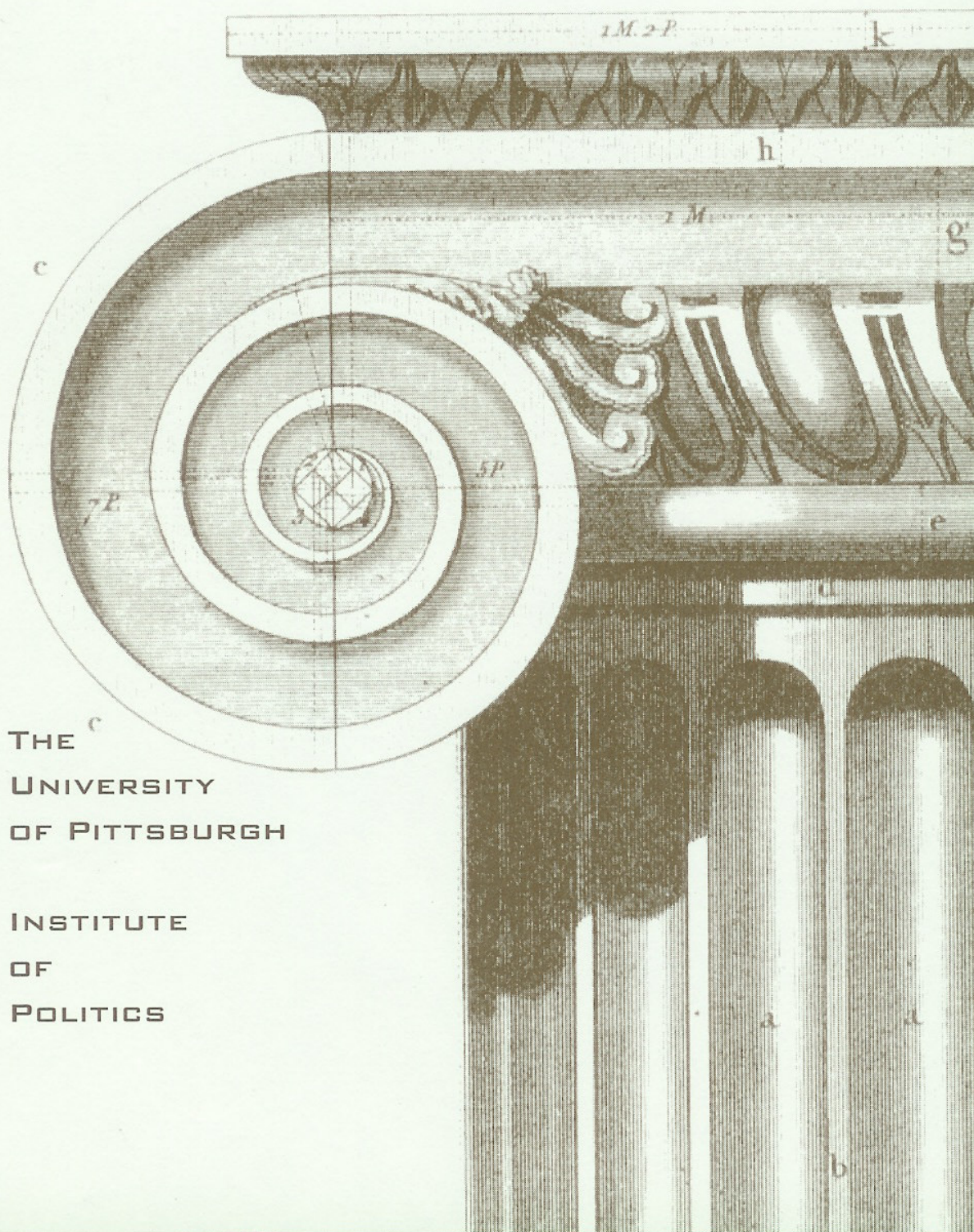


# ISSUES

HOW BROWN IS MY VALLEY

CLARKE M. THOMAS



THE<sup>c</sup>  
UNIVERSITY  
OF PITTSBURGH

INSTITUTE  
OF  
POLITICS



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## HOW BROWN IS MY VALLEY

*The people have a right to clean air, pure water, and to the preservation of the natural scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustees of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.*

— Article I, Section 27 of the Pennsylvania Constitution, an amendment approved by a 1971 vote of the people.

Theoretically? Splendid!

Practically? Problems, and nowhere more so than in the growing “brownfield/greenfield” controversy:

How to depollute and reuse old industrial sites (brownfields) both to utilize their site advantages and to avoid disrupting the countryside with new plants (nicknamed greenfields). In theory perennial opponents, industrialists and developers on the one hand and environmentalists on the other, for a change have common cause on this issue.

But it isn't proving easy to find solutions to the three major components of the issue:

- Purity. (How pure is pure?)
- Clearance. (When can there be a definitive sign-off by environmental agencies?)
- Liability. (Who is financially responsible for cleanup, both for past and for future pollution?)

Before discussing these issues in detail, here are some insights into the problem.

**Example (hypothetical):** A manufacturing property has been operated for 50 years with reasonably due care. Particularly since the 1970 emphasis on environment, it has been run in compliance with the rules on waste and raw materials management. However, it does have soil and ground water (subsurface water table) pollution, although everything is contained within the property and not threatening the outside. The business is viable, but the corporation wants to sell and has an interested industrial buyer. But the firm never has done an evaluation of subsoil and groundwater conditions, and fears opening what might be a Pandora's box.

Is there any way out? Or must



the willing buyer give up and seek a "greenfield" site?

**Example (this one true):** A Clairton neighborhood group covets a vacant steel corporation facility. Not only is it an eyesore but non-productive in a community needing jobs and a more adequate tax return.

