminated sites on the Superfund National Priorities List have been mostly cleaned up or contained, the 500,000 brownfield sites in the United States are the next major task.\(^6\) By empowering cities to clean up environmentally hazardous sites in their own backyards, lawmakers can remove many of the barriers to brownfield redevelopment at once, rather than addressing them one by one. Simple legislative and policy changes might unleash development potential that could restore prosperity and vitality to dormant urban areas and protect the country's open spaces and environmental resources.

I.

**CERCLA: COST RECOVERY AND ACTIONS FOR CONTRIBUTION**

This section provides a brief description of the differences among a cost recovery action brought by a state or the federal government, a cost recovery action brought by a private, innocent landowner, and an action for contribution brought by a responsible party. It explains why the cost

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\(^6\) Survey, supra note 27, at 11.

\(^6\) U.S. Group Warns of Expensive Toxic Waste Cleanup, DOW JONES INT'L NEWS, July 10, 2001 (reporting that of the 1,076 sites on Superfund's priority cleanup list, the EPA has declared 739 clean). Comparing the roughly 1,000 sites on the Superfund NPL to the over 500,000 brownfield sites within the United States clearly shows that brownfields are as much of, if not more, a problem than the Superfund sites CERCLA was enacted to eradicate.
recovery action that federal law offers to cities is weaker than is needed to encourage cities to exercise their eminent domain power to acquire, clean up, and redevelop contaminated sites.

A. Cost Recovery Liability under CERCLA Section 107(a)

At the end of the 96th Congress in 1980, and on the heels of disasters like Love Canal, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). Its purpose is to clean up leaking, inactive, or abandoned chemical waste sites, as well as to provide an emergency response to spills. Among other things, the Act authorized new taxes on sales of petroleum and certain chemical feedstocks to create a "Superfund," from which the Act's nickname arises, to be used to pay for the cleanup of abandoned hazardous waste sites.

The Superfund is insufficient to finance cleanup of all sites, so provisions of CERCLA require federal and state governments to locate potentially responsible parties ("PRPs")—those statutorily responsible for the contamination—to pay for cleanups. Once the federal government or a state agency has incurred cleanup costs, it brings a cost recovery action against a PRP under section 107(a) of CERCLA. Section 107(a) treats these PRPS aggressively, effecting the Act's

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64. 42 U.S.C. §§ 9601-9675 (1995); see John Cruden, CERCLA Overview, 98 ALI-ABA 807, 809 (June 26, 2000).


67. 42 U.S.C. §§ 9608-9609; United States v. Conservation Chemical Co., 628 F. Supp. 391, 403 (W.D. Mo. 1985) (voluntary private party cleanup of sites is strongly encouraged, as the Superfund is insufficient to finance cleanups at all sites, and therefore must be allocated to those sites where there are no viable potentially responsible parties); infra note 74 and accompanying text defining potentially responsible party; see 42 U.S.C. § 9622.

68. 42 U.S.C. § 9607. The federal government also has an additional cause of action in section 106 of the Act, but it is not the subject of this article.
“fundamental purpose” to provide for the expeditious and efficacious cleanup of hazardous waste sites\(^6\) and to ensure that those responsible for the dangerous condition bear the financial burden for cleanup.\(^7\) Love Canal and other disasters had exposed industry’s reckless disregard for environmental safety over the years. In response, CERCLA was drafted to embody the “polluter pays” principle—the idea that those who benefited from their disregard should now pay to clean up the mess.\(^7\)

The cause of action works as follows: CERCLA section 107(a) provides that a party will sometimes be liable to pay costs for cleanup of contaminated sites directly to the federal or state government, and/or private persons,\(^7\) if the party is either (1) the current owner(s) and/or \(^7\) operators(s) of the site; (2) the person who owned or operated the site at the time the waste was deposited at the site; (3) the waste generator or one who arranged for the transportation of the waste to the site; or (4) the transporter of the waste.\(^7\) Anyone who had any responsibility for creating, transporting, or disposing of the waste is liable, but the current owner of the property is also liable, subject to certain exceptions. This is the liability provision under CERCLA that makes purchasers, developers, and lenders wary of property suspected of contamination, and prevents brownfields from being redeveloped even under favorable market conditions.\(^7\)

The four categories of potentially responsible parties, “PRPs” or “person[s] otherwise liable,”\(^7\) are entitled to certain limited defenses laid out in section 107(b). Otherwise, liability attaches if (1) there was a “release” or “threatened release” from a facility;\(^7\) (2) the release or

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71. STAFF OF SENATE COMM. ON ENV’T AND PUB. WORKS, 97TH CONG., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980 (SUPERFUND), PUBLIC LAW 96-510, No. 97-14, 2d Sess. at 320 (Comm. Print 1983) (one of the statute’s principal goals is “assuring that those who caused chemical harm bear the costs of that harm . . .”).
72. The right of private persons to bring actions for cost recovery under section 107(a) is the subject of Part I.B of this article infra.
73. The actual language of the statute says “owner and operator,” but courts read in the disjunctive. See Long Beach Unified School District v. Dorothy B. Godwin California Living Trust, 32 F.3d 1364 (9th Cir. 1994). The fact that this typo has not been fixed may be a testament to how reluctant Congress has been to reconsider this piece of legislation, as well as how fast this legislation was thrown together at the end of the 96th Congress.
75. See Solo, supra note 47.
76. 42 U.S.C. § 9607(b).
77. 42 U.S.C. § 9607(a)(4). CERCLA defines “release” to include “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing” into the environment. 42 U.S.C. § 9601(22).
threatened release caused response costs to have been incurred, \textsuperscript{78} and (3) the response costs were consistent with the National Contingency Plan ("NCP"). The NCP is a lengthy manual or guide specifying cleanup methods, safety guidelines, and other procedures that those cleaning up hazardous sites must follow. \textsuperscript{79}

Intent to release or knowledge of the release is not one of the elements required to establish liability. CERCLA is silent on whether liability attaches without fault or knowledge, but it defines "hazardous substance" as any substance so designated in section 311 of the Clean Water Act. \textsuperscript{80} Courts have interpreted that section as imposing a no-fault liability standard, which has, in turn, been applied to CERCLA section 107(a). \textsuperscript{81} In addition, Congress intended CERCLA to apply retroactively to past owners and operators whose past acts contributed to existing hazardous conditions, regardless of whether the actions were legal or illegal at the time. \textsuperscript{82}

Section 107(a) is a powerful cost-recovery tool. In addition to the no-fault liability and retroactivity provisions outlined above, the statute of limitations is six years from the "initiation of physical on-site construction of the remedial action." \textsuperscript{83} Courts have also uniformly ruled that liability under section 107(a) is joint and several if two or more persons have contributed to a single indivisible harm—for example, when groundwater at a site is polluted with chemicals produced by more than one owner. If the harm is indivisible, each PRP can be held individually liable for the entire cost of the cleanup. \textsuperscript{84}

\textsuperscript{78} 42 U.S.C. § 9607(a)(4).
\textsuperscript{79} 42 U.S.C. §§ 9607(a)(4)(A)-(B). The NCP provides "the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants." National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.1 (1995). Basically, the NCP governs how cleanups must be conducted under CERCLA to recover costs of the cleanup.
\textsuperscript{80} 33 USC §1317(a) (2002); 42 USC §9601 (14) (2002).
\textsuperscript{81} See, e.g., United States v. Alcan Aluminum Corp., 964 F.2d 252, 259 (3rd Cir. 1992).
\textsuperscript{84} See United States v. R.W. Meyer, 889 F.2d 1497, 1506–08 (6th Cir. 1989). And, conversely, if a party can prove that the harm is divisible, then they are liable for only the part of the harm for which they are responsible. United States v. Monsanto Co. 858 F.2d 160, 171 (4th Cir. 1988).
B. Public Plaintiff Favored under Section 107(a) Action for Cost Recovery.

Both public (state and federal government) and innocent private parties can bring actions under section 107(a) to recover cleanup costs.\(^8\) The cause of action is significantly weaker, however, when a private party, which includes cities and municipalities,\(^6\) brings the suit. First, a private party has the burden to show that its costs were consistent with the guidelines set forth in the NCP.\(^7\) Costs incurred by the state or federal government, on the other hand, are presumed consistent with the NCP, unless the defendant can show otherwise.\(^8\) Private parties also cannot recover their attorneys’ fees.\(^9\)

The inability to recover attorneys’ fees and the city’s burden of proving that its cleanup was consistent with the NCP can be deal-killers for cities. Much of the CERCLA litigation is about whether costs were consistent with the NCP. Arguing whether or not a cleanup method followed the spirit of thousands of pages in the NCP manual requires more than a few hours of attorneys’ and experts’ time.\(^9\) Facing this battle without the possibility of recovering attorneys’ fees means that pursuing a cost recovery action is simply out of reach for all but the wealthiest of cities (which, paradoxically, are unlikely to have many brownfields).

In short, as a private plaintiff under current federal law, the best weapon a city has to recover cleanup costs from responsible parties is the a weaker of the two section 107(a) causes of action. And, there is a chance that a city will not even be allowed this private plaintiff cause of action. Courts sometimes consider cities to be PRPs if they have acquired property by eminent domain, thereby making full cost recovery even more problematic. PRPs—as opposed to innocent parties—have recently been precluded from bringing cost recovery actions under section 107(a) altogether and are relegated to the weaker “contribution” provision in section 113.\(^1\) Section (C) of this Part explains the difference between a section 107(a) action for cost recovery and a section 113 action for

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8. 42 U.S.C. § 9607(a)(4) assigns liability to PRPs for “(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan” and “(B) any other necessary costs or response incurred by any other person consistent with the national contingency plan.”

86. See infra notes 207–208 and accompanying text.


88. Id.


90. See Robert P. Dahlquist, Consistency with the National Contingency Plan in 2000 and Beyond, 15 NAT. RESOURCES & ENV’T 32 (2000) (explaining that due to CERCLA’s limited defenses and the fact that failure to comply with the NCP defeats a claim completely, “the ‘inconsistent with the NCP’ defense has been the subject of considerable litigation in the past two decades . . .”).

91. See infra note 102 and accompanying text.
contribution. Part III then explains how cities exercising their eminent domain power are sometimes limited to a section 113 action when trying to recover their cleanup costs.

