

# THE CHALLENGE OF BROWNFIELD CLUSTERS: IMPLEMENTING A MULTI- SITE APPROACH FOR BROWNFIELD REMEDICATION AND REUSE

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#### INTRODUCTION

In the fall of 2001, James E. McGreevey ran for Governor of New Jersey on a “smart growth” platform, promising to address issues of urban sprawl through changes in state government.<sup>1</sup> Once in office, Governor McGreevey appointed Bradley M. Campbell Commissioner of the New Jersey Department of Environmental Protection (NJDEP), and together they launched a series of strategies to realize the goals of smart growth.<sup>2</sup> A key

<sup>1</sup> Lewis Goldshore & Marsha Wolf, *Agricultural Preservation, Suburban Sprawl and Urban Revitalization: Where Do They Stand?*, 166 N.J. L.J., Oct. 22, 2001, at 291. Sprawl is generally defined as poorly planned and managed growth, frequently linked to auto-dependent suburban development. See New Jersey Future, *What is Smart Growth?*, at <http://njfuture.org/HTMLSrc/njfsmartgrowth.html> (last visited Dec. 21, 2003); SAMUEL R. STALEY, *THE SPRAWLING OF AMERICA: IN DEFENSE OF THE DYNAMIC CITY* (Reason Pub. Pol’y Inst., Policy Study No. 251, 1999), <http://www.rppi.org/ps251.html>.

<sup>2</sup> Smart growth, frequently cited as the opposite of suburban sprawl, is well-planned and well-managed growth. See, e.g., New Jersey Future, *supra* note 1. In February 2002, Governor McGreevey signed an executive order to establish the Smart Growth Policy Council and consolidate state efforts to support smart growth. Exec. Order No. 4, 34 N.J. Reg. 951(a) (Mar. 4, 2002). The following October, Governor McGreevey signed an order outlining specific duties for the primary agencies involved in brownfield redevelopment, including NJDEP, NJDCA, and the New Jersey Economic Development Administration (NJEDA).

element of these strategies focused on redevelopment in cities and older suburbs where the transportation, utility, and commercial infrastructure could support growth and curb sprawl. Meeting this objective required the creation of a strong program to encourage remediation and redevelopment of brownfield properties—commercial or industrial sites that are currently vacant or underutilized and on which there has been, or there is suspected to have been, a discharge of contamination.<sup>3</sup>

Many of the more commercially viable brownfield properties in New Jersey have been cleaned up and redeveloped under the “first generation” of brownfield programs initiated in the 1990s,<sup>4</sup> but NJDEP estimates that over 10,000 less attractive brownfield properties languish unremediated, draining the vitality out of local communities and the economy.<sup>5</sup> A “second generation” of brownfield programs is needed to address the complex technical and economic issues associated with these properties, and to ensure that the communities that remain adversely impacted by multiple brownfields benefit from the remediation and reuse efforts. This Article examines one such second generation approach: the Brownfield Development Area (BDA) Initiative. Under the BDA Initiative, NJDEP and other involved agencies partner with affected stakeholders to comprehensively address clusters of closely spaced brownfields, rather than follow the traditional site-by-site approach.

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Exec. Order No. 38, 34 N.J. Reg. 4015(a) (Dec. 2, 2002).

<sup>3</sup> Brownfield and Contaminated Site Remediation Act, N.J. STAT. ANN. §§ 58:10B-1 to -31 (West 2003). The adverse impacts of brownfields to the host communities and in terms of loss of green space elsewhere have been thoroughly catalogued elsewhere, and will not be reiterated here. *See, e.g.*, D. Evan van Hook, *Area-Wide Brownfields Planning, Remediation and Development*, 11 FORDHAM ENVTL. L.J. 743, 747 (2000); John Chihak et al., *Developing Brownfields*, 19 HAMLIN J. PUB. L. & POL'Y 254, 254-58 (1997).

<sup>4</sup> Bradley M. Campbell, NJDEP, Policy Directive 2002-03: Acceleration of Brownfield Cleanup and Reuse (Nov. 25, 2002) [hereinafter NJDEP Policy Directive], at <http://www.nj.gov/dep/newsrel/releases/bfpolicy.htm>.

<sup>5</sup> News Release, NJDEP, DEP Issues Enforcement Directives Against Three Companies to Compel Cleanup Action Supports State Brownfield Redevelopment Area Initiative (Nov. 18, 2003), at [http://www.state.nj.us/dep/newsrel/releases/03\\_0165.htm](http://www.state.nj.us/dep/newsrel/releases/03_0165.htm). This estimate reflects only brownfields known to NJDEP. New contaminated sites are brought to NJDEP's attention on a regular basis, indicating that there are numerous brownfields that are currently unknown to NJDEP and are not included in this estimate. According to the New Jersey Environmental Management System records, over 3,900 new sites were added to the state's list of known contaminated sites in 2002.

In 2000, one of the authors challenged the traditional approach of revitalizing areas impacted by multiple brownfields on a property-by-property basis.<sup>6</sup> He argued that single brownfield properties, redeveloped in isolation and surrounded by unremediated properties, missed the efficiencies gained by a multi-site remedial response and the synergistic economic activity on nearby properties such a response could offer, two elements that could make reuse of less attractive brownfields viable.<sup>7</sup>

The author, van Hook, argued that a clustered approach to brownfield development could bring improvement over the piecemeal approach in three areas: (1) increased efficiency in investigation and remediation of contamination; (2) more meaningful stakeholder participation in planning for remediation and property reuse; and (3) greater public and private value in coordinated reuse of clustered brownfield properties.<sup>8</sup> Seeking to capture all of these potential benefits for the numerous New Jersey neighborhoods impacted by multiple brownfields, in October 2002, Commissioner Campbell announced the first statewide program to address clusters of brownfield properties: the BDA Initiative.<sup>9</sup> The BDA Initiative is premised on the argument that, where multiple brownfields exist in close proximity, these benefits will sufficiently decrease the costs and increase the potential benefits of remediation and reuse so that successful clustered brownfield reuse projects will be accomplished.

This Article examines how successful the BDA Initiative has been in capturing the projected benefits of a clustered approach, including technical advantages, public participation benefits, and

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<sup>6</sup> See van Hook, *supra* note 3, at 752.

<sup>7</sup> See *id.*

<sup>8</sup> *Id.* at 770-71.

<sup>9</sup> NJDEP Policy Directive, *supra* note 4. A number of jurisdictions have experimented with clustered approaches in discrete areas, most notably in Wilmington, Delaware and Emeryville, California. Telephone interview with Karl Kalbacher, Administrator, Maryland Environmental Restoration and Redevelopment Program (June 18, 2003); see also CITY OF EMERYVILLE, CAL., BROWNFIELDS REDEVELOPMENT DEMYSTIFIED: 13-14, <http://www.ci.emeryville.ca.us/bf/bf-finalstatus.html> (last visited Nov. 23, 2003). Similarly, The U.S. Environmental Protection Agency (EPA)—sponsored pilot programs have similarly adopted a clustered approach in communities receiving EPA Brownfield Pilot Grants. See Brownfields Revitalization and Environmental Restoration Act of 2001, § 211, Pub. L. No. 107-118, 115 Stat. 2360, 2364 (2002) (to be codified as amended at 42 U.S.C. §§ 9601, 9604) (allowing brownfield grants on a site-by-site or community basis).

enhanced options for reuse.

## I

### THE NEED FOR A CLUSTERED APPROACH TO REVITALIZING AREAS WITH MULTIPLE BROWNFIELDS

Various authors have noted that the current piecemeal, property-by-property approach will not be successful in revitalizing areas impacted by multiple brownfields and that, instead, these areas need an approach that addresses clusters of brownfields in a coordinated way.<sup>10</sup> Under historical development patterns, industrial and commercial uses were not developed in isolation. Rather, many urban and older suburban areas were the locations of multiple industrial and commercial uses in close proximity.<sup>11</sup> For reasons that have been catalogued elsewhere,<sup>12</sup> many of these properties are now brownfields: abandoned or underutilized properties with known or suspected contamination.

The cumulative impact of multiple brownfields on an affected community can be devastating. The exposure to harmful contaminants is at best cumulative, as community members face exposure from multiple contaminated properties.<sup>13</sup> At worst, exposure to multiple contaminants may result in synergistic health effects, about which little is currently known due to the infinite number of possible chemical combinations and the multiplicity of resulting exposure scenarios.<sup>14</sup>

Remediation can be significantly more complicated when multiple contaminated properties are in close proximity.<sup>15</sup> The

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<sup>10</sup> See van Hook, *supra* note 3, at 745-46; Joel B. Eisen, *Brownfields Policies for Sustainable Cities*, 9 DUKE ENVTL. L. & POL'Y F. 187, 193-94 (1999) (discussing EPA efforts toward unifying brownfield redevelopment).

<sup>11</sup> See van Hook, *supra* note 3, at 744.

<sup>12</sup> See Paul Stanton Kibel, *The Urban Nexus: Open Space, Brownfields, and Justice*, 25 B.C. ENVTL. AFF. L. REV. 589, 598-605 (1998) (discussing the impact of environmental liability rules on brownfield redevelopment).

<sup>13</sup> See 2 PRESIDENTIAL/CONG. COMM'N ON RISK ASSESSMENT AND RISK MGMT., RISK ASSESSMENT AND RISK MANAGEMENT IN REGULATORY DECISION-MAKING 71 (1997), <http://www.epa.gov/ncea/pdfs/riskcom/riskcom2.pdf> (generally describing the negative health effects of cumulative exposure to multiple toxic agents at low response levels).

<sup>14</sup> See Robert W. Collin & Robin Morris Collin, *The Role of Communities in Environmental Decisions: Communities Speaking for Themselves*, 13 J. ENVTL. L. & LITIG. 37, 55-56 (1998).

<sup>15</sup> See van Hook, *supra* note 3, at 752.

chemical and physical properties associated with various classes of chemical compounds can present significant obstacles to using certain chemical, physical, or biological treatment technologies.<sup>16</sup> The probability of contamination by multiple compounds increases substantially when multiple contaminated properties are in close proximity, particularly where contamination from different sources has commingled in soil or groundwater.<sup>17</sup> An additional concern with closely spaced contaminated sites is the potential for recontamination of a remediated property by an off-site source.<sup>18</sup>

While clusters of closely spaced contaminated properties create unique challenges in terms of risk and remediation, their greatest impact may be in the area of redevelopment. Few developers are interested in reusing a single site in a cluster of brownfield properties without some expectation that those surrounding properties will also be revitalized in a timely manner.<sup>19</sup> Parties who are saddled with these properties through historic ownership may assume that they are unmarketable even after remediation if they are single clean properties in an otherwise derelict area and subject to a continual possibility of recontamination from nearby unremediated sources. The cumulative impact of multiple abandoned, underutilized, and possibly contaminated properties makes these areas unattractive for redevelopment.<sup>20</sup>

Moreover, in many areas impacted by multiple brownfields that to date have not attracted developer attention, at least some of the brownfields are small, irregularly shaped, and served by a neglected infrastructure of roads and services. Ownership of these parcels is often fragmented among multiple public and private owners, and is often subject to a complex array of liens, bankruptcy considerations, and other results of the properties' sub-optimal economic histories. All of these factors increase the difficulty of comprehensive revitalization. Prospective buyers and

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<sup>16</sup> For a survey of soil and water remediation techniques, see OFFICE OF ENVTL. POL'Y AND GUIDANCE, U.S. DEP'T OF ENERGY, ENVIRONMENTAL RESTORATION WASTE MANAGEMENT GUIDE (2000), <http://tis.eh.doe.gov/oepa/guidance/cercla/erwmg.pdf>. For example, bioremediation techniques are incapable of removing inorganic compounds. *Id.* at 5-7.