But the corporation is uninterested. Presumably it fears that any environmental survey necessary nowadays for a property transfer would uncover pollution problems that would be highly costly to remediate. Although the neighborhood group said it would assume the risk, the corporation, in effect, shakes its head: "They wouldn't sue you; they'd come right through you to us, reaching for deep pockets." Apparently the firm would rather continue paying minimal taxes on non-productive property, rather than run that risk.

But, the effect is that the community is deprived of an opportunity to better its situation in important ways.

The range of cleanup problems facing Pennsylvania was summarized this way in a September 14, 1993, report by the Citizens Advisory Council to the state

Department of Environmental Resources (DER):

"As a long-time industrial state, Pennsylvania has more than its share of contaminated sites, ranging from abandoned mine sites with a \$15 billion reclamation price tag, to as yet uncounted industrial sites, both abandoned and operational, with undetermined cleanup liabilities."

In colloquial terms, "You ain't seen nothing yet!"

At a September 1993 public hearing conducted by the State Senate Environmental Resources and Energy Committee, Mayor Warren Haggerty of Reading urged changes in current environmental policies, contending they are causing "a continuing spiral of environmental degradation." He described the spiral this way:

Companies abandon sites in the cities and build new facilities in cornfields. No one is interested in the sites they leave behind because there is a fear of contamination problems. Taxes go up in the cities to make up for the abandoned sites, encouraging more companies to relocate out of town. Workers file unemployment claims and people start driving longer distances to work, Haggerty said.

Andrew S. McElwaine, pro-







gram officer for the environment for the Howard Heinz Endowment, says flatly: "Unless there is a solution, there won't be any development in Pennsylvania."

Matters in the brownfields controversy thus came to a head in the winter of 1993-94, partly because of the impasse's effect on economic development, with business groups pressing for change. But another important factor was that some environmental groups worried about the continued disruptive "invasion" of the rural countryside were groping for answers, too. Not only was there pressure on the state Department of Environmental Resources (DER) but in the state legislature.

A particular instance of the latter came with the introduction in 1993 of a series of bills that came to be called the "Brightbill package" for a major instigator, State Senator David (Chip) Brightbill of Lebanon, Republican chairman of the Senate Environmental Resources and Energy Committee.

As a response to business concerns about environmental regulations and processes, the package triggered worries in the environmental community while receiving broad-based support from busi-

ness. A key provision called for taking into greater account the future use of a site, i.e., that requirements could be less strict where a heavy-industry site was planned than for, say, a proposed daycare center.

The Pennsylvania Chamber of Business and Industry in a December 7, 1993, letter to the senators who sponsored the bills in the "Brightbill package" said of the initiative:

"We want you to know that it is in line with a recently adopted policy of our Board of Directors which states that cleanup standards must be based on the future use of a site if there is to be reuse of old industrial, or any active industrial sites."

(The "Brightbill package" and other legislative initiatives from differing sides on the issue will be discussed in more detail below.)

One argument cited for action in the legislature was that the DER is bound to follow the "pure" dictates of the 1971 Constitutional Amendment. Therefore, it was contended, only action by the legislature would take the DER off the hook by allowing it to fashion less stringent regulations.

Environmentalists such as Brian Hill of Pittsburgh see that point, but have reservations. Hill



heads the Western Pennsylvania office of the Pennsylvania Environmental Council. Last fall, PEC, in collaboration with business and environmental groups, held a series of roundtables around the state on the brownfields/greenfields subject, and Hill is the first to say that he gained new insights into the need for adjustment. (PEC's co-sponsors for the Pittsburgh meeting were the Southwestern Pennsylvania Growth Alliance and the Western Pennsylvania Conservancy.)

However, Hill expressed fears that some of the proposed changes could become a "Trojan horse" for business groups that want a wholesale scrapping of anti-pollution requirements. "They'd make it so that even those who have contaminated since 1980 might not have to meet cleanup standards."

In the fall of 1993, DER Secretary Arthur Davis in a *Pittsburgh Post-Gazette* interview worried that "the sharks are smelling blood in the water and hope to tear to pieces the entire pollution cleanup program."

But, in a later interview in April 1994, he said a "sea change" had taken place because of what he saw as a determination on the part of all sides to find answers—and soon. A series of initiatives

and counter-initiatives by business and by the DER had clarified matters and narrowed the range of difference. This was not to minimize the remaining gaps, such as on health standards, but Davis was hopeful.

It is worth noting that at the 1993 roundtables that PEC sponsored with business groups in Philadelphia, Pittsburgh, Wilkes-Barre, and Erie that participants reached consensus that Pennsylvania should:

- Encourage the reuse of former industrial sites, make use of existing infrastructure, and protect the countryside.
- Encourage the cleanup of both orphan and operating sites, so that the public's exposure to contaminants is reduced.
- Begin to make the necessary changes in public policy to eliminate institutional barriers to the reuse of industrial sites.
- Encourage the Pennsylvania Legislature and U.S. Congress to provide guidance to the DER and the federal Environmental Protection Agency (EPA) on these issues.

Frank Tugwell, executive director of the Howard Heinz Endowment, makes the point that







the problem and current legislative efforts are not unique to Pennsylvania. Ohio, the state of Washington, and other areas are among those "looking at remediation laws." And the Clinton administration and Congress are taking another look at federal superfund laws concerning major hazardous-waste sites.

According to *Insight* magazine, the Minnesota Legislature has adopted a Land Recycling Act, which stipulates that only parties directly responsible for contaminating a property are liable for its cleanup. Later the law was amended to say that parties who clean up property voluntarily can also be exempted from liability. And the New Jersey Legislature adopted the Industrial Site Remediation Act of 1993 to offset the high liability thresholds in the state's 1982 Environmental Cleanup Responsibility Act. (*Insight* is connected with the generally conservative *Washington Times*.)

