COMMENTS

DEREGULATION BY ANY OTHER NAME: NEW JERSEY'S SITE REMEDIATION REFORM ACT IN FEDERAL CONTEXT

TOM RATH*

TABLE OF CONTENTS

* J.D. Candidate, 2012, American University Washington College of Law; B.A. History and Philosophy, East Stroudsburg University, 2007. I would like to thank my colleagues and friends at the *Administrative Law Review* for all their excellent support.

INTRODUCTION

Forced through a lame-duck Congress in 1980, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund)[1] was a bold,[2] but flawed,[3] legislative initiative. Superfund never attained the success of previous federal environmental programs, and a dramatic shift in political context played a lead role in that shortcoming.[4] Throughout the 1980s, critics began to accuse federal environmental regulation of impeding economic growth while delivering only marginal results.[5] When subsequent thinking coalesced around "streamlining" the Superfund program, one idea predominated: devolving enforcement duties to the states.[6] This process is now quite advanced[7] and enjoys some current

1. 42 U.S.C. §§ 9601–9675 (2006).

2. *See Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1465–66 (1986) [hereinafter *Developments*] ("The courts have enhanced the statute's radicalism in subsequent interpretation, finding in its language and legislative history a congressional intent to adopt unusually broad and highly controversial standards of liability.").

3. For example, the Comprehensive Environmental Response and Liability Act (CERCLA or Superfund) was hopelessly vague on the central point of what standard of liability courts should apply. *See* 42 U.S.C. § 9607(a) (providing that responsible parties shall be liable, but failing to define whether such liability is strictly imposed or conditioned on some other standard). Litigation on this point contributed to excessive delay and cost of initial enforcement efforts. *See also Developments*, *supra* note 2, at 1511–43 (discussing judicial construction of CERCLA liability sections).

4. *See* Editorial, *Not So Super Superfund*, N.Y. TIMES, Feb. 7, 1994, at A16 ("Apart from throwing some cleanup money at a few favored Congressmen, the Gorsuch-Lavelle team let one industry after another off the hook."). *See generally* WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY 42, 110 (1992) (describing lobbying efforts of the Superfund Coalition, which counted among its members former EPA directors and a host of major polluters).

5. *See generally* MARC K. LANDY ET AL., THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS (1990) (criticizing environmental law broadly for failing to impose enforceable standards and achieve cost-beneficial results).

6. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-97-77, SUPERFUND: STRONGER EPA–STATE RELATIONSHIP CAN IMPROVE CLEANUPS AND REDUCE COSTS 2 (1997) ("A growing consensus has emerged . . . that the states should take on more responsibility for leading the cleanup of the program's highest-priority sites . . . ."). Some commentators use the "streamlining" argument to go further, even suggesting devolution from states to local municipal bodies. *See, e.g.*, Matthew D. Fortney, Comment, *Devolving Control over Mildly Contaminated Property: The Local Cleanup Program*, 100 NW. U. L. REV. 1863, 1875–76 (2006) (arguing that state programs are too distant and inefficient to account for the smallest sites). And of course, still more radical voices have recommended that government retire from site remediation altogether. *E.g.*, JAMES V. DELONG, CATO INST. POLICY ANALYSIS NO. 247, PRIVATIZING SUPERFUND: HOW TO CLEAN UP HAZARDOUS WASTE (Dec. 18, 1995), *available at* http://www.cato.org/pubs/pas/pa247.pdf.

7. *See generally* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 597–98 (2001) (noting that by 1997, 5552 sites had been

academic support.[8] Yet the same administrative problems, including administrative intransigence[9] and political horse-trading,[10] plague state governments as well. If politics has hindered Superfund administration,[11] some state agencies face similar challenges. This Comment explores that possibility and asks what the federal Environmental Protection Agency (EPA) can do about it.

No state represents the progress of this regulatory evolution quite like New Jersey. Highly developed, densely populated, and heavily industrialized, New Jersey was—and remains—one of the most contaminated states in the nation.[12] Its legislature enacted the first hazardous waste remediation program in the nation in 1976, preceding even the federal government.[13] In the first five years of the federal program, a remarkable number—one quarter—of Superfund sites were in New Jersey.[14] Thus, the state represents the most advanced test of the wisdom of decentralized regimes.[15]

---

remediated under state enforcement, while only 200 had been completed by the Environmental Protection Agency (EPA)); Heidi Gorovitz Robertson, *Legislative Innovation in State Brownfields Redevelopment Programs*, 16 J. ENVTL. L. & LITIG. 1 (2001) (surveying state initiatives).

8. *See* Jonathan H. Adler, *Reforming our Wasteful Hazardous Waste Policy*, 17 N.Y.U. ENVTL. L.J. 724, 724–25 (2009) (advocating a decentralized regime for regulating hazardous waste management).

9. *See* Revesz, *supra* note 7, at 584 (cautioning that the state laws are sometimes merely symbolic and should not necessarily be taken to indicate robust enforcement).

10. *See, e.g.*, Robert R. Kuehn, *The Limits of Devolving Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373, 2377 (1996) ("Today, states are engaged in what one governor called 'cannibalism' in their competition to attract new businesses, wooing them with tax breaks and other taxpayer-financed economic incentives.").

11. *Compare* United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) ("Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal."), *with* H.R. REP. NO. 99-253, pt. 1, at 55 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2837 (declaring that the EPA was doomed to fail in administration of CERCLA because Congress allocated insufficient resources). Only politics can explain the chasm between these accounts of congressional intent.

12. *See generally* N.J. Exec. Order No. 140, 41 N.J. Reg. 2163(a) (May 7, 2009), *available at* http://www.state.nj.us/infobank/circular/eojsc140.htm (linking New Jersey's long history of economic prosperity with the problem of hazardous waste contamination).

13. *See* Adler, *supra* note 8, at 746 (arguing that although New Jersey was one of the first states to take the problem seriously, the states are generally more capable today).

14. OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, REPORT NO. 08-P-0169, IMPROVED CONTROLS WOULD REDUCE SUPERFUND BACKLOGS 2 (2008), http://www.epa.gov/oig/reports/2008/20080602-08-P-0169.pdf [hereinafter OIG REPORT].

15. A few academics have come to the same conclusion. *See, e.g.*, Joel B. Eisen, *Brownfields at 20: A Critical Reevaluation*, 34 FORDHAM URB. L.J. 721, 723–24 (2007)

But New Jersey's site remediation regime has been troubled by many of the same problems as those of the federal government. By the late 2000s, a backlog of more than 19,000 contaminated sites had accumulated under the jurisdiction of the New Jersey Department of Environmental Protection (NJDEP).[16] The press exposed numerous scandals that suggested that the Department had lost track of its own priorities and had failed to enforce its own orders.[17] The state legislature responded in 2009 by enacting a reform[18] that paralleled the federal strategy of years past: it shifted the burden of enforcement to private contractors.[19]

New Jersey's current experiment with privatization punctuates a long evolution of environmental policy under pressure to take economics into account.[20] Today, the state with the oldest site remediation program has one of the nation's most permissive.[21] Given New Jersey's recent history, the obvious question is whether the program goes too far. While New Jersey is free to pursue the policies it chooses,[22] its privatization plan risks tension with the EPA, especially if state standards slip below federal minimums.[23] On the other hand, this tension may be an inescapable attribute of the current distribution of Superfund authority. As New Jersey's path to privatization makes clear, shifting authority to the states has fundamentally altered administrative priorities.[24] Once development

(highlighting the large number of cases New Jersey's program has processed); Lynn Singband, *Brownfield Redevelopment Legislation: Too Little, but Never Too Late*, 14 FORDHAM ENVTL. L. J. 313, 314–15 (2003) (noting that New Jersey was one of the first states to pass Brownfields legislation).

16. *See* N.J. Exec. Order No. 140, 41 N.J. Reg. 2163(a) (emphasizing that a new, more efficient program was necessary to maintain industry and prosperity).

17. *See infra* Part III.A.

18. Site Remediation Reform Act (SRRA), N.J. STAT. ANN. § 58:10C–1 (West Supp. 2010).

19. The SRRA provides for the licensing of Site Remediation Professionals, § 58:10C-7, and mandates that the responsible party hire such a professional to conduct remedial actions, § 58:10B–1.3(a) to (b). Direct agency enforcement is generally limited to auditing ten percent of outcomes. § 58-10C-24.

20. *See generally* Joel B. Eisen, "*Brownfields of Dreams*"*?: Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883 (1996) (surveying state laws).