<sup>17</sup> See van Hook, *supra* note 3, at 762.

<sup>18</sup> *Id.* at 752.

<sup>19</sup> Telephone Interview with Irving E. Cohen, Managing Member, GreenEagle LLC (Dec. 16, 2003).

<sup>20</sup> See *id.* at 744.

sellers are also unlikely to find viable uses, adequate insurance, or financing to effectively manage their liability and exposure due to the small size and corresponding limits on the scale of redevelopment on these properties.<sup>21</sup>

In addition to creating a high investment risk for developers, these properties pose an unwieldy challenge to local government or area residents wishing to spur revitalization. Tracking sites in isolation requires considerable dedication from citizens, including regular attendance at planning and zoning board meetings to learn about development plans as they are considered for approval. When contaminated properties are remediated on a site-by-site basis, the developers that do come forward often bring a specific reuse that may or may not match the community's overall revitalization goals for the area. Because only one use for one property is proffered, the community has no alternative that respects other, more preferred uses that might be expected on surrounding brownfield properties. As a result, the community may feel constrained to accept either the one proffered use or nothing at all.<sup>22</sup> Add to these problems the compounded technical and developmental difficulties referenced above and the area may end up a developmental wasteland.

In most jurisdictions, brownfield remediation proceeds one site at a time, with remediation occurring only when the individual property becomes an agency priority or when an individual developer chooses to proceed.<sup>23</sup> Even with respect to the sites where remediation is initiated, there is generally little attention paid to how those sites fit into the larger physical, political, or social contexts. At the state level, separate administrative groups with separate staff handle remediation and reuse, depending on the specific type of contamination involved, making cohesive planning difficult.<sup>24</sup>

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<sup>21</sup> See Terry J. Tondro, *Reclaiming Brownfields to Save Greenfields: Shifting the Environmental Risks of Acquiring and Reusing Contaminated Land*, 27 CONN. L. REV. 789, 813-14 (1995) (discussing the problems associated with small-site brownfields).

<sup>22</sup> See Patrick J. Skelley II, Note, *Public Participation in Brownfield Remediation Systems: Putting the Community Back on the (Zoning) Map*, 8 FORDHAM ENVTL. L.J. 389, 399-400 (1997) (discussing a community's power to veto a developer's proposal).

<sup>23</sup> See van Hook, *supra* note 3, at 744.

<sup>24</sup> See N.J. ADMIN. CODE tit. 7, § 1-1.2(k) (Supp. 2003); Site Remediation Program, NJDEP, Brief Synopsis of NJDEP's Brownfields Development Area

Many of the challenges of revitalizing areas with multiple brownfields could be best resolved by addressing brownfields in clusters rather than solely on a site-by-site basis. Establishing a programmatic capacity within all involved agencies to administer brownfields in clusters would be one way to achieve this goal. New Jersey established such a programmatic capacity in 2002 through the BDA Initiative.<sup>25</sup> The next Part describes the administrative details of the BDA Initiative, after which this Article evaluates existing information on the BDA Initiative's success in capturing the projected benefits of a clustered approach to brownfield revitalization.

## II

### THE DETAILS OF THE BDA PROCESS

In his 2000 article, van Hook developed a theoretical framework for an area-wide brownfield redevelopment program.<sup>26</sup> The framework follows four basic principles: (1) establish a process to “defin[e] and delineat[e] areas affected by multiple brownfields;” (2) aggregate financial and technical resources and incentives; (3) develop area-wide remediation and redevelopment plans; and (4) “[p]rovide ongoing, [coordinated, cross-property,] focused support, incentives and assistance for remediation and redevelopment of the brownfields area in accordance with the area-wide plans.”<sup>27</sup> These principles are reflected in the design of the New Jersey BDA Initiative.<sup>28</sup>

To accommodate clusters of brownfields, an administrative program must be both structured and flexible. The enterprise of remediating and reusing multiple brownfields with different owners, types of contamination, historical uses and future re-uses is inherently complex. Structure is therefore important to keep this enterprise on track. However, the diversity of situations facing brownfield properties also requires flexibility so that varied needs can be addressed and varied opportunities can be captured. The BDA Initiative attempts to balance structure and flexibility through

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Initiative [hereinafter BDA Synopsis], at [http://www.state.nj.us/dep/srp/brownfields/bda/bda\\_synopsis.htm](http://www.state.nj.us/dep/srp/brownfields/bda/bda_synopsis.htm) (last visited Nov. 23, 2003).

<sup>25</sup> NJDEP Policy Directive, *supra* note 4.

<sup>26</sup> See van Hook, *supra* note 3, at 752-66.

<sup>27</sup> *Id.* at 753.

<sup>28</sup> See BDA Synopsis, *supra* note 24.



the following procedural steps.

#### A. *Application*

The first step in the BDA approach is a rigorous, competitive application process. Central to the BDA selection criteria is the requirement that the application must be submitted on behalf of a steering committee that is demonstrably representative of the relevant stakeholders, who may include neighborhood residents, property owners, potential developers, community organizations, environmental groups, and others.<sup>29</sup> While the participation of a specific stakeholder group is not mandated, the application makes clear that stakeholder representation will be judged competitively.<sup>30</sup> This places the onus on applicants to reach out as broadly as possible for participation, and to address the concerns of potential dissenters. The steering committee must also demonstrate in the application the capacity and will to guide the process through to redevelopment, and to work in close consultation with state agencies until the project is complete.<sup>31</sup> The applicant must also demonstrate the support, either by resolution or ordinance, of the host municipal government.<sup>32</sup>

The application must further identify the specific brownfields to be addressed, explaining the steering committee's vision of why this particular grouping of properties should be addressed in coordination.<sup>33</sup> For example, the proposed brownfield cluster may be located in a particular neighborhood, or may include properties that are logical components of a comprehensive reuse strategy. Additionally, information known respecting contamination on the brownfield sites may be used to justify treating multiple sites together to help prevent cross-contamination between the sites, for example. While no specific number of properties is mandated, NJDEP generally considers between four and ten properties to be optimal.<sup>34</sup>

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<sup>29</sup> NJDEP, BROWNFIELD DEVELOPMENT AREA INITIATIVE APPLICATION GUIDANCE 3 [hereinafter APPLICATION GUIDE], at [http://www.state.nj.us/dep/srp/brownfields/bda/bda\\_appguide.pdf](http://www.state.nj.us/dep/srp/brownfields/bda/bda_appguide.pdf) (last visited Dec. 21, 2003).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 4.

<sup>34</sup> The properties comprising BDAs to date range from four to twenty-eight sites, averaging eight properties per BDA.

The application need not include detailed plans for the brownfield properties, but it must articulate a meaningful and realistic vision for where the community, as represented by the steering committee, would like to be at the end of the process.<sup>35</sup> Such visions could include, for example, reconnecting the applicant community with a waterbody or developing integrated resources to support a pedestrian- or transit-centered community.

B. *Selection of Successful BDA Applications and Designation of BDAs*

Selection of successful BDA applications is designed around one of the basic principles of a clustered approach—the coordination of public resources. The BDA Initiative establishes an organizational structure that allows the multiple agencies that support remediation and redevelopment to coordinate their resources toward projects that reflect shared goals. The groundwork for this is laid in the BDA application process, in which a committee representing NJDEP, NJDCA, and NJEDA reviews applications and selects by consensus those that will be designated as BDAs. Administration of a BDA involves a substantial investment of limited agency resources. Therefore, care is taken to approve only those BDAs for which the agencies have adequate capacity to ensure completion.<sup>36</sup> The cross-agency application approval process forces the involved agencies to confer and debate to select the proposed BDAs that best reflect the state's smart growth goals as articulated by Governor McGreevey.<sup>37</sup>

C. *Appointment of Case Manager and Remediation and Reuse Planning*

Once successful BDA applicants are selected, NJDEP appoints one case manager, supported by one geologist, to oversee

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<sup>35</sup> APPLICATION GUIDE, *supra* note 29, at 4.

<sup>36</sup> In the first application process in the Fall of 2003, for example, only half of the proposed BDAs for which an application was actually filed were approved by the state. Several other potential BDA applicants postponed their applications after discussions with the state indicated that they were not sufficiently organized at a local level to ensure success.

<sup>37</sup> See NJDEP Policy Directive, *supra* note 4 (stating that NJDEP will work closely with other agencies such as EDA and DCA in implementing the BDA initiative).

remediation necessary within the BDA.<sup>38</sup> This organizational change sharply contrasts with the model prevailing in most jurisdictions, including New Jersey. In most jurisdictions, different categories of contaminated sites are subject to different statutory and regulatory structures, which are often administered by correspondingly separate administrative units. This can include, for example, separate programs for leaking underground petroleum tanks, sites contaminated by hazardous substances, sites contaminated by hazardous wastes, contaminated landfill properties, and others.<sup>39</sup> This segregated administration of contaminated sites often results in multiple case teams (from different programs) managing cases within a single neighborhood, working on different schedules, subject to different priorities, and possessing a limited ability to share technical information or design cross-property remedial measures. Assigning one case manager and geologist to all properties within a BDA ensures continuity throughout the remediation process by applying regulations and standards consistently among the properties, and by assisting with intra- and inter-agency issues such as permit coordination, land use, and beneficial reuse of contaminated soil.

NJDCA and NJEDA similarly appoint single contacts to manage the planning and economic incentive aspects of the BDA projects. The BDA team, comprised of the appointed representatives from each agency, guides the steering committee through a series of steps, discussed below, aimed at developing and implementing a comprehensive community-based remediation and reuse plan.

1. *Planning Step 1: Initial Meeting, Preliminary Environmental Assessment, and Collection of Ownership Information*

The next step in the process is convening an initial meeting among the BDA agency team, the steering committee, and the host municipality.<sup>40</sup> The steering committee presents an overview of its

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<sup>38</sup> See BDA Synopsis, *supra* note 24.