C. Confusion and Disfavor Under the Contribution Provisions of Section 113.

1. Differences between Section 113 and Section 107

Congress initially considered, but ultimately rejected, a right of contribution in CERCLA when it enacted the law in 1980. Nevertheless, courts immediately began to apply common law principles to CERCLA, recognizing an implied right of contribution among PRPs.93 Courts allowed defendants, who were liable to a state or the federal government for the entire amount of the government's cleanup costs under a theory of joint and several liability, to bring a contribution action against other parties who were also responsible for the contamination. In 1986, Congress enacted section 113 to codify these court decisions.94 Section 113 confirms that a PRP has a right to seek contribution from any other person who is also liable under section 107(a) for some share of the cleanup costs.95

There are three reasons why contribution under section 113 is not nearly as powerful or effective as cost recovery under section 107(a). First, the statute of limitations is just three years for a contribution action, compared to six years for section 107(a) cost recovery actions.96 The statute for contribution actions begins to run as soon as a party becomes liable to another person for cleanup costs, rather than when actual on-site cleanup begins, as is the case in suits for cost recovery.97

Second, courts have construed liability under section 113 as "several" only.98 That is, one can recover from a party only the share of the cleanup costs for which that party is responsible. When the action is several, rather than joint and several, the plaintiff-PRP has the burden of

94. See, e.g., United States v. Monsanto Co, 858 F.2d at 171 n.23.
96. Id. § 9613(g)(2)(A).
97. Id. The statute begins running as soon as there is a judgment order in favor of another party in a cost recovery action, an administrative order requiring cleanup, or a judicially approved settlement. There is confusion here because sometimes none of these three events happen, i.e. there is no judgment, administrative order, or settlement decree. Part III.C.2 addresses this "gap" in the law.
98. See Pinal Creek Group v. Newmont Mining Corp., 188 F.3d 1298, 1303 (9th Cir. 1997); Redwing Carriers, Inc. v. Saraland Apts., 94 F.3d 1489, 1513-14 (11th Cir. 1996).
proving each defendant's contribution to the cost of cleanup. This introduces an element of causation that is not present under an action for cost recovery, in which the plaintiff recovers all costs, not just the ones for which it can prove others are responsible. One explanation for these court decisions is that the legislative history suggests that a section 113 action is only for costs greater than one's share, implying that the plaintiff-PRP has a right to recover only those costs attributable to contamination others caused. More important, courts interpret a section 113 action for contribution using the well-known legal definition of the word "contribution." It means a claim "by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make." 

The third reason a contribution claim is not as effective as a cost recovery action is that parties who have settled their liability with the government are immune from actions for contribution for matters addressed in the settlement. Granting immunity serves the important policy goal of encouraging parties to settle with the government and to participate in the cleanup process. However, it also means that solvent parties may be unavailable to private PRP-plaintiffs attempting to recover some of their costs through actions for contribution.

One may wonder why a PRP would prefer to sue for cost recovery instead of bringing an action for contribution in the first place. When all potentially responsible parties are brought into the suit, it may indeed make no difference at all. Often, however, responsible parties are unavailable because they settled or are insolvent. Responsibility for contamination at a site may also be impossible to parse among all PRPs. In these instances, bringing a cost recovery action instead of an action for contribution could determine whether the plaintiff recovers all its cleanup costs and, therefore, whether a site is remediated and ultimately redeveloped.

2. **PRPs Relegated to Section 113 in Recent Appellate Court Decisions**

Recent appellate court decisions have rejected all arguments in favor of allowing private party-PRPs to sue under section 107(a), relegating them to the weaker cause of action embodied in section 113. A

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100. Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994).
102. United Technologies Corp. v. Browning-Ferris Industries, Inc., 33 F.3d 96 (1st Cir. 1994); Bedford Affiliates v. Sills, 156 F.3d 416 (2d Cir. 1998); New Castle County v. Haliburton NUS Corp., 111 F.3d 1116, 1120 (3rd Cir. 1997); Pneumo Abex Corp. v. High Point, Thompsonville & Denton R.R. Co., 142 F.3d 769, 776 (4th Cir. 1998); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989); Centerior Serv. Co. v. Acme Scrap Iron and Metal Corp., 153 F.3d 344, 355 (6th Cir. 1998); Akzo Coatings, 30 F.3d at 764 (holding that a plaintiff's claim
standard rule of statutory construction directs courts to attempt to effectuate meaning to every word or phrase in a statute. The plain meaning of the statute—namely that section 113 exists at all—counsels against the idea that PRPs can proceed under section 107(a). The typical reasoning is that allowing PRPs to proceed under section 107(a) would effectively write section 113 out of the statute. There would be no point in Congress adding a right of contribution in section 113, if such a right was given by section 107(a). Indeed, a PRP would "readily abandon a suit in favor of the substantially more generous provisions of [section] 107(a)."

Courts have also looked to the definition of contribution to distinguish it from an action for cost recovery. In *United Technologies Corp. v. Browning-Ferris Industries, Inc*, the court stated that "contribution is a standard legal term... [that] refers to a 'claim by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make,'" and so the court restricted plaintiffs to a section 113 claim in a case where the plaintiff was subject to a government CERCLA consent decree. Courts have decided that while Congress agreed that PRPs should be allowed to bring an action for contribution, Congress enacted section 113 to differentiate the PRP cause of action from one brought by a non-responsible party.

This rule that PRPs may not use section 107(a) against other PRPs, however, has created a "gap" in CERCLA. Section 113's contribution was a "quintessential claim for contribution" and exclusively governed by section 113 in a case where the plaintiff was subject to an EPA unilateral administrative order; Pinal Creek, 118 F.3d at 1301; United States v. Colorado & Eastern RR Co., 50 F.3d 1550 (10th Cir. 1995) (restricting plaintiff's third-party claims in a government enforcement action to claims governed by section 113); Redwing Carriers, 94 F.3d at 1496. The Eighth Circuit has yet to decide this issue squarely. In *Control Data Corp. v. SCSC Corp.*, 53 F.3d 930, 935 (8th Cir. 1995), the court held that once liability is established, allocation of liability is determined by section 113. Lower courts in the Eighth Circuit have held that this language is consistent with the holdings in other circuits that relegate PRPs to section 113. See *Reynolds Metal Co. v. Arkansas Power & Light Co.*, 920 F. Supp. 991, 996 (E.D. Ark. 1996); *Wolf, Inc. v. L. & W. Service Center, Inc.*, 1997 WL 141685, at 6 (D. Neb. March 27, 1997) (recognizing split and lack of controlling decision in the Eighth Circuit).

103. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

104. United Technologies Corp., 33 F.3d at 101-02 (1st Cir. 1994); New Castle County, 111 F.3d at 1123; *Colorado & Eastern Railroad Co.*, 50 F.3d at 1536.

105. Bedford Affiliates, 156 F.3d at 424.


107. See William D. Araiza, *Text, Purpose and Facts: The Relationship Between CERCLA Sections 107 and 113*, 72 NOTRE DAME L. REV. 193, 222 (1996) (analyzing the legislative history of the SARA amendments and concluding that the legislative history reflected intent to reaffirm "in a modified form" the third party right of action that courts had previously found implicit in section 107(a)).
provision states that "any person may seek contribution from any other person who is liable or potentially liable under section [107(a)], during or following any civil action under section [107(a)]." This begs the question, how do PRPs recover their cleanup costs if they have not yet been subject to civil action under section 107(a)? The statute of limitations provisions further expands the gap. A party has six years from the time of incurring costs to bring a cost recovery action, but just three years after a judicially-approved settlement, judgment, or administrative order to bring an action for contribution. What statute of limitations applies when there has been no settlement, judgment, or administrative order at all?

One possible interpretation is that if there has not yet been a civil action under section 107(a), even a PRP may bring a section 107(a) cause of action. In this reading, a contribution action arises only after a civil action has been initiated under section 107(a). The section 107(a) action triggers liable parties' ability to sue other responsible parties under section 113. Indeed, those who have criticized the idea that PRPs have no cause of action under section 107(a) point to the very language of the statute quoted above and the corollary statute of limitations to bolster their arguments that PRPs should, in certain circumstances, be allowed to sue under section 107(a).

However, all circuits have decided that a PRP may not use section 107(a). In these decisions, some circuits addressed the apparent gap such a decision creates in the statute—that PRPs who have not yet been subject to an EPA order or a section 107(a) suit by a non-PRP may lack a means to recover costs, and, even if allowed to proceed, may have no applicable statute of limitations. The Circuits acknowledge the various implications of their holdings.

Some circuits have implied that PRPs can file section 113 actions without any previous suits or administrative orders. The Ninth Circuit, in Pinal Creek Group v. Newmont Mining Corp., expressly rejected the idea that a PRP would be left without a cause of action if it was unable to use section 107(a). The court reasoned, in dicta, that once a PRP undertakes the "necessary costs of response" required under section 107(a), then it, along with all other PRPs associated with the site, becomes responsible for those costs. Even if no cost-recovery suit has been filed, the PRP is responsible in a theoretical sense, and may thus bring contribution

109. Id. §§ 9613(g)(2)-(3).
111. See supra note 102.
112. See 42 U.S.C. § 9613(g).
113. Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1305 (9th Cir. 1997).
actions against other PRPs. The First Circuit, on the other hand, has implied that a party who could be held responsible for contamination but who spontaneously initiates a cleanup might be able to pursue an implied right of contribution under section 107(a), rather than section 113, but it did not expressly decide the issue.\(^{114}\)

In contrast, in *Aviall Services v. Cooper Industries*, the Fifth Circuit held, in a decision recently reversed by an *en banc* panel, that a PRP could not bring an action for contribution without a prior or pending federal administrative action or private section 107(a) action against it.\(^{115}\) Briefly, the panel decided, based on the "gap" in CERCLA explained above, that Congress’ statutory scheme mandates a pending or adjudged administrative order or cost recovery action action as a prerequisite to a section 113 action.\(^{116}\) According to the panel’s reasoning, section 113’s statute of limitations for contribution claims would start running only upon the date of judgment, the date of administrative order, or the date of a judicially approved settlement of a claim under section 107(a).\(^{117}\)

As the *en banc* majority pointed out, the text of CERCLA does not mandate such an extreme result. There are other ways to make sense of the "gap" in the statute. The *en banc* majority observed, among other things, that the first sentence of section 113(f)(1) is permissive: "any person may seek contribution... during or following any civil action..."\(^{118}\)

The *en banc* majority also criticized the earlier panel’s decision for its policy implications. For example, requiring an administrative order or prior cost recovery suit would unnecessarily discourage voluntary cleanups by PRPs.\(^{119}\) No PRP would decide to clean up contaminated property it acquired from other contributors to the pollution, if it knew it would be unable to recoup any of its costs in court. The previous *Aviall* panel had addressed this policy concern by stating that nothing in the decision precludes parties from relying on state environmental laws to recover costs from other liable parties.\(^{120}\)

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\(^{114}\) United Technologies Co. v. Browning-Ferris Industries, Inc., 33 F.3d 96, 99 (1st Cir. 1994) (citing the Supreme Court’s decision in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), for the idea that CERCLA expressly authorizes an action for contribution in section 113 and "implicitly authorizes a similar and somewhat overlapping remedy in section 107.").

\(^{115}\) 263 F.3d 134, 138 (5th Cir. 2001), reversed 312 F.3d 667 (5th Cir. 2002) (*en banc*). Despite explicit language in *Key Tronic* regarding an implied cause of action in section 107 for PRPs, no implied cause of action survived the enactment of section 113. See *supra* notes 92 – 95 and accompanying text.

\(^{116}\) *Aviall*, 263 F.3d at 145 (citing 42 U.S.C. § 9613).

\(^{117}\) *See* 42 U.S.C. § 9613.

\(^{118}\) 312 F.3d at 679 (emphasis added).

\(^{119}\) *Id.* at 690.

\(^{120}\) *Aviall*, 263 F.3d at 145; *see infra* note 231 and accompanying text (listing states that lack statutory private causes of action for cost recovery).
The Fifth Circuit's earlier panel decision would have been especially onerous to cities attempting to acquire contaminated brownfields to return them to productive use. Due to "the political desire not to pursue cities engaging in brownfields redevelopment," a city would rarely be subject to an administrative action. If other courts were to adopt the reasoning of the Fifth Circuit panel and not the en banc majority, cities would be forced to request an administrative order from the EPA or the state equivalent to initiate a suit for contribution. This may seem trivial, but it would constitute simply another technical, time-consuming hurdle to the achievement of brownfield redevelopment, unnecessarily consuming public resources and staff time.