21. Although the licensing of professionals for site remediation is not uncommon, few states have so thoroughly privatized the program. *Compare* CONN. GEN. STAT. ANN. § 22a-133y (West 2010) (permitting licensed professionals to conduct remediation in industrial-use properties, subject to agency oversight), *with* N.J. STAT. ANN. § 58:10C–27 (West Supp. 2010) (describing limited conditions under which the New Jersey Department of Environmental Protection (NJDEP) will assume oversight of site remediation).

22. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

23. *See* 42 U.S.C. § 9604(c)(3) (2006) (requiring assurances from the states before EPA enforcement is deferred).

24. *Cf.* Mark K. Dowd, *New Jersey's Reform of Contaminated Site Remediation*, 18 SETON

became the central rationale for reform of the site cleanup process, "the core, definitional purpose of the regulatory program," as one commentator noted, was "to provide for compliance with the regulations."[25] Put simply, if Superfund was designed to distribute liability, state programs like New Jersey's aim to dispense with it as quickly as possible.

As their proponents frequently point out, states have often been more responsive to calls for Superfund reform than the federal government.[26] However, conflicting goals, such as urban redevelopment, "smart growth," and economic competition, give the success of these programs a different significance. Decentralization has predictably led to a patchwork not only in terms of written legislation,[27] but also in the prospects that standards will be actually reached, even at sites where cleanup is supposedly complete.[28] Ironically or by design, this kind of shadow deregulation was precisely the policy the Reagan Administration favored.[29] The question this Comment ultimately pursues is what methods remain for a differently motivated EPA to harness state initiative, while reasserting the protective environmental purpose of the law.

The administrative journey from streamlining to privatization suggests it may be time to adjust the EPA's posture with respect to state agencies that administer site cleanup laws. Part II of this Comment begins the discussion with a historical summary of the political forces that have gutted the environmental focus of hazardous site cleanup programs since 1980 and that have constantly pushed for a state-law solution. Next, Part III critiques New Jersey's new law in light of the scandals that brought about the reform in the first place, revealing a categorical failure to respond to a crisis of

---

HALL LEGIS. J. 207, 209 n.3 (1993) (highlighting a change in terminology accompanying a 1993 reform, and noting the change indicated lower public expectations of state remediation programs).

25. Miriam Seifter, Comment, *Rent-a-Regulator: Design and Innovation in Privatized Governmental Decisionmaking*, 33 ECOLOGY L.Q. 1091, 1112 (2006).

26. *See infra* Part II. *See generally* Robertson, *supra* note 7 (surveying state legislative innovations).

27. *See generally* U.S. ENVTL. PROT. AGENCY, STATE BROWNFIELDS AND VOLUNTARY RESPONSE PROGRAMS: AN UPDATE FROM THE STATES (2009), http://www.epa.gov/brownfields/state_tribal/update2009/bf_states_report_2009.pdf [hereinafter EPA UPDATE] (reporting basic statistics related to state brownfields laws).

28. *See* Seifter, *supra* note 25, at 1114 (noting that Massachusetts audits revealed as low as 13% of privately remediated sites were in compliance with the law, but that only 20% of all sites are actually audited).

29. *See, e.g.*, H.R. REP. NO. 99-253, pt. 1, at 55 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2837 ("[T]he program was victimized by gross mismanagement and policies which limited expenditures for site cleanups, in part in an effort to dissuade Congress from extending the funding for the program beyond its scheduled expiration date of October 1, 1985.").

enforcement at the NJDEP. Finally, Part IV proceeds to the question of a federal response. While the EPA has the discretion to order remediation at any site where a release has occurred,[30] in practice only those listed on the National Priorities List (NPL) are of "federal concern," and even these may be deferred to state agency leadership.[31] That process and simple budgetary reality means that the EPA needs state programs to work. However, the EPA should not quietly step aside; federalism does not require such a neat division of power. The EPA should therefore maximize its apparent willingness to intervene when state programs fail.

I. THE POLITICAL ROOTS OF SUPERFUND REFORM TRAJECTORIES

Congress passed the Superfund legislation with a core purpose of making the polluter pay.[32] CERCLA authorized the President (through the EPA) to order responsible parties to conduct cleanup at contaminated sites.[33] Where responsible parties refused or could not be found, the law created the Superfund to allow the EPA to do the work on its own, before it sued for compensation.[34] "Shovels first, lawyers later," went the refrain.[35] On the heels of a decade of important legislative victories for environmentalists, CERCLA represented the high water mark of federal environmental authority.[36]

But the tide quickly began to ebb. The political process of reversal stemmed from several factors, each of which helped inform calls for state involvement. As we shall see, the political process was forged in an exaggerated sense of crisis, subject to ideological hijacking and mindful, above all else, of the marketplace. In this climate, calls for deregulation and

30. 42 U.S.C. § 9604 (2006).

31. *See* 40 C.F.R. pt. 300, app. B (2010) (listing the highest priority sites for Superfund action); *see also id.* § 300.500(b) (describing procedures for state leadership at federally funded sites).

32. *See, e.g.*, S. REP. NO. 96-848, at 98 (1980) (executive communication of Douglas M. Costle, Administrator, EPA) (linking polluters' responsibilities to past benefit from commerce in hazardous substances).

33. 42 U.S.C. § 9606.

34. *See id.* § 9604 (authorizing remedial action); *see also id.* § 9611 (authorizing use of the Superfund to pay for remedial action); *id.* § 9607(a)(4)(A) (imposing liability for costs).

35. Press Release, U.S. Envtl. Prot. Agency, The Environmental Protection Agency: A Retrospective (Nov. 29, 1990), *available at* http://www.epa.gov/history/topics/epa/20a.htm (last updated Apr. 14, 2011).

36. *See generally* Hubert H. Humphrey III & LeRoy C. Paddock, *The Federal and State Roles in Environmental Enforcement: A Proposal for a More Effective and More Efficient Relationship*, 14 HARV. ENVTL. L. REV. 7, 36–37 (1990) (describing how federal regulators took over responsibility from state governments in the 1970s, but that most states had since enacted programs of their own).

for devolution of authority to the states were indistinguishable. The reality was that for the regulated community, devolution to the states was deregulation by another name.[37]

A. Mischaracterizing the Hazardous Waste Problem

The law was slower to respond to historical contamination than to other, more visible environmental problems.[38] Clean air and water naturally took precedent, largely because those problems were publicized by catastrophes.[39] But when numerous latent environmental disasters hit the news in the late 1970s, including the famous incident at Love Canal, New York,[40] historical contamination became a national priority. Voters feared toxic waste could be lurking under their houses, and Congress made clear that CERCLA was intended to tackle the emergency situation.[41] This hasty response to a perceived crisis with a major piece of environmental law was a familiar practice.[42] However, Love Canal was an atypical case, and it made a poor indicator of the problem Congress had taken on.

For the most part, there is not much drama or obvious heroism in site remediation.[43] The actual health effects of many kinds of hazardous waste exposure are difficult to predict in individuals and are almost always dislocated in time.[44] Furthermore, the characterization and quantification

---

37. *See* BARRY D. FRIEDMAN, REGULATION IN THE REAGAN–BUSH ERA: THE ERUPTION OF PRESIDENTIAL INFLUENCE 56–57 (1995) (noting that business leaders were initially apprehensive about a patchwork of state cleanup laws, until it became clear that poor funding meant these programs would not be enforced).

38. *See Developments*, *supra* note 2, at 1469–70 (reasoning that part of the delay in the law was due to the need for high technology to detect latent contamination).

39. *Id.*

40. For a news account of that incident, see Donald G. McNeil Jr., *Upstate Waste Site May Endanger Lives*, N.Y. TIMES, Aug. 2, 1978, at A1.

41. *See* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 24–25 (1982) (recounting Congressional debate on the subject, but noting that Superfund actually failed to provide any relief for the victims Congress cited).

42. *See, e.g.*, Jonathan H. Adler, *Fables of The Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89 (2002) (chronicling the effect of public outcry over the spontaneous combustion of a river in Cleveland, Ohio); Keith Schneider, *New View Calls Environmental Policy Misguided*, N.Y. TIMES, Mar. 21, 1993, at A1 (criticizing environmental law generally as too responsive to panics, rather than actual risks).

43. *Cf.* Marc B. Mihaly, *Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions Through Partnership with Experts and Agents*, 27 PACE ENVTL. L. REV. 151, 151–52 (2009) (discussing a lack of meaningful opportunities for public involvement in a process dominated by technicians and paperwork).

44. *See, e.g.*, *Health Effects of PCBs*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/wastes/hazard/tsd/pcbs/pubs/effects.htm (last updated Aug. 8, 2008) (summarizing the

of risk is a contentious regulatory process subject to all the inherent weaknesses and necessary compromises of democratic government.[45] The very existence of the invisible problem of hazardous waste contamination was susceptible to review once the panic subsided. Today, human health remains the foundation of site remediation laws,[46] but reformers appear intent on minimizing damage from the laws themselves. This is partly the result of original exaggeration of the severity of the problem.

