Green Schools, Brown Fields: School Siting Legislation Provides a Weak Foundation

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I. OVERVIEW

Why are schools built on contaminated land? What role, if any, should the federal government play in addressing this problem? Consider the Vista Hermosa Learning Center (Vista Center) project in Los Angeles, once deemed a "public works disaster of biblical proportions" by a California district attorney investigating potential environmental crimes at the site.[1]

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1. Beth Barrett, *Belmont Learning Center Resurrection 10 Years and $300 Million Later, End May Be in Sight*, DAILY NEWS (Los Angeles, Cal.), Sept. 15, 2005, at N1. The Vista Center was formerly called the Belmont Learning Center.

In 1985, the Los Angeles Unified School District (LAUSD) faced overcrowding and proposed a new school that would serve mostly minority students from low-income neighborhoods.[2] LAUSD did not perform a comprehensive environmental evaluation when the site—an abandoned oilfield—was acquired in 1992, although a state report four years earlier warned of its risks.[3] The school broke ground in 1997.[4] Two years later, state toxics officials partly halted construction due to concerns over insufficient environmental testing and the absence of any mitigation plan to eliminate gases already gathering beneath partly completed buildings.[5] In 2000, construction stopped completely when parents learned what the state and LAUSD already knew: soil at the site was saturated with toxins, including hydrogen sulfide, benzene, and crude oil.[6] Construction was stop-and-go for the next few years. The school board cancelled the project twice, but also investigated mitigation plans calling for the installation of an underground plastic liner to trap and release gases.[7] By 2005, LAUSD had spent $175 million on cleanup, and planned to spend an additional $111 million.[8] School expenditures, including the cost to rebuild structures that had been constructed on a seismic fault, totaled approximately $300 million in 2007.[9] The Vista Center is scheduled to open in September 2009, twenty-four years after the land was purchased, and twelve years after breaking ground.[10]

The Vista Center likely represents the most expensive and prolonged environmental school siting fiasco to date, but reports of schools on toxic sites are not uncommon.[11] An explanation for this

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2. CHILD PROOFING OUR CMTYS. CAMPAIGN, POISONED SCHOOLS: INVISIBLE THREATS, VISIBLE ACTIONS, A REPORT OF THE CHILD PROOFING OUR COMMUNITIES POISONED SCHOOLS CAMPAIGN 20 (2001), http://www.childproofing.org/documents/poisoned_schools.pdf.

3. Barrett, *supra* note 1.

4. *Id.*

5. *Id.*

6. RHODE ISLAND LEGAL SERVICES (RILS), NOT IN MY SCHOOLYARD: AVOIDING ENVIRONMENTAL HAZARDS AT SCHOOL THROUGH IMPROVED SCHOOL SITE SELECTION POLICIES, A REPORT TO THE U.S. ENVIRONMENTAL PROTECTION AGENCY 8 (2006), http://www.nylpi.org/pub/School_Siting_Final.pdf.

7. Barrett, *supra* note 1.

8. James W. Prado Roberts & Jason Method, *New Schools Being Built on Contaminated Sites*, ASBURY PARK PRESS, Feb. 20, 2005, at A1.

9. Barrett, *supra* note 1; Tony Illia, *Los Angeles Battling Rising School Costs: An Overheated Market Pushes Bid Prices up 200% in Five Years*, ENGINEERING NEWS-RECORD, June 18, 2007, at 58.

10. Howard Fine, *Belmont School, Ambassador Site Teach Hard Lessons*, L.A. BUS. J., Jan. 28, 2008, at 4.

11. CHILD PROOFING OUR CMTYS. CAMPAIGN & THE CTR. FOR HEALTH, ENV'T & JUSTICE, BUILDING SAFE SCHOOLS: INVISIBLE THREATS, VISIBLE ACTIONS, A REPORT OF THE CHILD

phenomenon is that state law generally does not address, or does not effectively address, environmental issues specific to siting a school on or near contaminated land.[12] The federal government has focused on environmental school health topics like asthma, lead-based paint, and childhood cancers.[13] However, it was silent with regard to environmental school siting problems until December 2007, when the Healthy High-Performance Schools Act (HPS) was enacted as an amendment to the Toxic Substances Control Act (TSCA).[14] Under HPS section 2695a (Siting Provision), the Environmental Protection Agency (EPA) is directed to develop voluntary model guidelines for the siting of school facilities.[15]

Although the voluntary guidelines created pursuant to the Siting Provision will serve as a much-needed reference to schools planning to build on polluted property, this Article argues that the provision should be strengthened to encourage state compliance with the guidelines. Part II presents the case for urgent action. Part III provides the legal framework under which siting decisions are made, discusses the absence of state legislation or any effective state legislation, and highlights weaknesses in California and New Jersey school siting laws. The development and framework of the HPS is detailed in Part IV. Part V identifies limitations to the Siting Provision and proposes amendments intended to fill in the gap between state and federal siting legislation.

II. THE NEED FOR ACTION

Entire communities are subject to the harmful effects of exposure to hazardous substances, but children are especially vulnerable.[16] This is because children absorb and metabolize toxins differently than adults.[17] Toxic carcinogens in the environment may lead to cancer, which is the second leading cause of death in children.[18] Asthma, the primary chronic

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PROOFING OUR COMMUNITIES CAMPAIGN AND THE CENTER FOR HEALTH, ENVIRONMENT & JUSTICE 12-16 (2005), http://www.childproofing.org/documents/building_safe_schools.pdf.

12. *See* discussion *infra* Part III.A.

13. S. REP. NO. 110-241 (2007). The President's Task Force on Environmental Health Risks and Safety Risks to Children was created in 1998 specifically to address children's health issues in schools. The Task Force established school workgroups charged with developing a federal inventory of school environmental health programs, but in 2005, the Task Force expired.

