Mark Cordes: The panel now consists of the day's speakers and also Jim Ford. Jim's been at the Northeastern Illinois Planning Commission for twenty-five years and has dealt extensively with issues of Brownfields redevelopment, solid waste planning and mature community initiatives. He's also the principal staff member to the Corridor Planning Council of Central Lake County, which provides local oversight of planning for the proposed tollway in Lake County. I'll ask Jim to open because he hasn’t had the opportunity yet to speak. I hope he can offer his observations on what he’s
seen so far today, and after that I will give the panelists the opportunity to ask each other questions they might have, and then we will take questions from the audience.

Jim Ford: Everyone else up here on the panel knew when they came in the room this morning what they were going to say, and the beauty of my position is that I got to come in and listen and wait for something to respond to. I want to thank the speakers for making the entire day valuable.

Mr. Harrington made a point that I want to pick up on. He commented early on about the chilling effect of liability and the degree to which it induces disinvestment in older industrial areas and encourages development of virgin property. This question of disinvestment in the mature communities in the region and the Chicago metropolitan area is one in which my agency is very concerned. Some of you are aware of a number that we were quite surprised to discover a few years back. Between 1970 and 1990 in the Chicago metropolitan area, our population was essentially flat — it grew by four percent — while the amount of land that we used for urban purposes increased by almost fifty percent. So as Mr. Harrington commented this morning, it's not that we grew, it's that we reallocated and spread out and one of the consequences of that has been to increase the effective cost of redeveloping contaminated sites.

We tend to focus on that as being a problem of the city of Chicago — he mentioned the Clybourn Corridor — or at best of the older industrial suburban cities — Elgin and Aurora and Waukegan and Joliet. Those of you who do real estate deals involving contaminated property know that that is not an issue simply in the older large cities. It's also an issue in Franklin Park and Woodstock and North Chicago. You could almost map the existence of contaminated properties by looking at the commuter rail lines in the Chicago metropolitan area. Those are the older communities which have been developed earlier than environmental laws went into effect and which are now dealing with the consequences of that.

One of the effects of that fact — of having that problem dispersed through communities large and small through the metropolitan area — is that you get, at the level of local government, a knowledge gap. The city of Chicago has substantial intellectual resources of its own — its own lawyers, its own engineers, its own planners — and can go into its involvement in real estate transactions with some base of knowledge. A town like Franklin Park, which has one person doing community development and may not have in-house counsel, has a much more difficult time and yet a particular contaminated site may be a much larger percentage of its potential total economic base than even something like the South Works in Chicago. I think of the Allied Signal facilities in Woodstock, which as a percentage of
that town's economic base are just enormous. So one of the problems that we and other agencies like us have been addressing is: How do you bring the kind of knowledge that’s present in this room today to local officials who may be trying to figure out how to deal with a particular site that represents a great potential?

One approach to that is being taken by a group of towns in west Cook County, the West Central Municipal Conference. Tom Healy is here, who was a major actor in organizing that effort. They have received U.S. E.P.A. pilot grant funding to do a couple of things. The first is to seek out and encourage the redevelopment of a couple of pilot sites, to really work through with the Conference’s member local governments how redevelopment is done. And this is an area in which the potential number of sites is very large.

The other thing that they’re doing that we think has potential applicability in the rest of the region is to assemble what they’re calling a quick response team — a group which has legal skills, engineering skills, environmental skills and public management skills — who can come in and consult with the local government as it works with property owners on the redevelopment of a site, so that that local government doesn’t have to go looking for people to help it figure out what it needs to know. What it needs to know will be brought to it by this joint intergovernmental effort. And it seems to us that that’s the kind of thing that can empower a local government to participate more actively in the process.

You’ve talked a lot today about risk-based, about future use-based remediation. You’ve talked about the need for institutional controls, and those are areas where you get into local planning and local zoning and future use, where a local government has a role to play. Our sense is that this experiment that’s going on in west Cook may be a way of bringing the knowledge base of small local governments up to a point where they can really be constructive in support of the private sector as it seeks to figure out a way to reuse these sites. Thanks very much, and thanks to the panel members. This has been a very informative day.

Mr. Cordes: Thank you, Jim. I do have one brief question I want to ask you to begin with, and then I’ll open it up to the rest of the panel. How do you see the new Brownfields legislation affecting the work of NIPC?

Mr. Ford: I guess the quick answer is that I’m not sure yet. Today is the first day that I have heard an explication of the law. I think to the extent that the new law makes it more possible for the private sector to go ahead and do redevelopment — to the extent that it brings a greater degree of certainty, particularly to the extent that it encourages future use-based
remediation — that’s got to be positive for our constituents, who are looking at ways of gaining back the tax resources and the employment and the amenity values that they lose when those sites are abandoned.

Mr. Cordes: Thank you. First of all, do any of the panelists have any questions or comments that they want to pose to each other?