Instead of hidden, highly contaminated hazardous waste sites like Love Canal,[47] the usual case involves a property contaminated by routine uses that resulted in the statistical uptick of a future risk of disease.[48] Although far less politically galvanizing, this problem affected many more sites than anyone anticipated in 1980.[49] CERCLA's radicalism—strict liability for anyone in the chain of title without regard to wrongdoing—is explained by a public perception of crisis.[50] When that image faded, the comparatively mundane reality helped foster the appearance that federal dollars were being wasted on matters of purely local concern. Absent a national crisis, critics began to call federal involvement a "jurisdictional mismatch"; contaminated property was a problem that state and local authority could resolve more efficiently.[51]

---

challenges of coming to a consensus on polychlorinated biphenyls (PCBs) because of the difficulty in testing, but concluding the well-known contaminant is a probable carcinogen).

45. *See* MICHAEL D. REAGAN, REGULATION: THE POLITICS OF POLICY 3–5 (1987) (describing the need to make a qualitative choice even when science is clear).

46. *E.g.*, 40 C.F.R. § 300.430 (2010) ("The purpose of the remedy selection process is to implement remedies that eliminate, reduce, or control risks to human health and the environment.").

47. One notable exception was discovered in 2006 at a New Jersey nursery school, where the mercury residue from a former thermometer factory poisoned sixty children. Tina Kelley, *After Mercury Pollutes a Day Care Center, Everyone Points Elsewhere*, N.Y. TIMES, Aug. 19, 2006, at B1. The incident helped spur the reform discussed *infra* Part III.

48. *See* Eisen, *supra* note 20, at 901 (describing the factors differentiating the broader CERCLIS listing from the National Priorities List (NPL), where only the latter denotes the limited set of sites worthy of federal involvement).

49. *Compare* Sen. Robert T. Stafford, *Why Superfund Was Needed*, EPA J., June 1981, at 8, 8, *available at* http://www.epa.gov/history/topics/cercla/04.htm (last updated Aug. 12, 2009) (explaining that the 1980 Congress had identified over 2000 sites where human health was affected), *with* Adler, *supra* note 8, at 734 (totaling over 45,000 sites investigated under Superfund since its passage).

50. *Cf.* Adler, *supra* note 8, at 733–34 (questioning the initial validity of reports of crisis at the Love Canal).

51. *See infra* Part IV. For an outline of the components of the jurisdictional matching argument, see Michael G. Faure & Jason Scott Johnston, *The Law and Economics of Environmental Federalism: Europe and the United States Compared*, 27 VA. ENVTL. L.J. 205, 240–45 (2009).

B. National Politics

CERCLA was also crippled by political misfortune. The 1980 presidential election ushered in an administration with a radical attitude toward corporate responsibility and federal regulation.[52] President Reagan's politicization of the administrative state was concentrated and comprehensive, marshalling the appointment power to ensure loyalists took control of key agencies.[53] Once installed, the Administration took steps to insulate its agents from the more liberal permanent bureaucracy in Washington.[54] Most importantly, Reagan initiated a centralized cost–benefit review process for new regulations under the auspices of the Office of Management and Budget.[55] Since no one had defined benefits with any rigor, the program served largely as a veto power for industry in the regulatory process.[56] Finally, the Administration systematically reduced funding and staff to ensure remaining regulation would not be enforced.[57]

These efforts had an especially dramatic effect on the EPA. Action was minimized to the point where the EPA Administrator Anne Gorsuch Burford actually abolished the Office of Enforcement for a time.[58] One commentator noted that the period resembled something like agency capture, except that it was the stated policy of the Executive Branch.[59] This period of agency surrender coincided exactly with CERCLA's infant years, from 1981 to 1983.[60] In 1986, President Reagan openly opposed reauthorization of the program, but Congress rejected this position while reaffirming the most controversial parts of the law.[61] However, with the

52. *See generally* FRIEDMAN, *supra* note 37 (evaluating the reactive behavior of the executive agencies, Congress, the courts, and interest groups to President Reagan's regulatory relief programs).

53. *See id.* at 33 (detailing President Reagan's centralization of the budgetary, appointment, decisionmaking, and regulatory processes).

54. *Id.* at 43.

55. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *revoked by* Exec. Order. No. 12,866, 3 C.F.R. 638 (1993).

56. *See id.* § 2(e), 3 C.F.R. 128 ("Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.").

57. *See* REAGAN, *supra* note 45, at 106 (deducing that the Administration clearly intended deregulation when it refused to increase staff).

58. FRIEDMAN, *supra* note 37, at 84.

59. REAGAN, *supra* note 45, at 98.

60. *Id.*

61. *See generally* Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. § 9621(f) (2006)); *Superfund Cleanups Termed Lax*, N.Y. TIMES, Nov. 24, 1987, at C11.

EPA hamstrung by political opposition, Congress' additional attempt at agency-forcing legislation was a futile response.[62]

C. Feedback Loops: The Brownfields Problem

CERCLA generated another unexpected problem on its own terms. Once the courts clarified that the law permitted, without requiring, joint and several liability,[63] property ownership in industrial or formerly industrial areas began to resemble Russian roulette.[64] Unless previous owners could be identified, any current stakeholder could find herself saddled with the entire bill for a cleanup that was guaranteed to be long and expensive.[65] Importantly, this was true even when the owner had purchased an idle property only recently; an environmental assessment was considered part of a buyer's due diligence.[66] Predictably, many investors chose to look elsewhere.

CERCLA's discouragement of investment in industrial property is known as the "Brownfields problem."[67] The extent of the problem has been debated, as it is not entirely clear whether or to what extent disuse of industrial land can be attributed to fear of environmental liability.[68] At the

62. *See Superfund Cleanups Termed Lax*, *supra* note 61 (detailing post-SARA failures to enforce the law).

63. *See, e.g.*, United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983) ("[A] court performing a case by case evaluation of the complex factual scenarios associated with multiple-generator waste sites will assess the propriety of applying joint and several liability on an individual basis.").

64. *See* Eisen, *supra* note 20, at 902–05 (discussing the serious potential for innocent owners to be named responsible parties under CERCLA).

65. *See* Anne D. Weber, Note, *Misery Loves Company: Spreading the Costs of CERCLA Cleanup*, 42 VAND. L. REV. 1469, 1474–75 (1989) (discussing the four categories of potentially liable parties under CERCLA and advising that any person "linked by even a tenuous thread" to a contaminated site should assess potential liability).

66. *See, e.g.*, United States v. Serafini, 706 F. Supp. 346, 350–52 (M.D. Pa. 1988) (discussing the innocent landowner's burden to prove he had no reason to know of the contamination at the time of purchase).

67. CERCLA was amended in 2002 to reflect the Brownfields problem. The amendment provided that a Brownfield is "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 211 115 Stat. 2356, 2360–61 (2002) (codified at 42 U.S.C. § 9601(39)).

68. *See* Marie Howland, *The Legacy of Contamination and the Redevelopment of Inner-City Industrial Districts*, NAT'L CTR. FOR SMART GROWTH (July 18, 2002), http://www.smartgrowth.umd.edu/research/pdf/Howland_ContaminationLegacy_DateNA.pdf (concluding from a case study of industrial property sales in Baltimore that environmental liability was only one of many factors complicating redevelopment).

very least, the perception of Brownfields as a challenge to development added a new dimension to the law. Especially at the state level, new legislation offered incentives for investment in Brownfields as a sweetener to environmental medicine. States created numerous initiatives to spur investment, like environmental land-use restrictions (covenants not to use land for specified purposes in return for relaxed standards)[69] and voluntary programs in which fast-track cleanup was incentivized by state funds and awards of covenants not to sue.[70] Partly in response to states' increased capacity to handle contaminated sites, the EPA accelerated its reliance on state authority.[71]

But state Brownfields laws were primarily intended to alleviate the economic effects of federal requirements, not to fulfill them.[72] The emergence of the Brownfields problem comports with what Professors J.B. Ruhl and James Salzman called "feedback" in their recent study of complex environmental law problems.[73] In their assessment, relationships *between* problems that did not appear correlated at the outset often complicate administration of the law.[74] Lifting one "strand" of policy—in this case hazardous waste cleanup—nudges other apparently discrete strands. In this light, the states' focus on Brownfields is not necessarily "environmental" law at all, but an attempt to attend to the policies—urban redevelopment, economic growth, etc.—affected by environmental law.[75] Yet the widespread adoption of Brownfields legislation in the states is cited in favor of further reduction in federal authority.[76]

---

69. *See, e.g.*, CONN. GEN. STAT. ANN. § 22a-133o (West 2006).