14. 15 U.S.C. § 2695 (2000).

15. *Id.*

16. RILS, *supra* note 6, at 7-8.

17. *Id.* at 7.

18. Am. Cancer Soc'y, *Cancer Facts and Figures 2007*, at 11, http://www.cancer.org/downloads/STT/CAFF2007PWSecured.pdf (last visited Jan. 28, 2008). Accidents are the number one cause of death for children.

illness in children, may present an even bigger challenge, as it causes fourteen million missed school days per year.[19] In some circumstances, low-income and minority populations suffer increased exposure to environmental risks and are disproportionately affected by environmental dangers.[20] For example, the Department of Health and Human Services estimated that African-American children are "three times more likely than white children to be hospitalized for asthma" and "four to six times more likely to die from asthma."[21]

The number of students potentially affected by unsafe environmental conditions continues to climb.[22] Public school enrollment increased 16% from 1991 to 2004, and an additional 9% increase is expected by 2016.[23] In 2016, an estimated 59.8 million students will enroll in public and private school.[24] Spending on new school construction to accommodate this continuing growth totaled more than $20 billion in 2006.[25]

Research shows a correlation between a building's physical characteristics and educational outcomes.[26] For example, a study conducted in the D.C. Public Schools concluded that on standardized tests, students attending school buildings in poor condition scored eleven percent below students attending buildings in excellent shape.[27] In light of this apparent connection, it is distressing that in 2000, "about 40% of schools reported a minimum of one "unsatisfactory environmental condition."[28] These unsatisfactory conditions exist more frequently in

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19. *Green School Initiatives: Hearing Before the S. Comm. on Environment and Public Works*, 107th Cong. 1-2 (2002) (statement of E. Ramona Trovato, Deputy Assistant Administrator, Office of Environmental Information, U.S. Environmental Protection Agency) [hereinafter *Trovato Statement*].

20. *Id.* That low-income and minority communities suffer disproportionately from exposure to environmental risks can in part be traced to reduced access to health care due to economic status. *Id.*

21. *Id.*

22. National Center for Education Statistics—Fast Facts, http://nces.ed.gov/fastfacts/display.asp?id=372 (last visited Jan. 28, 2008).

23. W.J. HUSSAR & T.M. BAILEY, NAT'L CTR. FOR EDUC. STATISTICS & U.S. DEP'T OF EDUC., PROJECTIONS OF EDUCATION STATISTICS TO 2016: THIRTY-FIFTH EDITION 6, http://nces.ed.gov/pubs2008/2008060.pdf (last visited Jan. 28, 2008).

24. *Id.*

25. PAUL ABRAMSON, 2007 CONSTRUCTION REPORT: SCHOOL PLANNING AND MANAGEMENT, at C2, http://www.peterli.com/global/pdfs/SPMConstruction2007.pdf (last visited Jan. 28, 2008).

26. *Green School Initiatives: Hearing Before the S. Comm. on Environment and Public Works*, 107th Cong. 5 (2002) (statement of Claire Barnett, Executive Director, Healthy Schools Network) [hereinafter *Barnett Statement*].

27. *Id.*

28. Trovato Statement, *supra* note 19.

"urban schools, schools with high minority student enrollment, and schools with a high percentage of low income students."[29]

Among the many factors affecting school siting, the cost of land is second only to availability, and land is becoming increasingly expensive.[30] School districts with limited budgets, particularly those in urban areas, may be forced to locate a new school on a less expensive "brownfield."[31] Budgetary pressure to build on brownfields can be augmented by guidelines that suggest or require minimum acreage for school sites.[32] In heavily developed communities, frequently the only plots big enough to meet acreage requirements are abandoned industrial sites that may be polluted due to the lax nature of past hazardous waste disposal laws.[33] Moreover, in cities like Los Angeles, entire communities are situated atop former oil and gas production areas.[34] Banning brownfield development would leave those communities without a school.[35]

An estimated $320 billion is required to bring schools up to national healthy standards.[36] Updating a school to healthy standards, however, arguably makes sense only if the school is set on environmentally safe land. One report argues that 600,000 children are at risk in California, Massachusetts, Michigan, New Jersey, and New York alone, because in those states 1100 schools have been built within a half-mile of a federal or state hazardous waste site.[37] Given these pressures, school districts

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29. *Id.*; *see also* Hartford Park Tenant's Ass'n v. R.I. Dep't of Envtl. Mgmt., No. C.A. 99-3748, 2005 WL 2436227 (R.I. Super. Ct. Oct. 3, 2005) (finding that Rhode Island's Department of Environmental Management (DEM) violated the environmental equity provisions of the Industrial Property Remediation and Reuse Act by accepting the City of Providence's plan to build public schools at a longtime dumpsite and failing to take into account "issues of environmental equity for low income and minority racial populations").

30. OR. DEP'T OF TRANSP. & THE OR. DEP'T OF LAND CONSERVATION & DEV., PLANNING SCHOOLS & LIVABLE COMMUNITIES: THE OREGON SCHOOL SITING HANDBOOK 14 (2005), http://www.oregon.gov/LCD/TGM/docs/schoolsitinghandbook.pdf.

31. *Id.* "The term 'brownfield site' means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substances, pollutant, or contaminant." 42 U.S.C. § 9601(39) (2000).

32. ROBERT HERSH, BUILDING SCHOOLS ON BROWNFIELDS: LESSONS LEARNED FROM CALIFORNIA 1581 (2005), http://cpeo.org/pubs/BFschools.pdf. The Council of Education Facility Planners International suggests a minimum of ten acres of land with an additional acre for every 100 elementary school students. Thus, an elementary school with 500 students would require fifteen acres.

33. *Id.*

34. *Id.* at 1582.