<sup>39</sup> See *supra* note 24. EPA lists a number of programs active in the cleanup and redevelopment of contaminated properties. See Office of Solid Waste and Emergency Response, EPA, Cleaning Up and Redeveloping Our Land, at <http://www.epa.gov/oswer/cleanups.htm> (last updated June 28, 2002).

<sup>40</sup> BDA Synopsis, *supra* note 24. Where relevant expertise is lacking among steering committee members, the steering committee is encouraged to engage a planning and/or environmental advocate to “quarterback” the planning and implementation process. *Id.* This advocate assists the steering committee in

goals for the BDA.<sup>41</sup> The BDA case manager, in turn, explains the role NJDEP will play, and provides the steering committee with a summary of NJDEP information for each BDA brownfield property.<sup>42</sup> The parties then sign a memorandum of understanding (MOU) governing the partnership formed between the steering committee, the municipality, and NJDEP. This MOU is of one-year duration, renewable upon a showing of adequate progress.<sup>43</sup> This annual renewal requirement imposes responsibility on both NJDEP and the steering committee to ensure such progress.

The initial meeting ends with concrete plans for the first tangible step in the remediation and reuse process: an environmental assessment of each brownfield property within the BDA.<sup>44</sup> These assessments provide baseline information about historical site ownership and operations and include a preliminary

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realizing the stakeholders' goals, but is not expected to usurp the goal setting process.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* The Technical Requirements for Site Remediation establish the minimum performance standards in New Jersey for all phases of the site remediation process, including preliminary assessment, site investigation, remedial investigation, remedial action selection, remedial action, and post-remedial monitoring and maintenance. N.J. ADMIN. CODE tit. 7, § 26E (Supp. 2003). The preliminary assessment (PA) is New Jersey's equivalent of the assessments outlined by AMERICAN SOCIETY FOR TESTING AND MATERIALS (ASTM), *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, in ASTM STANDARDS RELATING TO ENVIRONMENTAL SITE CHARACTERIZATION 2002, at 161 (2d ed. 2002) [hereinafter ATSM 2000 STANDARD]. The PA, the first phase of the remedial process, establishes an "all appropriate inquiry" standard in order to show due diligence under the New Jersey Spill Compensation and Control Act. N.J. STAT. ANN. § 58:10-23.11g (West 2003). The PA is an investigation and evaluation of existing information to identify "potentially contaminated areas of concern" at a subject property. Technical Requirements for Site Remediation, N.J. ADMIN. CODE tit. 7, § 26E-3.1. All "potentially contaminated areas of concern" (AOCs) identified in the PA require further remediation and must be investigated during a site investigation (SI). *Id.* The SI requires the collection and analysis of samples from appropriate environmental media (soil, ground water, surface water, etc.) to determine if contaminants are present at concentrations above an applicable New Jersey remediation standard. *Id.* § 26E-3.3. A remedial investigation (RI) is required for all AOCs exhibiting contamination above an applicable New Jersey remediation standard. *Id.* § 26E-4.1. The purpose of the RI is to determine the "horizontal and vertical extent of contaminants in all [environmental] media," to identify and evaluate migration pathways and potential receptors, and to "[c]ollect and evaluate all data necessary" to select and implement an appropriate remedial action. *Id.*

identification of areas of potential environmental concern that require further investigation. The assessments therefore provide a starting point for identifying parties liable for remediating contamination, for estimating the scale of the remediation projects, and for identifying realistic limitations on reuse choices resulting from environmental conditions at the sites.

In the initial meeting, NJDEP commits to ensuring that a preliminary environmental assessment will be completed on each brownfield property within the BDA. The state has a variety of options for meeting this commitment. Where parties who are liable for remediating individual properties have been identified, the state's first option is to request that these parties conduct the assessments. Where no liable parties are identified at the outset, the state may work with potential developers to conduct the assessments.<sup>45</sup> The state may also provide grants to conduct remediation in BDAs under specified conditions.<sup>46</sup> Finally, NJDEP has a limited staff that will conduct environmental assessments in BDAs directly when no other resources are available. Irrespective of which combination of strategies is selected, the state's commitment is that the assessments will be completed. This ensures that the baseline information for all future planning will be available.

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<sup>45</sup> Working with developers is facilitated by the Brownfield Reimbursement Fund, which allows non-responsible developers to recoup up to seventy-five percent of remediation costs from tax revenues generated from businesses operating on the brownfield site, as well as other taxes. Brownfield and Contaminated Site Remediation Act, N.J. STAT. ANN. §§ 58:10B-27, :10B-28, :10B-30 (West 2003). This law was recently amended to allow housing developers to recoup remediation costs as well. *Id.* § 58:10B-28. In addition, Governor McGreevey has issued an executive order directing NJEDA to create short-term bridge loans for brownfield developers to offset pre-development and remediation cost gaps. Exec. Order No. 38, 34 N.J. Reg. 4015(a) (Dec. 2, 2002).

<sup>46</sup> The Hazardous Discharge Site Remediation Fund (HDSRF), overseen by NJEDA in conjunction with NJDEP, provides grants to municipalities to quantify the cleanup costs of underutilized sites. N.J. STAT. ANN. §§ 58:10B-4 to :10B-6. The HDSRF also provides loans to parties that have a statutory obligation pursuant to the Environmental Cleanup Responsibility Act, N.J. STAT. ANN. §§ 13:1K-6 to -14 (West 2003) (formerly Industrial Site Recovery Act), parties that have a statutory obligation pursuant to the New Jersey Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11 to 23.11g, and to parties that want to voluntarily clean up contaminated sites. N.J. STAT. ANN. § 58:10B-5. A bill was recently proposed to create a new grant program for municipalities in dealing with small brownfields. S. 476, 210th Leg., 2002 Sess. (N.J. 2002).

## 2. *Planning Step 2: Preliminary Planning Meeting*

The BDA application requires the steering committee to provide an initial vision for the brownfield cluster as a whole but does not require a fully detailed plan, nor does the BDA process require steering committees to possess sophisticated planning expertise. At the preliminary planning meeting, planners from NJDCA review the baseline information contained in the preliminary assessments and provide the steering committee with basic information the committee may find useful in developing a remediation and reuse plan. The goal here is not to usurp the process by which the community defines its vision for the BDA, but rather to discuss planning concepts, informed by environmental information, that will empower the community. The general concepts discussed may include, for example, consideration of traffic patterns, location of park lands or other open space, or the use of marketing studies. The goal of the preliminary planning meeting is to generate a thought process that will be carried on by the steering committee in its internal meetings and in meetings with the community as the remediation and reuse plan is developed.

## 3. *Planning Step 3: Baseline Resources Meeting*

A major weakness of first generation brownfield programs is the absence of a mechanism by which to identify and coordinate all of the resources potentially applicable to a project and means by which to focus those resources on specific sites.<sup>47</sup> The BDA process focuses the collective resources of the state on BDAs. These resources are administered by many different agencies, but the BDA designation, supported by the commitment of state partners to the BDA Initiative, creates the ability to focus the various funding and other resource streams into the investigation, remediation, and reuse needs of the BDA.

Led by NJEDA, the baseline resources meeting discusses the remediation and reuse process for each site and identifies the resources potentially available for each step in the process.<sup>48</sup>

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<sup>47</sup> The first generation brownfields law in New Jersey was established by the Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11 to -23.11g, and the Brownfield and Contaminated Site Remediation Act, N.J. STAT. ANN. §§ 58:10B-1 to -31.

<sup>48</sup> BDA Synopsis, *supra* note 24.

These resources may include grants, loans, special tax packages, or unique resources such as interagency transfers.<sup>49</sup>

In addition, one component of the preliminary environmental assessments conducted under Step One is the identification of past site owners and operators and others who, under law, are jointly and severally liable for remediation.<sup>50</sup> The baseline resources meeting initiates a process under which NJDEP first contacts the parties, inviting them to discharge their legal obligations by voluntarily participating in the BDA remediation and reuse process. Many parties respond positively to this invitation, knowing that voluntary participation is a least-cost approach to resolving environmental liability.<sup>51</sup> Where a liable party refuses to participate, NJDEP commits to securing their participation through available enforcement mechanisms.<sup>52</sup>

Another important resource identified during the baseline resources meeting is developer participation. Experience to date shows that, while developer interest in redeveloping isolated brownfields may be low, this interest increases when the state collectively commit resources to ensuring comprehensive remediation and reuse of a BDA.<sup>53</sup>

#### 4. *Planning Step 4: Creation of the BDA Remediation and Reuse Plan*

Once there is a clear understanding of which resources are available to conduct the remediation and reuse activities, the steering committee begins the task of developing a remediation and reuse plan for the entire BDA. Under the leadership of NJDEP and NJDCA's Office of Smart Growth, this plan is developed to reflect a strategy for all properties in the BDA, not just brownfield properties. Existing uses on non-brownfield

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<sup>49</sup> These resources are site-specific and may include PRPs (including present and former owners) identified through the site assessment process or other parties with expressed or potential development interest in specific parcels. Where PRPs exist, NJDEP can exercise its enforcement authorities, if necessary, to ensure that recalcitrant parties do not impede remediation and reuse of the BDA. BDA Synopsis, *supra* note 24.

<sup>50</sup> See Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (2000)); N.J. STAT. ANN. § 58:10-23.11 to -23.11g.

<sup>51</sup> See *infra* text accompanying notes 94-96.

<sup>52</sup> See *infra* note 92.

<sup>53</sup> See *infra* text accompanying note 110.

properties within the BDA are considered in ensuring that the comprehensive plan benefits both existing individual and corporate residents and new residents on the redeveloped properties.<sup>54</sup>

The BDA case manager provides guidance on the environmental aspects of the remediation and whether the plans are realistic given the level of remediation required for the site. If the steering committee has a planning consultant, the state agency works with the steering committee and its planner to develop a comprehensive investigation and remediation schedule that best accommodates the planned reuse and maximizes efficiency in remediating all the BDA brownfield properties in a comprehensive manner.

##### 5. *Planning Step 5: Creating a Path To Success*

With the remediation and reuse plan for the BDA in place, NJDEP and other involved agencies meet as needed with the steering committee to establish a “critical path” to implement the plan. The “critical path” establishes site-specific timelines for remediation and marshals identified resources for implementation of the plan.<sup>55</sup> While a timeline is established for each site, the plans reflected in the timelines are often multi-site in scope, referencing multi-site mobilization of sampling equipment, for example. The meetings include representatives from any state departments and agencies necessary to advance the remediation and reuse plan, and may include permit staff from NJDEP, Green Acres (New Jersey’s open space preservation element), and New Jersey Department of Transportation (NJDOT) highway and bikeway staff, depending on the needs of the plan.<sup>56</sup> After this meeting, the steering committee continues to meet periodically with state partners to foster an ongoing dialogue, report on progress, and revise strategies as needed to keep the projects moving. The process accommodates a recognition that plans may change in response to new information, the departure or appearance of new PRPs or developers, or a host of other factors.