3. The "Innocent Plaintiff" Exception

Perhaps in response to the harshness of their holdings, some courts have recognized an "innocent plaintiff" exception to the rule that potentially liable parties cannot sue under section 107(a). This section discusses the genesis of this exception, and how it has been applied both strictly and generously to those innocent parties attempting to make use of the exception to sue under section 107(a), rather than under section 113.

The "innocent plaintiff" exception has its roots in the "innocent landowner defense" to CERCLA liability, which is found in sections 107(b)(3) and 101(35)(A). Section 107(b)(3) provides that a PRP can escape CERCLA liability if the PRP can establish by a preponderance of the evidence: (1) that the release or threat of a release of a hazardous substance, as well as the resulting damages, were caused solely by (a) an act or omission of a third party other than an employee or agent of the PRP, or (b) an act or omission of a third party not committed in connection with either a direct or indirect contractual relationship with the PRP; (2) that the PRP exercised due care with respect to the hazardous substance concerned; and (3) that the PRP took precautions against foreseeable acts or omissions of the third party who caused the hazardous condition. In other words, if the person who polluted the environment was the PRP's employee or agent, or polluted in the course of a contractual relationship with the PRP, the PRP has no defenses to liability under these sections. In addition, even if the person who polluted the environment had no connection with the PRP, the PRP is liable if it failed to exercise due care or take reasonable precautions.

121. E-mail from Thomas W. Baker, Attorney, Indiana Department of Environmental Management Office of Legal Council (Sept. 18, 2001) (on file with author).
122. See infra note 128.
124. Id. § 9607(b)(3).
Prior to the 1986 amendments to CERCLA, courts construed the phrase "contractual relationship" to encompass a sale or lease of property. Thus, landowners who bought property from prior polluters had no defenses to CERCLA liability, even though they did nothing wrong except purchase the polluted property. The instrument transferring title created the necessary "contractual relationship."

In response to the inequitable treatment of innocent purchasers, as well as the fact that the rule seriously prevented people from even contemplating buying property that might be contaminated, Congress established the so-called "innocent landowner defense." Specifically, section 101(35)(A) of CERCLA now provides that if a PRP acquired real property after the disposal or placement of the hazardous substance, the PRP can take advantage of the innocent landowner defense and will not be considered in a contractual relationship with the seller, so long as: (1) at the time the PRP acquired the facility it did not know and had no reason to know that any hazardous substance was disposed of on, in, or at the facility; (2) the PRP is a government entity that acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation; or (3) the PRP acquired the facility by inheritance or bequest. It is, of course, the second element type of the innocent landowner defense that pertains most directly to cities desiring to acquire properties by eminent domain in order to remediate and redevelop them.

The good news is that section 101(35) provides that municipalities will not be liable to others for cleanup costs when they acquire property. However, by itself, it does not permit a city to use section 107 to recover cleanup costs from PRPs. The innocent landowner defense is simply a defense to CERCLA liability. Some courts have, however, extended this defense into an "innocent plaintiff" exception to the judge-made rule that requires PRPs to use section 113's contribution provisions to recover cleanup costs from other responsible parties.

128. New Castle County, 111 F.3d at 1124; Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F.3d 534, 548-49 (6th Cir. 2001); Rumpke of Indiana v. Cummins Engine Co., 107 F.3d 1235, 1240-41 (7th Cir. 1997); Redwing Carriers, 94 F.3d at 1496 (To bring a cost recovery action based solely on §107(a) Redwing would have to be an innocent party to the contamination of the Saraland Site). District Court decisions recognizing the exception include: Boyce v. Bumb, 944 F. Supp. 807 (N.D. Cal. 1996); Advanced Technologies Corp. v. Eliskim, 87 F. Supp. 2d 780 (N.D. Ohio 2000); Volunteers of America of Western N.Y. v. Heinrich, 90 F. Supp. 2d 252, 257 (W.D.N.Y. 2000), Burlington N. and Santa Fe Ry. Co. v. Cargill, Inc., 76 F. Supp. 2d 1155 (D. Kan. 1999) (discussing and declining to follow the lower standard of Rumpke and why not followed).
Courts have done this in two ways. First, some courts have decided that if and only if a PRP has a statutory defense to liability, then that person is by definition no longer a PRP and may proceed under section 107(a) instead of section 113. As one court described these rulings, "if an 'innocent party' exception [to the rule that PRPs must use section 113] is even possible, a question we need not decide here, it would therefore seem prudent to limit its applicability to those who can make out one of the defenses to liability that section 107 itself provides."

The Seventh Circuit Court of Appeals has carved out an even larger exception. In the Seventh Circuit, a party need not be able to demonstrate that it qualifies for the innocent landowner defense. Instead, even though a landowner is technically still a PRP, if this PRP can demonstrate that it did not contribute to the contamination in any way whatsoever, it can proceed under section 107(a) to recover its costs. For example, in *AM International v. Datacard*, the Seventh Circuit allowed a landowner who paid a lower purchase price for property because it knew it was buying into an expensive cleanup to proceed under section 107(a). This purchaser was a PRP because it had direct knowledge of the contamination, causing it to fail the first element of section 101(35)'s innocent landowner defense. Nonetheless, the court allowed the purchaser to proceed under section 107(a) to recover cleanup costs from the other responsible parties because it did not actually contribute to the contamination. The Seventh Circuit has stated,

[A] landowner who, although technically strictly liable for hazardous wastes on its property was innocent of the contamination, would not have to bring a contribution action under § 113(f) (because he did not 'contribute' to the contamination); he could instead bring a direct cost recovery action under § 107(a) against the responsible party.

Other courts have expressly left undecided the issue of whether PRPs who are nonetheless “innocent” with regard to the contamination,

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129. *See New Castle County,* 111 F.3d at 1124 (“We decide that a potentially responsible person under section 107(a), who is not entitled to any of the defenses enumerated under section 107(b), may not bring a section 107 action against another potentially responsible person”); *Franklin County Convention Facilities,* 240 F.3d at 548–49 (“Because we have concluded that CFA is not immune from CERCLA liability as an innocent landowner, CFA’s cause of action under CERCLA is properly characterized as an action for contribution under § 113”).


131. *See Rumpke of Indiana v. Cummins Engine Co.* 107 F.3d 1235, 1238 (7th Cir. 1997) (allowing landowner who alleged that he didn’t contribute to the contamination to proceed under section 107(a)).

132. *AM Int’l, Inc. v. Datacard Corp.,* 106 F.3d 1342, 1347 (7th Cir.1997).

133. *Id.*

134. *Nutrasweet v. X-L,* 227 F.3d 776, 784 (7th Cir. 2000) (internal citations omitted).
although technically liable under CERCLA, can proceed under section 107(a).^{135}

II. ACQUARING PROPERTIES CAN FORCE CITIES INTO SECTION 113.

Only four circuits have expressly recognized the "innocent plaintiff" exception.^{136} Some courts have been unwilling to do so, fearful of undermining a rule that supposedly "protects the strict liability scheme created by the statute."^{137} In jurisdictions not recognizing the exception, cities embarking upon a new policy of acquiring brownfields for redevelopment would risk being relegated to section 113 from the outset, and would never recover all their remediation costs. Only federal or state law changes like those discussed in Parts IV and V of this article would ensure them the use of section 107(a).

Jurisdictions that do recognize the "innocent plaintiff" exception—in both its limited and broad form—would allow cities that acquire contaminated property by eminent domain to proceed with a section 107(a) cost recovery action. In the Seventh Circuit, a city able to show that it in no way contributed to the contamination would qualify for the exception. In those other jurisdictions that recognize the innocent plaintiff exception only insofar as a party can make out one of the statutory defenses to liability, a city exercising eminent domain would also qualify for the exception.

However, the breadth of the innocent purchaser exception for acquiring properties through the use of eminent domain depends upon how the power is exercised. A city can wield its eminent domain power in two ways. It can either spend time and resources to obtain a formal state court adjudication of its right to acquire property by eminent domain, or it can threaten to do so. When confronted with a reasonable offer from a city attempting to acquire property for a public purpose, a landowner will often acquiesce rather than spend more money forcing the city to take the landowner to court.

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135. New Castle County, 111 F.3d at 1123 (expressly not deciding whether innocent or less than innocent landowner may proceed under section 107(a)); Sun Co. v. Browning-Ferris, 124 F.3d 1187, 1191 (10th Cir. 1997) ("We express no opinion on whether PRPs who assert their innocence with regard to any waste at a site may be able to recover all of their costs from other PRPs in an action under § 107."); Commander Oil v. Barlo, 215 F.3d 321, 332 (2nd Cir. 2001) ("We express no view as to whether a successful innocent owner defense negates potentially responsible party status because it was not clearly erroneous for the district court to determine that Commander Oil was not innocent within the meaning of the statute."). Other courts seem to have recognized the larger exception. United Technologies, 33 F.3d at 99 n.8 (suggesting that PRP who initiates cleanup might be permitted to bring a section 107 action).

136. Supra note 128. These are the 3rd, 6th, 7th, and 11th Circuits.

In fact, California Government Code section 7267.2 requires government agencies to obtain an independent fee appraisal and to make an offer to the owner before the agency may commence formal eminent domain court proceedings. The amount offered generally must not be in an amount less than the independent appraisal approved by the agency. Thirty other states have similar provisions, which serve the important policy goals of encouraging settlement and reducing state court dockets.

In any one of these thirty states, a landowner could accept a city's initial offer, thus precluding any formal exercise of eminent domain power. If this happened, the city might be forced to proceed under section 113 because it did not meet the elements of the eminent domain innocent landowner defense—that is, a court could decide that the city simply purchased the property outright and did not exercise its eminent domain power.

Whether the elements of the innocent landowner defense are satisfied involves interpreting both the eminent domain innocent landowner defense, as well as the substantive law of eminent domain in each particular state. There appear to be just two reported—and divergent—cases addressing whether the innocent landowner defense applies when a city has not formally exercised its eminent domain power. In the first case examined below, City of Toledo v. Beazer

138. Michael A. DiSabatino, Annotation, Sufficiency Of Condemnor's Negotiations Required As Preliminary To Taking In Eminent Domain, 21 A.L.R. 4th 765 (1983) (summarizing decisions from states with statutes requiring negotiations prior to initiation of formal condemnation proceedings, including Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Virginia, Washington, West Virginia, and Wisconsin). It is possible that more than the 30 states listed have similar requirements, although the author found none.

139. In such cases, for example, City of Toledo v. Beazer Materials & Services, Inc., discussed below, a city may be able to take advantage of the new Bona Fide Prospective Purchaser defense to CERCLA liability found in the Small Business Liability Relief and Brownfields Revitalization Act, supra note 20. This defense, located in a new section, 107(r), provides that a purchaser who knows of contamination before purchase shall not be liable, subject to certain conditions and exceptions, if the purchaser acquired the property after January 11, 2002. 42 U.S.C § 9607(r). There are as yet no reported cases on how this defense will work. Specifically, it is not known whether those jurisdictions that recognize the innocent plaintiff exception would expand the exception to include bona fide prospective purchasers, especially because the new defense is not one of the defenses to liability “located in section 107(b).” New Castle County, 111 F.3d at 1124 (“We decide that a potentially responsible person under section 107(a), who is not entitled to any of the defenses enumerated under section 107(b), may not bring a section 107 action against another potentially responsible person.”) There is no legislative record on this point. Cities that find themselves in the predicament of the City of Toledo should of course argue the bona fide prospective purchaser defense in the alternative, but how the new law might affect the interpretation of the eminent domain innocent purchaser defense is beyond the scope of this article.