35. *Id.*

36. *Green School Initiatives: Hearing Before the S. Comm. on Environment and Public Works*, 107th Cong. 1 (2002) (statement of Chairman James M. Jeffords).

37. CHILD PROOFING OUR CMTYS. CAMPAIGN & THE CTR. FOR HEALTH, ENV'T & JUSTICE, *supra* note 11, preface.

may be tempted to build without thought to environmental concerns, and, as discussed in Part III, the absence of state and federal regulations or guidance makes this all the more likely.

III. SCHOOL SITING BACKGROUND

A. Local Control over School Siting

Local school governing bodies (school districts) are essentially sovereign with respect to siting schools, as "[n]o state requires school districts to cooperate with local government during the site selection process or any other process in school planning."[38] Siting decisions are subject to local government review only when the school district requests zoning approval for a proposed site; but even this process may be overridden in some states by the vote of school districts dissatisfied with an unfavorable zoning decision.[39] Some suggest this disconnect hinders cooperative, long-range planning between the two local entities, making it more difficult for communities and school districts to take into account the benefits and risks of undertaking environmental cleanup at a school site.[40] Moreover, school district independence with regard to siting decisions also allows individual school district leaders—who often lack the technical expertise to evaluate environmental assessments—to vote up or down on a brownfield site, entirely free from local government review processes.[41]

Local autonomy over the operation of public education has long been thought central to the integrity of the educational system.[42] States create school districts as discrete legal entities, and, "as an extension of the state," the school districts perform the state's duty to provide public education.[43] The authority to open a new school "falls within the heartland" of a school district's powers, and school districts are given a significant amount of discretion in this area.[44] A school board or school officers may be vested with the authority to locate land for schools.[45] In

38. Hersh, *supra* note 32, at 1583.

39. *Id.* A school district may exercise the power to override zoning ordinances provided it does not act in an arbitrary and capricious manner.

40. *Id.*

41. *Id.*

42. Milliken v. Bradley, 418 U.S. 717 (1974) (finding that federal courts have no power to mandate interdistrict remedies for school segregation in the absence of an interdistrict violation or interdistrict effect).

43. Hersh, *supra* note 32, at 1583.

44. Stark v. Indep. Sch. Dist., No. 640, 123 F.3d 1068, 1072 (8th Cir. 1997).

45. 78 C.J.S. *Schools and School Districts* § 364 (2007).

other instances, the authority is vested by statute in school district trustees or county boards of education.[46]

B. Survey of State Siting Legislation

Thirty years have passed since black muck was found oozing from the 99th Street School playground at Love Canal.[47] Yet, until the HPS was promulgated in 2007, federal legislation to address school siting with respect to toxic sites did not exist, and no effective state laws filled in the gap.[48] Although a few states like California and New Jersey have passed school siting statutes, even these fail to address pertinent environmental issues regarding contaminated school properties.[49]

In 2005, Rhode Island Legal Services (RILS) published a nationwide survey of findings indicating that forty-five states had no school siting laws specifically mandating new school sponsors to assume remediation or cleanup programs at polluted locations.[50] Further findings attest to the spotty coverage of school siting laws nationwide:

> Twenty (20) states have no policies of any kind affecting the siting of schools in relation to environmental hazards, the investigation or assessment of potential school sites for environmental hazards, the clean up of contaminated sites, making information available to the public about potential school sites, or providing some role for members of the public in the school siting process.[51]

Policies of restricting school sites "on or near environmental hazards" were adopted in twenty-six states, with only fourteen states absolutely prohibiting siting schools in environmentally hazardous areas that pose the potential for risk to human health and safety.[52] Policies that establish siting factors are more common than outright prohibitions and exist in twenty-one states.[53] In the event no law expressly governs management of a potentially contaminated school site, state environmental agencies will apply general hazardous waste laws.[54]

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46. *Id.* The power may also be vested in consolidated district boards of education, town district boards of education, or special school commissioners on creation of a subdistrict. *Id.*

47. Dick Usiak, *Dead for a Decade Love Canal: Why It Died 10 Years Ago, What Killed It, What's Next*, ALBANY TIMES UNION, July 31, 1988, at B3.

48. *See* discussion *infra* Part III.E.

49. *See* discussion *infra* Part III.E.

50. RILS, *supra* note 6, at 30.

51. *Id.* at 34.

52. *Id.* at 24-25.

53. *Id.* at 26.

54. *Id.* at 30; *see also* Hartford Park Tenant's Ass'n v. R.I. Dep't of Envtl. Mgmt., No. C.A. 99-3748, 2005 WL 2436227, at 55 (R.I. Super. Ct. Oct. 3, 2005) (finding that the Rhode Island Department of Environmental Management violated the environmental equity provisions

Even if states passed laws specifically to address contamination on proposed school sites, only a minority of states have promulgated legislation mandating state regulatory agency involvement in the environmental review process of proposed school grounds.[55] Therefore, some local districts can make school siting decisions without the review of either local government processes *or* state environmental agencies. California and New Jersey laws, discussed below, are useful models for analysis because they are among the most comprehensive state laws adopted to date, and illustrate the flaws that still exist in school siting legislation.

C. California School Siting Law

In 2000, California enacted Assembly Bill (AB) 387 and Senate Bill (SB) 162 (CA Law), and in so doing asserted itself as a leader in the adoption of school siting laws with regard to environmental hazards.[56] The legislation conditions receipt of state funds on compliance with a three-phase environmental review and/or cleanup process for proposed school sites.[57] The California Department of Toxic Substances Control (DTSC) oversees the review process, and states may choose at each step whether to abandon or remediate a contaminated property.