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<sup>54</sup> *Id.* The cooperation of NJDCA’s Office of Smart Growth in brownfield reuse is directed by NJDEP. NJDEP Policy Directive, *supra* note 4. The participation of existing corporate and individual residents of the BDA on the steering committees provides an essential resource for ensuring compatibility of new and existing uses.

<sup>55</sup> BDA Synopsis, *supra* note 24.

<sup>56</sup> *Id.*



Throughout, the plan is overseen by the BDA case manager, who acts as a state focal point driving the plan to completion.

#### D. *Subsequent Meetings and Annual Review*

The BDA case manager and the steering committee meet continually on an as-needed basis to implement the plan and keep the remediation on course. There is also an annual review to determine that sufficient progress has been made in implementing the BDA remediation and reuse plan.<sup>57</sup> This review compels all parties to assess their roles, identify any obstacles, and agree either to continue the BDA because progress is being made, or to close the BDA.<sup>58</sup> This step is critical in two ways. First, there may be circumstances that make continuing the BDA process impractical. Second, it provides the opportunity to evaluate whether each party has delivered on its responsibilities. The knowledge that this step exists encourages all parties to pay close attention to the process and the timetables.

### III

#### ANALYSIS OF EARLY BDA IMPLEMENTATION

When Commissioner Campbell launched the BDA Initiative in 2002, he designated neighborhoods in Trenton, Elizabeth, North Camden, and Cramer Hill (Camden) as pilots to test, refine, and evaluate the effectiveness of the BDA Initiative.<sup>59</sup> Although these pilots were designated, rather than selected through the application process, their progress has otherwise followed the format and trajectory applied to BDAs entering through the application process. In July 2003, four additional BDAs were selected, through the application process described above, in Palmyra, Irvington, Newark, and Hillside.<sup>60</sup>

As discussed above, NJDEP anticipated that the BDA Initiative would increase efficiency and effectiveness in three

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Lisa Murtha Bromberg & Thomas Spiesman, *State of the State Address Sets Environmental Agenda*, 161 N.J. L.J., Feb. 24, 2003, at 716.

<sup>60</sup> NJDEP, DEP Designates Four Brownfield Development Areas to Stimulate Reuse of Contaminated Sites, Cleanup Star Program for Consultants Created to Speed Remedial Work (Sept. 4, 2003), at [http://www.nj.gov/dep/newsrel/releases/03\\_0120.htm](http://www.nj.gov/dep/newsrel/releases/03_0120.htm).

areas: (1) technical responses to the investigation and remediation of contamination; (2) stakeholder involvement in remediation and reuse of brownfield properties; and (3) reuse of brownfields for a broad range of complementary purposes.<sup>61</sup> This Part evaluates the results of the first year of the BDA Initiative's implementation in these three areas and reveals other areas of success, as well as some challenges or special concerns raised by coordinating remediation and reuse on multiple properties. This Part also discusses the refinements that have been made to the BDA Initiative to date in response to lessons learned through initial implementation efforts.

#### A. *Technical Response To Remediation of Contamination*

Experience indicates that, in the areas for which it is appropriate, the BDA Initiative appears to result in increased efficiency and effectiveness in the remediation process. First, the BDA approach encourages remediation of properties that would otherwise continue to threaten public health and the environment. The approach also ensures that adjacent unremediated sites will not recontaminate these properties. Finally, there are economies of scale derived from coordinated investigation, remedy selection and waste management options. In addition to improving the process of removing environmental risk, these efficiencies create redevelopment benefits by reducing the costs and complexity of remediating brownfields within BDAs. Developers within BDAs have specifically identified the benefits of coordinated oversight of all the properties under one BDA case manager and the ability to perform remedial activities on an area-wide basis as factors in their decision to participate in remediating and reusing BDA brownfield properties.<sup>62</sup>

##### 1. *Remediation of Additional Contaminated Properties*

Subjecting brownfield properties to agency remediation oversight when those properties are preventing brownfield revitalization is a major contribution of the BDA Initiative. Limited resources are a critical issue for all government agencies.

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<sup>61</sup> See BDA Synopsis, *supra* note 24; NJDEP Policy Directive, *supra* note 4.

<sup>62</sup> Interview with Michael B. Jaffe, General Counsel, Denholtz Associates, & Eric D. Wisler, Managing Partner, DeCotiis, Fitzpatrick, Cole & Wisler (Dec. 12, 2003) [hereinafter Jaffe/Wisler interview].

As a consequence, government agencies, including NJDEP, must prioritize and focus their limited resources on the most significant concerns. The vast majority of contaminated sites currently being investigated or remediated with NJDEP oversight have been brought before the NJDEP voluntarily, usually as a result of a real property transaction.

Another significant number of sites is remediated as a result of a regulatory obligation pursuant either to New Jersey's Environmental Cleanup Responsibility Act or Underground Storage Tank programs.<sup>63</sup> Sites being remediated with public funds constitute the smallest fraction of cases.<sup>64</sup> In accordance with NJDEP's priority system, these sites represent the most significant and immediate threats to public health and the environment.

The contamination found at many brownfield sites falls short of the level required to compel an agency response. Additionally, the absence of the factors traditionally used to establish state and federal environmental priorities (e.g., drinking water wells, a surface water intake, or threatened or endangered species habitat) in close proximity to urban areas may result in a low priority risk designation for brownfield properties.<sup>65</sup> However, low risk designations may simply reflect the limited information available on many abandoned brownfields. Also, even where environmental and public health risk is not known to be high, unaddressed brownfields can cause significant public harm by contributing to urban blight and discouraging revitalization.

The BDAs brought before NJDEP often include properties that would not trigger independent agency action, and for which no developer has yet voluntarily stepped forward. For example, of the twenty-eight individual properties comprising the 198-acre Route 73 South Redevelopment Area, a recently designated BDA in Palmyra, New Jersey, only four of the properties had previously

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<sup>63</sup> See Environmental Cleanup Responsibility Act, N.J. STAT. ANN. §§ 13:1K-6 to -14 (West 2003) (formerly Industrial Site Recovery Act); Underground Storage Tanks, N.J. ADMIN. CODE tit. 7, §§ 14B-1 to -15 (Supp. 2003).

<sup>64</sup> Phyllis E. Bross et al., *The Greening of New Jersey's "Brownfields"—As Viewed by the Department of Environmental Protection*, 9 FORDHAM ENVTL. L.J. 541, 558 (1998) (discussing the scarcity of public funds for site remediation and their use as a last resort).

<sup>65</sup> See, e.g., 40 C.F.R. § 300 app. A (2002); Hazard Ranking System, 55 Fed. Reg. 51532 (Dec. 14, 1990) (codified at 40 C.F.R. pt. 300).

been active cases before the BDA application. The fact that these properties are included in a BDA indicates that, irrespective of their quantifiable environmental risk, their remediation and reuse is essential to a comprehensive revitalization of the BDA. The BDA process provides a mechanism for affected stakeholders to bring these properties into the remediation process and under NJDEP's regulatory oversight.

## 2. *Addressing Cross-Site Contaminant Migration*

Another significant obstacle to the remediation of brownfield clusters is the potential migration of contaminants from an unremediated property to one with a successful site remediation. The potential for the migration of contaminants, whether through or over soil, or via groundwater, is determined by several factors.<sup>66</sup> Contaminant mobility may be dictated by the chemical or physical properties of the soil or groundwater, local hydrogeology, the chemical or physical properties of the contaminants, or a combination of all these factors. Many contaminants typically associated with historic fill and, therefore, with brownfields, such as heavy metals, polycyclic aromatic hydrocarbons, and polychlorinated biphenyls, tend to be relatively immobile under most conditions.<sup>67</sup> On the other hand, petroleum products (including heating oil, fuel oil, and gasoline), the most ubiquitous of all contaminants, can migrate directly through soil for hundreds of feet to neighboring properties.<sup>68</sup> If present as light nonaqueous phase liquids, these petroleum products can float on the water table for thousands of feet, contaminating all groundwater and soil encountered along the way.<sup>69</sup> The real nomads of the contaminant universe are the gasoline additive methyl tertiary-butyl ether<sup>70</sup> and

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<sup>66</sup> Debbie Sivas, *Groundwater Pollution from Agricultural Activities: Policies for Protection*, 7 STAN. ENVTL. L.J. 117, 134 (1988).

<sup>67</sup> See Glen M. Vogel, *An Examination of Two of New York State's Brownfields Remediation Initiatives: Title V of the 1996 Bond Act and the Voluntary Remediation Program*, 17 PACE ENVTL. L. REV. 83, 102-03 (1999).

<sup>68</sup> See, e.g., U.S. GEOLOGICAL SURVEY, U.S. DEP'T OF THE INTERIOR, FACT SHEET NO. 084-98, GROUND WATER CONTAMINATION BY CRUDE OIL NEAR BEMIDJI, MINNESOTA (1998), <http://mn.water.usgs.gov/bemidji/results/fact-sheet.pdf>.

<sup>69</sup> See generally CHARLES J. NEWELL ET AL., EPA, GROUND WATER ISSUE: LIGHT NONAQUEOUS PHASE LIQUIDS (1995), <http://www.epa.gov/tio/tsp/issue.htm>.

<sup>70</sup> Robert G. Knowlton & Jeffrie Minier, *Recent Trend for Environmental Compliance Provides New Opportunities for Land and Water Use at Brownfields*

chlorinated volatile organic compounds, including degreasing and dry cleaning solvents.<sup>71</sup> These compounds are extremely persistent and can migrate in groundwater for miles from their source.<sup>72</sup> The vector of contamination can also be as simple as the transportation of contaminants from an upstream property to one lying downstream or from an elevated property to one downslope during a heavy rainfall.<sup>73</sup>

By addressing closely spaced contaminated properties in a concerted effort, the BDA approach helps ensure that this cross-contamination will not occur, regardless of the chemical or physical process involved. One lesson learned during initial BDA implementation is that potential for cross-property contamination should be one of the explicit factors considered in selecting BDAs because the ability to accomplish a complete cross-property cleanup is one of the substantial benefits of the clustered approach.

Experience in addressing multi-site contamination problems during implementation of the BDA has given rise to an innovative pilot approach for groundwater that would be unavailable under a property-by-property approach. A commingled groundwater contamination plume arising from multiple contamination sources from different properties can create substantial disincentives to voluntary brownfield remediation. A party who is willing to remediate the contribution to the collective groundwater problem emanating from their own property may find it technically impossible to do so if contamination from several properties is inextricably mixed with their contribution.<sup>74</sup> In the absence of an area-wide approach, this party may have to wait years before the other properties contributing to the contamination are remediated. Typical real estate, financing, and insurance arrangements will not accommodate this delay in reaching finality on remediation.<sup>75</sup> Faced with these unattractive prospects, many developers avoid voluntarily involving themselves in areas with multi-source

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*and Other Contaminated Sites*, 41 NAT. RESOURCES J. 919, 940-41 (2001).