140. In Transportation Leasing Co. v. State of California (CalTrans), 861 F. Supp. 931, 960 (C.D. Cal. 1993), the court held that the government's acquisition of land by eminent domain
Materials, Corp., the court found that unless a city actually goes through with formal eminent domain court proceedings, the city will not qualify for the defense and remains a PRP. Applying the rule that PRPs must proceed under section 113, a city in that jurisdiction must exercise its eminent domain power formally to qualify for section 107(a). In the second case, Emeryville v. Elementis Pigments, the court held that formal exercise of eminent domain is unnecessary to the eminent domain innocent landowner defense.

A. City of Toledo v. Beazer Materials & Services, Inc.

In the mid-1980s, the City of Toledo, Ohio, negotiated with Toledo Coke Corporation to purchase an old railroad right-of-way in order to widen Front Street in the old downtown industrial area. The city discovered dangerous levels of benzene and "other hazardous substances" in the soil and the groundwater at the site after purchase, and it sued prior owners and operators to recover costs of cleanup. As is typical in these cases, the prior owners and operators counterclaimed for contribution against the city. The city met the definition of a current owner under section 107(a), and thus was liable to the other parties under section 113, unless it could make out a defense to liability.

The city asserted the innocent landowner defense under section 101(35)(A)(ii), arguing that since it acquired the right-of-way by threatening to use its eminent domain power, it was exempt from CERCLA liability as a current owner. The court rejected this argument, holding instead that in the absence of a state court adjudication finding the city to have lawfully exercised its eminent domain power, the city failed to qualify for the innocent landowner eminent domain defense. Without closely considering the language of the defense itself—which requires only the "exercise of eminent domain authority by purchase or condemnation"—the court based its decision was done voluntarily, so section 106(20)(D), which carves out an exception to CERCLA liability for property acquired "involuntarily," did not apply. The court did not address the provisions of section 101(35) pertaining to eminent domain as a defense.

143. Id. The fact that the city discovered the contamination after purchase sets this case apart from the scenario this article explores—namely, that cities that know or suspect that property is contaminated will then aggressively pursue purchase (or condemnation) and cleanup of the property, as long as they know that they will be able to recover the costs of the entire process.
144. Beazer, 923 F. Supp. at 1014.
145. Id.
146. See supra notes 128–131 and accompanying text.
148. Id. at 1020–21.
on an examination of the substantive law of eminent domain in Ohio. The Ohio Revised Code, according to the court, requires the city to negotiate with the landowner.\textsuperscript{150} Only if the parties \textit{fail to agree} does the statute empower a city to exercise its power of eminent domain.\textsuperscript{151} Since the parties agreed, it follows that the city of Toledo did not exercise its eminent domain power under state law.\textsuperscript{152} That the city could have done so was of no consequence.

\textbf{B. Emeryville v. Elementis Pigments}

Emeryville is building its Bay Street mixed-use, pedestrian-oriented development on land whose cleanup was the subject of substantial litigation.\textsuperscript{153} In 1999, the City of Emeryville and the Emeryville Redevelopment Agency sued the prior owners of the property in U.S. District Court\textsuperscript{154} under CERCLA section 107(a) and 113,\textsuperscript{155} and California’s Polanco Act.\textsuperscript{156} Judge Alsup issued one preliminary opinion, which allowed the section 107(a) cost recovery claims to proceed to trial.\textsuperscript{157}

Emeryville purchased the property—which consists of about fifteen acres east of Interstate 80 and directly north of a new IKEA store—expressly to redevelop it. Originally, the Bay Street area was composed of four separate parcels; Emeryville had to assemble them from different owners to create a parcel large enough to attract developers.\textsuperscript{158} After Emeryville sued to recover its cleanup costs, all except one of the original owners settled—Elementis alone refused to pay Emeryville the cleanup costs of the parcel.\textsuperscript{159} Again, as in the Beazer case, Elementis

\begin{thebibliography}{9}
\bibitem{150} Appropriation of Property, OHIO REV. CODE ANN. §§ 163.04–163.05 (2002).
\bibitem{151} Beazer, 923 F. Supp. at 1020–21 (citing OHIO REV. CODE ANN § 163.04).
\bibitem{152} \textit{Id.}
\bibitem{153} City of Emeryville, \textit{supra} note 60.
\bibitem{155} Suing under section 113 was a contingency plan, in case the district court found that the city was precluded as a PRP from suing under section 107(a) because it did not qualify as an innocent landowner. As this section explains, the contingency plan was unnecessary because the court decided that the eminent domain innocent landowner defense applied.
\bibitem{156} CAL. HEALTH & SAFETY CODE § 33459 – 33459.8 (2001). The Polanco Act is the subject of Part IV of this paper.
\bibitem{157} City of Emeryville, \textit{supra} note 60, at 13. Soon after the issuance of the order, Elementis settled with Emeryville for $3.85 million. E-mail from Michael Biddle, City Attorney, City of Emeryville (March 7, 2002).
\bibitem{158} City of Emeryville, \textit{supra} note 60, at 5.
\bibitem{159} Interview with Michael Biddle, City Attorney, City of Emeryville, in Emeryville, Cal. (Nov. 3, 2000).
\bibitem{160} City of Emeryville, \textit{supra} note 60, at 12.
\end{thebibliography}
counterclaimed for contribution under section 113, asserting that the city was partially liable as the current owner.161

Before attempting to purchase any of the original four parcels, the City investigated the nature of the contamination.162 Lead, arsenic, petroleum hydrocarbons, heavy metals, volatile and semi-volatile organic compounds, pesticides, heavy metals, and numerous other toxic substances contaminated the soil and groundwater beneath the property.163 Industrial activities had commenced on the site in the 1920s, replacing a former racetrack and shooting gallery.164 Pesticide manufacturing, paint and pigment manufacturing, trucking operations, and machine shops contributed to the 25,000 cubic yards of contaminated soil (the equivalent of twelve miles of concrete trucks lined up end to end) and 635,000 gallons of contaminated water that the City eventually removed.165 Cleanup was completed May 8, 2000, although groundwater monitoring will continue for five more years.166

Emeryville had initially appraised the Elementis parcel at roughly $10 million, so it offered to purchase the property from Elementis for that amount, so long as Elementis turned over the property to Emeryville cleaned to California Department of Toxic Substances Control standards.167 Elementis ignored the offer.168 The City then offered one million dollars, representing market value less the estimated costs of cleanup.169 In response, Elementis filed an inverse condemnation lawsuit in state court.170 Emeryville then initiated formal eminent domain proceedings, filing an eminent domain suit against Elementis on February 18, 1998, seeking title to the parcel.171 On January 11, 1999, a state court held that the city was authorized to take the property by eminent domain.172 Significantly, this was the only one of the four original plots for which the city received a state court adjudication that its exercise of eminent domain was valid. Emeryville acquired the others by threatening to use eminent domain, and a state court adjudication was unnecessary because the owners agreed to sell the property to Emeryville outright.173

161. Id. at 13.
162. Id at 11.
163. Id. at 5.
164. Id. at 6.
165. City of Emeryville, supra note 60 at 12. The previous paint manufacturers on the property used acids and caustics that mobilized the arsenic—a byproduct of the paint and pesticide manufacturing—facilitating its migration into the groundwater. Biddle, supra note 159.
166. City of Emeryville, supra note 60 at 12.
167. Biddle, supra note 159.
168. Id.
169. Id.
170. City of Emeryville, supra note 60 at 9.
171. Id.
172. Id. at 10.
173. Biddle supra note 159.
Elementis argued that because Emeryville had purchased some of the property outright, the city had not actually exercised its eminent domain power over the Bay Street property and could not assert the innocent landowner defense. The court rejected that argument on two grounds. First, the plain language of the statute failed to support such a narrow reading of the eminent domain innocent landowner defense. Judge Alsup noted that the statute uses the words "exercise of eminent domain authority by purchase or condemnation." That language does not require any particular type of eminent domain proceeding, just the exercise of eminent domain authority generally, which includes simply encouraging landowners to sell by threatening the use of eminent domain. In addition, the words "by purchase or condemnation" encompass property acquisitions that are not solely the result of a judicial proceeding.

Second, the court expressed doubt that Congress intended to require "senseless litigation as a prerequisite to the defense or to saddle state courts with unnecessary litigation." Senseless litigation would frustrate CERCLA's purpose of ensuring the prompt cleanup of hazardous conditions. The court distinguished the City of Emeryville's case against Elementis Pigments from the City of Toledo v. Beazer case examined above. In contrast to Ohio law, California law expressly contemplates cities exercising eminent domain power without proceeding to litigation.

C. Courts Should Never Require a Formal Exercise of Eminent Domain Power

The Emeryville v. Elementis Pigments case was correctly decided. Cities that show they could have used their eminent domain power but ended up simply purchasing property should always be allowed to use section 107(a) to recover their costs of cleanup. Section (1) below explores why CERCLA's language probably encompasses not only the formal exercise of eminent domain under state law but also covers purchases that are merely initiated through the eminent domain process. Section (2) explains why a rule requiring the formal exercise of eminent domain power under state law would unnecessarily discourage brownfield redevelopment.

174. City of Emeryville, supra note 60 at 25.
175. Id.
176. Id.
177. Id.
178. Id. at 26.
179. Id. at 27.
I. Congressional Intent and the Statutory Language

Two interpretations of CERCLA's innocent landowner defense are possible. One, epitomized by Judge William Thomas in the *Beazer* case, is that Congress intended it state law alone to determine whether a property has been acquired "by purchase or condemnation." In this interpretation, eminent domain is what the particular state says it is, no more and no less. Another possible interpretation, used by Judge Alsup in the *City of Emeryville* case, is that the statutory language is not that narrow. Congress intended state law to govern insofar as the definition of "condemnation," but, since the entire phrase reads, "through the exercise of eminent domain authority by purchase or condemnation," there is room for federal courts to decide whether a local government acquired a site "through" the eminent domain authority, even though the site was purchased rather than formally condemned.

Unfortunately, there is no legislative history on this issue to provide guidance. The plain language of the statute indicates that Congress intended the language to be broader than Judge Thomas decided. The policy reasons based upon CERCLA's broad remedial purpose and related policy reasons—set forth in Judge Alsup's decision—also weigh heavily in favor of the federal courts having some role in characterizing local governments' acquisition of property by eminent domain.

A federal court deciding whether a city has properly exercised its eminent domain power in order to qualify for the innocent landowner defense might be wary of disregarding state common law rules on the matter. However, this concern can be set aside because eminent domain will still be defined by the state. When a federal court determines whether a city properly invoked the eminent domain power to hasten the purchase of a contaminated property, it is not overwriting state law on the matter. CERCLA's language—"by purchase or condemnation"—allows federal courts to decide that the innocent landowner defense applies when cities have actually exercised their eminent domain power.