First, even before acquisition of a school site, the school district must obtain a record review to determine whether hazardous substances were released on the grounds and/or to detect the presence of a naturally occurring hazardous material (a "Phase I report").[58] DTSC then reviews the Phase I report to determine whether the site is suitable for acquisition or whether further investigation via a preliminary endangerment assessment (PEA report) is required due to the presence or potential presence of pollution.[59] Rather than conduct a PEA report, the school district may abandon plans to build on that site.[60]

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of the Industrial Property Remediation and Reuse Act by failing to develop and implement public participation plans with regard to a school construction project on contaminated grounds in Providence, Rhode Island).

55. Hersh, *supra* note 32, at 1593.

56. Cal. Envtl. Protection Agency Dep't of Toxic Substances Control, Fact Sheet: New Environmental Requirements for Proposed Schoolsites 1 (2001), http://www.dtsc.ca.gov/Schools/upload/Schfsr.pdf [hereinafter Fact Sheet]. AB 387 and SB 162 were enacted as amendments to the California Education Code sections 17070.50 and 17268, and added sections 17072.13, 17210, 17210.1, 17213.1, 17213.2, and 17213.3.

57. *Id.*

58. CAL. EDUC. CODE § 17213.1(a)(1) (2008); *id.* § 17210(g).

59. *Id.* § 17213.1(a)(3). A school district may, with the consent of the DTSC, proceed directly to a PEA report without having first completed a Phase I report. *Id.* § 17213.1(a)(4)(B).

60. *Id.*

A PEA report evaluates whether present or past hazardous waste management practices have resulted in a release or threatened release that poses a risk to children's health or the environment.[61] Unlike a Phase I report, a PEA report requires soil sampling, in an attempt to make an initial determination of the type and extent of hazardous contamination at the site.[62] Any school district that elects to conduct a PEA must employ a qualified environmental assessor.[63] The school district then forwards the PEA to DTSC for approval.[64] DTSC reviews the PEA report for proposed school sites using its most protective standards for children: "that all schoolsites be suitable for residential land use."[65] In addition, at the time the PEA is submitted to DTSC, the school district is required to publish a notice in the local newspaper that the assessment has been submitted, and post the notice in a visible manner at the proposed school site.[66]

If DTSC approves the PEA and determines that no further investigation is required at the site, the school district may proceed with acquisition of the site or construction of a project.[67] If, however, DTSC determines that a discharge of hazardous materials has occurred or threatens to occur, then the school district again has the choice of whether to proceed under DTSC oversight or abandon the site.[68] Amazingly, school districts receiving state funds are not required to address a release of hazardous substances into groundwater, provided the school district did not cause or contribute to the contamination, and the school district provides DTSC officials access to the school site.[69]

D. New Jersey School Siting Law

New Jersey is the most recent state to enact legislation addressing environmental school siting problems. In January 2007, bill S2261/A3529 (NJ Law) was passed in response to state siting fiascos like Kiddie Kollege, where mercury was discovered at a child care center

61. *Id.* § 17210(h).
62. *Id.*
63. Fact Sheet, *supra* note 56, at 2. The California Education Code details the minimum requirements environmental assessors must meet to be given responsibility to prepare Phase I and PEA reports.
64. CAL. EDUC. CODE § 17213.1(a)(5); *id.* § 17213.1(a)(10).
65. Fact Sheet, *supra* note 56, at 2.
66. CAL. EDUC. CODE § 17213.1(a)(6).
67. *Id.* § 17213.1(a)(9).
68. *Id.* § 17213.1(a)(10).
69. *Id.* § 17213.2(b)(1)-(2).

built on the grounds of a former thermometer factory.[70] The main features of the NJ Law are that the New Jersey Department of Environmental Protection (DEP): (1) oversees assessment and cleanup programs of schools located on contaminated land, and (2) provides a variety of enforcement options against entities subject to the law.[71]

The NJ Law establishes a two-step certification process applicable to educational facilities located on an environmentally high-risk site,[72] and the facility must meet both sets of criteria before either altering an existing facility or building a new one.[73] First, the educational facility must obtain certification for indoor environmental quality from the Department of Health and Senior Services (DHSS).[74] Within a year after promulgation of the statute, DHSS must set forth standard procedures for use in the assessment of school building interiors, and establish maximum interior building contaminant levels that protect public health and safety.[75] Second, if the school site is contaminated, the school must demonstrate that the site has been remediated to DEP standards, or else it cannot get a permit for construction or alteration for any educational facility on the site.[76]

Under the NJ Law, DEP is endowed with a broad range of enforcement options against violators, including the authority to issue orders, impose civil administrative penalties, or bring an action for civil penalties or injunctive relief.[77] Violating a provision of the certification process or knowingly making false statement in any application may result in a fine of up to $25,000 "for a first offense, and not more than $50,000 for the second and every subsequent offense."[78] Furthermore,

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70. Press Release, State on New Jersey, Office of the Governor, Governor Corzine Signs Legislation To Improve Environmental Safety at Schools and Child Care Centers (Jan. 11, 2007), *available at* http://www.state.nj.us/governor/news/news/approved/20070111.html. Kiddie Kollege was closed when a third of all children tested were found to have mercury blood levels higher than the federal level, with the highest test at more than triple the level. Inside the EPA, *Lautenberg Eyes Linking Federal Education Funds to Clean Schools*, 13 RISK POLICY REPORT (2006).

71. N.J. STAT. § 52:27D-130.5(2)(a)(1)-(2) (2008).

72. Press Release, *supra* note 70. Environmentally high risk sites include sites that were previously used for industrial, storage, or high hazard purposes; known or suspected to be contaminated; subject to the provisions of the Industrial Site Recovery Act; or used as a nail salon, dry cleaning facility, or gasoline station.

73. N.J. STAT. § 52:27D-130.5(2)(a)(1)-(2).

74. *Id.* § 52:27D-130.5(2)(a)(1).