<sup>71</sup> See, e.g., EPA, 1 HAZARD RANKING SYSTEM DOCUMENTATION PACKAGE: WHITE SWAN CLEANERS/SUN CLEANERS AREA GROUND WATER CONTAMINATION: WALL TOWNSHIP, MONMOUTH COUNTY, NEW JERSEY 23-24 (2003), <http://www.epa.gov/superfund/sites/docrec/pdoc1671.pdf>.

<sup>72</sup> See, e.g., *id.* at 23.

<sup>73</sup> See, e.g., *id.*

<sup>74</sup> See van Hook, *supra* note 3, at 752.

<sup>75</sup> See Chihak, *supra* note 3, at 286.

groundwater problems.

In some instances, however, the area-wide BDA Initiative may provide for remediation of all properties contributing to the collective groundwater problem on a coordinated schedule. Since financial mechanisms can be utilized to give finality to the first properties completing remediation without forcing them to wait until remediation of the entire BDA is complete, the agency and the public have reasonable assurance that the collective problem will be addressed in a timely manner given an area-wide approach.<sup>76</sup> In appropriate circumstances NJDEP is offering to allow properties coming to early closure for soil contamination within a BDA to pay an amount equal to their modeled allocable share of the collective groundwater problem into a groundwater trust.<sup>77</sup> NJDEP will maintain the trust until all properties within the BDA have controlled their continuing sources of groundwater contamination. At that time, the trust will be used to implement a comprehensive groundwater solution.<sup>78</sup> In this way, the multi-site approach can accommodate the transactional needs of early entrants while still ensuring the public of an adequate groundwater remedy.

### 3. *Economies of Scale in Site Remediation*

As discussed above, individual sites were historically assigned by NJDEP to different case managers in different regulatory programs without consideration of how these sites related to other nearby sites.<sup>79</sup> The assignment of a single case manager to oversee all cases within the BDA, regardless of the regulatory program, has proven to be an extremely important aspect of the process. The BDA case manager participates in the planning process, understands the project goals, and can, therefore, ensure continuity throughout the remediation process with the steering committee's ultimate vision in mind for all sites within the BDA. In spite of NJDEP's very detailed and prescriptive remediation guidelines, a certain amount of subjectivity is inevitable when interpreting data and applying regulations and standards. A single BDA case manager ensures, to the extent

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<sup>76</sup> Cf. NJDEP Policy Directive, *supra* note 4.

<sup>77</sup> *See id.*

<sup>78</sup> *See id.*

<sup>79</sup> *See supra* note 24 and accompanying text.

possible, the consistent interpretation and application of regulatory requirements and remediation standards throughout the BDA. A single case manager can also coordinate the timing of specific steps of the individual remediation projects to maximize the benefit of the economies of scale discussed throughout this Article. In the Palmyra BDA example above, cases that had previously been assigned to the Bureau of Underground Storage Tanks and to the Bureau of Southern Field Operations will be managed along with the other twenty-four properties by a single case manager within NJDEP's Office of Brownfield Reuse.

Furthermore, the BDA case manager ensures that the work done on properties is thorough and appropriate for the remediation and reuse plan. For example, two properties owned and controlled by private developers in the Elizabeth Port BDA, one in the construction phase and the other undergoing environmental work, were working without NJDEP oversight. Once the area was designated as a BDA, the BDA case manager required this work to be assessed to ensure compliance with NJDEP's standards and requirements. While the developers understand that this may require them to do additional environmental assessments before moving forward with construction, they are committed to working with the BDA case manager to ensure compliance. In both cases, the BDA case manager is assisting the developer with NJDEP permits and interagency issues.

The BDA case manager deals directly with the developer, municipal officials, community groups, and local residents. This socio-political familiarity has proven to be as important, if not more so, in these historically neglected areas, as understanding area hydrogeology or other technical intricacies. This is especially true for community groups and local residents.<sup>80</sup> Trust is essential, and trust is earned over a period of time. Many affected residents

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<sup>80</sup> Cf. Gabriel A. Espinosa, *Building on Brownfields: A Catalyst for Neighborhood Revitalization*, 11 VILL. ENVTL. L.J. 1, 17 (2000).

Supporters of the Environmental Justice movement view brownfields redevelopment as an attempt by overzealous politicians and investors to skirt liability issues, loosen cleanup standards, and attract businesses that add little to the sustainability of communities while increasing potential health hazards. Therefore, it is not uncommon for local groups to unite in opposition to proposed brownfields development where these groups have not been consulted or included.

*Id.*

are suspicious of outsiders, especially government officials.<sup>81</sup> The BDA process establishes a close, long-term working relationship between one case manager and the steering committee.

Another lesson learned during implementation of the BDA Initiative, however, is that assignment of a single case manager to the BDA may not be sufficient to effect coordinated multi-site remediation. Case managers often must coordinate their remediation oversight with input from NJDEP personnel with specialized expertise in geology, particularly where there are issues of groundwater contamination. The high level of multi-site coordination necessary for the BDA process is not possible if this geologist support cannot be mobilized on the required schedule. Historically, however, geologists at NJDEP formed a separate unit servicing all remediation projects on a first come, first served basis. To ensure that unavailability of geologist assistance does not throw the BDA properties' remediation and reuse plans off schedule, the overseeing geologist's sole function is to advise on the BDA.

Efficiencies have also been gained by eliminating redundant work that would have been required if the BDA properties were handled individually. Many of the same sources of information must be researched for any given property during the initial assessment, including title and deed information, historic aerial photographs and Sanborne Fire Insurance maps, federal, state, county and local permit, inspection, violation, discharge, and response records, and federal and state inventories of regulated or contaminated sites.<sup>82</sup> Therefore, conducting several concurrent preliminary assessments on proximate parcels or a single area-wide preliminary assessment can result in significant time and resource savings. The savings grow as the project moves into the more resource-intensive site investigation, remedial investigation, and remedial action phases. The coordination of environmental sampling activities over several properties in close proximity reduces contractor mobilizations and analytical redundancies. In certain circumstances, the coordination of environmental sampling activities encourages the use of innovative investigative strategies.

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<sup>81</sup> BILLIE JO HANCE ET AL., N.J. DEP'T OF ENVTL. PROT. & ENERGY, IMPROVING DIALOGUES WITH COMMUNITIES: A RISK COMMUNICATION MANUAL FOR GOVERNMENT (5th ed. 1991).

<sup>82</sup> Technical Requirements for Site Remediation, N.J. ADMIN. CODE tit. 7, § 26E (Supp. 2003); ATSM 2000 STANDARD, *supra* note 44, at 161-87.



The economic viability of some of these strategies, such as the use of an on-site mobile laboratory, is dictated by the number of samples to be analyzed. The on-site approach becomes economically feasible when several properties are aggregated and investigated simultaneously, since the unit cost of analyzing samples decreases as the number of samples increases. This is true for most innovative approaches to site characterization.<sup>83</sup>

In particular, a significant lesson learned during early implementation of the BDAs was the natural compatibility of the BDA process with an innovative site characterization strategy known as the Triad process.<sup>84</sup> Developed through EPA's Technology Innovation Office, the Triad process integrates systematic planning, dynamic work plans, and real-time measurements to enable the developers to compress the timeframes of the assessment and site investigation phase into as little as half the current timeframe.<sup>85</sup> This process achieves more timely and cost-effective site characterizations, focuses the cleanup dollars on the most critical areas, and provides greater certainty for the developer.<sup>86</sup>

The BDA approach, because it allows for remediation strategies that encompass multiple properties, is particularly suited to capitalize on the Triad process. The economies of scale derived from this approach increase with the numbers of samples required and the scope of the remediation undertaken.<sup>87</sup> One project currently being considered for BDA designation is using the Triad process to investigate large areas encompassing multiple individual properties through one mobilization of field analytic

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<sup>83</sup> Cf. van Hook, *supra* note 3, at 752 ("Even where it is technically feasible to remediate single properties, there may be significant economies of scale in coordinating remedy selection . . . and remediation waste disposal from multiple properties.").

<sup>84</sup> EPA, IMPROVING SAMPLING, ANALYSIS, AND DATA MANAGEMENT FOR SITE INVESTIGATION AND CLEANUP (Apr. 2001), <http://www.epa.gov/swertio1/download/char/542-f-01-030a.pdf>.

<sup>85</sup> D.M. CRUMBLING, EPA, CURRENT PERSPECTIVES IN SITE REMEDIATION AND MONITORING: USING THE TRIAD APPROACH TO IMPROVE THE COST-EFFECTIVENESS OF HAZARDOUS WASTE SITE CLEANUPS 1, 6 (Oct. 2001), <http://www.epa.gov/tio/download/char/triad2.pdf>.

<sup>86</sup> *Id.* at 1.

<sup>87</sup> D.M. CRUMBLING, EPA, CURRENT PERSPECTIVES IN SITE REMEDIATION AND MONITORING: APPLYING THE CONCEPT OF EFFECTIVE DATA TO ENVIRONMENTAL ANALYSES FOR CONTAMINATED SITES 7-8 (Oct. 2001), [http://www.epa.gov/swertio1/download/char/effective\\_data.pdf](http://www.epa.gov/swertio1/download/char/effective_data.pdf).

equipment.<sup>88</sup> As remediation of these properties progresses, the intention is to gain some of these efficiencies through mobilizing remediation equipment and evaluating remediation completion. To ensure that this happens, one of the BDA case managers has been given the task of becoming an expert in the Triad process, so that she can identify other BDAs where its use might be appropriate.

Another potential benefit to be realized by aggregating multiple contaminated properties is improved management of remediation waste (contaminated soil) during the remedial action. Rather than digging and dumping the existing contaminated soil off-site, non-hazardous contaminated soil may remain on-site under certain circumstances.<sup>89</sup> To ensure that remaining contaminated soil is properly managed and does not impact public health or the environment, contaminated soil is frequently capped with asphalt, concrete, clean soil, or structures. This cap eliminates any potential contact with the contaminated soil and limits the infiltration of rainwater, thereby protecting groundwater and precluding surface runoff.<sup>90</sup> Managing contaminated soil in this manner is far more feasible for larger, mixed-use projects than for smaller or solely residential projects. Managing contamination in this manner, therefore, allows contaminated soils from one part of the BDA to be excavated, segregated based on the contaminant concentrations, and, where properly protected, placed under buildings, parking lots, roadways, or elsewhere within the BDA.<sup>91</sup>

The final area worthy of mention in which the BDA Initiative has benefitted the remediation process is through its focused use of enforcement authority within the BDAs. Whether due to resource constraints or as a result of established policy, agencies do not make the decision to proceed with an enforcement action lightly.

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<sup>88</sup> A twenty acre project in Milltown is currently being considered for designation as a BDA pilot by virtue of the application of the Triad approach for site characterization under a joint venture between the Middlesex County Improvement Authority, NJDEP, EPA and the New Jersey Institute of Technology.