182. This is because there are limits to how far CERCLA's remedial purpose can go when interpretations of state laws are at stake. Corporate successor liability under CERCLA demonstrates these limits well. In the *U.S. v. Bestfoods,* 524 U.S. 51, 62-63 (1998), decision, the U.S. Supreme Court implied that CERCLA's remedial purpose is an insufficient justification to reject state common law rules regarding when a corporation is liable for the actions of its subsidiaries. The remedial purposes and policy justifications were no excuse to rewrite this area of law. See Mank, supra note 181, at 1191.
(by state-defined "condemnation") and also when the city has only begun to do so (by purchase). Such an interpretation is consistent with CERCLA's statutory language and its broad remedial purposes, and it respects states' rights to decide their own state law.

2. **Requiring a Formal Exercise Would Discourage Brownfield Redevelopment**

In *City of Emeryville*, Judge Alsup stated that a rule requiring a formal exercise of eminent domain to qualify for the innocent landowner exception would spawn senseless litigation, burdening state courts and running contrary to CERCLA's remedial purpose. Even more important to the examination of this article, however, such a rule would constitute another barrier preventing cities from boosting their local economies by acquiring contaminated properties from unwilling sellers by eminent domain. Previous owners who accept an offer of purchase would be given an advantage in a city's subsequent suit for cost recovery, as that acceptance might require the city to proceed under section 113, rather than section 107(a).

The section 113 cause of action is vastly inferior to section 107(a)—it requires the plaintiff to prove each defendant's severable share of the contamination, it has a shorter statute of limitations, and some parties who have settled their liability already may be unavailable. \(^{183}\) There is even some question as to whether a city barred from section 107(a) would be able to initiate a section 113 contribution action at all without the participation of another regulatory agency—the Fifth Circuit has decided that there must be a section 107(a) suit or an administrative order as a predicate to a section 113 action. \(^{184}\)

In addition, a rule that precludes cities from pursuing a cost recovery action absent a formal exercise of eminent domain could cause cities to lowball their purchase offers to owners in order to ensure a state court adjudication. This raises both practical and policy concerns. As a practical matter, the strategy creates an extra financial burden on cities in the form of attorneys' fees spent on obtaining a state court adjudication, which private parties cannot recover under section 107(a). \(^{185}\) Equally important is the notion that federal law should not be structured to encourage cities to make disingenuous purchase offers, which effectively disrespect private owners' property rights, run contrary to state laws that attempt to encourage settlement, \(^{186}\) and create unnecessary conflict between a

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183. See supra Part II.C.1.
184. See supra notes 115–117 and accompanying text.
185. See Key Tronic Corp. v. United States, 511 U.S. 809 (1994); see supra text accompanying note 89.
186. See supra note 138 and accompanying text.
government and its citizens. Eminent domain is a powerful threat. Many state statutes embody the idea that eminent domain should be exercised only when attempts at amicable settlements with the landowner fail and when the public need is great. Both case law and the press contain numerous instances of cities and counties taking advantage of property owners, by either refusing to negotiate a purchase in good faith, or condemning property at too low a price. A rule that requires cities to go to court in every eminent domain action in order to ensure the use of section 107(a), would not only encourage cities to disregard property owners' rights, but would require it. Such a rule would force cities to ensure that they did not reach agreement with the landowner, as any agreement would preclude a section 107(a) cause of action.

This discussion assumes that cities are aware of the pitfalls posed by acquiring a site through the exercise of eminent domain. Many cities lack the legal expertise to be able to take precautionary action to protect their section 107(a) cause of action, if they even know of the eminent domain exception to liability in the first place. In one California case, City of Merced v. R.A. Fields, Inc., the city acquired land by eminent domain, and then the city brought a cost recovery action against a number of drycleaners for polluting the groundwater with PCE. The court held that the city could not bring a claim under CERCLA section 107(a) but was limited to a contribution claim under section 113. Even though the city had formally exercised its eminent domain power to acquire the property, the city was apparently unaware of the eminent domain liability exception in section 101(35). The city failed to argue to the court that it was entitled to proceed under section 107(a) since it qualified for the innocent landowner defense. This case illustrates that at least some cites lack the legal expertise required to ensure the most complete cost recovery possible.

A rule requiring the actual exercise of eminent domain would simply be one more factor making brownfield redevelopment too expensive and time-consuming for cities. To avoid being relegated to section 113 would require a level of legal expertise that some cities do not possess. For other cities with such expertise, such a rule would require wasting time and

187. See, e.g., Carpenter Tech. Corp. v Bridgeport, 180 F.3d 93 (2nd Cir. 1999), for a good example of abuses that might occur if cities are encouraged to ignore owners and to refuse to negotiate in good faith, in order to force the eminent domain action into state court. In this case, the city began formal condemnation proceedings without first negotiating with the landowner. An incredibly low offer finally arrived, to which the owner had just 48 hours to respond. See also Loy L. King, Editorial, Eminent Domain Should Be the Last Resort Protecting Private Property Rights, ROANOKE TIMES & WORLD NEWS, Jan. 1, 2001, at A9.


189. Id. at 2.
money on attorneys in order to obtain a state court adjudication that the city properly exercised its eminent domain power. Courts should be loathe to interpret CERCLA’s eminent domain innocent landowner defense as strictly as the court did in City of Toledo v. Beazer. For at least those thirty states that require cities to make reasonable offers to purchase property as a prerequisite to acquisition by eminent domain, courts should follow Judge Alsup’s lead in the Emeryville case—when a reasonable offer is accepted, cities should still qualify for the innocent landowner defense and be permitted to proceed under section 107(a) in their suits for cost recovery.

III. CITIES SHOULD BE TREATED AS STATES IN COST RECOVERY ACTIONS

The previous sections explain the differences among a section 107(a) action for cost recovery by states or the federal government, a section 107(a) cause of action by private parties (which include cities), and a section 113 suit for contribution. They also show how cities may be forced, in some circumstances and in some jurisdictions, to proceed under section 113. This article has argued that the section 107(a) cause of action should always be available for cities that acquire property by eminent domain in order to clean up and redevelop it.

Part A of this section presents the argument that Congress should amend CERCLA to allow cities to bring a section 107(a) action for cost recovery with the same standing as a state or the federal government. In other words, cities should also be permitted to recover their attorneys’ fees and receive the presumption of consistency with the NCP, which only the stronger cause of action in section 107(a) allows. At this point, legislation alone can alter cities’ status under section 107(a). If Congress fails to amend CERCLA, which is likely, Part B argues that

190. The first court to rule on whether cities were essentially “states” under CERCLA found that “by liberally construing the language of CERCLA in light of its broad remedial purposes...a municipality is a state or authorized representative thereof for purposes of invoking the provisions of CERCLA,” and that “such a construction of the Act is consistent with its purpose to encourage and facilitate the cleanup and treatment of hazardous wastes in order to protect and preserve natural resources and the public health.” Mayor of Boonton v. Drew Chem. Corp., 621 F. Supp. 663, 668 (D.N.J. 1985). Only a few courts followed Judge Ackerman’s lead. See, e.g., City of New York v. Exxon Corp., 633 F. Supp. 609, 619 (1986) (S.D.N.Y. 1986) (allowing cities to bring a section 107(a) action for natural resource damages reserved for states and the federal government because “the clear purpose of [CERCLA], which is to ensure prompt and effective cleanup of hazardous wastes and the restoration of environmental quality, is not advanced by preventing the authorities entrusted with the management of public resources from bringing actions to recover the cost of protecting them.”). After Judge Ackerman overruled himself in Mayor of Rockaway v. Klockner & Klockner, 811 F. Supp. 1039, 1048-49 (D.N.J. 1993), no court has allowed a city to proceed solely as a “state” under CERCLA section 107(a). See, e.g., City of Detroit v. Simon, 247 F.3d 619, 628 (6th Cir. 2001).
courts can and should allow redevelopment agencies, as opposed to cities, to proceed as states under section 107(a).

A. General Policy Reasons Support an Amendment.

The policy reasons that allow states and the federal government to bring the stronger of the two section 107(a) cost recovery actions are equally applicable to cities, and the differences between cities and states that Congress may have had in mind when it passed CERCLA in 1980 may not be as numerous or as meaningful as they once seemed.

Courts have recognized the great importance of allowing the government to recoup tax dollars spent by government on cleanup under section 107(a). Indeed, when states and the federal government bring a section 107(a) action, the burden of proof is on the defendant to show the cleanup was inconsistent with the NCP, and only government plaintiffs can recover attorneys' fees. Courts have recognized this superior purpose of section 107(a) to allow the government to recoup taxpayer dollars.

The importance of recouping taxpayers' dollars is no less significant when a city's budget is at stake. When a business leaves a community with unusable, polluted property, it forces a city to step in to clean it up. That business should be responsible for the city's costs. Otherwise, the costs are externalized to the city's taxpayers. These taxpayers often bear too many of the ill effects of polluting industries and should not be forced to also pay for the cleanup.

In addition, elementary public economics supports requiring industries to internalize all of the costs of production so that a firm's private costs of production are not lower than the social costs. A business that is able to force the public to pay its environmental costs will produce more of its product than it would if it were required to pay its own cleanup costs. Overproduction burdens the environment and the public. Granting cities the public cause of action under section 107(a) would help force businesses to account for all the costs of their activities.

Treating cities like states and the federal government will also serve CERCLA's broad remedial purposes. The goal of CERCLA is to promote the prompt cleanup of hazardous waste, and the incentives
offered by a section 107(a) action are not trivial. If cities were allowed to proceed as states under section 107(a), they would benefit from a shift in the burden of proof and the ability to recover attorneys' fees. Cities, which are in the best position to plan and accomplish brownfield redevelopment, would be able to move forward with their development plans.

A shift has occurred since Congress originally passed CERCLA—large sites have been cleaned up, while thousands of smaller, brownfield sites have been discovered. Often only cities know where these sites are, the developers who might be willing to purchase them, and which sites should be cleaned up first to jump start the local economy. Cities exist at the correct scale to address the brownfield problem. While one might argue that private parties would also benefit from a stronger section 107(a) cause of action, there is no reason for Congress to go that far. Private parties are not in the unique position of cities to remedy the brownfield problem.

In addition, treating cities like states or the federal government would alleviate the pitfalls (discussed in Part II of this article) that cities encounter when acquiring sites by eminent domain and attempting to recoup the costs from responsible parties. If Congress amended CERCLA to treat cities like states or the federal government, cities would probably be permitted to proceed under section 107(a) regardless of whether they were potentially liable or not. Courts have allowed states and the federal government to proceed under section 107(a), even though they are PRPs. Although no federal circuit court decisions has yet considered this issue, the several district courts that have considered the question have found that due to the special prominence of states and the federal government under section 107(a), state and federal governmental plaintiffs are permitted full cost recovery under section 107(a). In dicta, the Tenth Circuit stated that "a government entity (Federal, State or Indian) or a party who did not contribute to the waste may recover all of the federal government be immediately given the tools necessary for a "prompt and effective response" to hazardous waste problems)."

196. See supra note 62 and accompanying text.

its expenditures in a traditional §107(a) 'cost recovery' action against a PRP.198

These arguments in favor of treating cities like states or the federal government do not suggest that there are not real differences between these political entities. Cities exercise their eminent domain power to a much greater extent than states or the federal government. Indeed, that is why this article argues that federal law should encourage cities to acquire, remediate, and redevelop brownfield sites. It is possible that Congress did not and does not desire that cities take on such a role. One could argue that Congress' failure to amend this aspect of CERCLA in this regard over the last 22 years indicates its continuing approval of a scheme that disallows the use of the public section 107(a) cause of action by cities.