The DER has reacted to the growing concerns in several significant ways. One was to have friends in the legislature introduce bills codifying its present regulation process, an apparent realization that such action by the public's elected representatives

would strengthen the DER's hand, rather than weaken it. (See description of the "Lescovitz package" below.)

Earlier, the DER announced and embarked upon a new "greenfields policy." Gregg Robertson, a DER deputy secretary, at a Pittsburgh conference on the subject noted wryly that the title is an oxymoron because it actually is aimed at slowing greenfield development by accelerating reuse of brownfields.

The new policy includes modification of liability for certain purchasers; financial support for assessments so seller and buyer will know the exact waste situation; liability relief for various economic and industrial development agencies; and new guidelines for DER field offices in handling private-property transactions.

But businesspeople, developers, and bank officials interviewed for this *Issues* paper before the various "packages" came up for legislative debate were not convinced that the new DER policy would be a sufficient solution.

Kenneth Komoroski, an attorney with Kirkpatrick & Lockhart, Pittsburgh, said, "The legislature has to tell the DER that there is an economic aspect, too."



James Palmer chimed in: "DER rules cause nothing to happen, not even to get some marginal improvements. You have to study to the nth degree and to remediate to the nth degree." Palmer is president of the Beaver County Corporation for Economic Development.

Frank Brooks Robinson, as president of the Regional Industrial Development Corporation (RIDC) of Southwestern Pennsylvania, has had plenty of brownfield cleanup experience at the former USX sites in Duquesne and McKeesport. He said the problem is that the DER's sole accountability is to the environment. "Sometimes I think our society wants to stamp out anything that makes money. Why can't the DER be partners, rather than being just disciplinary?"

Philip Masciantonio, retired vice president of environmental affairs for USX, said that as the situation now stands, the value of a polluted piece of property even after a cleanup often is not enough to justify the cost of remediation.

Harold Miller of the Allegheny Conference on Community Development, vehicle for Pittsburgh's top industrial leadership, echoed that view: "The costs of remediation dwarf all the usual

incentives."

Jeffrey Ackerman of the Arnheim and Neely, Inc., Pittsburgh realtors, told a February 8, 1994, DER seminar on the "greenfields initiative:" "Greenfield development is inevitable unless there is change."

There is general agreement that what is involved are policy decisions. The technical—how many parts per million of this or that can be allowed, etc.—will fall into place once policy is set. This paper therefore scants that aspect.

But how to accommodate the various issues? Let us first take up the three facets—purity, clearance, and liability—and then discuss proposed solutions, as well as the larger, long-term dimensions.







## PURITY

*How clean is clean?*

“Clean air” and “pure water,” the state Constitution now says. But how clean is “clean” and how pure is “pure?”

Two state senate committees that held hearings on the subject said they found two major state policies that often block effective brownfield reuse. The Senate Environmental Resources and Energy Committee and the Senate Community and Economic Development Committee said in a joint 1993 report:

- New property owners are automatically held responsible for cleaning up all past pollution on a site even when they had nothing to do with putting it there in the first place.

- Cleanup standards are not based on the actual risk contaminants posed to public health or the environment, but on a policy which automatically assumes every site must be cleaned up to a pristine condition, even if it is to be used for a new heavy manufacturing plant and not a daycare center.

DER Secretary Davis says that the DER has gone along with restrictive legislation passed in re-

cent years. “And we’ve relaxed to the limit in hundreds of situations. We’ve said, ‘What can you reasonably do?’”

But, Davis added, “We won’t go along with something that says it’s OK to pollute in Pennsylvania.”

DER officials say that it simply isn’t true that theirs is an “all or nothing” approach. They point to two sites in Pittsburgh where the land was “divvied up” to allow construction in one area but not in another. The reference is to the Pittsburgh Technology Center on the old Jones and Laughlin steel mill site in Hazelwood and to Washington Landing, the old Herrs Island industrial site. Areas impossible or overly costly to clean up are used for lawns or parking.

The DER’s Gregg Robertson said a problem has been that the department assumed that just because it understood the cleanup standards that others did, also. “We’ve now moved to clarify them,” he said, by publishing two major handbooks now available to the public: “Conducting Cleanups” and “Criteria Estimation Modeling System.” The latter is a technical support software system for “estimation of protective contaminant levels in soil.”

A major argument has con-



cerned "background," the general condition of the site. Does "clean" and "pure" mean that the background has to be as pristine as it was when the white settlers first arrived or—as some put it—"back to the dinosaurs?"

David Matter, president of Oxford Development Corporation, said the concept of a "pristine condition" is an impossible standard under most conditions.

Miller of the Allegheny Conference said, "There are many trivially contaminated sites where you don't need it to be pristine. No-growth concepts like that worry me."

But environmentalist Hill has his worries—that when some legislators talk about "background," they mean that any given site doesn't have to be any worse than what's around it.

This brings a rejoinder from one developer who feels that the DER is much too "conservative and narrow-minded, using health-based and risk-based criteria. They see the world revolving around a particular ground-water reading. They say they'll approve as long as you don't contaminate your neighbor. So they are giving with one hand and taking away with another."

Charles Duritsa, director of

DER's Southwest Region, in a letter to the editor published in the December 24, 1993, *Pittsburgh Post-Gazette* disputed such allegations:

"To clear up a major misconception, Pennsylvania does not require contaminated dirt at sites to be cleaned to background levels of pollution, and we also recognize that it is often difficult to restore contaminated ground water to original background levels. The bottom line is that sites are required to be restored to a condition that protects public health and the environment, using commonly accepted risk standards."

The DER's Robertson in an interview makes two points about ground water. One is that it is "an immense resource" for the commonwealth, one not to be frittered away. The other is that not just drinking water for humans is involved, but also the danger to types of fauna and flora that can stand less pollution than human beings.

One environmental activist interviewed asserted that there are good reasons for concern about "background." He said, "Those sites do pose dangers, including for nearby sites." Not only are there the cancer risks so often mentioned, but birth defects and







neurological difficulties.