David Rieser: I’d like to follow up on the gentleman’s discussion on the redevelopment issue with Brownfields and the impact of this particular legislation. We should keep in mind that Brownfields is different things depending on who is talking about it. When President Clinton talks about Brownfields, his focus is on financial incentives to the community to go into some of these neighborhoods that need this type of redevelopment to encourage them to develop there. He says we can give them tax breaks for the work that they do.

Our focus, in the group that I worked with in working on the Illinois Brownfields legislation, was to deal with the liability issue. President Clinton’s proposal may not solve the problem since twenty-five percent of an infinite liability is still a big number. From the perspective of the industrial community, the focus was on how to cut off this liability so that there is some certainty in the process as Al [Wilson] talked about. But there is no question that the issues of redevelopment and liability cutoffs in a perfect world would work together. Some states that have other Brownfields approaches, such as Missouri, have approached it entirely from a redevelopment, financial incentive issue.

It’s also important not to lose sight of the redevelopment component because Brownfields is only one factor that keeps people from developing in the inner city — it’s the one that people can talk about politely, rather than the other concerns that keep development out of the inner city that market people are concerned about. This is an excuse that people use, and it’s a legitimate excuse, but it’s not the only factor. So one of our focuses was to deal with this particular factor, get it off the table, and then the redevelopment can go forward given the other incentives that people can bring to bear in that situation.

Al Wilson: I have a comment that bridges between what Dave [Rieser] is saying and what I said earlier. One of the perceptions that I frequently run into in my work is that lenders are not interested in "contaminated property." I don’t know why this has occurred, but over the past year and a half, there appears to have been a fundamental shift in that attitude.

It doesn’t apply to all kinds of contamination or all kinds of properties, maybe not even to all marketplaces. But I have found that lenders are quite
willing to lend, sometimes to surprisingly contaminated property, although much more willing to lend to non-source property than to source property, they are willing to lend to source-contaminated property at the same terms and conditions as if that property did not have a problem. So there's some sort of a fundamental shift occurring here. Part of it I think has to do with simply the discussion, let alone the enactment of things like Brownfields. Part of it has to do with U.S. EPA issuing policy statements that try to clarify what their position will be in certain sets of circumstances, even though they're not law or binding or whatever the other good things it is you include in that disclaimer statement.

But whatever it is, there is a shift occurring and contaminated properties are becoming more marketable, more redevelopable. I don’t know how far this is going to go, but it seems to have gone pretty far so far. So don’t write off a piece of property because it has a problem. That may not be the appropriate response.

And the reason I bring it up is that I happen to see a transaction about a month ago. A $10 million building based on its cash flow that an insurance company got rid of because it "had an environmental problem" for the grand price of $600,000. The problem turned out to be a pool of Number 4 heating oil ten feet below the foundation of the basement of the building. The oil didn’t have to be remediated, wasn’t going to go anyplace, never would go anyplace, and the buyer of course was, shall we say, ecstatic. That's the kind of silly deal that still occurs but is becoming rare.

Rodger Field: I have a question for perhaps Jim [Harrington] or David [Rieser] or the private practitioners involved in Brownfields redevelopment. I sometimes get the sense when we talk about these issues that we think there are three players involved — the lender, the buyer, the seller — and that the government's role should be to back off and remove all impediments as to liability. I don’t want to speak from the point of view of the government at this point, but I think we have to realize that land use is a social issue as well. It’s a community issue.

I’m wondering what you advise your clients about their obligations regarding community involvement. Is there any obligation to begin with? Do you think that’s a role that the buyer, the seller or anyone else should take on, and what is the nature of that responsibility in your view?

James Harrington: I think to a certain extent you’re right that in most real estate transactions you're trying to redevelop a piece of property in an appropriate location for that kind of industry, and what you’re putting on it is socially acceptable and meets other kinds of requirements. The role that the buyer, seller and lender would like is for the government to set
reasonable standards — taking into account risk and location and everything else — and if those standards are achieved, give some assurance that the liability has been contained, at least. It’s not "Butt out." It’s an active role in seeing that the standards are set, and that these standards have been met, and having been met, unless something new turns up, we think you are OK. That’s one role for government that’s a very important role and an active role.

My personal feeling is that if the Illinois Brownfields legislation works, far more properties will be cleaned up in Illinois than would have under any other program we could have imagined. And the government is going to be active on every one of those.

The second half of your question is the public involvement. And I think there that you get into a debate if you are going to talk about land use restrictions as part of the Brownfields cleanup and release, and it becomes important if the restrictions imposed are inconsistent with the overall plan that the community may have or would likely have for that same piece of property. If some people are looking at that as the perfect location for low-income housing, and I clean it up with a restriction that it can be used for steel mills and scrap yards, we’ve obviously got a problem. I envisioned that those land use restrictions are going to be looked at by EPA in light of zoning and other related requirements of the community.