More likely, however, Congress may not have thought cities needed to take on a cleanup function when it first enacted CERCLA, and may not yet possess the enthusiasm to overcome Congressional inertia to amend the section. While there is limited legislative history on the matter, Congress clearly thought of CERCLA as a remedy for the large toxic waste sites that drew national attention.199 Cities were not in a position to take the lead on those types of sites, so there may have been no reason to arm them with as strong a cause of action as states or the federal government. Since the passage of CERCLA, however, the brownfield problem has become increasingly apparent, and cities are in a key position to implement solutions. Congress may now favor granting cities the power to recover all their costs under section 107(a), just as states and the federal government are now able.

Since not all cities are as small, expert, and capable as Emeryville, it may seem undesirable to encourage these cities to undertake ownership of contaminated sites. It is not clear, however, that states or the federal government have an ability superior even to that of the most over-burdened city to handle brownfield redevelopment. The federal


199. See President Jimmy Carter, Remarks on Signing H.R. 7020 Into Law, 16 Weekly Comp. Pres. Doc. 2798 (December 11, 1980) ("[This law responds] directly and quickly to some of the highly publicized problems with toxic wastes that are just representative of many similar challenges and problems throughout the country. Love Canal and Valley of the Drums come to my memory right this moment."); Representative Culver, Committee Print, Vol. III, 97th Cong., 2d Sess. 1983; A Legislative History Of The Comprehensive Environmental Response, Compensation, And Liability Act Of 1980 (Superfund) (7C) ("[W]e have seen that the disastrous leakage of chemicals in such dumps as the La Bounty Site in Charles City, Iowa, or the Love Canal in New York, can cause premature death and irreversible damage to the health of an unsuspecting public. And, in other cases, such as the contamination of Lake Erie with the insecticide Mirex, and the release of polychlorinated biphenyls (PCB's) into the Hudson River, we have seen that the economic losses from a single release can add up to tens of millions of dollars, or even hundreds of millions of dollars, very quickly.").
government's track record on cleaning up Superfund sites has been heavily criticized, and the differences in ability between states and the federal government, on one hand, and cities, on the other, may not be as large as was once thought. It is also important to remember that any remediation initiated by a city still requires state certification once complete. If state agencies' oversight is reliable, cities utilizing a stronger section 107(a) cause of action to recover costs of brownfield cleanup will get the cleanup done correctly.

The issue is whether the differences between cities and states or the federal government still matter or should prevent cities from addressing the brownfield problem. Given the practical insignificance of differences between cities and states or the federal government for the purposes of brownfield redevelopment, there is no current reason to exclude cities from the stronger of the two section 107(a) actions for cost recovery. A narrowly-tailored amendment to CERCLA could grant cities the status of states and the federal government only for the purposes of section 107(a), leaving aside the issue of whether cities should be allowed to recover natural resource damages under section 107(f). While Congress has been reluctant to make any major revisions to CERCLA, it has been open to small amendments. When, or if, Congress ever decides to amend CERCLA, it should provide cities with the stronger section 107(a) cause of action.

B. Redevelopment Agencies Should be Considered "States" Under Section 107(a).

If Congress fails to amend CERCLA, it is still possible for courts to promote brownfield redevelopment through an interpretation of the word "states" in CERCLA. No court has decided whether redevelopment agencies—as opposed to cities—should be allowed to proceed as "states" under section 107(a), but there are strong arguments that they should.

All the general policy concerns explored in Part A of this section, which provide support for the idea that cities should be allowed to proceed as states under section 107(a), apply with equal or greater force to redevelopment agencies, whose primary purposes are to redevelop and return land back to productive use. CERCLA's remedial purpose and redevelopment agencies' primary mission are also in harmony. CERCLA's mandate is "to provide for the expeditious and efficacious
cleanup of contaminated property;" redevelopment agencies operate under state law to rehabilitate areas that fail to provide services to residents or that endanger public health and safety. The conditions that call for the creation of redevelopment agencies are specifically "beyond remedy and control solely by regulatory processes in the exercise of police power," and require the extra powers granted by the state legislature. Just like cities, and unlike the state or the federal government, redevelopment agencies know locations of brownfield sites within their jurisdiction, and could play a key role in cleaning up the over 500,000 brownfield sites estimated to exist in the United States.

In addition to strong policy considerations, the textual constraints that courts have viewed as determinative when denying "state" status to cities suing under section 107(a) are arguably nonexistent with regard to redevelopment agencies. One district court has stated that equating cities with states "would unnecessarily contradict the plain meaning of CERCLA." This is because CERCLA defines "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." However, CERCLA specifically defines a "state" as the several States of the United States, without mentioning municipalities at all. Because CERCLA defines persons and states in this way—leaving municipalities out of the definition of "state" but including them in the definition of "person"—courts agree that it would contradict the plain meaning of the statute to consider cities and states as one and the same.

This textual constraint would disappear if courts treated redevelopment agencies as "arms of the state." Black's Law Dictionary defines an arm of the state as "an entity created by a state and operating as an alter ego or instrumentality of the state, such as a state university or a state department of transportation." A political subdivision, on the other hand, is "a division of a state that exists primarily to discharge some function of local government." While state and federal laws treat cities and municipalities as political subdivisions, redevelopment agencies are

205. CAL. HEALTH & SAFETY CODE § 33035(b) (2001).
206. City of Toledo v. Beazer Materials and Serv., Inc., 833 F. Supp. 646, 652 (N.D. Ohio 1993); see also Blake A. Watson, Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?, 20 HARV. ENVTL. L. REV. 199, 301 (1996) (documenting "majority" of decisions in which federal courts prohibited cities from proceeding under section 107(a) as states based on a plain reading of the CERCLA's text).
209. BLACK'S LAW DICTIONARY (7th ed. 1999).
210. Id.
seen either as an arm of the state or a political subdivision of a state, depending on the context.

The remainder of this section briefly reviews the contexts in which arms of the state are distinguished from political subdivisions. It then argues that in the context of CERCLA, courts should be open to the interpretation that redevelopment agencies are arms of the state—not political subdivisions—thus entitled to take advantage of the stronger section 107(a) cause of action given to states and the federal government.

One major context in which courts attempt to distinguish between arms of the state and its political subdivisions is in federal Eleventh Amendment jurisprudence. Very generally, the Eleventh Amendment shields states from being sued in federal courts by private citizens, but it does not shield political subdivisions of a state from such suits. Thus, to determine whether a suit against a state can proceed, it is necessary to differentiate the "arms of the state" from its "political subdivisions."

The Supreme Court has articulated a general approach to help courts in this task, but the jurisprudence is anything but clear. The circuits each employ different formulations of a balancing test, weighing a variety of factors, such as how state law characterizes the entity, how many members of the governing board the state appoints, the mission of the entity, and the degree to which state policy controls the entity's actions. Needless to say, differentiating entities in this way is difficult, illustrated by the fact that the Second and Third Circuits once applied their respective tests to the same interstate transit agency and reached opposite results on whether the Port Authority was an arm of New York and New Jersey or one of these states' political subdivisions.

State courts also distinguish between arms of the states and political subdivisions, and their approach is just as imprecise. State courts have used various methods to decide whether an entity may be sued in state court under state tort claims acts, whether debts incurred by an entity

211. Hans v. Louisiana, 134 U.S. 1, 18-21 (1890).
213. See id.
216. The terminology is not necessarily even kept distinct. See, e.g., Yanero v. Davis, 65 S.W.3d 510, 526 (Ky. 2001) ("[A]school board is a political subdivision and arm of the state government.").
would be considered debts of the state, whether an entity is exempt from real estate taxes, and whether acts of an entity are the proper subject of the ballot initiative process, among other things. The criteria used to decide these cases and to distinguish state from local entities vary significantly. In some cases, whether the entity is pursuing a "state concern" controls. In other cases, whether or not a local governing body may put restrictions or prerequisites on the entity's operations matters most.

Determining whether a governmental entity is an arm of the state or a political subdivision of the state based upon the functions it performs or its funding structure may be misguided. In an era of privatized prisons and interstate governmental agencies, many have argued that the courts should instead look at the federalist principles behind the Eleventh Amendment to find guiding criteria to help differentiate arms of the state from its political subdivisions. Specifically, one first should identify the principles that led to the distinction in the first place, and then apply those principles in making the determination. Thus, if under the Eleventh Amendment, impinging on state sovereignty is the concern, then the state's own characterization of the entity and whether a judgment would affect the state treasury should control.

Likewise, in the CERCLA context, one must first decide why the distinction between states and the federal government, on one hand, and cities and political subdivisions, on the other matters. Unfortunately, Congress gives no guidance on this issue, as the legislative history is scant. At the very least, the remedial purposes behind the statute should guide the inquiry. Cleaning up properties and putting them back into productive use is CERCLA's primary goal, and a redevelopment agency's primary mission—as defined by state law—is to redevelop land within its purview. These critical facts should lead to the conclusion that in the CERCLA context, redevelopment agencies are "arms of the state"

218. Stallings & Sons, Inc. v. Ala. Bldg. Renovation Finance Auth., 689 So. 2d 790, 793 (Ala. 1996) (holding that a public corporation is an entity separate and distinct from the state, and debts of such corporation are not debts of the state, within the purview of state constitutional restriction on acts creating new debt against the state).


221. See, e.g., id. at 154.

222. See, e.g., Land Clearance Auth., 790 S.W. 2d, at 455.


224. Rogers, supra note 214, at 1303.
and not "political subdivisions." In other words, since state law has specifically authorized redevelopment agencies’ powers and those powers are to be exercised directly in concert with CERCLA’s remedial purposes, courts should consider redevelopment agencies arms of the state under CERCLA. 225

Similar to amending CERCLA to allow cities to bring section 107(a) causes of action as states or the federal government, however, the argument that redevelopment agencies should be treated as arms of the state requires one to set aside the real, qualitative differences that exist between states and the federal government, and redevelopment agencies—differences that Congress may have had in mind when it made the distinction between cities and states in the first place. 226 Any differences between cities and states, however, are of even lesser importance between states and redevelopment agencies because redevelopment agencies are not saddled with the competing and conflicting political mandates city governments face, which would distract them from the remedial enterprise.

Since CERCLA distinguishes between states, on the one hand, and political subdivisions, on the other, courts should consider redevelopment agencies to be arms of the state in the CERCLA context, because it comports with CERCLA’s broad remedial purpose and eleventh amendment guiding criteria. This would allow redevelopment agencies to take advantage of the stronger section 107(a) cause of action and thus promoting brownfield redevelopment. Even if courts do not adopt this interpretation, or if Congress fails to amend CERCLA to elevate the status of cities under section 107(a), the ability to promote brownfield redevelopment through more complete cost recovery still exists. The next section discusses how California’s Polanco Act has solved the cost recovery dilemma.

IV. CALIFORNIA’S POLANCO ACT: A SOLUTION FOR THE COST RECOVERY DILEMMA

California passed the Polanco Redevelopment Act in 1990. 227 Since then, it has become “one of the most powerful tools in the California redevelopment arsenal.” 228 It empowers municipal redevelopment

225. This approach would be similar to the “state action” doctrine under the Sherman Antitrust Act. Any political entity—state agencies or political subdivisions like cities—enjoy “Parker Immunity” when acting according to an unequivocal state mandate or express state authorization. Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). As such, the state action doctrine balances the competing concerns of preventing private collusion and respect for state sovereignty.