75. *Id.* § 52:27D-130.4(1)(a). The DHSS regulations must take into account the metabolic and absorption differences between adults, children, and infants.

76. *Id.* § 52:27D-130.5(2)(b)(1).

77. *Id.* § 13:1K-13.1(3)(a).

78. *Id.* § 13:1K-13.1(3)(d).

"[e]ach day that a violation continues shall constitute an additional, separate, and distinct offense."[79]

Public notification requirements must be met, and industrial facilities must alert local municipalities when the facility closes or transfers ownership or operations.[80] Industrial facilities must also make the facility's proposed remedial action plan available to the municipality upon request.[81]

E. Shortcomings of California and New Jersey Laws

Both the California and New Jersey school siting laws have shortcomings. Neither statute authorizes the state environmental agency to evaluate contamination on properties adjacent to the proposed site, grants public access to information as soon as it becomes available, or provides citizens with enforcement options if the agency itself fails to carry out its statutory mandates. Perhaps the most glaring deficiency between the two laws is that the NJ Law applies only to schools that are *already* located on contaminated property, thereby completely failing to address environmental issues arising prior to school construction.

Offsite hazards like emissions from air pollutants from stationary or mobile sources must be evaluated to assess what future impact these pollutants will have on school property. Yet, neither California's DTSC nor New Jersey's DEP is authorized to inspect nearby properties for contamination. In fact, the CA Law specifically exempts schools from having to consider contaminated groundwater sources unless the school itself caused the contamination.[82] Because environmental assessments are confined within the boundaries of the school site, it is possible that neighboring pollution may later migrate, contaminating school sites that were deemed safe prior to construction. To avoid future unexpected health risks and cleanup costs, school siting laws should mandate investigation of adjacent sites during the preliminary environmental review process.

In both the CA and NJ Laws, the public is deprived of information regarding contaminated school sites at the most important stage of the process: when sites are initially selected and reviewed. In particular, the CA Law does not require a Phase I report to be made public before it is submitted to DTSC; public notice requirements kick in only after the

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79. *Id.*
80. *Id.* § 13:1K-9(4)(a)-(b).
81. *Id.*
82. CAL. EDUC. CODE § 17213.2(b)(1)-(2) (2008).

PEA is submitted.[83] The NJ Law imposes various notice requirements on industrial operators that are planning to close or transfer operations.[84] However, there are no specific provisions in the NJ Law mandating the disclosure of environmental findings made at the school during the certification process. Withholding information regarding environmental contamination at a school site shuts the community out of the siting process, inhibiting community consideration of the potential risks and benefits of building a school on a brownfield.

As recognized by both the CA and NJ Laws, statutory incentives are necessary to attain compliance with school specific environmental siting laws. The CA Law encourages school districts to abide by the law by tying state funding for educational programs to participation in the three-step review process.[85] The NJ Law provides for administrative actions and civil penalties against those who violate certification and remediation requirements.[86] A deficiency in both laws, however, is that neither supplies the public with enforcement options *against the agency* if *it* fails to undertake duties with which it is charged. The effectiveness of many environmental laws depends on the ability of both the regulator *and* citizens to take action for failure to fulfill statutory mandates. Federal laws, discussed below, do not fill this void.

IV. HEALTHY SCHOOLS LEGISLATION

A. Development of the Green Buildings Act

The HPS, which includes the Siting Provision, is part of the High-Performance Green Buildings Act of 2007 (Green Buildings Act), which was later adopted as the Energy and Independence and Security Act of 2007 (Energy Bill).[87] The HPS was enacted as Title V of the TSCA.[88]

The Green Buildings Act sets up an Office of Federal High-Performance Green Buildings, which is charged with establishing a clearinghouse to gather and disseminate green building research via public education, outreach, and the provision of technical assistance

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83. *Id.* § 17213.1(a)(6).
84. N.J. STAT. § 13:1K-9(4)(a)-(b).
85. *See* discussion *supra* Part III.B.
86. *See* discussion *supra* Part III.C.
87. Katie Ash, *EPA Charged with Establishing School Building, Health Guidelines*, EDUC. WEEK, Jan. 16, 2008, http://www.edweek.org/ew/articles/2008/01/16/20epa_web.h27.html?print=1.
88. 15 U.S.C. § 2695 (2000). Senator Jeffords attempted to pass versions of the Green Buildings Act in the 108th and 109th Congress, but it was not until Senator Lautenberg introduced the current Green Buildings Act in the 110th Congress that the House and Senate finally took action. S. REP. NO. 110-241 (2007).

across the government.[89] The Green Buildings Act is meant to strengthen federal leadership and to encourage the federal government to serve as an example for state and local governments, as well as the private sector, in the research, construction, renovation, and operation of green buildings that reduce energy consumption and environmental impacts.[90]

Healthy, high-performance school provisions were first introduced in the No Child Left Behind Act of 2001 (NCLB).[91] In NCLB, a high-performance school building was defined as one in which the "design, construction, operation, and maintenance" reflects the use of cost effective, energy-efficient materials, and enhances and protects indoor air quality and water.[92] The definition of "high-performance green building" in the Green Buildings Act was derived from the NCLB language: under the Green Buildings Act a green building is one "that, during its life-cycle . . . reduces energy, water, material resource use" and the generation of waste, improves indoor environmental air quality, and reduced negative impacts on human health and the environment.[93]

Recognizing the potential health and environmental benefits that green school buildings present, school districts across the nation have built green educational facilities.[94]

B. Healthy High-Performance Schools Act and the School Siting Provision

Tucked into the HPS, the Siting Provision instructs EPA to develop voluntary model guidelines for the siting of schools.[95] In particular, EPA must, together with the Secretaries of Education and Health and Human Services, develop school site selection guidelines that take into account: "(1) the special vulnerability of children to hazardous substances or pollution exposure in any case in which the potential for contamination exists; (2) modes of transportation available to students and staff; (3) the efficient use of energy; and (4) the potential use of a school at the site as an emergency shelter."[96]

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89. Donald Horn & David Marciniak, Summary of Energy Independence and Security Act of 2007 (2007), http://epa.gov/iedweb00/ciaq/ohpgb_gsa_summary.pdf.