The third part of your question is of public participation, going beyond the zoning and the other local requirements, if you’re going to restrict it. I don’t think most people in private development are interested in having the public involved in a big debate over what they can do with their property. The very nature of most people’s view of what private property is all about is that its ownership is private and within the law they can develop it.

There are certain uses, however, of the property which are necessarily going to involve public input, some of it mandated by law and some of it voluntary. I’ve been involved in siting a waste-to-energy facility and been through numerous hearings relating to that, public hearings, political hearings, public debate. Some of them were mandated by laws such as the PSD Hearing, that the Clean Air Act requires the Illinois local siting hearing for solid waste facilities, as well as other village debates. That kind of massive facility with specific problems demands public debate and a public acceptance, at least in the communities where it’s going to be located.

The problems you get into with public debate is that you can have a community that is going to suffer or incur the major impacts of the facility, and other people all around it decide that they don’t care what benefits it brings to the community where it’s going to be located — they don’t like the idea of it. And they don’t care how many environmental officials say this is safer than anything else that could have been done, they don’t like
Mr. Maher: Let me inject a little cynicism into your question and say if you go to Waste Management and Waste Management takes it to a landfill that leaks, Waste Management being the waste behemoth that it is, with all their fine attorneys guarantees that you will also be named a defendant in any lawsuit filed. So at the risk of being too cynical, it cuts both ways.

I don’t want to overstep the question; it seems to me you’re asking how to cut off your liability. The first question is, if you’re talking about development, the issue is whether or not you’re dealing with a hazardous substance as opposed to some kind of construction debris, as opposed to something that’s a solid waste. The scenario that you’re talking about in terms of liability assumes that it’s a hazardous substance.

Participant #1: It is; it’s lead.

Mr. Maher: Well, I’d be happy to hear anyone at this table tell this individual how he can cut off his liability for off-site disposal of a hazardous substance.

Mr. Rieser: Part of the discussion of the Brownfields statute is that in a lot of cases it really makes no sense to pick stuff up from here and put it over there because you’re just increasing the risk as you’re doing this — the actual risk to the people handling it and the risk to the community. Further, because you’re unearthing the stuff and you’re taking it from here to there, you are increasing your liability because it’s now over here, and if it goes somewhere from over here, you’re part of the list of potentially responsible parties.

So one of the questions you ask yourself is: Is there a way that we can just leave it where it is? If we put a parking lot over it, if it’s going to be an industrial use and we’re going to put the building on top of it, is that OK? Is it going to go somewhere? Is it going to hit any receptors? Are there any pathways for that stuff to go off the property, or can we just leave it where it is?

Lead doesn’t go away like gasoline does; it stays where it is given soil conditions and groundwater conditions. The agency might come back in that situation for an industrial use, if it’s ten feet under the ground and you’ve
got a parking lot on top of it, and you agree to maintain it as an industrial use. The agency would then say it’s OK to keep it where it is.

As Al [Wilson] points out, however, somebody may come along later and say we have to get this out of here, but then you’d have this no-further-action letter, which is a statement by the agency saying it’s OK to leave it where it is.

Participant #1: My fear is that it’s going to be a shopping center; my fear is that there’ll be children coming in with their parents. The theory has been brought forth, why don’t you put it in a green area? Why don’t you bury it underground? But I’ve got a problem in that it’s not organic, it’s not buildable soil, so I’ve got to get it out one way or the other.

Mr. Rieser: Once you take it out, you have to deal with it. Once it comes out of the ground, it’s a waste that you have to properly dispose. So the issue is really: Can I leave it where it is, or if not, then I’ve got to take it somewhere that I feel pretty comfortable about where it’s going.

Participant #1: I cannot build on it because it’s organic, so then that goes back to Mr. Maher’s comment that I am still liable.

Mr. Maher: At some point you want to ask yourself: Does it make more sense to try to manage it than to create additional liability by sending it somewhere else where somebody else could create a catastrophe that will make you a defendant? It’s a case of the devil you know versus the devil you don’t know.

What you’re suggesting as I understand it is that you’ve got property that you want to develop and you’re concerned with what happens with the bad stuff when you move it.

Participant #1: I’ve got to remove it because it’s organic; I can’t build on it. Either that or I’ve got to put in a green area, and I’ve got a problem with kids coming in and out of the shopping center.

Mr. Wilson: If you move it and keep it on your property, you may have bigger problems than you want. As long as I’m in the business of re-engineering the federal law, the answer to your question is: Move to Europe. (Laughter)

Because there, when you transfer it to Waste Management, they own it and you’re done with it. And that’s one of the fatal flaws of Superfund as far as I’m concerned as a valuer of property. You will own it, for as long as it exists, wherever you put it. And you have to factor that into the value of your property and make a decision accordingly.
the idea. So their view of public participation is their right to stop that facility in somebody else's community, even though it might have been a key or only method that community had of recovering its economic viability. So I think public participation of directly affected parties in certain types of projects is going to be essential.