226. See supra note 199, on legislative history, and accompanying text.


agencies to “take any actions” that they determine necessary “to remedy or remove a release of hazardous substances” from a redevelopment project area. In short, it allows redevelopment agencies to identify brownfield sites within their borders and to initiate the cleanup, by either pressuring the owners of the sites, or by undertaking the cleanup themselves after acquiring the site by eminent domain. State agencies are responsible for oversight, but otherwise redevelopment agencies, which have a stake in the future use of these sites, can take the first steps, ensuring that their brownfields are not ignored. Under the Polanco Act, redevelopment agencies can act like mini-EPAs, issuing cleanup orders for sites that they do not yet even own. Or, they can acquire the property with their eminent domain power, and clean it up with funds recovered from responsible parties.

This section will explain what makes the Polanco Act such an important supplement to the federal CERCLA law; it will show how the law helps redevelopment agencies overcome the barriers to brownfield redevelopment and will address some of the Polanco Act’s shortcomings. Throughout, this section will also contrast the Polanco Act with other states’ hazardous waste cleanup laws.

All states have the power to remedy CERCLA’s shortcomings by providing cities or redevelopment agencies with the ability to recover all the costs of brownfield redevelopment. A survey of state law, however, reveals that only seventeen states have hazardous waste laws that give a city an action for cost recovery in any form, and none have all the components embodied in California’s Polanco Act. Often those states that do provide a cause of action lack key incentives for cities to embark upon a strategy of brownfield cleanup and redevelopment, by, for example, failing to allow for recovery of attorneys’ fees or joint and several liability.

State laws are also important to forestall any potential problems court interpretations of CERCLA could create. In Aviall Services v. Cooper Industries, a Fifth Circuit panel held that a PRP—barred from using CERCLA section 107(a)—could not bring an action for contribution either, unless there had been a prior or pending federal administrative action or a private section 107(a) action claim before a

230. Id.
231. The following states lack either a private right of action or a hazardous waste clean up law altogether: Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Maine, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, and Wyoming. Some of these states have voluntary cleanup programs or private statewide liability relief, but none have a state law that would allow a city to acquire a site by eminent domain, and then sue a responsible party for the costs of cleanup.
PRP could initiate an action for contribution. Acknowledging the discouraging effect this might have on private parties who might undertake cleanups voluntarily, the court stated that, instead of using CERCLA, "[p]arties may be able to rely on state environmental laws to recover costs from other liable parties." When thirty-two states lack such a law, this faith in current state laws to remedy CERCLA's defects is certainly misplaced. An en banc court reversed the Aviall decision. Nevertheless, the earlier panel holding and the possibility that other circuits could decide the issue similarly underscores the need for changes in cost recovery procedures at both the state and federal level.

A. The Polanco Act Goes Beyond CERCLA.

1. Attorneys' Fees

CERCLA section 107(a) allows only a state or a federal agency to recover attorneys' fees. The Polanco Act goes further and allows redevelopment agencies to recover attorneys' fees from responsible parties. Michael Biddle, city attorney for Emeryville, labeled this the Polanco Act's most important provision. It compensates municipalities for their own city attorney time, as well as for the costs of hiring outside attorneys to assist on cases, which is often required. For the Emeryville v. Elementis Pigments case, Emeryville used four attorneys from two separate firms in addition to the city attorney. Government expenditures on attorneys' fees are much less than the amounts spent by private industry and insurance companies, which aggressively litigate CERCLA-related claims. Regardless, attorneys' fees are a large part of government outlays spent on cleanup.

As a practical matter, even if the redevelopment agency fails to recover attorneys' fees, the mere fact that they are available at the outset of negotiations alters the balance of power. Large polluters, who might otherwise threaten drawn out legal action knowing that their opponents cannot afford it, would have nothing to gain from such tactics. In addition, the possibility of recovering attorneys' fees makes the

232. Aviall, 263 F.3d at 138; see supra notes 115–120 and accompanying text.
233. Id. at 145.
234. 312 F.3d 677 (2002).
235. See, e.g., United States v. Chapman, 146 F.3d 1166, 1173 (9th Cir. 1998); see also supra text accompanying note 89; Key Tronic Corp. v. United States, 511 U.S. 809 (1994).
237. Biddle, supra note 159.
redevelopment agency's decision to become involved with a site that much easier. When weighing the pros and the cons of acquiring a brownfield site, the possibility of compensation for attorney time counts heavily on the side of acquisition. The calculus could turn out differently for cities in states such as Michigan and Wisconsin, which have a cause of action for cost recovery under their state laws but do not have the possibility of recovering attorneys' fees.

2. Consistency with the NCP

In addition to enabling recovery of attorneys’ fees, the Polanco Act, as interpreted by Judge Alsup in Emeryville v. Elementis Pigments, entitles redevelopment agencies to a presumption of consistency with the NCP. First, section 33459(c) of the Act allows a redevelopment agency to recover costs to “the same extent” as the state Department of Toxic Substances Control, which is an arm of the state. Then, section 33459.4(c) states that the “scope and standard for cost recovery... shall be the scope and standard of liability” under CERCLA. Therefore, a redevelopment agency under the Polanco Act is entitled to a presumption of consistency with the NCP, just as are states and the federal government are under section 107(a) of CERCLA.

Under Judge Alsup's reasoning, defendants in Polanco Act claims of redevelopment agencies' will be unable to tie up the cases and waste countless hours of attorney time bickering about whether the cleanup was consistent with the NCP. Instead, the defendants will bear the burden of coming forward with good evidence of inconsistency or letting the issue drop altogether. This result clearly furthers the goal of quick, efficacious cleanups and suits to recover the costs of those cleanups.

3. Ability to Recover from Responsible Parties

There was only one defendant in Emeryville v. Elementis Pigments, so the issue of whether defendants can be held jointly and severally liable for contamination was not before the court. Regardless, since the standard of liability for redevelopment agencies under the Polanco Act is probably the same as it is for the state of California, as discussed above, a redevelopment agency should be able to hold a party liable for the entire cost of remediation, just as a state could under CERLCA. Using CERCLA, a redevelopment agency may hold a defendant jointly and severally liable only under section 107(a). Without the Polanco Act, a

242. City of Emeryville, supra note 60 at 33.
redevelopment agency forced to proceed under section 113 would recover only the defendant's severable share of the contamination.²⁴³

A survey of other states reveals that many, including Illinois, Indiana, Louisiana, New Hampshire, Ohio, Texas, and Utah,²⁴⁴ provide cities with a cause of action for cost recovery but allow them to recover from responsible parties only severally—that is, only for the parties' proportional share of the contamination. The debate over CERCLA's joint and several liability provisions has been ongoing,²⁴⁵ and, in many ways, it is a debate about who should bear the costs of tracking down and collecting from all the parties who had some hand in contaminating a site and who should bear the costs of "orphan shares"—those shares of cleanup costs for which the responsible parties have neither assets nor insurance. Since the Polanco Act shifts both types of costs to responsible parties, a redevelopment agency will be more likely to move forward with the acquisition and cleanup.

In addition to creating joint and several liability, the Polanco Act uses a more expansive definition of responsible party, decreasing the likelihood that no responsible parties will be found. Specifically, section 33459 of the Polanco Act defines a responsible party as one who is responsible under section 107(a) of CERCLA, as well as under section 13304 of California's Water Code. Not only are all owners and operators, transporters, and all other responsible parties under CERCLA responsible under the Polanco Act, but anyone who discharges, causes, permits, or threatens to discharge, cause, or permit waste to be discharged into any water of the state is also responsible.²⁴⁶ Some parties who may escape liability under CERCLA may thus be held responsible under the Polanco Act.

More important, by referencing this portion of the Water Code, the Polanco Act, unlike CERCLA, has no petroleum or asbestos exclusions.²⁴⁷ The Polanco Act thus allows claims for cleanup of contamination due to leaking gasoline or oil, making many more sites, such as abandoned gas stations, available for cleanup and redevelopment.

²⁴³. See supra text accompanying note 98; Pinal Creek Group v. Newmont Mining Corp., 188 F.3d 1298, 1303 (9th Cir. 1997); Redwing Carriers, Inc. v. Saraland Apts., 94 F.3d 1489, 1513-14 (11th Cir. 1996).
²⁴⁷. The petroleum exclusion is found in 42 U.S.C. § 9601(14) ("The term 'hazardous substance'... does not include petroleum."). Courts have also interpreted the placement of asbestos in a building as not "disposal" of hazardous substance within meaning of CERCLA. 3550 Stevens Creek Assoc. v. Barclays Bank of California, 915 F.2d 1355, 1362 (9th Cir. 1990).
Attorney William Brown, who has used the Polanco Act for at least fifteen clients since 1993—the year he brought the state’s first Polanco Act claims on behalf of the Chula Vista Redevelopment Agency—believes this provision to be the Polanco Act’s most crucial. He estimates that 80 percent of all brownfield sites that a city confronts are contaminated service stations or leaking underground storage tanks of some kind, and at least half of those can be traced to major oil companies.248 Empowering local redevelopment agencies to recover completely from these parties furthers the goal of brownfield redevelopment.

4. **Longer, More Flexible Statute of Limitations**

Recall from Part I.B that the statute of limitations for cost recovery actions under CERCLA section 107(a) is six years from the time site cleanup begins, while the statute of limitations for a section 113 action is just three years from the initial administrative order or suit by another responsible party. In stark contrast, the Polanco Act’s statute of limitations is three years after “completion of the remedy or removal.”249 The elongated timeframe for cost-recovery works a tremendous benefit. Rather than scrambling to put together a lawsuit while cleanup is ongoing, a redevelopment agency can wait until cleanup is complete and then devote its full attention toward recovering from a responsible party. Even the most advanced redevelopment agencies have limited staff resources. Removing the pressure of commencing a lawsuit is a very important aspect of the Polanco Act. It further eases any redevelopment agency’s decision to proceed with brownfield acquisition and redevelopment.

5. **Polanco Act Claims Trigger Insurance Duties**

In *Foster-Gardner, Inc. v. National Union Fire Insurance Co.*, the California Supreme Court held that the California EPA’s administrative order requiring an insured party to remediate a polluted property was not a “suit” triggering the insurers’ duty to defend under the insured’s comprehensive general liability policy.250 Decisions in at least two other states—Illinois and Maine—have resulted in similar holdings.251

251. Mark S. Dennison, Annotation, What Constitutes "Suit" Triggering Insurer's Duty To Defend Environmental Claims—State Cases, 48 A.L.R.5TH 355 §§ 7(a)-(b) (1997) (noting cases in which state courts have found that administrative orders trigger the duty to defend and those cases in which they have not).
by redevelopment agencies in California, pursuant to the Polanco Act, however, do trigger the insurance duty. Access to the greater resource pool available through insurance companies further ensures more complete cost recovery by municipal redevelopment agencies. Unfortunately, until other states empower redevelopment agencies to do the same, only redevelopment agencies in California will have this benefit.

6. Immunity from any Further State Actions

As explained in Part C of the Introduction, there are two major categories of barriers to brownfield redevelopment. The first can be categorized as financial. The plaintiff-friendly cost recovery provisions of the Polanco Act outlined above give redevelopment agencies the ability to overcome the financial barriers to brownfield redevelopment by enabling them to recoup theircleanup costs from previous owners and other responsible parties.