Joseph Chnupa of the Western Region of the DER told the PEC/Growth Alliance Roundtable in Pittsburgh in October 1993: "How much pollution can be allowed? None! But we know that doesn't work. So we have procedures to deal with that. We realize that 'pump and treat' environmental regulations are a real killer; you never get to zero. It's our goal, but at some point, we have to decide to let a company off the hook, to say that DER won't go after you."

Chnupa said that in the past the DER's policy has been that any new owner is responsible for polluted conditions on the site. "We're trying to move to a new policy on that."

A major point of contention surrounds the question of "off-site migration," that is, underground pollution that drifts from one site to another with the natural, slow gravity flow of ground water. It is clear that a site owner should be responsible for any contamination he adds. But should he be accountable for also cleaning up the pollution that drifts into his site?

James Snyder, director of the DER's Bureau of Waste Management, said there is a clear recognition that leeway has to be made

for an owner of a site that historically has been surrounded by contaminated sites. He cannot be expected to clean up the drift from everyone else's mess both past and present.

But pinning down the "who" and "how much" in ground water cases has been a key point of contention in the discussion of regulations and of legislation.

This part of the discussion thus moves naturally to the next topic—clearance, sometimes termed "closure" or "finality."



## CLEARANCE

### *The 'Comfort Letter' Question*

The nub of the controversy is this:

Developers, sellers, and buyers want from the DER a signal of finality, a "Good Housekeeping Seal of Approval" that means the DER will not bring any further action against a site. Such a document also would serve as important protection against suits by third parties, whether environmental groups or litigants bringing health-based lawsuits.

But the DER is cautious about granting any such "King's X," both in terms of the past and of the future. It wants to make sure that any party involved in past pollution of the site is brought forward to bear or share the cleanup cost. And it wants to be certain that there are no unforeseen hazards that will pop up in the future.

Another reason for DER persistence is that if the original polluter isn't found, the cost of cleaning up a site may fall on the taxpayers.

For these reasons, the DER has followed a "joint and several liability" legal process. That means that anyone at all involved in a site may be liable for the entire cleanup cost, if the DER can't find other violators. Obviously, that

creates a problem with sites that have had successive owners and users across the decades, including firms that long ago went out of business.

PEC's Brian Hill, who agrees there is a problem with "joint and several liability," explains the reason for its use. "The government found it very hard to prove a percentage of liability for each party concerned. So it goes after everyone involved," Hill said.

But businesspeople and developers say it is this cautionary attitude that is thwarting the cleanup, let alone the reuse, of brownfield sites.

Ray Reaves, director of the Allegheny County Planning Department, said that when there is no "comfort letter" from the DER, that leaves the matter up to the lender.

But Denise Chamberlain of Mellon Bank, a leader in the brownfield lending arena, said, "We can't get answers from the government agencies, especially on underground storage tanks. Even when we are willing to sign off on a loan, there is no release from the DER or the EPA, so nobody will buy." She is associate counsel with Mellon's Legal Affairs Department.

Chamberlain noted: "In the







1970s, the DER's policy seemed to be to chase the perpetrators, bring in every villain, name every party, look for deep pockets, beware of releasing someone with deep pockets. A voluntary cleanup offer would throw them for a loop."

Now the hope is that the DER will be taking a "more business-like approach," Chamberlain said, "making it [a brownfield project] work rather than going after the bad guy, really becoming an economic development partner."

She adds: "I don't see anyone saying, 'Let's trash the commonwealth.'"

For their part, DER officials contend too many businesspeople come in at the 11th hour, such as before a sales deadline, not realizing the time periods that may be required for environmental assessments, permits, and the like.

Zelda Curtiss, DER assistant counsel, said, "If people will just come in and talk with us first, it will save time and money. We can resolve most problems without litigation."

She also told the audience at the DER's "greenfield initiative" briefing: "We're not on opposite sides. We protect the public, but *you* are the public, you and your children and grandchildren. We don't want to allow to remain on

a site a disaster about to happen."

DER officials point out that there have been more than 500 so-called "voluntary cleanups," that is, where the DER wasn't forcing the action. And 85 percent of these were done even without any "consent agreements" with the DER.

Interestingly enough, both the PEC roundtable and the DER "greenfields policy" briefing were held on the two old industrial sites, described above, that were cleaned up within DER regulations. The first was in the Technology Building on the former Jones and Laughlin steel plant site in Hazelwood. The second was the DER's regional headquarters at Washington Landing, formerly called Herrs Island. The Urban Redevelopment Authority of Pittsburgh was involved in both instances, in close cooperation with the DER.

Mark Schneider, vice president with the Rubinoff Company, sums up for developers the dilemma of clearance: "We'd like a total release, but DER won't give it."

The resulting impasse has been closely tied up with the question of liability.



## LIABILITY

### *The 'Tarbaby' Problem*

Under the present system, an old industrial site is like a tarbaby—anyone touching it can get stuck.

McElwaine of the Howard Heinz Endowment puts it this way: “The present system leads to frivolous lawsuits, so that nothing gets done. Indeed, the present system offers every incentive to avoid turning dirt.”

As pointed out in the two examples at the beginning of this issues paper, site owners often are reluctant to put a property on the market, even when there are buyers, for fear they will get saddled with the costs of cleaning up not only their contributions to the mess but that of previous owners.

And Oxford's David Matter asks: “What's your exit standing if your project craters?”

Even utilities become skittish about the “tarbaby.” If a natural-gas company, for instance, digs a trench for a pipeline across a piece of property, does it become liable for old contamination it inadvertently uncovers?