Mr. Field: What always strikes me is that if we rely simply on the formal public participation procedures that are required by law, whether they're in the zoning program or the permitting program, it opens everyone — government and the applicants — up to complaints that people are given late notice, not enough information.

Some of the more innovative suggestions reflect a much more proactive public involvement to be undertaken voluntarily by the developers or those performing the clean-up. That's an effort which is probably valuable from everyone's perspective. And I don't hear what you're saying, Jim, as disagreeing with that, but that's a way that we can begin to address some of these issues.

Mr. Harrington: One way, for example, in the situation I talked about of a waste energy facility which is major-impact, is a lot of preliminary information presented in informational hearings and community investigation, all before the official hearings, so that people were informed by the time they came around. When one argues in a given case that they didn't reach out far enough in the information process to people who are going to be impacted by it, and it's always an argument who is going to figure out they're impacted by something.

In the Clybourn Corridor, we did one to defend an existing industrial use against encroaching retail usage. We just couldn't quite see the fine crystal store being built next to the high-pressure press for the tool factory. They just weren't compatible uses, and the community got involved.

Michael Maher: Actually, I wanted to ask Jim Ford a question. You had mentioned local government and in my experience, oftentimes there's a situation where you have a buyer and seller of the property that's been now cleaned up. You've got a PE who will sign off on it that says it's clean, the documents are waiting at Illinois EPA and this kind of goes back to something that Al [Wilson] said also, and the local community says, "As soon as we get your no-further-action letter, we'll consider your business license."

And you sit, and you wait, and you wait, and you wait. Now this is a situation where the local people are scared to death, even though the property is clean and the environmental professionals are on record as
saying it’s going to be OK, you’ve got a situation where — change the facts a little bit — you’ve got a buy-and-sell that’s going on and they want to get it done and turn it around and perhaps start moving soil in the next sixty days, you can get the property cleaned up to a standard where the Girl Scouts can dig a drinking water well, but the local municipality will not issue a business license until somebody at some regulatory agency issues a no-further-action letter which, and I’m putting on my regulator’s hat now, and from my past experience, nobody’s in a big hurry to do because, for good reasons, they’re very conservative. And is there something that we can do or say to get the process moving with the local folks?

Mr. Ford: I’m glad you came back to the term conservative because I was thinking earlier, talking about how conservative the regulators are, that local officials may be the next notch up in terms of conservatism about this, and their conservatism doesn’t begin to reflect the conservatism of the neighbors. I think this is the point when you talk about how people can respond to potential impacts; if this insurance company was concerned about a pool of Number 4 fuel oil under the building, think how concerned the relatively less informed neighbors would have been.

It seems to be that this is one of the arguments for the USX kind of approach to public involvement — recognizing that from the standpoint of the buyer and seller, that public involvement process imposes some costs in terms of the time it takes to get done with the transaction and the rest of it. But it seems to me that in the long haul, one of the things that needs to be done — and it’s very difficult to do — is to bring initially the local officials, and the local influentials who are not necessarily official, up to a level where they have the same kind of trust in the science, if nothing else, that you all have who work with this day in and day out.

When it comes down to that kind of local permitting question, the level of acceptance, the level of knowledge, the level of trust, in all of you and in the science, among the neighbors of that site are real clear limiting conditions. I don’t think any of us who works with the public and with public officials day in and day out would underestimate the difficulty of notching the knowledge level up a little bit. But it strikes me in this case it’s just absolutely essential because it is a limiting condition.

Mr. Cordes: Before we go on, are there any questions in the audience?

Participant #1: Following up on the comment about the land that got cleaned up, my understanding is that when you clean up a piece of land and it goes to a landfill, that you’re responsible from the cradle to the grave and that everyone involved in ownership has some liability. Do you go out as
What should be is that Waste Management buys it from you, even though you're writing them the check, of course, and it's their problem forever and ever, but that's not the way our law works. And that's one of the fatal flaws in our law — you will have a contingent liability as long as you or your entity survives.

Mr. Harrington: There are a couple of answers to look at. Some companies, Waste Management in some circumstances, will give you guarantees and indemnities and will not sue you if the material is sent to one of those sites when they owned the site. They'll sue people who used to send stuff there when someone else owned it, but in general they try to not sue people, their customers, who truthfully sent the material. It's just bad business for them.

On the other hand, everybody in the world has sent stuff to the CID landfill in the South Side of Chicago. If it turns into the Superfund site, it will bankrupt Waste Management and ten other companies before they're done with it. You can treat the waste on occasion and reduce the toxicity, or perhaps even eliminate the toxicity before you ship it off-site.