70. *See, e.g.*, *id.* §§ 22a-133x to -133y (authorizing voluntary cleanup where cleanup standards and hurdles to state certification vary according to inherent risk to human health associated with site location).

71. *See* Eisen, *supra* note 20, at 887 ("The rise of state voluntary cleanup statutes is consistent with the trend of devolving responsibility for environmental protection to the states . . . .").

72. *See, e.g.*, *id.* at 944 (explaining that state standards for carcinogens incentivize development by allowing risk levels higher than CERCLA permits).

73. J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CAL. L. REV. 59, 84 (2010).

74. *Id.* at 84–85.

75. *Cf.* Eisen, *supra* note 15, at 723 (advocating a reappraisal of the cleanup system to focus on urban redevelopment generally).

76. *See* Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 154 (2005) (arguing that extensive environmental regulation at the state level proves states can be trusted with the responsibility).

D. Decentralization as a Key to Reform

Decentralization of the Superfund program grew out of the hostile political context outlined above. CERCLA quickly passed through Congress as members responded to a perceived crisis they barely understood, and it was immediately undermined by a new administration intent on deregulation. A decade of expense and delay spread serious doubt that the government was up to the job, and the mere suspicion that a property could trigger government involvement began to complicate investment in these urban Brownfields. Meanwhile, states were developing legislation (if not the funding) to attend to these sites themselves.[77] The solution was obvious.

State responsibility took off in the late 1980s.[78] Under the Superfund Amendments and Reauthorization Act of 1986 (SARA), states were to be given "substantial and meaningful involvement" in the identification and cleanup process.[79] Today, state enforcement leadership is the norm.[80] Regional Memoranda of Understanding with many states set the EPA's hands-off approach in writing.[81] Even at NPL sites, states often take the lead role, so that EPA involvement is limited to regional review of the paperwork.[82] Federal deferral to state leadership cannot be explained independently of politics. As we have seen, the EPA was purposefully crippled in the 1980s, and drafting the employees of state environmental agencies became the surest way to augment a meager budget.[83] Furthermore, this administrative decision dovetailed with an ideological

77. *See* Robertson, *supra* note 7, at 2 n.2 (compiling citations to state legislation).

78. *See* Humphrey & Paddock, *supra* note 36, at 7–8 (noting that while environmental law had once been a local matter, federal authority was created in the 1970s, and had been reversed in the late 1980s); *see also* Marc K. Landy, *Local Government and Environmental Policy*, *in* DILEMMAS OF SCALE IN AMERICA'S FEDERAL DEMOCRACY 227, 238–39 (Martha Derthick ed., 1999) (describing a "pendulum swing" toward state authority).

79. Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. § 9621(f) (2006)).

80. *See* David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 32 (2000) (cautioning that where states take on this responsibility, the EPA still must find ways to ensure states themselves are complying with the law).

81. *See, e.g.*, Gale Lea Rubrecht, Op–Ed., *EPA Signs Agreement for State Voluntary Cleanup Program*, ST. J., Apr. 30, 2010, 2:44 PM, http://statejournal.com/story.cfm?func=viewstory&storyid=79110 (announcing that the EPA will not bring enforcement actions at sites that enter West Virginia's voluntary program).

82. *See* 40 C.F.R. § 300.5 (2010) (defining lead agencies under the National Contingency Plan).

83. *See* Humphrey & Paddock, *supra* note 36, at 35–36 (contrasting increased state commitment with new interstate and international demands on the federal EPA).

decision, as devolution of authority to the states became an aspect of deregulation.[84]

Academics also embraced devolution of authority to the states as a key to reforming the broken system. The most nuanced argument to emerge was the "matching principle" advanced by Professor Daniel C. Esty, which held that local problems should be addressed by local agencies.[85] Accordingly, the federal role should be limited to interstate spillovers (e.g., the Chesapeake Bay watershed)[86] and areas where states could benefit from economies of scale (e.g., health-protective standards that require expensive scientific study).[87] Opposing academics generally cited the "race-to-the-bottom" rationale for federal involvement in local affairs.[88] If states were allowed to set their own standards, each would compete for industry by setting the lowest standard the population would support.[89]

Much of this back-and-forth lacks grounding in political reality.[90] The law and economics perspective, in particular, tends to view regulation as a type of widget, produced by government for the consumption of the regulated community.[91] A focus on politics helps remind us that, at some level, government cannot "sell" its regulations without fundamentally altering them; stated another way, the marketplace has warped the law beyond recognition. Eventually, regulations, though unpopular with the regulated community, simply must be enforced. Thus, the pertinent question is not whether a particular jurisdiction is theoretically optimal

---

84. *See* FRIEDMAN, *supra* note 37, at 56, 95 (quoting Jim Florio, architect of the Superfund legislation and former New Jersey governor, to the effect that executive oversight of the regulatory process was forcing responsibility "into the laps of . . . State and local officials" (citation omitted)).

85. *See* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 574 (1996) ("[T]he challenge is to find the best fit possible between environmental problems and regulatory responses—not to pick a single level of government for all problems.").

86. Adler, *supra* note 76, at 141–42.

87. *See* Esty, *supra* note 85, at 573 ("[Do] we really want every state or hamlet to determine for itself whether polychlorinated biphenyls create additional cancer risks greater than 10^{-6} . . . [?]").

88. *See* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1210 n.1 (1992) (compiling numerous arguments for the race-to-the-bottom justification).

89. *See id.* at 1217–18 (comparing the problem of state cooperation to the classic "prisoner's dilemma").

90. *See id.* at 1213–19 (contrasting the optimal choices of a hypothetical "'island' jurisdiction" with those of a jurisdiction in competition with others to characterize the race-to-the-bottom rationale).

91. *See id.* at 1234 (explaining that states deter firms from investing in their territory through legal and tax measures even if they cannot reject such firms outright, creating an effect which can be seen as "the sale price of a traditional good").

from a cost perspective, but whether it will manage to actually enforce an unpopular law.

II. THE NEW JERSEY SITE REMEDIATION REFORM ACT

New Jersey's record reveals striking continuity with the problems that hindered the Superfund from the start, including political opposition, administrative constraints, and short-circuited priorities. By the late 2000s, the site cleanup process in New Jersey was in a state of disarray comparable to that of the EPA in the early 1980s.[92] Similarly, the New Jersey Site Remediation Reform Act of 2009 (SRRA) appears to confirm that a pattern of regulation, nonenforcement, and reform continues to favor developers.[93] If decentralization looked attractive in light of federal failure to enforce the law, privatization responds to the same distrust of state officials.

A. The Ill to Be Addressed

The first point to consider about the SRRA is that it reforms a system widely regarded as a failure.[94] Under the former rules, most private parties in New Jersey could enter a voluntary cleanup program and submit their work for NJDEP review.[95] The NJDEP retained a backdrop of enforcement measures, which theoretically operated to ensure oversight at the most contaminated sites.[96] However, too many sites—more than

92. *Compare Not So Super Superfund*, *supra* note 4 ("Superfund has failed on nearly every count."), *with* Alex Nussbaum, *Cleaning Up the Cleanup Process in New Jersey*, RECORD (Bergen County, N.J.), Apr. 2, 2006, *available at* http://www.redorbit.com/news/science/456127/cleaning_up_the_cleanup_process_in_new_jersey/ ("[W]e have multimillion-dollar cleanups with thousands of tons of contaminated soil and we have no one on site. The whole system is broken." (quoting Bill Wolfe, Director, New Jersey Public Employees for Environmental Responsibility (PEER), on environmentalists' calls for reform)).

93. *See* Eisen, *supra* note 15, at 742–43 (suggesting that previous New Jersey reforms that aimed at accommodating redevelopment, including voluntary cleanup with minimized state involvement, encouraged "developer[s to] run[] amok").

94. Former NJDEP commissioner Lisa Jackson said, "We realize that the state's system that allows self-reporting for monitoring of these contaminated properties is broken, and we are taking the first steps toward fixing this." News Release, N.J. Dep't of Envtl. Prot., DEP Takes Enforcement Actions Against Responsible Parties for Failure to Meet Contaminated Site Monitoring Requirements (Sept. 24, 2007), http://www.state.nj.us/dep/newsrel/2007/07_0041.htm [hereinafter News Release].

95. *See* N.J. ADMIN. CODE § 7:26C–2.3(b) (2010) (describing procedure for no-oversight remedial action); *see also id.* § 7:26C–6.3 (declaring NJDEP policy to issue a "no further action letter" upon completion).

96. *See id.* §§ 7:26C–5.1 to :26C–5.6 (providing for NJDEP oversight at sites subject to administrative consent orders due to high levels of risk).