<sup>89</sup> See SITE REMEDIATION PROGRAM, NJDEP, GUIDANCE DOCUMENT FOR THE REMEDIATION OF CONTAMINATED SOILS 53 (1998) [hereinafter SRP REMEDIATION GUIDANCE], <http://www.state.nj.us/dep/srp/regs/soilguide>.

<sup>90</sup> *Id.* at 53-54.

<sup>91</sup> Those soils that exceed NJDEP standards, as defined in the Technical Requirements for Site Remediation, would nevertheless need to be transported off-site for acceptable reuse or disposal. *Id.* at 53; see *supra* note 44.

However, the BDA Initiative recognizes that an adverse impact to community revitalization can be a perfectly valid basis for proceeding with enforcement actions.<sup>92</sup> As discussed above, activities at all sites within the BDA are interrelated, if not interdependent, and one stalled property can effectively bring the entire BDA project to a standstill or impair the value of the other redevelopments.<sup>93</sup> The relationship amongst properties within a BDA demands an appropriate and strategic use of available enforcement tools to bring each of the properties into compliance with the remediation and reuse schedule, and, as the BDA process evolves, to keep the projects moving at a fairly common pace. Without this temporal coordination, many of the other benefits derived from the coordination of resources and economies of scale will not be realized.

BDAs are fundamentally positive expressions of stakeholder decision-making. Therefore, NJDEP's initial efforts are to invite parties who are legally liable for remediating the sites within the BDA to participate voluntarily.<sup>94</sup> BDAs can benefit substantially from this participation through reliance on PRPs' knowledge about the contamination on and history of the sites, their input into reuse options, their motivation to attract developers, and their resources to design and implement necessary remediation.<sup>95</sup> PRPs who voluntarily participate in the BDA process are welcomed as partners. In October 2003, two of three responsible parties identified for the Monument School/Magic Marker BDA in Trenton and two of three responsible parties identified for the North Camden BDA signed voluntary remediation agreements with NJDEP. By agreeing to satisfy their remediation obligations in a voluntary manner, the responsible parties avoid the unpleasant and potentially costly specter of environmental litigation. This

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<sup>92</sup> See Alexander Lane, *Cleanup of Brownfields Ordered to Speed Development in Cities*, STAR LEDGER (Newark), Nov. 19, 2003, at 30; Lawrence Hajna, *Gelatin Plant Gets Deadline for Cleanup*, COURIER-POST (South Jersey), Nov. 19, 2003, at B1.

<sup>93</sup> See *supra* Parts III.A.1 & III.A.2.

<sup>94</sup> BDA Synopsis, *supra* note 24.

<sup>95</sup> Cf. Sarah L. Inderbitzin et al., *The Use of Alternative Dispute Resolution in Natural Resource Damage Assessments*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 1, 19 n.170 (1995) ("PRPs frequently have special knowledge of the site or resource which may be useful in making the initial [natural resource damage assessment] determination. Early inclusion of PRPs may therefore increase the speed of the preassessment determination and reduce its cost.").

process, by design, is intended to be as painless as possible for those who choose to participate and as unpleasant as possible for those who do not. This combination of invitations to a rational, progressive remediation and revitalization effort backed up by the threat of enforcement if necessary has provided for the voluntary remediation of BDA properties for which there were previously no remediation resources available.<sup>96</sup>

When liable parties do not respond to their remediation obligations within BDAs, however, NJDEP has been prepared to turn to its enforcement authority to compel action.<sup>97</sup> In November 2003, NJDEP issued directives to the non-volunteering responsible parties for the Monument School/Magic Marker and North Camden BDAs, as well as a noncompliant responsible party for the Elizabeth Port BDA.<sup>98</sup> The directives enable NJDEP to use public funds to conduct the necessary remediation and then collect those costs plus three times that amount in damages.<sup>99</sup> NJDEP can assign its ability to collect treble damages to any volunteering remediating party.<sup>100</sup>

### B. *Enhanced Stakeholder Involvement*

Stakeholder involvement in the brownfield remediation and reuse process can be viewed as having three aspects: 1) the ability

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<sup>96</sup> The New Jersey Spill Compensation and Control Act directs a discharger of a hazardous substance to clean up and remove or arrange for the cleanup and removal of a discharge of a hazardous substance. N.J. STAT. ANN. § 58:10-23.11g (West 2003). The Act puts PRPs on notice that if they do not comply with the specific requirements of the Act, NJDEP may conduct or arrange for the cleanup and removal of the discharge. *Id.* If PRPs do not comply with the Act and NJDEP conducts the work, the PRP loses control over the direction the investigation and cleanup will take. NJDEP has the flexibility to direct a PRP to actually do the work necessary to clean up and remove a discharge. *Id.* Otherwise, the PRP pays a sum determined to be sufficient to conduct the cleanup and removal of a discharge or to pay a third party. This flexibility is an advantage. When a directive is ordered to a PRP to clean up the discharge or cease operation, if the PRP does not comply, it could be subject to treble damages. *Id.* This is a powerful tool at NJDEP's disposal that generally gets a PRP to respond.

<sup>97</sup> To date there have been three directives ordered in the BDAs to compel responsible parties to respond to the need for remediation, which have resulted in negotiations over liability and remediation plans. *See Lane, supra* note 92, at 30; Hajna, *supra* note 92, at B1.

<sup>98</sup> *See Lane, supra* note 92, at 30; Hajna, *supra* note 92, at B1.

<sup>99</sup> N.J. STAT. ANN. § 58:10-23.11f.a(1) (West 2003).

<sup>100</sup> *Id.* § 58:10-23.11f.a(2).

of the people impacted by potential contamination to thoroughly understand what is being done in the remediation phase and the potential risks; 2) the ability of affected stakeholders to express their opinions and participate in the remediation decision-making process; and 3) the ability of stakeholders to have a role in deciding the reuse of the targeted brownfield sites.<sup>101</sup> These aspects are interrelated in that different remediation strategies and measures have different impacts on potential reuses of the remediated properties. For example, capping contamination in place on a brownfield may require restriction of future uses to industrial or commercial purposes, but this may be accomplished relatively quickly and with relatively low physical impact on the surrounding community during remediation. Complete excavation of all contamination on a brownfield may expand potential future uses, but it may delay the community's desired use, require extensive trucking for waste removal with its attendant adverse community impacts, and consume resources that otherwise could be used for other community amenities. Where stakeholders are informed about remediation choices and consequences they can, given the opportunity, appropriately balance remediation and reuse options. The principal vehicle for stakeholder participation in the BDA Initiative is the steering committee. As discussed above, breadth of stakeholder representation is a substantial consideration in the competitive BDA application process.<sup>102</sup>

With respect to the first two aspects of stakeholder involvement—communication of remedial decisions and attendant risks and stakeholder participation in making those choices, no step is taken on any brownfield property within the BDA without informing the steering committee and, where appropriate, obtaining the steering committee's consent. Where remediation on a brownfield within a BDA is conducted with public funds or grant monies, the BDA case manager thoroughly reviews remedial choices with the steering committee prior to implementation and incorporates the steering committee's preferences wherever possible.<sup>103</sup>

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<sup>101</sup> BDA Synopsis, *supra* note 24; *see* Skelley, *supra* note 22, at 397, 403-06. *Cf.* 42 U.S.C. § 9617 (2000).

<sup>102</sup> *See supra* text accompanying notes 29-30.

<sup>103</sup> NJDEP retains, of course, its regulatory obligation to ensure the protectiveness of remedial measures, even if this were to create conflicts with a steering committee's preferences. To date, such conflicts have not occurred and

Where remediation within a BDA is conducted using the private funds of a liable party or a developer, the first aspect of stakeholder involvement remains the same: the BDA case manager thoroughly discusses each remedial decision with the steering committee. With respect to the second aspect, New Jersey law provides broad discretion to the party conducting remediation to select among remedial measures that meet NJDEP's protectiveness requirements.<sup>104</sup> The steering committee has less ability, therefore, to insist that its specific remedial choices are implemented in private cleanups within the BDA. Even in these cases, however, the steering committee's concerns and preferences are communicated to the remediating party by the BDA case manager.

The third aspect of stakeholder involvement in brownfield reuse—involvement in shaping the new uses to which the brownfields will be put—is particularly enhanced through the BDA Initiative. The ownership and control of brownfields within BDAs is varied and complex, ranging from properties in public hands, to properties in private hands but subject to substantial tax burdens or other liens, to private properties held by bankrupt parties, to properties owned by solvent parties that have simply chosen to leave their properties abandoned or underutilized.

The ability to influence reuse is largely tied to ownership and control of the real estate in question. Inside or outside of BDAs, stakeholders generally will not have the ability to dictate specific uses on properties they do not control. While BDA steering committees do not have the ability to dictate reuse on all properties, however, the BDA Initiative does give the reuse preferences of the steering committee substantial persuasive force.

The BDA process results in a multi-site remediation and reuse plan that incorporates environmental and marketing data, planning considerations, and community preferences, including the preferences of both local residents and local elected officials. There is a strong argument that the plan will make sense on several levels. This is particularly true because an effort is made to include property owners or other parties controlling the brownfields within a BDA as steering committee members directly

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NJDEP and the steering committees have been successful in jointly agreeing on remedial directions.

<sup>104</sup> Brownfield and Contaminated Site Remediation Act, N.J. STAT. ANN. § 58:10B-13a(2) (West 2003).

involved in developing the remediation and reuse plan.<sup>105</sup> Parties in control of the properties within a BDA may find that uses the plan proposes are those that would be most profitable. The support of the steering committee for the uses proposed in the remediation and reuse plan is also an indication that reuse in accordance with the plan would benefit from public support and would not face costly and time consuming public opposition.

Consolidated governmental support for the selected BDAs also provides incentives for aligning reuse with the steering committees' remediation and reuse plans. As indicated above, BDAs are selected and overseen by a team comprised of the agencies most involved with property development and assisted by other agencies as needed.<sup>106</sup> The local municipality is also expressly a participant in the BDA process. Resources and incentives under the control of these governmental bodies are directed to BDAs on a prioritized basis wherever possible. Access to this support and these incentives provides strong motivation to those controlling the BDA properties to pursue reuse options that are consistent with the remediation and redevelopment plans.

While it is useful to evaluate how the BDA process implicates each of the three aspects of stakeholder involvement in remediation and reuse, this parsing risks obscuring the cumulative positive impacts of the BDA Initiative in creating robust public involvement. When functioning robustly, steering committees are involved in an ongoing and multi-tiered synthesis of environmental and planning considerations, including property control options, applied across several brownfield sites. The remediation and reuse plans synthesize the opportunities and constraints generated by these considerations to achieve the optimal overall vision for the area. There is nothing in existing law respecting property-by-property approaches to brownfields that provides this sustained and effective level of risk communication, stakeholder involvement in remediation decisions, and stakeholder involvement in reuse decisions.