You have to treat it under the land ban anyway, and depending on the material, you may be able to treat it to the point it's not hazardous. That's one of the things people look at today, either treat it so it's not hazardous and keep it or treat it so it's not hazardous and they can send it someplace else. But that depends on the waste, the form, the amounts, the concentrations . . .

Participant #1: It's not hazardous, it's intermediate.

Mr. Harrington: If it's special waste, you might not have as big of a problem. You have to get in a real analysis with your engineers of exactly what you have before we can give you any commentary on it. But there are ways of dealing with it that people have found acceptable, but you're always dealing with it.

Mr. Maher: And this liability scheme that we've been talking about is this animal called CERCLA that applies to hazardous substances. So what we're talking about here assumes that the materials you're discussing fit this definition of hazardous substances. I'd like to ask Jerry [Phillips] what he thinks about whether you need some TSD permit to move it from one end of the facility to the other.

But if what you're saying is that it's not a hazardous substance, then I would suggest to you that you have a lot more options available to you, and a lot less liability. At that point, it becomes a question of whether you don't want to continue managing. Maybe you're in a situation where you
can off-site dispose. Because this big monster we're talking about — this CERCLA and Superfund — it only applies to hazardous substances as defined. So I suggest to you that you want to find out, whoever your consultant is, what he or she is suggesting that they do with it, and whether you need a permit and what your landfill costs are going to be will tell you whether or not your landfill believes it's a hazardous substance or not. But I think you've got a lot more options if it's not a hazardous substance.

Mr. Harrington: But deal with somebody reputable and remember that something can contain a hazardous substance that can result in liability even though it is not a hazardous waste. I've found that even with respect to municipal garbage. So you may think it's not a hazardous waste, but it still could have liability if there's lead in it, or some other substance below the amount that's necessary to make it a hazardous waste, but still present.

Mr. Cordes: Did you have another question? (Another audience participant approaches microphone.)

Participant #2: Seven years ago, we built a shopping center, and they put a dry cleaner in the shopping center. I've operated on the shopping center for the last seven years. I sent in a very major company about a year ago to make sure that the dry cleaner's not doing anything wrong. The major company comes back and says, "You're clean; there's not a problem here. They're using Safety-Kleen, the stuff is being taken out. You don't have a problem."

My question is: What kind of liability I could still have if the major company has made a mistake? We didn't talk about dry cleaning here at all.

Mr. Wilson: You're the owner. That's the bottom line. You're it. If something goes wrong, you're it.

Mr. Rieser: It depends on whether there's a problem or not.

Mr. Wilson: If there isn't, you're OK. If there's a problem, though, you're the owner and you're it.

Mr. Rieser: This is the kind of stuff that Kathleen [Deveau] was talking about earlier. As Al [Wilson] says, if you're the owner of the property, there's stuff on the property, you're it. And the question is how do you obtain your costs from the people who are responsible for it. It depends on what your lease is with this dry cleaner and whether the lease has language about making them responsible and to indemnify you and whether they've
got insurance, etc., to help you take care of this problem if they’re the ones who caused it.

Kathleen Deveau: You have a lawsuit, but how big is this cleaner and what kind of money do they have? Ultimately, you’re going to be responsible.

Participant #2: You’ve got a ma-and-pa operation.

Mr. Cordes: It’s a very broad liability net that CERCLA casts. It almost has no end to its reach. And I think the bottom line is that if there is a problem, you are liable as the owner.

Participant #2: The bottom line is we don’t lease to dry cleaners any more.

Mr. Harrington: Many people have concluded that.

Mr. Field: One thing that occurs to me as a result of that question is that, as the owner of a site that’s going to be leased out, you have an interest in ensuring that the practices of your tenants are safe and protected. I think that’s an important obligation.

I know, for example, that in the city of Chicago there is the Greener Cleaner, who actually uses water instead of perchloroethylene. Maybe this is one of the ultimate effects of environmental regulations — that there will be more of an impetus on the private sector to prevent pollution. I know a lot of industries are already exploring the possibilities for actually changing some of their practices so not to create an environmental problem that may result in liability at some time in the future.

Participant #2: This [situation] is seven years old, and your point is well taken.

Mr. Field: And I don’t want to ruin the economic viability of your tenants, but it’s just something to think about. As a general societal matter, it’s an important way to go.

Mr. Maher: As a practical matter, one thing we haven’t addressed here is the issue of insurance. My wife’s an environmental attorney that works for an insurance company, and she tells me over and over that her job is not to deny and delay environmental claims. Yet I tease her all the time, because I can never seem to get a finding of coverage in anything close to some sort of reasonable time.
Before 1986, there is a possibility that the insurance that your tenant had may provide for coverage. When I say before 1986, I mean that after that date, everyone had this "pollution exclusion" language. Let's say you had a tenant for thirty years and asked for copies of his old policy to help you sleep a little better at night, then at least that puts you in a position to marshall your forces in the event that at some time in the future, you might have some kind of environmental problem.