The Polanco Act also addresses the second category of barriers to brownfield redevelopment, namely, the purchasers’ and lenders’ legal and regulatory concerns. Developers and lenders know that under seemingly clean and cleaned up property can lie hazardous contamination requiring thousands or millions of dollars in cleanup for which CERCLA and state law will hold them responsible. The Polanco Act gives future owners and users of contaminated property protection from any further state level requirements for cleanup of that contamination. Once property has been cleaned up to standards outlined by the California Environmental Protection Agency, purchasers cannot be liable for additional cleanup if, for example, residual contamination is discovered. The person or parties responsible for the original contamination, however, are never off the hook. If there are further problems, these original polluters can be required to pay for them.

CERCLA’s immunity provisions and administrative liability assurances provided by other federal agencies are not the subject of this article. In general, however, federal initiatives seek to limit liability for cleanups on a case by case basis, through the use of prospective purchaser agreements. If a site has been cleaned up satisfactorily according to the EPA, then the EPA will provide assurances that it will not hold subsequent purchasers and their lenders responsible if something later

252. See supra note 74 and accompanying text.
goes wrong with the cleanup. These agreements, however, can be time-consuming and expensive to execute. In addition, there are no guarantees that unforeseen circumstances will not render the agreement useless or ineffective.

The Polanco Act’s more general immunity provisions grant immunity from any further state level liability for the contamination to (1) the redevelopment agency; (2) any party that enters into an agreement with a redevelopment agency for redevelopment of the property; (3) any future purchasers of the property; and (4) lenders who provide the financing to either the purchasers or the developers. This immunity is not renegotiated at the outset of each new brownfield redevelopment project by redevelopment agencies that may not have the legal or technical expertise—or simply the time—to do so. Instead, every development embarked upon under the Polanco Act receives immunity automatically.

B. The Polanco Act’s Shortcomings

I. The Act is Ineffective when Responsible Parties are Unavailable.

The Polanco Act cannot completely replace federal and state brownfields programs that make funds available for redevelopment. The Act, following the lead of the federal CERCLA law, adopts the philosophy that those who polluted a site should be responsible for paying for its cleanup. Therefore the Polanco Act does not make funding available for site assessments or cleanups. Instead, its plaintiff-friendly provisions, such as the presumption of consistency with the NCP and the ability to recover attorneys’ fees, give redevelopment agencies the potential to recover all their costs spent on cleanup and redevelopment from the parties responsible or indirectly through the price developers pay for the land.

Unfortunately, some brownfields sites are owned by parties without funds or insurance to pay to clean them up. The responsible parties are simply unavailable. No matter how strong the Polanco Act’s cause of action, a redevelopment agency cannot recover costs from parties who have no assets, and so it must sometimes find other sources of funding for the cost of remediating its brownfields.

256. Id.


258. CAL. HEALTH & SAFETY CODE § 33459.3(e) (2001).
Despite this limitation, it is crucial to recover from responsible parties when they are available, and the Polanco Act allows such recovery. Relying on state or federal grant programs externalizes the costs of cleanup to the general taxpayers. In addition, there is probably not enough public funding to clean up all the brownfield sites. The state of Florida established a state-funded program to clean up properties that were contaminated as a result of drycleaning operations alone, and the fund went bankrupt within two years. While the Polanco Act cannot replace state and federal funding programs when responsible parties are not available, it is important for achieving recovery from such parties when they are solvent or have insurance.

2. **No Immunity from Further Federal Action or from Third Parties.**

The Polanco Act does not provide immunity from any legal action taken by the federal EPA or by third parties, such as residents of neighboring land. Indeed, it would be difficult to see how a state law could preclude the federal government from exercising its enforcement duties. In addition, residents harmed by contamination at a site may have a cause of action against the current site owner, regardless of whether that owner is liable to the state for cleanup costs.

Recent federal legislation, however, does prohibit the EPA, subject to certain exceptions, from taking enforcement action under CERCLA section 107(a) against a person who is in compliance with a state program. Cities, developers, and lenders should thus have fewer concerns about duplicative federal enforcement. And, while suits by third parties are not preventable, their number may be lessened if redevelopment agencies and all parties involved are careful to ensure adequate cleanup. The Polanco Act's incentive structure encourages cities to care about preventing these third party suits. While the Act puts the redevelopment agency in a potentially conflicting role—the agency directly manages the cleanup, while at the same time it has a direct stake in the cleanup and the redevelopment moving forward—threats of third party suits may be helpful in providing incentives to ensure that the cleanup proceeds without irregularity.

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259. Brown, *supra* note 248. Attempting to locate the program on the internet revealed broken links and the information that 1998 was the last year the program took grant applications. See http://www.dep.state.fl.us/waste/quick_topics/publications/wc/drycleaning/information/general/pdf (last visited Nov. 25, 2002).

260. The Small Business Liability Relief and Brownfields Revitalization Act *supra* note 20 at Subtitle C, Section 128 (prohibiting the EPA from enforcement under section 106(a) or section 107(a) of CERCLA).
3. **Cities Must Use the Act Proactively in Order to Be Effective**

This article's portrayal of the Polanco Act as a solution for the problem of idle, contaminated brownfields in cities across the United States stands in contrast to the fact that the Act is used relatively infrequently in California. *Emeryville v. Elementis* is the only reported decision on the Act, and, besides Emeryville, few cities are familiar with the Act. No attorney even sued under the Act until three years after its enactment.\(^{261}\) One newspaper article describing Santa Cruz's first experimentation with the Polanco Act—ten years after its enactment—is entitled, "City Eyes Little-Used State Law on Tainted Land."\(^{262}\) The preliminary results of a survey by the California Association of Redevelopment Agencies reports that only 28 redevelopment agencies have used the Act since its passage, resulting in the cleanup of 38 sites altogether.\(^{263}\)

One reason for these relatively small numbers may be the need for cities to educate themselves on brownfield problems and then learn to use the Polanco Act to remedy these problems. Indeed, brownfields were not an issue until the late 1980s, and California's Polanco Act was a ground-breaking in its response to the problem. Some large projects, such as Emeryville's Bay Street, the Ikea that preceded it, and San Diego's new ballpark, have helped draw attention to the Polanco Act's potential. Legal practices sometimes change slowly, and it is important to get the word out in this arena. As one lobbyist for the California Redevelopment Agency put it, "You can count on plagiarism... as cities and redevelopment agencies have successful experiences, others follow."\(^{264}\) Polanco Act claims have nearly a one hundred percent success rate, since redevelopment agencies can pick and choose their cases.\(^{265}\) It would be surprising if the number of Polanco Act cases did not continue its upward trend.

Unfortunately, all the time in the world will not enable some cities to use the Polanco Act. The bottom line is that for cities to be instrumental in solving the brownfields problem in the United States, they will need

\(^{261}\) Brown, *supra* note 248.


\(^{263}\) Phone Interview with Diana Rude, Legislative Assistant, Office of California State Senator Polanco (Apr. 1, 2002). Of 409 redevelopment agencies, about one-third responded to the survey. Attorney Bill Brown, *supra* note 248, believes that this number of 28 sites underestimates the actual number of sites redeveloped by half. Only five of his fifteen clients responded to the survey.

\(^{264}\) Interview with David Jones, Lobbyist, California Redevelopment Agency (Mar. 25, 2002).

\(^{265}\) Brown, *supra* note 248. He notes that, in his experience, the average "bread and butter" Polanco Act claim has a one hundred percent success rate.
help and assistance to accept the role of rescuer and overcome any lingering apprehensions about taking on contaminated properties. Even the City Attorney for Emeryville acknowledges the fact that the Act requires cities to be proactive and aggressive in their acquisition and cleanup of property as one of the reasons the Polanco Act is rarely invoked.266 Cities are cash-strapped, especially those in urban areas which that suffer from a depleted tax base. In order to make effective use of the Polanco Act, such cities first must form a redevelopment agency within their borders. Then they need technical assistance to acquire the expertise required to manage and hire consultants to perform environmental assessments and cleanups. The Polanco Act prohibits a local agency from overseeing a cleanup unless it has "adequate staff resources and the requisite technical expertise and capabilities available to adequately supervise the remedial action." 267 This ensures that the cleanup will be performed correctly, assuring its effectiveness and the safety of those who use the site in the future. Of course, not all cities would judge themselves ready to undertake such a task.

In addition, few cities have experience with this type of litigation, nor do they regularly seek assistance from private firms that specialize in Polanco Act and cost recovery claims. Many cities are wary about fronting large amounts of money—dollars that could be spend on schools and services—for environmental cleanup, on faith that they will be able to recover the costs through litigation. Such faith demands a certain amount of familiarity with the legal process.

**CONCLUSION**

The United States has a brownfield problem. Used, abused, and abandoned contaminated properties drain vitality from urban neighborhoods and encourage development of open spaces at the urban fringe. This article has pointed out that cities exist at the correct scale to contribute to a solution. The over 500,000 brownfield sites throughout the United States are generally too small or too insignificant to catch the attention of larger state and federal regulatory agencies. Cities, on the other hand, are well aware of the burden brownfields place on their local economies and community welfare and are in a prime position to take ownership of the brownfields in order to overcome the barriers to their redevelopment.

Regrettably, the legal and regulatory context in which most cities operate frustrates cities' assumption of this otherwise natural role. Additionally, because of the remediation costs and the increased costs of building in urban areas, redeveloping brownfields is expensive. Cities

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266. Biddle, supra note 159.
must be able to recoup all the costs of acquiring and cleaning up contaminated sites to be able to address the brownfield problem. Federal CERCLA law offers cities limited cost recovery, at best. At worst, it may force cities into a section 113 contribution action, with which cities would rarely be able to recover all of the costs of brownfield remediation and redevelopment. If a city is located in a jurisdiction that does not recognize the innocent plaintiff exception, it would be left only with section 113. In jurisdictions that do recognize the exception, a city is still at risk of failing to negotiate correctly the legal intricacies of acquiring sites by eminent domain in order to use the section 107(a) reserved for cities and other private parties. Even if a city were successful in securing the exception and using section 107(a), it still would not be compensated for the attorney and staff time spent negotiating the regulatory and legal environment.

For these reasons, Part IV of this paper argued that cities should be treated like states and the federal government under CERCLA. That is, they should be allowed the stronger of the two section 107(a) causes of action so they may fully recoup their cleanup costs without the apprehension that they might be considered potentially responsible parties. Either Congress should amend CERCLA, or courts should interpret CERCLA to allow redevelopment agencies the stronger cause of action.

In the absence of federal action, states can play an important role in empowering cities to transform brownfields. Part V of this article presented California's solution to the cost recovery dilemma—the Polanco Act. In addition to enabling redevelopment agencies to recover all of their costs, the Polanco Act is arguably more effective than CERCLA. This article demonstrated that when cities weigh the pros and cons of initiating brownfield redevelopment, the Polanco Act's provisions have tipped the scales in favor of cities taking action. Lawmakers in other states would do well to examine California's law and identify provisions that would allow cities in their states to pursue urban revitalization the way that cities like Emeryville have in California. State innovations like the Polanco Act can make it easier for cities to embark upon a path of brownfield redevelopment. By empowering cities to lead brownfield redevelopment efforts, lawmakers would unleash a force that could transform millions of acres of poisonous, underutilized land into thriving and vital components of local economic and civic life.