19,000—entered the program,[97] and no one could say for certain whether sites inappropriate for voluntary action were misrepresenting the extent of contamination.[98] At the same time, NJDEP faced the same constraints the EPA did, including budget cuts, staff reductions, and pressure not to delay economic development.[99] As with the EPA's Superfund efforts, part of the problem in New Jersey was political. When Christine Todd Whitman became governor in 1994, her administration promised New Jersey was "Open for Business," and aggressively targeted environmental regulation.[100] Current Governor Chris Christie appeared ready to reaffirm this policy when he recently declared, "Simply put, the DEP must do less with less, and do it better."[101]

Recent history shows that NJDEP in fact does accomplish less with less. By the late 2000s, reports revealed NJDEP had allowed many sites to take advantage of a "grace period" far in excess of the law, even though this should have led to fines.[102] Even more troubling, there were indications that NJDEP was "rubber-stamping" the work of unlicensed contractors claiming remediation was finished.[103] Around the same time, the EPA was forced to retake control at a series of NPL sites where NJDEP had been designated the lead agency.[104] Federal action was prompted by an EPA study into why certain sites in New Jersey were still contaminated after twenty years on NJDEP's docket.[105] The answer: The department had

97. N.J. Exec. Order No. 140, 41 N.J. Reg. 2163(a) (May 7, 2009), *available at* http://www.state.nj.us/infobank/circular/eojsc140.htm.

98. *See* Eisen, *supra* note 15, at 747 (suggesting that NJDEP never adequately ranked sites in terms of priority as the law requires, making enforcement impossible to guarantee).

99. *See id.* at 745–46 (arguing the developer-centered focus of New Jersey's Brownfields rules made any changes adverse to developers appear contrary to the intent of the law).

100. *See* Tina Kelley, *New Jersey Vows to Overhaul Environmental Cleanup Work*, N.Y. TIMES, Oct. 24, 2006, at B2 (noting that the Whitman administration cut funding, hours, and staff of the environmental agency while increasing responsibilities).

101. *See* Scott Fallon, *N.J. Gov. Christie's Transition Team Has Harsh Words About State's Environmental Department*, RECORD (Bergen County, N.J.), Jan. 31, 2010, http://www.northjersey.com/news/environment/local_environment/83187117_Rein_in_DEP_s_power__Christie_team_urges.html (reporting on plans to slash the powers of the Department to avoid driving business out of state).

102. *See* News Release, *supra* note 94 (vowing to impose fines in accordance with the rules).

103. *See* Kelley, *supra* note 100 (interviewing the chairman of a New Jersey engineering firm on the lack of qualifications necessary to report to NJDEP).

104. *See* Letter from Jeff Ruch, Exec. Dir., PEER, to Barack Obama, President-elect (Dec. 5, 2008), *available at* http://www.peer.org/docs/epa/08_8_12_peer_ltr_opposing_jackson.pdf (describing how the EPA took over New Jersey's lead role of supervising Superfund cleanups because of the state's inability to resolve cleanups in a timely manner).

105. *See* OIG REPORT, *supra* note 14, at 4 (finding that the state failed to initiate

declined to use the tools it had to enforce the law.[106] Given fewer resources, NJDEP predictably accomplished less.

Demand for reform reached a crescendo after a high-profile incident in which toddlers attending a day care center called Kiddie Kollege were exposed to levels of mercury so high that masks were required to even enter the building.[107] NJDEP failed to inspect the former thermometer plant because the agency believed it was vacant—even though the owner claimed he contacted the department.[108] Tests eventually revealed that Kiddie Kollege exuded nearly thirty times the acceptable level of mercury, and beads of the toxic metal were found in the floorboards.[109] NJDEP claimed the owner was responsible for failing to conduct tests on his own, but state law actually mandated cleanup at the site a decade before.[110] The only reason it remained contaminated was NJDEP's failure to enforce the law.[111]

Just as state oversight became less likely, private site remediation grew into a big business in New Jersey. State and local subsidies, a willingness to consider impermanent (and therefore cost-sensitive) remediation plans, and a healthy market in urban redevelopment prompted one company alone, Cherokee Investment Partners (Cherokee), to spend hundreds of millions of dollars on contaminated properties all over the state.[112] Projects like Cherokee's plan to occupy the landfills of the Meadowlands with new condos and golf courses delighted local officials, who were keenly aware that the sheer amount of work necessary would make any other redevelopment unlikely.[113] However, scandal erupted at the site when Cherokee's partner, EnCap, admitted it could not finish the job despite having taken over $300 million in public assistance.[114] In other cases, even

---

discussions and effectively prioritize and define each party's responsibilities).

106. *Id.* at 9–10.

107. *See* Tina Kelley, *Memo Shows Agency Knew of Danger in Child Care Building*, N.Y. TIMES, Sept. 1, 2006, at B6.

108. *Id.*

109. Kelley, *supra* note 100.

110. Kelley, *supra* note 47.

111. *See id.* (quoting Bill Wolfe, Director, PEER) ("Had [responsibility under the Spill Compensation and Control Act] been addressed appropriately by [NJDEP], all the other stuff would not have occurred.").

112. *See* Jill P. Capuzzo, *Striking Gold in Acres of Brownfields: How a North Carolina Firm Has Come to Dominate Development in the State*, N.Y. TIMES, Apr. 17, 2005, at NJ1 (highlighting Cherokee Investment Partners' (Cherokee's) political connections and contributions and noting its reliance on local funding).

113. *See id.* (quoting former NJDEP Commissioner Bradley Campbell to the effect that Cherokee's willingness to take risks advanced New Jersey policy).

114. Ken Belson & David W. Chen, *Sharp Rebuke for Developer in Big Project at Landfills*, N.Y. TIMES, Feb. 29, 2008, http://www.nytimes.com/2008/02/29/nyregion/29encap.html.

when projects like Cherokee's were successful from a business perspective, advocates worried whether private cleanups actually met the standards set by the law.[115]

In addition to controversial mistakes, New Jersey witnessed numerous cases where developers were found to have intentionally misrepresented the extent of contamination or to have exaggerated the steps they took to fix it.[116] This cynical disregard for environmental regulation in general was on display when Cherokee became concerned that the nesting of a protected bald eagle pair at a worksite could derail plans for a massive development in Pennsauken, New Jersey.[117] The company hired a "consultant" to study the birds, but it chose an agent with a long record of illegal bird smuggling and other offenses against wildlife to do the job.[118] The consultant was eventually fired, but only after a baby eagle was found dying at the site, apparently scared out of the nest when Cherokee's consultant set up his tent too close, in violation of state and federal wildlife regulations.[119]

B. The New Program

If New Jersey's reform had an agenda, Kiddie Kollege put clear, comprehensive obligations at the very top.[120] At the same time, egregious, intentional disregard of the law should have at least called into question New Jersey's reliance on developers to police themselves.[121] Measured against these dual priorities, the resulting legislation is a decidedly poor performance, and one whose emphasis on efficiency is a jarring non sequitur.[122] While the SRRA sensibly created a licensing board for the

115. *See, e.g.*, Nussbaum, *supra* note 92 (describing environmentalists' concerns about new luxury condominiums in Edgewater, New Jersey that were built on contaminated land capped with asphalt).

116. *See id.* (citing a Hamilton, New Jersey scandal where property was certified without state inspection, even though the land was later discovered to contain 15,000 tons of soil laced with asbestos in concentrations as high as forty percent).

117. Jill P. Capuzzo, *The Fight over the Future of Pennsauken*, N.Y. TIMES, Apr. 24, 2005, Sec. 14, at 1.

118. *Id.*

119. *Id.*

120. *See* Eisen, *supra* note 15, at 745 ("That a site such as Kiddie Kollege may fall through the cracks should serve as a warning to New Jersey and other states to revise the assumptions they make about [B]rownfield sites and look for more of a demonstration from innocent developers up front.").

121. *See* Nussbaum, *supra* note 92 ("It's now not enough that a company steps forward and says, 'Here is a report from a licensed engineer.' We've all learned the hard way that can't be trusted,' Hamilton Mayor Glen Gilmore said. 'We're a community that's been dumped on and lied to.'").

122. *See, e.g.*, Carol Lawrence, *N.J.'s New Law Promises Faster Remediation, at a Price*,

professionals who already dominated the industry,[123] it simultaneously undermined this progress by devolving even more oversight authority onto these same professionals.[124] The bottom line is that the SRRA would not have prevented the crises to which it purports to respond.