I'm not saying that my wife would find coverage in this case; I don't want to go on record as saying that. But what I am saying is as a practical matter, if there is insurance coverage, it takes you out of the situation whereby your protection is only as good as your tenant.

Mr. Wilson: Yes, but in the ultimate practical end, what you're going to have to do is make that fine business judgment between risk and reward. You are taking a risk; you are the owner. It's nice to have an insurance company to sue or someone else to sue, but what you're really going to do is pay these people a lot of money. And the question is: Are you willing to accept the risk of being the owner for the reward of the income stream that you get? And there's no one in the world who will make that judgment but you.

Participant #2: We didn't know that seven years ago, though.

Mr. Wilson: Well, maybe now's the time to sell. (Laughter) I'm not trying to be facetious here, but if you become uncomfortable, if the risks are no longer balanced by what you perceive to be the rewards or vice versa, as long as you're making an honest judgment of the two, maybe it's time for you to sell and let someone who's willing to take more risk than you come in.

On the other hand, you might look at this building I was talking about, with a $600,000 risk in return for a $10 million, ten-year cash flow, last time I checked I had my money back in seven months. What did I invest? The possibility that some regulator may come along and go berserk because of this pool of oils down there that isn't hurting anybody. That's a pretty good risk.

Mr. Cordes: Are there any more questions?

Participant #3: I have a comment and a question. The comment is that a lot of states over the last few years have developed their own initiatives in voluntary cleanups. Illinois has been a leader in this. Their program was launched in 1988. Other states — New York, Pennsylvania, Missouri, Ohio,
Minnesota are the ones I’m familiar with — have all been able to launch Brownfields initiatives basically on their own. A lot of localities have taken up the cause and we’re starting to see some new thinking on Brownfields redevelopments, and forums like this have been very helpful.

U.S. EPA has also gotten into the act, although somewhat belatedly. And U.S. EPA now has a formal, national Brownfields agenda. I’m asking you to make a prediction of whether any of you think that U.S. EPA is going to take control of the Brownfields efforts that are going on nationwide and is U.S. EPA going to try to create some sort of broad, top-down, policy-driven Brownfields program that is going to jeopardize any of the state and local initiatives that seem to be flourishing on their own?

Mr. Cordes: Why don’t we let Jerry [Phillips] or Rodger [Field] first handle that? It’s an excellent question.

Mr. Field: I’ll start off. I think EPA sees its role as a facilitator in this program to remove unnecessary impediments to redevelopment. I would say that there are some Superfund sites where we have an involvement, and you’re going to have to deal with this. But there are thousands and thousands of sites as you well know that may potentially have a problem, but don’t necessarily rise to the level of a federal interest. And we’re taking a number of steps to try to give out the information to the private sector that we’re not interested in those sites, to allow the kind of transactions that are being discussed today to take place, and I think the state voluntary cleanup programs have a very important role to play in that process. I don’t see EPA as taking over that in any way.

In my experience, we are tending to work pretty closely with the states in order to try to mesh our programs so that the states can take care of sites that don’t rise to a federal interest and that seems like a good way to get cleanups done. The federal government can deal with what we consider the more high-risk Superfund sites.

The proposed Superfund amendments that were never enacted recognized the importance of state voluntary cleanup programs. There were provisions in there which discussed how such programs could be authorized, etc., but it was a recognition that these programs are out there and play a very important role in cleaning up environmental contamination. Jerry, do you have anything to add?

Gerald Phillips: To expand further, the Superfund program has tried to work with states and their voluntary cleanup programs for several years, and Region V has been very active with the City of Chicago and several states.
The oldest voluntary cleanup program I'm aware of is in Minnesota — that was in 1988 — and the other states are relatively recent.

But there are a couple of wild cards. First of all, voluntary cleanup programs primarily apply, and in some cases exclusively apply, to Superfund sites. So if you have a voluntary cleanup program, read the fine print. It says for your Superfund site, this applies. If you have an underground storage tank site or a RCRA site under an interim status or a permit or another kind of site, voluntary cleanup programs probably don't apply.

My second point is that we're trying to broaden the understanding of what Brownfields mean and voluntary cleanup programs mean and include the other programs as well. We've got negotiations ongoing with the Illinois EPA to try to figure out a way to link the RCRA hazardous waste program with the state's voluntary cleanup program to make it a possibility.