90. S. REP. NO. 110-241 (2007).

91. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 5586 (2001).

92. *Id.*

93. 42 U.S.C. § 17061 (13) (2000); S. REP. NO. 110-241 (2007).

94. Alliance To Save Energy—Promoting Energy Efficiency World Wide: Programs: Green Schools, http://www.ase.org/section/program/greenschl/spirit (last visited Mar. 9, 2008) (describing green school initiatives in California, District of Columbia, Maryland, New York, and Pennsylvania).

95. 15 U.S.C. § 2695a (2000).

96. *Id.*

Under the HPS, EPA is also directed to create voluntary guidelines for use by states in the development and implementation of school environmental health programs.[97] The guidelines must address, with respect to school facilities, the presence of environmental contaminants including lead, asbestos, radon, mercury, and pollutant emissions, as well as any other environmental problem or contaminant that may present a threat to health or the environment.[98] EPA is further instructed to consider "the special vulnerability in low-income and minority communities to exposures from contaminants, hazardous substances, and pollutant emissions."[99]

The public outreach section of the HPS is intended to ensure that "to the maximum extent possible," the public clearinghouse established under the Green Buildings Act receives and disburses information on the exposure of children to environmental hazards in schools.[100]

To support HPS program initiatives, the EPA "may" provide grants to states.[101] States must use grant money to assist implementation of EPA school programs designed to address school environmental health issues, including issues of school building design, construction, and renovation.[102] Grants may also be used for the detection of continuing school building environmental problems, including those posed by hazardous contaminants and hazardous substances, as well as for the assessment of information gathered.[103] To carry out the title, Congress allocated one million dollars for the fiscal year 2009, as well as an additional $1.5 million per year from 2010 to 2013.[104]

V. SCHOOL SITING PROVISION DEFICIENCIES AND SUGGESTED AMENDMENTS

A. Limitations of the Siting Provision

While the Siting Provision takes a very good first stab at addressing school siting problems, it does not cover the gap in state legislation. In particular, the Siting Provision does not: (1) comprehensively list what EPA should consider in creating the model guidelines, (2) include provisions which will encourage states to adopt the guidelines or provide

97. *Id.* § 2695c(a).
98. *Id.* § 2695c(a)(1).
99. *Id.* § 2695c(a)(7).
100. *Id.* § 2695b(b).
101. *Id.* § 2695(a).
102. *Id.* § 2695(a)(2)(A).
103. *Id.*
104. *Id.* § 2695d.

enforcement options if EPA fails to promulgate the guidelines, or (3) provide adequate funding or grant guidelines.

Although EPA must consider a lengthy list of factors in the promulgation of guidelines under the HPS's environmental health program provision, instructions to EPA under the Siting Provision are sparse: the model guidelines are to take into account only four criteria.[105] Of these, only one instructs EPA to consider children's special vulnerability to hazardous substances.[106] Moreover, the instruction lacks specificity; Congress provided EPA with no direction as to exactly which substances EPA must evaluate or what particular risks to children should be considered. EPA is not directed to take into account issues of environmental equality for schools sited in low-income or minority communities. It is unclear whether the guidelines will recommend the evaluation of properties adjacent to school sites. Also, there is no indication that the guidelines will address the administrative oversight problems states and state environmental agencies confront when assessing and remediating pollution at school sites.

Furthermore, because the guidelines are voluntary, there is no guarantee they will be adopted or implemented by state regulatory bodies, environmental agencies, or local school districts. At the worst, the guidelines will be viewed as suggestions and ignored. Or, the entities in charge of assessing environmental hazards at school sites could cherry-pick portions of the guidelines to implement based on cost or ease of compliance, rather than on the need to protect human health and the environment. Worse, some localities may want to implement the guidelines but lack the administrative framework or funds to do so. Of course, the above speculations assume that EPA will follow its statutory mandate to promulgate guidelines. If, however, it does not, citizens are without administrative remedies to force EPA action under the Siting Provision. Without incentives or enforcement mechanisms applicable to either schools or EPA, any range of outcomes is conceivable.

Congress allotted only $1 million per year to carry out the HPS, and this $1 million will be stretched thin among the numerous HPS programs which are to be implemented by grants to states.[107] Illustrative of this deficiency is the fact that, in comparison, Congress appropriated $600 million in federal loans and grants to schools with asbestos problems and financial need under the Asbestos School Hazard Abatement Act

105. *See* discussion *supra* Part IV.B.
106. *See* discussion *supra* Part IV.B.
107. 15 U.S.C. § 2695d.

(ASHAA).[108] Pursuant to the ASHAA, in 1985 alone EPA issued $45 million in awards for 417 abatement projects in 340 schools.[109] Unfortunately, the trend of underfunding children's healthy schools initiatives is all too familiar: the Healthy High-Performance Schools program included as part of NCLB was never funded.[110]

B. Toxic Substances Control Act Title II: The Asbestos Hazard Emergency Response Act

The Siting Provision, as part of the HPS, was enacted as an amendment to the TSCA.[111] Another TSCA title, the Asbestos Hazard Emergency Response Act (AHERA), may serve as a model when considering improvements to the Siting Provision.