The idea to regulate site remediation professionals through licensing is a natural extension of voluntary site remediation programs. Because voluntary programs permit site owners to do the cleanup themselves, they create a demand for environmental professionals familiar with both the law and the science necessary to comply with it.[125] Without a licensing program for these professionals in New Jersey, some questioned how thoroughly NJDEP actually vetted their reports before issuing the covenants not to sue that constituted the end of the process.[126] The SRRA responded to this concern with a Licensing Board[127] modeled on a similar program in Massachusetts.[128] Massachusetts, however, was a questionable model if the program's aim was to bolster compliance. While Massachusetts' experience with privatization was sold as a success within New Jersey,[129] its actual record is more complicated. Sites are ushered through the process more quickly in Massachusetts, but there is evidence to suggest widespread compliance failures.[130] Thus, the Massachusetts model is a better fit for a state seeking efficiency gains than one hoping to avoid a Kiddie Kollege-type fiasco, or worse.

The SRRA attends to compliance concerns through the requirements the Licensing Board is authorized to impose on license seekers. Under the

---

RECORD (Bergen County, N.J.) Feb. 28, 2010, http://www.northjersey.com/news/85754562_Privatizing_toxic_cleanups.html ("[T]he answer to expediting the sluggish process of removing toxic waste from properties is giving more responsibility to the remediators.").

123. *See* Kelley, *supra* note 100 (criticizing unlicensed contractors as too beholden to private parties to reliably complete work).

124. *Cf.* Belson & Chen, *supra* note 114 ("[In] New Jersey's political culture . . . large developers work with well-connected law firms to lobby state agencies for the purpose of waiving environmental regulations and other rules.").

125. *See* Seifter, *supra* note 25, at 1107 (dividing professional responsibilities into categories of compliance decisions and supplementary work, including testing and drilling).

126. *See* Eisen, *supra* note 15, at 748 (warning of a risk of abuse when NJDEP exercises discretion whether to consider violations serious).

127. N.J. STAT. ANN. § 58:10C–3 (West Supp. 2010).

128. *Cf.* MASS. GEN. LAWS ANN. ch. 21A, § 19A (West 2008) (establishing a licensing board for hazardous waste site cleanup professionals).

129. *See, e.g.*, Letter from William G. Dressel, Jr., Exec. Dir., N.J. State League of Municipalities (Feb. 23, 2009), http://www.njslom.org/ml022309-remediation.html (touting the efficiency of the Massachusetts program).

130. *See* Seifter, *supra* note 25, at 1114 tbl.1 (tabulating audit data from Massachusetts showing that only 28% attained a passing or "no follow-up" rate of compliance).

SRRA, Licensed Site Remediation Professionals (LSRPs) must meet minimum education and experience requirements[131] and pass a licensing test.[132] The law also imposes a duty of care[133] and corresponding threat of liability on the LSRPs.[134] Hiring an LSRP is a positive duty for any responsible party[135] and, once hired, the LSRP has the power to tell his client whether the site is clean enough.[136] The law attempts to balance this responsibility with an array of duties and declarations that theoretically direct the LSRP's loyalty to the public standards the law requires.[137]

However, these rules are unlikely to deter willful violations and may well impede their discovery. Since the SRRA allows LSRPs to certify compliance without the Department's review, audits are the only means of determining the extent to which purported remediation plans are actually enacted.[138] In addition to providing information, audits could also deter noncompliance if the consequences of a failure are strong enough.[139] However, the small sample of sites—ten percent—that will be examined may not prevent property owners from viewing noncompliance as a manageable risk.[140] Furthermore, even audited properties may be able to manipulate the data to depict compliance.[141] The audits provide NJDEP with only the final snapshot of a remedial plan, potentially obscuring faulty intermediate steps. Retesting in such a situation may not be possible, so auditors will be left with only the paperwork to determine whether initial testing—upon which every subsequent action rests—was properly

131. N.J. STAT. ANN. § 58:10C–7(d).

132. *Id.* § 58:10C–5(b).

133. *Id.* § 58:10C–16(a) to (z).

134. *Id.* § 58:10C–17.

135. *Id.* § 58:10B–1.3(b).

136. *See id.* § 58:10B–13.2(a) (deeming Licensed Site Remediation Professional (LSRP) issuance of a "response action outcome" the equivalent of the state's covenant not to sue, as independently ending the remediation process).

137. *See, e.g.*, *id.* § 58:10C–16(a) ("A licensed site remediation professional's highest priority in the performance of professional services shall be the protection of public health and safety and the environment.").

138. *See* Seifter, *supra* note 25, at 1104 (noting that under the Massachusetts program, there is no check on private licensees' work at nonaudited sites).

139. *See* Lawrence, *supra* note 122 (reporting that environmental professionals fear consequences such as the loss of a license or fines).

140. N.J. STAT. ANN. §§ 58:10C–24; 58:10C–25 (providing for audits of 10% of licensed remediation professionals, but only of response action outcomes issued within three years); *cf.* MASS. GEN. LAWS ANN. ch. 21E, § 3A(o) (West Supp. 2010) ("In each year the department shall, at a minimum, audit twenty percent of all sites . . . .").

141. *See* Seifter, *supra* note 25, at 1115 & n.127 (listing opportunities for professionals to exercise judgment within a defensible conception of the vague command to protect the public under Massachusetts law).

conducted.

Of course, it is not possible to know how broad the class of scofflaws actually is. However, as Professor Joel B. Eisen has discussed, New Jersey's approach to site remediation has long depended on the assumption that if the law was only streamlined, developers would tackle both the environmental *and* economic problems associated with disused industrial sites.[142] This story is simply not credible in New Jersey after EnCap, Kiddie Kollege, and other abuses of public trust. Yet with the SRRA, New Jersey continues to tout the need for more efficient work above all else.[143]

III. FEDERAL IMPLICATIONS

New Jersey's uninspiring experience suggests the state programs that helped justify decentralization of Superfund authority were built on shakier ground than originally suspected.[144] Most state cleanup programs took shape in the 1990s, as a decade of political attack on the regulatory state was followed by a period of congressional inertia on environmental issues. But, at least in New Jersey, the environmental agency charged with administering these innovations was either unable or unwilling to do the job.[145] Now, the same deregulation arguments have been retooled to enact a reform that promises further efficiency gains but fails to address the serious compliance failures that animated the change from the start.

New Jersey's record of nonenforcement, coupled with the state legislature's mandate for further diminished agency involvement, seriously undercuts rationales for federal reliance on state enforcement. But even if a federal response is warranted, the question of its scope implicates the ongoing academic debate over the proper federal–state balance in environmental law. The first question here is what New Jersey's experience

142. *See* Eisen, *supra* note 15, at 723 ("[Brownfields policies] seek to discover and rehabilitate neglected sites, reverse the decay of urban cores, and, in some cases, link with smart growth strategies by slowing the march of development to suburban and exurban America.").

143. *See Site Remediation Reform Act (SRRA)*, N.J. DEP'T. OF ENVTL. PROT., http://www.state.nj.us/dep/srp/srra (last updated May 11, 2011) ("Implementation of SRRA will therefore result in contaminated sites being cleaned up more quickly, thus providing a greater measure of environmental protection to the citizens of New Jersey and ensuring that development of underutilized properties are returned to the tax rolls more quickly.").

144. *Cf.* William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 112–13 (2005) (cautioning that state activism cannot be generalized out of the political and historical context that created it).

145. *See, e.g.*, Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 399 F.3d 248, 265 (3d Cir. 2005) ("The evidence demonstrates a substantial breakdown in the agency process that has resulted in twenty years of permanent clean-up inaction.").

suggests about existing theories of environmental federalism. The second is what, if anything, this means for the EPA.

A. Optimal Jurisdictions

Proponents of state leadership in environmental enforcement gather support from the principle of "jurisdictional matching." States, the argument proposes, are more responsive to local concerns, more knowledgeable about local conditions, and better able to respond to citizens' demands.[146] Contaminated property most directly affects the neighbors it puts at risk and the businesses asked to pay for the response.[147] This limited class will be most effectively represented at lower levels of government, where incentives are clearest.[148] According to the matching theory, the states should be the optimal jurisdictions for efficient responses to local issues with contamination.

Theory aside, it is clear that New Jersey's citizens have not reaped a representational advantage from their access to the NJDEP. As an illustration, consider the case of Jersey City's Honeywell International (Honeywell) site. The site was opened in 1895 by Mutual Chemical Company of America—eventually the largest chromate processor in the world—as a dump for waste products on the banks of the Hackensack River.[149] One of the byproducts of chromate processing is hexavalent chromium, a carcinogen the EPA and NJDEP rate as more dangerous than polychlorinated biphenyls (PCBs) or arsenic.[150] Hexavalent chromium at the site exceeded 8,000 times the acceptable levels in places, and 1,500,000 tons of soil was contaminated.[151] The pollution was so bad that even Honeywell (which had succeeded to the title through acquisition of the previous corporate owner) acknowledged that there was "something terribly not right with the site."[152] However, even though New Jersey ordered

146. *See* Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 536–38 (1997) (arguing for a presumption in favor of decentralization to account for local differences).