The third point I'd like to make is that our folks in D.C. are looking at the voluntary cleanup programs and trying to decide whether or not we should approve voluntary cleanup programs as far as we're concerned. Approval sounds innocuous, but what it really means is, it's an authorization process and if we look at a state's voluntary cleanup program and we don't agree, then as far as we're concerned, it's not valid. There is a tremendous amount of internal pressure to stop that particular movement. Our goal from Region 5 at least is to ensure that if a state has a voluntary cleanup program, our goal is to support that concept and provide assistance as appropriate, and to the extent we can, stay out of the state's way, because the state's voluntary cleanup programs are working quite well, and the last thing we want to do is screw them up by making them more complicated.

But you need to understand that because of the statutory and regulatory requirements out there under RCRA, TANKS, Superfund and a variety of others, our headquarters is looking at whether or not approval is necessary for us to sanction participation through a Memorandum of Agreement or whatever with the state's voluntary cleanup program. The jury's still out; the last draft I saw said yes, we had to. But again there's a lot of resistance. So it might be worth your while to develop an interest in this particular issue, because I can assure you after twenty years at EPA, the last thing you want us doing is approving your states' voluntary cleanup programs, because it means you'll kill them.

Participant #3: Let me just ask a follow-up question because what you've said is very provocative in a way. What is the statutory authority that EPA has that it can issue an edict to the states that "we must approve your state's voluntary cleanup program" or that, in your words, that it is not valid?
Mr. Phillips: Well, we don't have any law that says we can approve or disapprove states' voluntary cleanup programs. But there are currently four Superfund Memorandum of Agreement out there. For example, in the state of Illinois, through this SMOA, we agree with what you're doing under voluntary cleanup programs and when you say the site is of no further interest to you, it's of no further interest to us.

So what that allows is for people to have confidence from a liability standpoint, which is what we keep talking about, that they proceed through the state's voluntary cleanup program, the state of Illinois says, "You're done. We don't have any further interest." Now all we have to do is say that we don't sign MOAs.

Participant #3: I understood you to say something a little bit different than that.

Mr. Phillips: So what we'll do is we will evaluate a state's voluntary cleanup program and determine, from an agency perspective, whether or not we're comfortable entering into some kind of agreement with the state to allow them to proceed. If we feel we're uncomfortable, then our position is: "State of Illinois, you do whatever you want. All of you can take whatever risk you would like to take." And if you're confident that U.S. EPA will never come to that facility and take some kind of action, you're fine. And the chances of our being there are pretty small. But again, it's a liability issue you have to think about.

So my point is we don't have the legal authority to approve or disapprove. But we have the legal authority to say we agree or don't agree that this is a stringent or more stringent program. So it's a stringency issue and it gets us into a real vague area of: What does our saying that we don't enter into MOAs with the state for voluntary cleanup programs mean? I think we can argue the legal basis for whether or not we make that decision, and I'm not an attorney, so I'm not going to get into that debate.

But I think the practical reality is, if we look at Illinois' program and decide for whatever reason that we don't like their liability scheme, and we say that publicly, then a lot of voluntary cleanup actions that are ongoing now will suddenly stop, they'll hit that brick wall and they won't proceed because of the fear of potential federal liability.

So my point is that we're trying to get our headquarters office to take that whole concept, put it back on the shelf, and leave it there. Not even bring up the issue as to whether or not we should consider a state's voluntary cleanup program acceptable or not. If we don't have to ask the question, why ask? And the issue is: well, it's an issue out there, and shouldn't we be looking at this? And it's an internal debate; I don't know
who is going to win. But since you raised the question, I thought it was important for you to understand that that debate is currently ongoing. I don’t know how it will come out, but we’re trying to get the debate to come down on the side of just leaving it alone.

Mr. Maher: In your answer to this gentleman’s excellent question, you use the terms SMOA and MOA, and I’m wondering if you want to tell people what those mean.

Mr. Phillips: SMOA means Superfund Memorandum of Agreement, and it’s an agreement between U.S. EPA and a state agency that establishes our relationship with the state under that particular agreement. SMOA means that the Superfund program has agreed with the Illinois EPA, for example, that under certain terms and conditions, we’re happy with the way they do a voluntary cleanup program. But the MOA has an “S” in front of it, so it’s only applicable to the Superfund program.

That’s why I’m pointing out that if there’s a state voluntary cleanup program, and it’s got a SMOA, and you’re not an “S” but you’re a RCRA or something else, it doesn’t apply to you yet. We’re trying to get it there, and there are four SMOAs that exist nationally, all four are in Region 5, and all four have an “S” in front of it.

Mr. Cordes: Any more questions?

Participant #4: I have two questions that deal with the laboratory data. Let’s say that he (Participant #2) built his shopping mall, and seven years from now, someone sued. And it turned out that the data that the laboratory supplied was wrong. Who’s liable?

Second, do you have any kind of mechanism to certify a laboratory in the state of Illinois?

Mr. Rieser: The state of Illinois has a certified labs program, and labs are certified for different activities — some are certified for waste water, some for drinking water, and most for performing the types of testing that’s involved in evaluating hazardous materials.