AHERA establishes a federal regulatory framework pursuant to which EPA oversees asbestos inspection and implementation of response measures in schools.[112] Under AHERA, local educational agencies must inspect school buildings for the presence of asbestos in accordance with EPA procedures.[113] If asbestos is found, the local school governing body must: (1) develop an asbestos management plan in accordance with AHERA regulations, (2) adhere to AHERA accreditation requirements for contractors and laboratories, and (3) make the management plan available to the public.[114] Congress adopted AHERA based on findings

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108. EPA History, Signing of Asbestos Hazard Emergency Response Act, http://www.epa.gov/history/topics/tsca/05.htm (last visited Feb. 21, 2008).

109. *Id.* The following year, EPA granted another $47 million to 295 schools for 421 projects. *Id.*

110. Scott Moore, *Federal High-Performance Buildings Initiative: 25 Ideas*, THE REVIEW OF POLICY RESEARCH 496(2) (2007).

111. 15 U.S.C. § 2695a. Congress enacted the TSCA in 1976 to guard against the risk of injury posed to human health and the environment from the large number of chemical substances people come into daily contact with in air, water, soil, consumer products, and food. *Id.* § 2601(a)(1) (2000). The primary goal under the TSCA as originally enacted is to gather information about the production and use of chemical substances and corresponding health and environmental effects. *Id.* § 2601(b). The TSCA has been referred to as a "sleeping giant," because it has the potential to provide faster and less costly means to attain better environmental ends. Although it has not "attained gargantuan stature," in recent years interest in the TSCA has grown. TSCA has played a primary role in EPA's enforcement program, as fines and penalties collected under the TSCA have frequently exceeded those generated by the Resource Conservation and Recovery Act (RCRA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Clean Air Act (CAA), and Federal Water Pollution Control Act (FWCPA). Elizabeth C. Brown et al., *A Practitioner's Guide to the Toxic Substances Control Act*, *in* TSCA DESKBOOK, at vii (1995).

112. 15 U.S.C. § 2641 (b)(1).

113. *Id.* § 2643(b).

114. *Id.* § 2643(5); *id.* § 2643(i)(1). In addition, local educational agencies must ensure that asbestos-containing material that has been discovered and is still in routine maintenance areas

that asbestos exposure was a continued threat in schools and that a lack of regulatory guidance from EPA regarding asbestos caused some schools to avoid response actions, while others embarked on costly cleanups "without knowing if their action is necessary, adequate, or safe."[115] Not only does AHERA provide an administrative structure to manage asbestos detection and cleanup, it also sets health standards "for the education and protection of both workers and building occupants."[116] AHERA has been widely adopted, with 94% of schools implementing its programs.[117]

AHERA prohibits unaccredited contractors from inspecting schools for asbestos-containing material, preparing a management plan, or designing or conducting asbestos response actions.[118] States play an active role in the implementation of the accreditation program, and must "adopt a contractor accreditation plan at least as stringent as the model plan developed by [EPA]."[119] This provision has had some success: it is estimated that thirty-nine states have adopted accreditation programs, providing substantial assistance to EPA in monitoring the work force that carries out asbestos-related activities in schools.[120]

Any local educational agency that violates AHERA provisions or "knowingly submits false information to the Governor regarding any inspection pursuant to [AHERA]," may be civilly liable for a penalty of no more than $5000 each day that a violation occurs.[121] Civil penalties collected against a school are typically returned to the local school governing body for purposes of complying with AHERA.[122] Any unspent portion of the civil penalty remaining must be deposited into an Asbestos Trust Fund for the benefit of use by other schools.[123] Congress plainly sought to have health and environmental risks posed by asbestos

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bears a visible warning label cautioning that asbestos is hazardous and should not be disturbed. *Id.* § 2643(3).

115. *Id.* § 2641(a)(1)-(2).

116. *Id.* § 2643(e).

117. Arnold W. Reitze, Jr., *The Legal Control of Indoor Air Pollution*, 25 B.C. ENVTL. AFF. L. REV. 247, 345 n.449 (1998).

118. 15 U.S.C. § 2646(a)(1)-(3); *id.* § 2641(b)(1); *id.* § 2646.

119. *Id.* § 2646(b)(2).

120. Charles G. Garlow, *Asbestos—The Long-Lived Mineral*, 19 NAT. RES. & ENV'T 36, 39 (2005) (suggesting that the capability to collect licensing fees to finance program administration is an important factor in the state's decision to undertake this responsibility).

121. 15 U.S.C. § 2647(a)(1). Contractors who perform asbestos-related work without accreditation are also liable for civil penalties of no more than $5000 for each day a violation continues, unless the contractor is a direct employee of the federal government. *Id.* § 2648 (2000).

122. *Id.* § 2647(a)(1).

123. *Id.*

addressed promptly, and "this was one way of putting the money where the problems were."[124] The penalty structure has been criticized because returning fines to noncompliant schools does not really penalize the local educational agency, beyond the "punishment of public embarrassment and attorney's fees."[125]

AHERA also provides any person with the right to file a complaint with EPA or the State Governor, and if the claims are "reasonable," EPA or the Governor will investigate and respond in a timely manner.[126] Furthermore, under AHERA any person can commence a civil action against EPA to compel the agency to meet its AHERA deadlines.[127]

C. Proposals

The absence or lack of effective state laws to govern contaminated school sites and the poor siting decisions that can result when local school governing bodies make siting decisions independent of state and local review processes suggest a need for stronger federal legislation. Shortcomings of the CA and NJ Laws, as well as deficiencies in the Siting Provision, may be remedied by amending the Siting Provision to include: (1) more detailed guidance as to what EPA should consider when establishing model school siting guidelines, and (2) measures to incentivize adoption and compliance with the guidelines and to force agency action.