Matter at the October, 1993, PEC/Growth Alliance Roundtable described an unpleasant event for Oxford Development in cleaning up the old Union Switch

and Signal site in Swissvale for the Edgewood Town Centre. The operator of a backhoe working along a border of the property became dizzy and ill. It turned out that he had uncovered an unsuspected area of contamination, something that cost tens of thousands of dollars to remediate.

Naturally, buyers are skittish, too, without the “comfort letter” described in the section above. A general assumption is that buyers expect to be held accountable for any pollution they cause *after* the land is in their hands, but not for that already present.

But even at that, there is what is called the “future knowledge” problem. That comes in two forms.

One is learning 10 years or more down the road that a presumably benign substance is really toxic and having to clean it up (the asbestos fiasco is an example). The other is the arrival of a technological advance in cleanup techniques, which the DER or the federal Environmental Protection Agency (EPA) at that point might require the owner to utilize to make a site even cleaner.

Understandably, the DER is cautious about giving a “King's X” to an owner on these subjects. One DER official said she would







imagine that employers would want to utilize the latest techniques to defend against worker liability litigation. But “future knowledge” is a pivot upon which redevelopment of many a brownfield may hinge.

Finally, there is the matter of the lenders, key in any transaction. As one developer pointed out, “You can have a seller and a buyer and even have a DER OK, but if a lender won’t come across, you’re dead.”

But the lenders have their problems in the current system. As Mellon’s Chamberlain explains, a lender has an environmental stake at several points in the process.

“If a borrower goes to a site—brownfield or greenfield—and finds a waste problem, then he has a cash flow problem. He will want to know if he can use that real estate as collateral. But a bank has to have clean collateral.”

Chamberlain continues, “If at any point we have to foreclose on the property, we’re liable since the beginning of time, even though we are not the owner or manager. So not only have we lost the loan, but we’ve also inherited the pollution problem.”

Michael McGinley, a Mellon vice president, explains that his

office has six engineers making evaluations. “You have no idea how important environmental concerns have become for us.” In addition to its own professional staff, Mellon makes contracts with environmental consultants to evaluate commercial real estate for which loans are sought.

A problem nowadays, McGinley said, is that often a bank is willing to give an OK to a particular site but buyers balk because of unfavorable publicity in the past—Neville Island in the Ohio River being an example. “There is a mindset against certain areas,” he said, so that, ironically, there is what could be called a buyer “redlining” similar to the accusations often leveled against banks by loan-impooverished urban communities.

But the result is, in McGinley’s words, “There’s no incentive to go to brownfields.”

Chamberlain said that only recently have insurance companies begun to give banks protection. But such protection only covers what’s “forward,” not the past. “There’s no insurance ‘product’ to cover that,” she said.

Insurance companies, in turn, often have found themselves bitten hard by broad insurance coverage they issued back in the 1950s



or so, before environmental issues came to the fore. Not surprisingly, they have become gun-shy.

As to the lenders, Chamberlain argues that the state should provide more protection than it does now, in terms of services enhancing the commonwealth's environmental goals. "We do environmental checkouts and monitoring and provide private funding for developers to do cleanup. We steer the borrower to the proper way to get permits. We give letters of credit to, say, close a mine, to get bonding. We're entitled to protection."

She notes that Mellon is heavily staffed in the environmental area, compared especially to many banks that don't have that ability. Therefore, under present circumstances, many small banks will say, "No," because they don't have the capability to take risks.

On the other hand, some banks are not as cautious in making loans, thus putting "conscientious" banks like Mellon at a disadvantage, Chamberlain said. In either case, she contends, both the DER's goals and economic development as a whole are the losers.

These are some of the problems connected with purity, closure, and liability. Now, what to do?







## PROPOSED SOLUTIONS

The long struggle between business and industry, on one hand, and regulatory agencies backed by environmentalists, on the other, has entered a new stage with the realization by both groups that they may have a common cause. That is in seeking ways to reuse old industrial sites, rather than carving up untouched farm and woodland for new greenfield sites.

But proposed remedies spill all over the lot.

As noted above, the DER itself announced a new greenfields policy, which is aimed at saving the countryside by making more feasible the use of brownfields. Critics contend this is a defensive measure on the part of the DER that never would have been mounted had there not been the threat in the legislature of more far reaching changes.

The major such initiative in the state legislature was the aforementioned "Brightbill package," a set of bills introduced by State Senator David Brightbill, Lebanon Republican, and others.

In the words of a document of explanation released by Brightbill's office, the initiative was designed to (1) establish a process for the DER to consider cleanup plans,

(2) provide liability protection for innocent landowners, financial institutions, tenants, and future landowners, (3) create a \$5-million grant and loan program to help finance environmental assessments and cleanups and (4) require registration of environmental professionals developing cleanup plans to help assure their competence.

A final component for the debate that has ensued was the introduction on April 6, 1994, of RARA, legislation in tune with DER thinking. RARA, introduced by State Representative Vic Lescovitz of Washington County, is the acronym for Response Action Requirements Act. As described in an executive summary:

"RARA will encourage the remediation of contaminated sites. RARA builds upon existing cleanup requirements and processes (no new mandates), and provides flexibility and certainty to the regulated community without imposing new requirements or weakening current environmental and human health protectiveness standards. It creates special, more flexible requirements for cleanups of industrial properties."

Senator Brightbill responded to the introduction of RARA:



"After two years of saying we don't need legislation to set cleanup standards, I'm glad DER is finally recognizing how important reasonable standards are to recycling industrial sites. DER's proposal has some elements we like, others we don't."

The Lebanon senator earlier had criticized the DER for "showing no willingness to work with us." He said the agency was just "playing politics."

DER Secretary Davis in a mild voice called the accusation "unfair." He said, "I have met for hours with Chip on this bill. And we sent him a five-page letter on it in December."

Contrary to accusations, Senator Brightbill said, the bills he and like-minded senators have introduced *will* protect the environment by reusing the brownfield sites, rather than tearing up the countryside.