147. *See generally* Adler, *supra* note 8 (discussing arguments in favor of decentralizing regulatory authority, including the ability to narrowly tailor protection efforts).

148. *See* Adler, *supra* note 76, at 133 ("Environmental protection efforts are most likely to be optimal where those who bear the costs and reap the benefits of a given policy determine how best, and even whether, to address a given environmental concern.").

149. *Interfaith*, 399 F.3d at 252.

150. Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 263 F. Supp. 2d 796, 816 (D.N.J. 2003), *aff'd*, 399 F.3d 248 (3d Cir. 2005).

151. *See Interfaith*, 399 F.3d at 261 (examining the degree to which hexavalent chromium in the soil exceeded the state standard).

152. *Id.* at 253.

Honeywell to clean up the site as early as the mid-1980s, no action was taken until 1993, when an interim concrete cap was placed over the site.[153] Though the cap was designed to last only five years, no further work began for well over a decade, when community organizers convinced a federal judge to order the site excavated.[154]

In *Interfaith Community Organization v. Honeywell International*,[155] Judge Van Antwerpen of the Third Circuit dealt summarily with Honeywell's argument that the federal remedy infringed on state agency process.[156] "Honeywell's dilatory tactics and NJDEP's inability to deal effectively with those tactics . . . . cast[] strong doubt as to whether there *is* a process to override in this case," he wrote.[157] Maddeningly then, it took ten years of citizen advocacy in federal court to enforce an order NJDEP issued in 1993. The citizen plaintiffs, frustrated that a massive chemical dump sat within a block of their grocery store, were not better served because local officials were in charge of the site; in fact, the mismatch probably went the other way. Honeywell had revenues of over $30 billion in 2009,[158] while the entire State of New Jersey passed a budget of $29 billion this past summer.[159] Thus, whatever theoretical value the matching principle has (a question that will not be settled in this Comment), it offers no guidance when the circumstances do not fit its assumptions.

It is not easy to reconcile this story, or Judge Van Antwerpen's remarks, with the claim that states are optimal, matching jurisdictions. Yet even without reopening the theoretical debate about jurisdictional matching, we can acknowledge that states will sometimes fail. New Jersey's recent history supports the limited assertion that in some political, geographic, and economic contexts, states are not effective enforcers of environmental law,

153. *Id.*

154. *Id.* at 268 ("Enough time has already been spent in the history of this matter and the time for a clean-up has come.").

155. 399 F.3d 248 (3d Cir. 2005).

156. *Id.* at 267–68. The procedural argument may have been more promising than it appears, since *Interfaith* was decided under the Resource Conservation and Recovery Act (RCRA). Unlike CERCLA, the RCRA delegates authority to the states entirely upon EPA authorization. *See* Harmon Indus. v. Browner, 191 F.3d 894, 897–99 (8th Cir. 1999) (ruling that the EPA lacked authority under RCRA once powers were delegated to the state). While the laws differ, the point about jurisdictional matching is the same.

157. *Interfaith*, 399 F.3d at 267.

158. Honeywell Int'l Inc., Annual Report prepared for the Sec. & Exch. Comm'n (Form 10-K) 22 (Feb. 12, 2010), *available at* http://www.sec.gov/Archives/edgar/data/773840/000093041310000784/c60039_10k.htm.

159. Richard Pérez-Peña, *Christie and Legislature Avoid a Showdown Over Money (for Now)*, N.Y. TIMES, June 30, 2010, at A22.

despite their representational advantages over the federal government.[160] If the states are sometimes suboptimal jurisdictions, the EPA needs effective means correcting these situations when they arise.

B. Cooperative Federalism

Federal intervention, however, potentially conflicts with the cooperative model of environmental federalism.[161] This design was chosen in an effort to assert centralized control while respecting traditional notions of state sovereignty.[162] Because most environmental problems are essentially local, they were traditionally the province of local government.[163] However, by the 1970s it was apparent that the states had largely failed to tackle the pressing concerns that environmental disasters raised.[164] The cooperative federalism design was a compromise that allowed the federal government to seize control by demanding minimum standards and practices, while preserving a major enforcement role for the states.[165] To capriciously reassert federal enforcement authority could upset this balance.

On the other hand, New Jersey does not appear to be holding up its end of the cooperative bargain either. CERCLA was unique in that it did not provide for much state involvement as originally drafted.[166] However, once states took over responsibilities, various conflicting political impulses—toward efficiency, economic growth, and urban redevelopment—clouded the purpose of the law. The resulting feedback could be devastating to the

160. *See* Buzbee, *supra* note 144, at 112–13 (advocating a contextual, case-by-case approach to analyses of federal–state approaches to environmental enforcement, rather than monolithic, theoretical justification).

161. Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1174 (1995) (providing an overview of the basic principles of cooperative federalism).

162. *See* Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 722–23 (2006) (describing cooperative federalism as a way to pursue federal goals without "running roughshod" over state sovereignty).

163. *See* Adler, *supra* note 76, at 157–58 (highlighting the local character of environmental concerns). *But see* Percival, *supra* note 161, at 1182 (noting that conceptions of the proper level of government to address various problems vary widely over time).

164. *See* Percival, *supra* note 161, at 1144 (analogizing the federalization of environmental law to the migration of civil rights law to federal jurisdiction after manifest state failure).

165. *See* Glicksman, *supra* note 162, at 754 ("[A] cooperative federalism program affords considerable discretion to the states to decide how to achieve the goal, thereby minimizing the extent to which pursuit of the federal goal infringes on state sovereignty.").

166. *See* Percival, *supra* note 161, at 1163 (explaining that CERCLA imposed a regime of strict liability for hazardous-substance releases and authorized the federal government to delegate cleanup decisions to the states).

cooperative model. In New Jersey's case, entrusting enforcement to NJDEP assumes a uniformity of goals that simply does not exist.[167] New Jersey's reform experience suggests that when sovereign state actors pursue nominally federal goals, their true cooperation is conditioned on the political reality of their jurisdiction.[168] Thus, if federal intervention is problematic, cooperation is equally threatened when local politics dictate a strategy of nonenforcement under delegated authority.

Political choices have a dramatic effect even when the final goal—a clean environment—is not up for debate.[169] Inevitably, then, when multiple levels of differently motivated decisionmakers collaborate in the manner cooperative federalism suggests, the potential exists for conflict among the ideological bases that inform their decisions.[170] When that happens, "cooperation" is no longer a viable course of action. It is unrealistic—not to mention inconsistent with cooperative federalism's supposed respect for state sovereignty—to expect states to quietly do the federal government's bidding. At the same time, recognizing the intergovernmental conflict inherent in the model is not a call for federal deference. Rather than reopening an interminable debate about which jurisdiction is optimal, New Jersey's reform should challenge the EPA to join the fray.

---

167. *Cf.* Buzbee, *supra* note 144, at 121 (citing state and federal tax and employment goals to explain diverging preferences between state and federal lawmakers).

168. *See* Mark Atlas, *Enforcement Principles and Environmental Agencies: Principal-Agent Relationships in a Delegated Environmental Program*, 41 LAW & SOC'Y REV. 939, 965 (2007) (examining correlations between states' political and demographic characteristics and the relative strength of their enforcement measures).

169. *Cf.* Cass R. Sunstein, *The Arithmetic of Arsenic*, 90 GEO. L.J. 2255, 2257–58 (2002) (comparing the regulatory preferences of the "intuitive toxicologist" with a more rigorously scientific cost–benefit analysis, but concluding that neither provides an absolute answer for arsenic levels).

170. This interaction has been labeled "contextual federalism" or "dynamic federalism." *See* Buzbee, *supra* note 144, at 112 ("Environmental problems and regulatory responses must be examined with attention to their historical context, their political environment, and realities of what really are, at most, regulatory propensities and incentives."); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 161 (2006) ("[A] static allocation of authority between the state and federal government is inconsistent with the process of policymaking in our federal system, in which multiple levels of government interact in the regulatory process."). For purposes of this Comment, both theories are incorporated as instructions to attend to the dynamic features inherent in federal–state "cooperation."

C. Federal Response

If rigid adherence to theory is removed as an obstacle, the question remains as to what form a federal intervention should take. The crux of the problem in New Jersey is that by delegating authority to private parties, the SRRA makes noncompliance easier to hide, even as NJDEP's recent record reveals poor enforcement efforts.[171] This problem is not limited to New Jersey: even where federal law makes violations easy to detect, state level nonenforcement tends to obscure the extent to which standards are obtained.[172] The EPA's interest in New Jersey's new program should therefore focus on enhancing transparency and ensuring that consequences are imposed when failures come to light. This approach is not punitive; it presumes that if New Jersey keeps its promises, the SRRA could achieve a level of enforcement consistent with federal law, while incorporating the state's strong economic concerns. This is precisely the balance cooperative federalism intends.