The Siting Provision should set forth detailed factors for EPA to contemplate in developing the model guidelines, as does the HPS provision for developing environmental health guidelines.[128] First, to fill the gap in state legislation, EPA's guidelines should address the potential for migrating hazardous waste from adjacent sites. In addition, EPA should be instructed to develop notice procedures mandating the early and direct release of environmentally-related school siting information *to the involved communities*, rather than merely making the information available via the Green Buildings Act clearinghouse.[129] Finally, EPA should be directed to develop guidelines that factor in issues of environmental equality specific to school siting.

The Siting Provision should also clarify what guidelines govern situations where neither EPA nor state guidelines cover an issue

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124. Garlow, *supra* note 120, at 40.
125. *Id.* at 40.
126. 15 U.S.C. § 2647(d).
127. *Id.* § 2647(f).
128. *See* discussion *supra* Part IV.B.
129. *See* discussion *supra* Part IV.A.

regarding the presence of hazardous substances at a proposed school, or where there is insufficient data to determine whether there may be a potential threat to health or the environment. In a discussion draft of an earlier bill proposing regulations similar to those now included in the HPS, Senator Menendez suggested that in such circumstances EPA should presume that the environmental contaminant poses a special risk to children.[130] The draft further recommended that, due to the special vulnerability of children to harm from pollution exposure, children should be safeguarded by "an additional safety factor of at least 10-fold in the establishment of environmental standards when reliable data are not available."[131] Even without going as far as Senator Menendez's bill, the Siting Provision should be amended to indicate what action should be taken in the absence of federal and/or state guidance.

One way to promote state adoption of federal siting guidelines is to model the Siting Provision after AHERA. Both are situated under the TSCA, and both were enacted for the same purpose: to ensure that educational facilities do not pose environmental health risks to children from exposure to toxic substances. A siting provision fashioned after AHERA would require schools to inspect for contamination not only at proposed school sites, but also at *existing* school grounds. In either case, if pollution were found, school districts would be required to develop cleanup plans using accredited contractors and laboratories, subject to EPA oversight, as in AHERA. EPA guidance throughout the assessment and cleanup process would provide much-needed administrative assistance to school districts, while allowing school districts some flexibility to customize management plans to suit local needs. School districts and states would still retain traditional discretion over all other aspects of the school siting process.

An AHERA-like enforcement structure might also be used to encourage state and school district implementation of siting guidelines. As in AHERA, schools districts that do not follow standardized site investigation and cleanup procedures would be subject to monetary penalties, but those fines would eventually return to local school governing boards to carry out compliance with guidelines issued pursuant to the Siting Provision. Penalty funds will be allotted where the need is, and, the penalty mechanism would provide accountability for poor environmental management on school district leaders, which may have a deterrent effect. Furthermore, the Siting Provision should include

130. Environmental Protection for Children Act of 2006, 109th Cong. 4 (2006) (Discussion Draft of Act, as introduced by Sen. Menendez).

131. *Id.* at 5.

a provision, as AHERA does, which gives citizens an administrative action to compel agency compliance with statutory mandates. As the Siting Provision now stands, citizens are without recourse if EPA fails to promulgate guidelines.

Rather than mandating compliance with federal siting guidelines through the adoption of an enforcement framework modeled on AHERA, states and school districts might be encouraged to comply with guidelines in order to receive federal funding for education programs. Such a measure was "actively being discussed," and "absolutely a possibility," at the time of enactment of the HPS, but nothing was ever formally introduced.[132] An alternative method to secure safe school sites is to condition receipt of grants on state adoption of environmental school siting laws that incorporate federal siting guidelines. Under the current HPS grant program, EPA has discretion to provide grants to states for program implementation, but the provision does not set forth application requirements.[133] In his discussion draft, Senator Menendez suggested a program that would give EPA the authority to issue block grants to states which have enacted a law requiring environmental testing for pollution on the proposed site for a school.[134] This final option may be the best mechanism to promote safe schools, as it gives states maximum flexibility to tailor a law to local preferences.

VI. CONCLUSION

The Supreme Court cites education as the "most important function of state and local governments,"[135] but these governments have failed to provide children with a healthy environment in which to learn. States have compulsory school attendance laws, yet lack laws to protect children from attending schools on polluted grounds.[136] While awaiting effective school siting legislation, millions of children will pass through schools that may pose a risk to their health and the environment. Billions of dollars will be spent building schools on property that was not subject

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132. Inside the EPA, *supra* note 70, at 1. A spokesman for Senator Lautenberg indicated that this approach is based on legislation pushed by Lautenberg in 1984 that "threatened states' share of federal highway funds if they did not increase the legal drinking age to 21." *Id.*

133. 15 U.S.C. § 2695(a) (2000).

134. Environmental Protection for Children Act of 2006.

135. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954) (finding racial segregation in the context of public education violative of the Equal Protection Clause under the Fourteenth Amendment).

136. U.S. Dep't of Labor Wage & Hour Div., State Labor Laws: Employment Related Provisions in State Compulsory School Attendance Laws (Jan. 1, 2008), http://www.dol.gov/esa/programs/whd/state/schoolattend.htm.

to comprehensive environmental review that takes into account the special vulnerability of children to environmental hazards. Strengthening the Siting Provision to encourage compliance with EPA guidelines will ensure that the assessment and cleanup of school sites prior to construction is performed under an enforceable environmental regulatory framework.

Although school districts may save money by building schools on redeveloped brownfields, land reuse can create big problems due to past industrial contamination. If contaminated property is not sufficiently dealt with early on, the consequences can be disastrous for school districts and school occupants alike. In an extreme situation, the entire school may have to be abandoned and torn down, and children and school personnel will suffer from pollution-exposure health problems. While the federal government has passed landmark green building legislation, what good is a green school if it is built on an improperly remediated brownfield?