"They talk about trashing the environment. The point is that the environment already is trashed. If we don't do something, these old sites will stay natural disaster zones. Anything we can do to improve them will be an environmental advance."

In response specifically to RARA, Brightbill said while it would loosen some requirements, it actually tightens them in other

cases. Also, the Lescovitz bill didn't contain sufficient "future owner protection" or appropriate cost consideration.

From the other side, a RARA summary comparison of RARA and the Brightbill package was quite critical of the latter. Its basic premise: The Brightbill proposals "may not encourage or require any cleanups... because... many owners would be allowed to avoid any type of environmental cleanup by building fences and restricting access." Also, the package "relaxes standards for all owners and therefore does not give special incentives to the cleanup of old, abandoned sites."

This summary comparison accompanying the Lescovitz measure particularly dwelt upon the fact that RARA would protect to one in a million the cancer risk level, while the Brightbill proposals would allow the cancer risk level to be as great as one in 10,000. "One in a million is widely accepted and is used in other Pennsylvania regulatory programs and other states. One in ten thousand is 100 times less protective," said the summary.

Critics of the Brightbill package said the problem with it is that it is really a containment, rather than a cleanup, bill. They charge that it gives site owners a range of







options, some of them considerably below national health standards. This could add a bewildering set of tasks for the DER, especially in terms of fairness among applicants, they say.

Thus were the lines drawn at the time this issues paper was written.

Meanwhile, other ideas for breaking the impasse have been proposed.

Ray Reaves, director of Allegheny County's Planning Department, suggests that a way to get faster action is for DER to license environmental consultants (now unlicensed) to oversee and approve at least the initial steps in meeting DER requirements.

But neither businesspeople nor environmentalists interviewed were enthusiastic. Businesspeople saw it as just one more layer of regulators with whom to deal. Environmentalists worried about accountability and bonding requirements. Both are concerned that it might take as many DER personnel for oversight duties as would be saved by farming out that responsibility.

One idea that repeatedly surfaces is that of keeping liability strict but knocking out the "joint and several" liability doctrine

which, as described above, makes the old industrial sites such a legal tarbaby.

There have arisen suggestions for a liability system along the lines of the ill-fated state CAT fund for motor vehicle insurance. Under that system, vehicle owners paid an extra fee which went into a state-operated "catastrophe fund," which could be used to meet losses or legal judgments that went above a certain figure.

The DER estimates a cost of anywhere between \$5 and \$10 million apiece for the remediation of large-scale sites in Pennsylvania. Using that figure as a hypothetical base would suggest that if the CAT fund approach were used, perhaps the first \$3 million in potential liability costs would be covered by the owner's own insurance. The next tier, say \$3 million to \$10 million would be covered by the CAT fund. For liability above \$10 million, a corporation could buy supplementary insurance, an add-on that would be much less costly because probability would be so low. (**Note:** *These are hypothetical ranges to suggest a spread; an actuarial study might change the tiers considerably.*)

But critics ask, "Where would the money for the CAT fund come from?" Industry as whole, polluters or not? The general taxpayer?



In the case of auto insurance, there was a clear band of potential beneficiaries who could be tapped. Even at that, as Harrisburg ruefully learned, there was so much public resistance that the CAT fund system rather quickly was scuttled.

Another liability-related proposal is to expand the "hold harmless" doctrine to cover more parties. For example, one proponent suggested, hit those with fiduciary responsibility, but not those who are only managing the sites. Also, it is asked, why not "hold harmless" the innocent purchaser?

The problem there, of course, is defining who an "innocent purchaser" is. Environmentalists say it is hard to believe that in this day of ecological awareness that anyone "innocently" buys a piece of property without checking first.

Inevitably, this brings up the subject of "orphan sites," where the identity of the original polluter can't be pegged down for certain. Estimates for their numbers in Pennsylvania range from 2,000 to 15,000. PEC's Hill thinks opponents of environmental regulations greatly inflate the numbers in order to bolster their claims that the "living" are being penalized unduly for the sins of the "dead." Hill said, "We simply don't

believe that there are that many orphan sites."

Foundation official McElwaine said that one idea being discussed is that of letting the surrounding community decide how much pollution on a given site it will tolerate. That is, if a community thirsting for jobs and revenues is willing to accept a "cap and contain" cleanup, rather than something pristine, why not?

Such a solution, McElwaine said, would not obtain if the "plume of contamination" in the ground water left the property.

At the PEC/Business Roundtables in 1993 a number of neighborhood groups suggested that community advisory committees be created to be part of the negotiations and to help determine what kinds of uses and cleanup may be appropriate for a particular site within a neighborhood. The current, typical 30-day public comment period with a public hearing is inadequate, their representatives said.

**Note:** The RARA legislation provided for input by local planning agencies in determining if the proposed industrial use is in accord with local land-use considerations.

A PEC report on the roundtables also reported concerns about what it called "variable stan-







dards and social equity.” It explained that “there are cases of low-income families and minority communities who are exposed to more than their share of waste facilities and environmental risks.” Therefore, there is concern “that any effort to modify cleanup standards will lead to less stringent cleanups in poor neighborhoods,” all the more reason for community involvement in the process, the report said.

How about money?

It would appear that on all sides there is a dislike for facing the probability that any real hope of breaking the impasse over the long haul—other than fulfilling DER Secretary Davis’s fears of a scuttling of the entire pollution cleanup effort—will require massive public expenditures, i.e., tax money.

To be sure, Senator Brightbill makes an interesting point in favor of public expenditures. “While companies may have been the actual polluters, the consuming public benefited. All of our products have been cheaper because industry didn’t take the responsibility for all the wastes generated. We’ve all enjoyed a higher standard of living because of this. Now we’re reaping what we helped sow,

but we don’t want to step up to the plate to take our share.”