While the potential rewards of this level of stakeholder involvement are great, experience to date has revealed challenges in achieving it. NJDEP has learned that it may be unrealistic to expect volunteer steering committee members to be able to commit

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<sup>105</sup> BDA Synopsis, *supra* note 24.

<sup>106</sup> See *supra* Part II.C.5.

the time and resources necessary for intense involvement in a process that may take years to complete. A model that has emerged in practice and has since been included as a suggestion in the BDA process is that the steering committee should retain an individual with environmental or planning expertise who is paid to make the necessary day-to-day commitment to the BDA. This person would have the task of ensuring that the steering committee is fully informed of progress and of securing steering committee approval for significant decisions. This individual may be an employee of the host municipality, a staff person from a public interest group, or a party retained by the steering committee for this purpose.<sup>107</sup>

NJDEP has also learned the importance of evaluating as thoroughly as possible the level of steering committee commitment in selecting among BDA applications. While this remains an inexact science, the application selection committees have found it helpful to personally interview each of the applying steering committees to apprise them of expectations and to evaluate the sincerity of their dedication. The selection committees are also on the alert for commitment that is limited to personnel tied to a specific municipal administration, which may or may not remain in office during the period needed to complete the project.

Finally, the interagency BDA teams have learned that they must embrace maintenance of stakeholder involvement as a specific goal and activity. Frequent meetings should be scheduled with the steering committees, and progress within the BDA should be well publicized to provide the steering committee with a sense of achievement. NJDEP is currently considering how personnel from its community relations group might help with communication and maintain the motivation of steering committees where they appear waning.

### C. *Reuse Benefits*

As noted above, NJDEP anticipated that the BDA process would result in greater reuse benefits as compared to the traditional property-by-property approach.<sup>108</sup> These anticipated benefits include development synergies, improved timing, coordination of state resources, improved planning, and enhanced infrastructure

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<sup>107</sup> BDA Synopsis, *supra* note 24

<sup>108</sup> See *supra* note 61 and accompanying text.



investment. By addressing multiple properties comprehensively, the BDA Initiative was also expected to create opportunities to link or de-link properties or parts of properties to maximize redevelopment potential.

While one year is too short a time for any of the BDAs to have completed the remediation and reuse process, experience to date does indicate that the BDA Initiative is generating significant reuse benefits. Developers working in the BDAs have identified several ways in which the BDA Initiative has increased the attractiveness of problematic brownfields.<sup>109</sup> In fact, developers initially involved in BDAs have proven to be a source of new development resources. Once a comprehensive reuse plan begins to take shape, they have, on more than one instance, identified how additional BDA properties can augment their original development plans and have taken responsibility for those properties as well.

The reuse benefits of the BDA Initiative are evaluated individually below. Again, however, this separate consideration risks obscuring the cumulative impact of the BDA Initiative on reuse of brownfields within BDAs. The BDA Initiative generates a remediation and reuse plan that has the support of the relevant agencies and affected stakeholders and reflects strong marketing analysis and then focuses coordinated state and private resources in support of implementing the plan. Belief that this process will succeed in creating value within the BDA attracts developer participation which, in turn, contributes further to the success of the BDA process.

As a result, NJDEP now regularly responds to developer requests to review BDA applications, and developers are currently engaged in several areas of the state in generating local stakeholder interest in forming a BDA. The overall impact of the BDA Initiative has proven greater than the sum of the parts analyzed below.

### 1. *Timing*

Time is of the essence for all developers. The BDA remediation and reuse plan and the “critical path” give a high level of assurance to developers that the time frames established are feasible, will result in time and cost savings, and will make their investment that much more practical. This assurance extends to

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<sup>109</sup> Jaffe/Wisler interview, *supra* note 62.

the incorporation of community amenities, such as reopening access to waterfronts or open space, which can enhance the viability of the redevelopment.

This assurance also applies to all component properties within the BDA, so that developers of individual properties have a high level of confidence that other, complementary uses will emerge on surrounding brownfields on a schedule that will redound to their benefit. In one instance, for example, a developer claimed that several years ago his company had been interested in one large property that is currently part of a BDA. Although the individual property met his company's redevelopment criteria, the project was not pursued because of concerns about the lack of plans for surrounding brownfields. Once this property was incorporated in an overall BDA remediation and reuse plan involving several properties, the developer renewed its interest in the original property and may extend its project to other BDA properties as well.<sup>110</sup>

The multi-agency BDA team can be of tremendous assistance in cutting down delay in redevelopment within a BDA. Any particular brownfield project may need approvals or reviews from several agencies. Representing each of the principally involved agencies, and with access to other agencies as necessary, the team can act as the champion of the BDA in ensuring prompt agency review of key decisions. For example, development of a central property in one city had been hampered for years because of an unused historic transportation easement held by the state. Once the property was included in a BDA, the BDA case manager was able to quickly assemble the necessary parties and reach an agreement to extinguish the easement. Similar coordination has been achieved to obtain permits and cross-agency support for grants for BDA properties.

The progress imperative built into the BDA process also contributes to time savings. As discussed above, each BDA is reviewed annually for adequate progress.<sup>111</sup> The interagency BDA teams continuously review progress on each property and proactively promote necessary action. This ensures that each brownfield property, and the BDA as a whole, is proceeding as quickly as reasonably feasible.

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<sup>110</sup> Jaffe/Wisler interview, *supra* note 62.

<sup>111</sup> See *supra* Part II.D.

## 2. *Reduction of Uncertainty and Information Barriers To Development*

Developers have also claimed that the BDA Initiative increases the attractiveness of brownfields within BDAs by reducing risk and information barriers. A principal component of this aspect of the BDA Initiative is NJDEP's commitment to ensure performance of a preliminary environmental assessment of all brownfield properties within the BDA. One of the most significant deterrents to brownfield redevelopment is uncertainty. When the scope of environmental contamination is unknown and cannot be quantified, it is difficult or impossible to procure the financing and insurance necessary for development or to establish reasonable certainty respecting the schedule on which environmental remediation can be completed. At the same time, because a developer can become responsible for environmental remediation simply by purchasing or operating on a contaminated property, there is no easy way for developers to conduct initial environmental investigations themselves without risking environmental liability. Even if a developer were to pursue an environmental assessment of a property that interested it, the developer would still lack information regarding the environmental conditions of surrounding brownfields—information that might complicate remediation of the developer's property. By ensuring that a preliminary environmental assessment will be performed on all brownfields within the BDA, NJDEP takes an important step in reducing the uncertainties affecting these properties. These assessments are available to the development community, which can use them in fashioning reuse options.<sup>112</sup>

Developers have also indicated that the stakeholder involvement and planning aspects of the BDA Initiative have reduced the development risks associated with brownfield properties within BDAs. Developers can be fairly confident that

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<sup>112</sup> In fact, some developers have suggested that the amount of environmental information provided through the BDA Initiative may, by reducing redevelopment risks, impact the competitive advantage of developers who specialize in brownfield properties. Remediation and reuse of brownfields requires substantial specialized expertise in assessing the potential impacts of contamination on development costs and schedules. By increasing the availability of assessment information and lowering the expertise barriers to participation, the BDA Initiative may increase the potential pool of developers who would consider involvement with environmentally impaired properties. Jaffe/Wisler interview, *supra* note 62.

their plans will garner community support if they are consistent with the BDA remediation and reuse plans established by the community-based steering committee. Additionally, the steering committees create a structure for community and municipal actors to review, participate in, and comment on remediation and reuse activities, providing a convenient and organized forum in which developers can solicit feedback on changes and revisions to plans as they develop.<sup>113</sup>

### 3. *Coordination of State Resources*

Suffering the impacts of multiple brownfields, BDAs are by definition areas particularly needing governmental assistance. Sparse or intermittent assistance to these areas may be insufficient to have any real impact. Anemic assistance could, in fact, do more harm than good by generating community disappointment over failed initiatives. Once BDAs have been selected by the state after a careful review process, therefore, there are strong policy arguments for concentrating sufficient resources in these areas to virtually guarantee their success.

As partners in the BDA Initiative, state agencies dedicate and prioritize resources to assist the BDAs.<sup>114</sup> While the baseline resources meeting discussed above is a focal point for resource coordination in individual BDAs,<sup>115</sup> discussions among the agencies for more systematic coordination of resources within BDAs occurs on an ongoing basis. HDSRF grant money has already proven a beneficial tool in the BDA Initiative, funding assessments in the Cramer Hill (Camden), Elizabeth Port and Trenton BDAs. NJEDA is a critical partner in the resource prioritization process, and NJEDA staff members work with the BDAs to link them with potential developers and non-NJEDA financial resources.<sup>116</sup> NJDEP resources are also prioritized with

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<sup>113</sup> *Id.*

<sup>114</sup> These resources include the HDSRF and the Brownfield Reimbursement Fund. *See supra* notes 44, 46.

<sup>115</sup> *See supra* Part II.C.3.

<sup>116</sup> The New Jersey legislature developed a permanent fund mechanism to keep HDSRF funded. It proposed to amend the state constitution to allow for a portion of the New Jersey Corporate Business Tax to fund a loan and grant program that will address the discharge of hazardous substances. *See* S. Con. Res. 61, 210th Leg., 2002 Sess. (N.J. 2003) (enacted). The Resolution was adopted and presented to the New Jersey voters as Public Question No. 2. *See* OFFICIAL LIST: BALLOT QUESTIONS FOR NOVEMBER 2003 GENERAL ELECTION 2

the BDAs in mind.<sup>117</sup> As discussed above, concentrated provision of resources can have a snowball effect. When it is clear that the state will devote resources to revitalization of an area, this increases developer interest, which in turn brings additional development resources to bear.

While experience to date has shown the vital importance of this agency coordination, this coordination creates unique challenges for implementing agencies. Successful implementation requires a significant commitment of resources by the involved agencies. These resource demands may not be entirely consistent with preexisting agency priorities established by statute, policy, or otherwise. An agency considering implementation of an area-wide brownfield development approach must plan for this level of resource allocation and must resolve any conflicts created by obligations. In some cases, it may be difficult to convince legislators, agency staff, and the public that this change in focus is reasonable, appropriate, and warranted.