If the lab gets it wrong, they are on the hook to the people they got it wrong for. They are among the people he could bring into the picture if he’s sued by a third party down the line, depending on what the agreement is between the lab and himself.

Mr. Wilson: There’s one point I’d like to make in defense of this whole thing, though. Keep in mind that so much environmental work is the attempt
to prove that the needle was never in the haystack. And it's something that simply cannot be proven.

So to have an environmental company, no matter how good they are, go out and do work, no matter how well it is done, and place absolute reliance on the results is not wise, because they can't do that. So whatever you're told by an environmental consultant, understand that you're accepting a risk and it's that risk you must balance against the rewards that you hope to get. And suing a good environmental firm could be a waste of a lot of money, because you've asked them to prove that the needle was never in the haystack. It can't be done.

Mr. Cordes: The one question I'd want to leave with the panel would take each panelist about an hour to answer, but we'll attempt to discuss it.

Al [Wilson] has been trying to restructure federal law here this afternoon, and indeed the title for this program is "New Directions," and there are some basic assumptions that are being rethought today in environmental law. Very briefly, and in just a few seconds, what fundamental changes in state and federal law still need to take place in your opinion?

Mr. Phillips: You already know the answer. The answer is to look at the liability scheme and find a way to come up with a liability scheme that makes sense. I agree with Al [Wilson] that if you knowingly contaminate the environment, the sky should fall on you. I think that's true.

But if you did your best, or you bought or you had a facility there for a long time and you just discover a problem, I think it's our responsibility as EPA and Congress' responsibility to all of us to find a liability scheme that is workable and that makes sense and allows people to get on with business. So I think the real key here is to come up with some kind of overarching liability scheme that holds people properly accountable, but that lets people that are doing the right thing to try to get on with their lives.

Mr. Cordes: So are you suggesting to eliminate strict liability, and joint and several liability?

Mr. Phillips: I don't want to get into the legal debate because I'm not an attorney, but the issue is that joint and several liability has been very helpful in bringing people to the table. And I think a lot of people are now good environmental citizens because joint and several liability gave them no choice over the past twenty-five years but to be good citizens, and as a result, they've changed their philosophy.
So I think it was good, and I think it may still be good under some circumstances. So what we really need to do is carefully craft some kind of compromise language and I don't know what that language is, but I think the key here is you have to associate the liability with the risk of the site. If the site isn't really risky, the liabilities should be related to that somehow, but you're going to need real-world examples and demonstrations before you can get to some kind of real conclusion to solve the problem.

*Mr. Cordes:* Any other responses?

*Mrs. Deveau:* I'd like to see more of a continuation of this common-sense approach out of both the federal and state EPAs. I think the Brownfields is an indication of that, some of the new EXCEL programs they have that feed in that audit policy. At least for responsible corporations and individuals, I think that's a real step forward and something we should continue to push for.

*Mrs. Wilson:* I think I would suggest a fundamental shift in philosophy of those who are going to do whatever is necessary, and get rid of the idea that there are black hats running around, doing all these nasty things everywhere. That's not the case.

There are some black hats; there have always been. But most people generally try to do the best they can with the knowledge and resources they have available. And if we're going to rewrite the law, let's rewrite the law understanding what most people are like, and also admitting that there are some really bad actors that have to be dealt with, too. But let's not treat everybody as if they were all the bad actors; they're not.

Admittedly, when Superfund was written, we had the wonderful example of Love Canal. That was the image in everybody's mind, an exceptional image. And the bad actor was the school board.

*Mr. Cordes:* That's an excellent point, and I think there's one problem with education regarding environmental issues. When people think of contaminated property, everyone thinks of Love Canal, and I think that there is a major education issue in terms of informing the public of the true dangers of contaminated property, because I think it often is exaggerated in the public's mind.

*Mrs. Harrington:* The basic idea that Gerald [Phillips] had of rethinking the liability scheme with some common sense is necessary. If we don't, we're just going to have a constant drag on the economy, with a lot of money being spent for things that aren't that important.
Recall three years ago, in the closing minutes of the discussion that we had here, someone pointed out that if you ranked environmental problems according to the potential impact on the environment and human health, you found out that indoor air pollution was at the top and contaminated real estate was at the bottom, taking into account all the environmental scientists, the EPA, etc.

If you took a look at where we were spending our money, contaminated real estate was at the top, and indoor air pollution was at the bottom. It doesn't make sense. Some common sense has to be brought to the program so we spend our national resources where they are going to have the best environmental impact. And those resources are national resources, whether it’s General Motors spending them, or the federal government spending them.

Mr. Cordes: That’s an excellent way to end the program this afternoon. I’d like to applaud the panelists, but I’d also like to applaud you as an audience. You’ve asked excellent questions, and you’ve been a fun group to work with. Thank you, everyone.