But at least one DER official expressed skepticism about that argument, suggesting it was just a way to let business and industry off the hook. Furthermore, in the case of the old milltowns in Southwestern Pennsylvania, citizens there long ago absorbed the cost in health, etc., of polluted air and water. He asked: Why should they be required to pay all over again?

Of course, there already is the precedent of organizations such as the Regional Industrial Development Corporation (RIDC) making huge investments of public funds in cleaning up old sites such as those at former USX plant locations in Duquesne and McKeesport.

Another precedent is the tax to support the state superfund, the commonwealth’s counterpart of the much discussed federal superfund arrangement for tackling the worst hazardous-waste sites. Under Act 108, passed in 1988, one-half of one percent of the capital stock and franchise tax goes to provide money for the Hazardous Sites Cleanup Fund, the official title.

The revenue, averaging \$30 million to \$50 million a year, goes to activity concerning (1) a desig-



nated list of superfund sites and (2) occasional emergency action where a site might go bad (example: a field of deteriorating barrels with toxic waste that might begin leaking).

There are more than 50 state superfund sites and, in Pennsylvania, 94 federal superfund sites.

This state superfund money can be used by the DER for a variety of activities, including evaluation, study, and implementation of cleanup of designated superfund sites. It can be used for "orphan sites" or where the owner or operator is indigent and can't pay the cost. The money also can be used where the owner chooses not to participate ("we'll see you in court") and the DER decides to proceed with the cleanup with state dollars, following up with a cost-recovery action against the owner. The risk that a recalcitrant owner runs is that under "joint and severability," he can be sued for triple damages under Act 108.

The final possibility for expending superfund money is "mixed funding." For example, the DER under Act 108 could sock the entire cost to one particular polluter of a property. But, considered in equity terms, that might not be fair. So the DER can assess

part of the cleanup cost to that particular party and use superfund money for the rest, possibly hoping to recover some of it later from other responsible parties. But that way the cleanup can go ahead.

A recent *New York Times* article suggested that a way to accelerate the molasses-slow federal superfund process would be to turn it over to the states. It was written by J. Winston Porter, president of the Waste Policy Center, a private research organization in Sterling, Virginia. From 1985 to 1989, Porter directed the federal superfund program. He wrote:

"Since the [federal superfund] law went into effect in 1980, the Environmental Protection Agency has completed cleanup of only about 200 of 1,300 federal waste sites. Litigation is rampant. The typical cleanup takes 10 years and costs about \$30 million."

Pennsylvania businesspeople interviewed about that suggestion expressed skepticism, pointing to the continuing impasse over the Avtex Fibers site in Meadville, a carpet fibers manufacturing plant operated from 1929 to 1986, where a variety of industrial waste was generated, treated, or disposed of at the site. It once was a federal superfund site, then was designated a state superfund site, with







numerous redevelopment authorities involved. The process was complicated further by a fire where destruction of transformers caused PCB contamination.

Avtex cleanup-cost estimates range from \$10 million to \$29 million. The DER already has spent \$1.2 million for feasibility tests, including engineering surveys and laboratory work.

The DER did a feasibility study and outlined a plan for the Avtex site. But the DER and the current owner, FMC Corporation, have disagreed over who is liable for what, something still being sorted out. Regardless of blame, both environmentalists and businesspeople have been able to cite Avtex as a case in point of how the other side can be responsible for the cleanup delay.

The prospect of more tax spending explains why some are suggesting an extension or a variation of the bond issue-supported Pennvest program pushed by Governor Robert Casey and passed by the legislature in 1988. Pennvest stands for Pennsylvania Infrastructure Investment Authority, an independent state agency that, through a revolving loan fund arrangement, finances improvements to drinking water and sewage treatment facilities. It has been

funded by a \$650-million bond issue approved by the voters, \$330 million in federal sewerage funds, and \$400 million in various state funds. Over a 30-year period, Pennvest will spend an estimated \$2.5 billion.

The argument for doing something with Pennvest is that in many ways it has propelled greenfield development by providing infrastructure services for new areas of growth. (It will be remembered that State Representative Tom Murphy of Pittsburgh—now mayor—was a lone voice protesting that Pennvest would hurt older cities and industrial areas for that very reason.)

If it is all right to spend taxpayers' money to spread development into new areas, it is argued, why not use a greater chunk of it than now to revitalize the brownfields? That not only would take advantage of infrastructure already in place but utilize the workforce in nearby mill communities and revitalize those towns.

Foundation officials Tugwell and McElwaine suggest charging higher fees for developing greenfield sites. They contend that developers likely won't be driven back to brownfields unless higher fees that reflect true taxpayer costs are charged for permits for



greenfield sites. They point out that taxpayers foot the "indirect cost" bill for roads, traffic alignments, sewer lines, additional transit, and the like for countryside developments, beyond what the developer itself pays.

Another idea is a broadbased tax on feed stocks, to be used for cleanup purposes. One argument is that these products are responsible for much of the pollution, and therefore that particular industry should bear a proportionate share of the cost of cleanups.

A final concept cited by Tugwell and McElwaine is the Oregon system of "rural land boundaries." That is, drawing a line between urban and rural and saying that there can be no commercial or industrial development on the rural side of the boundary.

Obviously, that moves the discussion into a broader arena.







## LARGER DIMENSIONS

"Plan" is a four-letter dirty word in Pennsylvania.

That pungent comment was made at a 1993 forum on reuse of industrial sites, sponsored by the University of Pittsburgh's Institute of Politics.

The speaker asserted as evidence that Pennsylvania has no overall plan and that the state planning board is a "shell," a situation heightened because by law zoning—the key element in planning—is left with local municipalities (not even counties). Therefore, the official went on, "You read in the newspaper that somebody is doing something, and it's the first time you've heard of it. And often it is too late."