New Jersey has a history of joint implementation of brownfield programs by involved agencies.<sup>118</sup> These agencies are guided by a unitary, statewide smart growth vision articulated by

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(2003), [http://www.state.nj.us/lps/elections/elec2003/2003g\\_pubques.pdf](http://www.state.nj.us/lps/elections/elec2003/2003g_pubques.pdf). By a vote of approximately sixty-one percent, the constitutional amendment passed. See OFFICIAL LIST: BALLOT QUESTIONS TALLY FOR NOVEMBER 2003 GENERAL ELECTION 2 (2003), [http://www.state.nj.us/lps/elections/elec2003/results/2003g\\_pubques\\_tally.pdf](http://www.state.nj.us/lps/elections/elec2003/results/2003g_pubques_tally.pdf); Nat'l Conference of State Legislatures, Initiatives and Referenda: New Jersey Initiatives and Referenda, at <http://www.ncsl.org/ncsl/db/elect98/irsrch.cfm?recid=2180> (last visited Dec. 29, 2003). Additionally, the New Jersey Constitution was amended in 1996 to allow a portion of the tax to fund a loan and grant program to address underground storage tanks. N.J. CONST., art. VIII, § II, ¶ 6 (1996). This modification to the constitution will allow HDSRF funding to be applied to the assessment and cleanup of brownfield sites over the next twenty years.

<sup>117</sup> Additionally, proposed amendments to the Brownfield and Contaminated Site Remediation Act would give priority to BDAs for the disbursement of funds from HDSRF. S. 2459, 210th Leg., 2002 Sess. (N.J. 2003).

<sup>118</sup> The New Jersey Brownfield and Contaminated Site Remediation Act provides for redeveloper agreements that are overseen by the State Treasurer and the Commissioner of Commerce and Economic Development in consultation with NJDEP. N.J. STAT. ANN. §§ 58:10B-26 to -31 (West 2003). The Act also establishes the Brownfields Redevelopment Task Force and an interagency team to provide advice on improving the remediation and reuse of brownfields. *Id.* § 58:10B-23. Another example of multiple agency involvement is that NJDEP and NJEDA co-manage Hazardous Discharge Site Remediation Act grants. *See id.* § 58:10B-4.

Governor McGreevey.<sup>119</sup> Coordination of interagency priorities and development of cooperative working relations was not, therefore, a significant hurdle in implementing the BDA Initiative in New Jersey. In jurisdictions without this history or mechanisms enabling joint leadership, agencies should focus on establishing both a structure for interaction and a track record of cooperative management of shared initiatives.

The infrastructure planning element provides an additional benefit of the BDA approach. BDAs can justify major infrastructure improvements that might not be justified by the reuse of a single brownfield property because they incorporate several properties and a considerable aerial expanse. These improvements can contribute to the success of BDA redevelopment.<sup>120</sup>

#### 4. *Property Assemblage and Ownership Structures*

Assemblage of properties is frequently cited as difficult to achieve in brownfield reuse. Another major benefit of designating an area as a BDA is that such designation creates mechanisms through which owners of smaller blocks of property may work together on larger projects and owners of larger properties can subdivide their properties. Through the BDA planning process, value from combining or dividing properties can be examined and evaluated, which is not possible under a site-by-site approach.<sup>121</sup>

Examples of the importance of this benefit have arisen in several of the BDAs. Small properties within one BDA have been combined to create a commercially viable parcel. In another BDA, one brownfield was conjoined to create a parking area for a second brownfield within the BDA. In a third BDA containing several large properties, the property owners are discussing an arrangement in which they will transfer options on their properties to a third party who will have the authority to independently decide how the properties should be assembled or divided for

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<sup>119</sup> See *supra* note 2 and accompanying text.

<sup>120</sup> See van Hook, *supra* note 3, at 760.

<sup>121</sup> In the Elizabeth Port BDA, for example, a site without a PRP that required considerable remediation became part of a larger strategy for adding a supermarket to the community. An adjacent parcel will be the site of the supermarket and the orphan site will become the parking lot. This rearrangement was possible because the parties were at the same table, and the conversation fostered the search for creative solutions.

marketing purposes to maximize value.

If this mechanism proves successful, it may serve as a model for BDAs in the future. A particularly attractive potential aspect of this mechanism is that it may facilitate conversion of brownfields in BDAs into new “greenfields”—parks and open space that will benefit both residents and the environment. The property-by-property approach creates a strong imperative for individual property owners to maximize the commercial value of their individual properties. This may preclude using selected brownfields for greenfield uses even if this would increase the total value of the properties within the BDA. A third party charged with maximizing the total collective value of the brownfields within a BDA could allocate greenfield, commercial, industrial, and housing uses to achieve optimization.

The unique ability to assemble properties in BDA designations allows for two other major benefits that are crucial to successful area-wide planning and BDA remediation and reuse plans: access to environmental insurance and creative ownership and control mechanisms.

Expanding the size of the BDA to achieve a particular property value threshold enables a developer to secure environmental insurance that might be unavailable for individual properties within the BDA. Fear of the unknown is perhaps the greatest concern facing a potential brownfield developer. Sources of liability include previously unknown contamination, conditions that are created or exacerbated during construction, and third party claims for injury or pollution.<sup>122</sup>

The value of environmental insurance to manage these risks is widely recognized by developers.<sup>123</sup> Unfortunately, due to the

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<sup>122</sup> See Ann M. Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, in ENVIRONMENTAL INSURANCE: PAST, PRESENT, AND FUTURE 265, 273-83 (A.L.I.-A.B.A. Course of Study, June 13-14, 2002), WL SH090 ALI-ABA 293 (discussing the coverage of various available insurance policies).

<sup>123</sup> See Steven L. Humphreys, *Getting the Deal Done: A Survival Guide to Environmental Problem-Solving in Brownfields Transactions*, 11 FORDHAM ENVTL. L.J. 799, 837 (2000) (“[P]arties to transactions involving potentially contaminated real estate are increasingly looking to environmental insurance as a way to cost-effectively manage environmental liability risks . . . .”); see also Denise Ferkich Hoffman & Barbara Coler, *Brownfields and the California Department of Toxic Substances Control: Key Programs and Challenges*, 31 GOLDEN GATE U. L. REV. 433, 462 (2001) (“Some interest groups suggest that the uncertainties associated with unanticipated cleanup costs and with the

limited property value of brownfields and the unwillingness of most insurers to write policies for under one million dollars in remediation costs, developers of many smaller or less valuable brownfields are unable to secure these policies.<sup>124</sup> By bringing several properties together as part of a single BDA, the properties can collectively surpass the generally applied remediation cost threshold and qualify for this important resource.<sup>125</sup>

The BDA approach also accommodates a variety of ownership and control options that allow the BDA to maximize reuse benefits. Each site has a remediation strategy tailored to the conditions of the site and its ownership structure, but the BDA designation creates the opportunity to examine how best to structure ownership transfers to achieve the desired reuse. In addition to the third-party option transfer mechanism discussed above, BDA participants have begun to experiment with other ways in which creative ownership and control mechanisms can enhance value.

One option for ownership and control is municipal. Municipally owned and controlled properties are eligible for a variety of federal and state grants which enable the municipalities to conduct environmental assessments in order to define the nature and extent of the contamination.<sup>126</sup> Municipalities can also purchase insurance for a portfolio of sites to control costs, provide finality to sellers, and ensure protection against future spills or unknown contamination. All of these advantages can be realized by a municipality if the municipality has multiple brownfields sites

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potential for open-ended liability can be addressed with environmental insurance mechanisms.”)

<sup>124</sup> See Waeger, *supra* note 122, at 349-58 (showing that most types of environmental coverage policy limits run from \$1,000,000 upward); Hoffman & Coler, *supra* note 123, at 462.

<sup>125</sup> See Waeger, *supra* note 122, at 277 (for cleanup cost cap coverage, insurers “are not interested in insuring a cleanup of less than \$1,000,000”); Hoffman & Coler, *supra* note 123, at 463 (noting that California’s Financial Assurance and Insurance for Redevelopment program seeks to “make environmental insurance more affordable by lowering the transaction and unit costs of purchasing the insurance through the pre-negotiation of a group policy, bulk purchasing, and the creation of a guaranteed market”).

<sup>126</sup> The Brownfields Revitalization and Environmental Restoration Act of 2001 authorizes EPA to provide grants for assessment and cleanup of brownfield sites. Pub. L. No. 107-118, § 211, 115 Stat. 2360, 2363-64 (2002) (to be codified as amended at 42 U.S.C. §§ 9601, 9604). HUD also provides support through its Brownfield Economic Development Initiative grants.



to remediate.

Privately owned and controlled properties generally must rely on low interest government or private sector loans to perform the same work for which municipalities can receive grants.<sup>127</sup> By working together in the BDA Initiative, property owners and agencies can plan and develop viable strategies to begin remediation, outline desired end uses, market the property, and select a developer, leaving property in private ownership or shifting it to public ownership as best achieves the reuse goals for the site and the BDA. Opportunities to cooperate in other ways, such as in the purchase of portfolio insurance, are also available when private parties work in partnership with the public sector.

In the Elizabeth Port BDA some privately held properties are changing ownership, whether through voluntary swaps or involuntary means. One example involves one publicly held property and one privately held property. The privately held property is slated for commercial development but is adjacent to a recreation and sports field. The publicly held property, destined for park development, abuts a busy marina in an area of commercial development. The success of the BDA process to date in resolving other land ownership issues has prompted discussions between the parties on the relative value of the two intended uses and possible options. Current talks involve a swap so the publicly held land can be developed as additional park space next to the recreation facility and the commercial property can be located in the more developed area around the marina. The discussion further illustrates the opportunities created as a result of a concerted effort of the BDA process to follow a comprehensive strategy to link remediation and reuse.

Another situation in the Elizabeth Port BDA where a change of ownership seems likely involves an abandoned privately owned property that is encumbered by a city tax/water lien. The steering committee is moving aggressively with the city to acquire this property through foreclosure, thereby making it eligible to receive state and federal financial assistance. Designating the area as a BDA provided the forum for the Elizabeth Port community to select the various ownership and property assemblage forms

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<sup>127</sup> In New Jersey, non-responsible private parties can access the state Brownfield Reimbursement Fund, recovering up to seventy-five percent of site remedy costs through tax refunds, and federal tax incentives tied into the cost of site remedy. N.J. STAT. ANN. §§ 58:10B-27, :10B-28, :10B-30 (West 2003).

necessary to achieve the community's reuse goals—a forum that is nonexistent in a property-by-property approach.

#### CONCLUSION

A consensus is building among environmental and real estate professionals that the remediation and reuse of brownfields that were not addressed through “first generation” brownfield programs will require new strategies. For neighborhoods impacted by multiple brownfields, initial observations of the BDA pilots indicate that a multi-site, clustered approach can provide significant improvements in the areas of remediation, public involvement, and reuse.

The unifying message of the lessons learned during the BDA pilot implementation is the importance of cooperation and coordination. Addressing areas affected by multiple brownfields is as complex as it is important. The benefits, both for the environment and affected communities, suggest that other states should adapt and replicate the BDA Initiative in order to establish new levels of cooperation and coordination among governmental and non-governmental actors.

While the New Jersey BDA Initiative has already generated important fundamental lessons for redevelopment initiatives, there should be continued dialogue among jurisdictions considering implementing a clustered approach. This Article has attempted to share these lessons and spark dialogue among parties addressing these issues which are so vital to our country's environmental and developmental health.