The problem with transparency strikes at the heart of what makes the SRRA suspicious. The streamlining process has whittled away the points at which NJDEP collects information, from every step of the way to now only rarely. By renouncing the power to collect information at each and every site, NJDEP can no longer reliably tell whether standards are met.[173] New Jersey developers are not ready for an "honor system" approach, and yet without information there can be no independent assurance of their compliance. To enhance the likelihood that at least one actor—either the public, NJDEP, or the EPA—will hold licensees accountable, information gleaned from yearly audits should be shared between agencies and made accessible to the public.[174]

This suggestion requires minimal investment or change in law. New Jersey has in fact already promised to publish LSRP documents online "as soon as an internet site with document posting capability is established . . . ."[175] The EPA is also already involved in initiatives to make

171. *See supra* Part III.

172. *See* Atlas, *supra* note 168, at 972 (explaining the results of an empirical study indicating widespread nonenforcement).

173. NJDEP could be operating on a theory of "out of sight, out of mind." *See* Percival, *supra* note 161, at 1180 (pointing out that shifting authority is often a tactic to make problems less visible).

174. *Cf.* Richard Webster, *Federal Environmental Enforcement: Is Less More?*, 18 FORDHAM ENVTL. L. REV. 303, 324–26 (2007) (showing that transparency is necessary to evaluate state innovations and make efficient choices between policies).

175. N.J. Exec. Order No. 140, 41 N.J. Reg. 2163(a) (May 7, 2009), *available at* http://www.state.nj.us/infobank/circular/eojsc140.htm.

state enforcement results publicly available in a centralized format.[176] The existence of these structures makes the solution plausible, but more specific efforts are necessary to boost the chances of successfully encouraging accountability.

The SRRA promises that each year 10% of LSRP documents stretching back three years will be audited.[177] In Massachusetts, a similar auditing program revealed widespread compliance failures, the most common of which were administrative shortcomings such as improper documentation of the reasons a course of action was chosen.[178] This kind of administrative failure is especially important because it will obstruct NJDEP's ability to gauge more substantial aspects of the program's success or failure. Therefore, it makes sense to emphasize that online publishing should make audit failures of any category recognizable as such, rather than bury them in a database of technical reports and correspondence. Clearly publicizing audit failures should encourage a high level of professionalism among LSRPs, driving down negligent mistakes and ensuring proper paperwork is submitted to NJDEP. Further, intentional obfuscation will be publicly identified, so that interested parties—like the community activists in *Interfaith*—can demand consequences. Publication will also serve as a form of promotion for good actors, since a clean audit record would likely drive business to these firms.

Interagency informational sharing could also lead to stricter enforcement of consequences when private cleanups fail. Under the SRRA, if an LSRP fails an audit, he or she is liable, but it is not entirely clear what consequences attach to the owner of the site.[179] Accordingly, the EPA should be ready to investigate and initiate unexpected federal action at the worst of these failed audit sites, even if it was not originally interested in the site.[180] Since cleanup of contamination is the goal of both the federal and state programs, this is consistent with the concept of a dynamic federal–

176. *See* Webster, *supra* note 174, at 327 (describing the EPA's Enforcement and Compliance History Online (ECHO) system, which tracks data on state enforcement of various delegated federal environmental mandates, not including CERCLA).

177. N.J. STAT. ANN. §§ 58:10C–24, :10C–25 (West Supp. 2010).

178. *See* Seifter, *supra* note 25, at 1113–17 (analyzing audit data).

179. *See* N.J. STAT. ANN. § 58:10C–22 (providing for department invalidation of LSRP-certified outcomes if the department determines the remedy is not protective of human health and the environment); *id.* § 58:10C–24 (directing responsible parties to cooperate and provide information in conduct of an audit).

180. *Cf.* Atlas, *supra* note 168, at 964–65 (describing the effect of more-aggressive-than-usual enforcement at Chicago's Region 5 EPA office on uniformity of state penalty assessments). *But see* Revesz, *supra* note 7, at 599–600 (noting that the EPA practice of determining where to act makes the risk of federal enforcement low at most sites that fall to state jurisdiction).

state relationship, in which responsibilities are fluid and optimal enforcement varies in context.[181] Opposing views will note that the practice of EPA intervention where a state has already acted, called "overfiling,"[182] is an extreme measure that can duplicate private costs, allocate public funds inefficiently, and cause interagency tension.[183] Here, though, the investment would reap rewards beyond the particular site at issue. Duplicative EPA action would reinforce pressure on responsible parties to contract with the best LSRPs, and on LSRPs to conduct actions in demonstrable compliance with the law. Furthermore, tension between the EPA and NJDEP is not something that necessarily should be avoided. The EPA can leverage NJDEP's desire to avoid federal interference by strategically manifesting its willingness to interfere when NJDEP lets out the reigns too far.

Finally, another EPA option is to engage New Jersey in negotiations for a Memorandum of Agreement (MOA). MOAs constitute a statement of EPA policy not to take action when a responsible party enters a state program, and they have been important tools in state efforts to encourage Brownfields redevelopment.[184] However, when Ohio adopted a privatized program similar to New Jersey's, the EPA balked at providing any assurances without changes in the program.[185] This led Ohio to create a "MOA Track" which allows property owners to engage in Ohio EPA oversight instead of private certification, in exchange for federal guarantees under the MOA.[186] As of 2009, twenty sites had entered the MOA Track program, compared with over three hundred in the private program.[187] This suggests that property owners in Ohio are not generally concerned about EPA overfiling, but that some self-select for the more rigorous MOA Track because they believe their situation justifies the added expense. Therefore, the EPA's skeptical stance toward Ohio's privatization can be credited with effectively engaging the regulated community without

181. *See* Engel, *supra* note 168, at 161 (rejecting the necessity of allocating power to one jurisdiction or another with minimal overlap).

182. Federal action is characterized here as "overfiling," even though the New Jersey program no longer features any initial agency "filing."

183. *See* Webster, *supra* note 172, at 329–31 (recommending a system of sanctions and incentives to encourage state compliance rather than federal overfiling in order to avoid antagonizing officials).

184. *See* Revesz, *supra* note 7, at 602–03 (highlighting Memoranda of Agreement (MOAs) as examples of federal accommodation of state innovations).

185. *See* Robertson, *supra* note 7, at 56–57 (explaining that Ohio's privatized program made it the only state in Region 5 lacking an MOA).

186. *See* EPA UPDATE, *supra* note 27, at 86 (outlining the ramifications of the MOA Track program).

187. *Id.* at 88.

spending agency resources on any particular site in that state.

The potential for worthwhile federal action depends on a combination of techniques, none of which is too costly or intrusive. Informational transparency and strategic federal overfiling at audit-failing sites would make the EPA a legitimate threat where NJDEP is not. At the same time, a MOA Track in New Jersey could attract the sites where EPA overfiling would present the greatest risk, and thus help enforce the SRRA's criteria for agency oversight rather than private cleanup at the most contaminated sites.[188] Combined, these EPA actions would encourage compliance by casting correct implementation of New Jersey standards as a condition of federal forbearance. Using all the tools available to it, the EPA can help provide the incentives and sanctions to convince private parties to choose alternatives that are protective of the environment and human health. Again, this is no more than the SRRA actually commands. Yet, by eliminating the promise of lax enforcement, the EPA could dramatically change the political subtext of New Jersey's reform.

CONCLUSION

New Jersey's reform of its environmental cleanup laws reveals much about the state's aims and ideology. What it does not show is a particular concern for a pristine environment. A streamlined NJDEP failed to enforce its own laws around the state; in response, the state legislature streamlined the program even more. As a result, New Jersey citizens are exposed to toxins that should not exist under federal law. This process of decaying standards demands greater attention than the EPA customarily gives to the operation of state law, yet federalism concerns appear to guard the way. Thus, an EPA response must avoid unnecessary intrusion or expense, while communicating the limits of federal patience.

Of course, there is one strategy that would ensure compliance with the law: uniform, direct oversight of every step of the process. This is the method Superfund proscribed, and one that has been wholly rejected since. But the process of compromise and accommodation ends in privatization; the only further step is outright deregulation. By intervening when states fail to enforce minimum standards, the EPA can signal it intends to hold off that result.

188. *See* N.J. STAT. ANN. § 58:10C–27(b) (West Supp. 2010) (allowing department oversight in certain situations, including the highest ranked priority sites).