In a real sense, the "four-letter dirty word" comment sums up a major reason for the brownfield/greenfield problem. Without planning guidelines, there is no check on local municipalities vying for new plants to build their tax and job base. Not only are there almost no "carrots" for investment in brownfield sites. But as foundation officials Tugwell and McElwaine in the section above point out, there are no "sticks" to steer developers away from greenfields and back to

brownfields.

"You no longer need mounds of ore and coal, so there's less reason than ever to use old sites," McElwaine said. But the result is that "everything is moving to the periphery and sucking the marrow out of the urban core."

Moreover, as a speaker at the Institute of Politics forum complained, one can argue that the major "planning" agency in Pennsylvania is the state Department of Transportation because PennDOT's decisions as to where to build roads have much to do with new development, especially in greenfield territory. "The tail is wagging the dog," the speaker asserted. "The object shouldn't be no-growth, but planned growth."

However, even in terms of planning at the local level, most of the bite-sized municipalities that populate Pennsylvania can't afford professional planners or planning. Indeed, many counties can't.

But a developer at that same Institute of Politics seminar insisted that there is a daunting list of restrictions already. New policies "would only give weapons to those who want to stop development." Urban revitalization is good, but government shouldn't be a policeman against people who



want to live in suburbia, he said.

The trick, of course, is to accommodate that desire, but with two important provisos. One is to apply model zoning ordinances for rural areas that emphasize density, cluster zoning, and open space as a safeguard against sprawl. The other is to find ways—both “carrots” and “sticks”—to steer industrial and commercial development in the direction of areas historically set aside for it.

Otherwise, say planning proponents, Pennsylvania—and Pittsburgh—will continue down the path of wasting resources by:

- Eating up the countryside, including eroding hillsides and destroying wetlands.

- Increasing motor vehicle traffic, with consequent added air pollution, even as Port Authority Transit ridership is down. The population of Allegheny County is up 10 percent in the past 10 years but travel is up 72 percent, with the average length of a trip now 10 miles from a decade ago.

- Spending tax dollars for new infrastructure even while abandoning infrastructure and people in the old industrial communities.

The curiosity is that the effort to reuse brownfield sites could bypass the NIMBY and NIMTOO syndromes. NIMBY stands for the citizen reaction, “Not in my backyard.” NIMTOO refers to the attitude of politicians faced with unpleasant decisions, “Not in my term of office.”

Old industrial towns want industry back, including “distasteful” plants. And their politicians do, too, *especially* during their term of office.

But it would appear that without real changes in the total approach, many of the proposals may damage pollution cleanup efforts while accomplishing little in terms of steering development to the brownfields.

Planning is not a sexy subject, as one speaker at the Institute of Politics seminar phrased it.

But John Oliver of the Western Pennsylvania Conservancy may be onto something in his quiet assertion at the PEC/Growth Alliance Roundtable in Pittsburgh last October: “Land-use management is an issue whose time has come.”







## OBSERVATIONS

By the time this issues paper is published, the legislature may have acted on the various brownfield/greenfield bills.

But whatever the outcome, some points still seem pertinent.

**ONE.** The fact that most people on all sides of the issue realize there is common cause in reusing old industrial sites in order to slow the flight of industry to rural farmlands and woodlands is something that should be capitalized on. (Note the recommendations listed in Chapter 1 from the PEC/Business Roundtables held across the state in the fall of 1993.)

But if environmentalists need to give ground in realizing rising public concern over economic considerations and jobs, business and industry need to realize that achieving too great a relaxation of pollution standards could backfire.

*First*, the result could prompt health-based litigation and court rulings that could mean costly set-backs for corporations beyond the brownfield sites themselves.

*Second*, there is the danger of a political backlash from a public much more attuned to health risks and environmental protection than in the past.

**TWO.** The state needs to develop a policy that goes beyond the margins.

This means addressing the whole question of planning, beyond just the question of brownfields. New highways, sewer and water line extension, and suburban development also are involved in the attractions of greenfields.

It is all well and good to talk of the DER collaborating with local planning bodies. But dealing with this small municipality and that isn't going to provide the combination of sticks and carrots needed to encourage brownfield reuse as against greenfield.

That is, no one community by itself can provide all that is needed. A much larger area strategy is needed, and one that won't be thwarted by one recalcitrant or greedy municipality. That isn't possible under the present laws.

The obstacle is political, not legal. That is, the same legislature that has given planning responsibilities solely to one of its creatures—local municipalities—can take them away and hand them to a different entity, if it wishes.

**THREE.** The public must be educated to realize that any “carrot” hope of real cleanup and reuse of old industrial sites in order



to provide jobs and save the countryside is going to take tax money. As this whole document suggests, much as environmentalists might wish otherwise, there is a limit to how much cleanup money can be squeezed out of corporations, not even counting the many sites where no "culprit" can be nailed.

Moreover, as this issues paper demonstrates, in too many cases the costs of remediation—even conscientious owner remediation—cannot pay off in terms of future use. That's why if Pennsylvanians—environmentalists and businesspeople alike—really want old industrial sites reused, they need to band together to back the provision of the tax money needed for the "carrots" to offset the easier greenfield route.

We say "environmentalists and businesspeople alike" because it likely will take not just special levies on business but general-fund money, too. If business and industry have to give ground on the former, then environmentalists and their allies will need not only to accede to the latter but help get public support for such appropriations from the legislature.

We submit these three factors—the overhang of judicial oversight, larger-scale planning, and tax money for "carrots"—will

need to be addressed in the years ahead, whatever the 1994 decisions in the brownfield/greenfield tug of war.

*This is the fifth in a series of issues papers written for the Institute of Politics at the University of Pittsburgh by Clarke M. Thomas, retired senior editor of the Pittsburgh Post-Gazette. The opinions expressed are his own.*







University of Pittsburgh

*Institute of Politics*

*4200 Fifth Avenue*

*Pittsburgh, PA 15260*

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