

Regulatory Developments to Promote Brownfields Redevelopment

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It has been generally agreed that the Brownfields program has been one of the most successful and popular that U.S. EPA has ever initiated. Brownfields redevelopment has been particularly effective in Michigan, largely because of the 1994 amendments to Part 201 of the Natural Resources and Environmental Protection Act (“NREPA”). By mandating the move to so-called “use based standards” to determine appropriate cleanup levels and providing the BEA process so that new owners could protect themselves from status liability – at least under State law – the NREPA amendments provided a great stimulus to Brownfields redevelopment in Michigan. Indeed, half of the Brownfields project grants approved by EPA Region V (which covers Michigan, Ohio, Indiana, Illinois, and Wisconsin) were for projects located in Michigan, as of the last report.

Despite the comfort of the revised NREPA, though, many prospective redevelopers have had concerns about potential liability under Federal law, particularly CERCLA (Superfund) and the Resource Conservation and Recovery Act (“RCRA”). In addition, Brownfields grant funds were limited and, often, Brownfields projects that were otherwise promising were not economically feasible because of the cost of environmental investigation and cleanup if grant funds were not available.

Relief has now been provided at the Federal level by both Congress and on-going regulatory changes by EPA. In January, 2002, the Small Business Liability Relief and Brownfields Revitalization Act (the “Brownfields Act”) took effect, making significant changes in Superfund. At the same time, EPA announced its intention to make the Brownfields program the “centerpiece” of Superfund and RCRA remediations whenever possible, wrapping those two remedial programs around the Brownfields redevelopment program. We will briefly outline some of the more significant provisions of the Brownfields Act and EPA statements about the direction that it intends to take the program.

Statutory Changes

Title I of the Brownfields Act is the small business liability relief section. We will not review that in detail here, but merely point out that it provides significant Superfund relief

for small generators – those that contribute less than 110 gallons of liquid materials or less than 200 pounds of solid materials to a Superfund site – and generators that were previously liable at a Superfund site because of the disposal of municipal waste. When representing a client that receives a Superfund notice from EPA, it will be important to review the exclusions – and the exceptions and conditions for qualifying for the exclusion – before taking a position with the Agency.

Title II provides the Brownfields program enhancement.

For many years, CERCLA has contained a so-called “innocent purchaser” exemption. The problem has always been that anyone who undertook sufficient investigation discovered the facts about contamination of the property and, thus, did not qualify for the exemption. Subtitle B of Title II, entitled “Brownfields Liability Clarifications,” “clarifies” the innocent landowner defense by considerably expanding it to a “bona fide purchaser” defense and making it possible to exempt oneself from CERCLA liability by doing a thorough investigation.

Lest one think that Congress has provided us with an unmixed blessing, however, it is important to consider the conditions that Congress tied to the bona fide purchaser defense. The new owner or tenant must be able to establish all of the following by a preponderance of the evidence:

- All disposal of hazardous substances occurred before the purchaser acquired the facility;
- The purchaser conducted an “appropriate inquiry”;
- The purchaser complied with all release reporting requirements
- The purchaser took “appropriate care” (yet to be adequately defined by EPA regulations) by taking “reasonable steps” to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance;
- The purchaser cooperates, assists, and provides access to persons that are authorized to conduct response actions or natural resource restoration;
- The purchaser complied with any land use restrictions established as part of response action and does not impede the effectiveness or integrity of any institutional control used at the site;
- The purchaser provides access to persons authorized to conduct response actions;
- The purchaser complies with any EPA request for information; and
- The purchaser is not a PRP or affiliated with any other PRP for the property through any direct or indirect relationship.

This may seem like a daunting list of conditions, but it really doesn’t seem to be all that different from what we have been dealing with since 1995 under NREPA and it does provide significantly enhanced protection to a new purchaser or tenant. Please note, however, that Congress only included this protection in CERCLA, not in RCRA.

The Brownfields Act also creates a new lien, called a “windfall lien,” in Section 107(r) of CERCLA. Essentially, the windfall lien permits EPA to recover its response

costs out of any increase in fair market value resulting from EPA response efforts. EPA recovers its costs at the time of any sale of the property.

The problems inherent in defining “before” and “after” fair market values are so obvious that they do not require comment.

The Brownfields Act provides significant new funding for the program, as well as slightly broadening the definition of the term “brownfield site.” The term now includes property the expansion of which may be “complicated” by contamination.

The Act increases the annual authorization for assessment and cleanup of Brownfields sites from approximately \$96 million to \$250 million per year for fiscal years 2002 through 2006. Of this amount, \$150 million will be allocated to local government, states and Indian tribes to support site assessment and cleanup and another \$50 million will be allocated to establish and enhance state and tribal cleanup programs. The final \$50 million will be available to clean up sites contaminated with petroleum. The big question, of course, is whether Congress will actually appropriate the \$250 million that it has authorized in each of those fiscal years.

Regulatory Change

EPA is also moving to promote the Brownfields program through planned changes in its administrative regulations and policy guidance to its project managers.

Of great significance is EPA’s intention, announced last spring, to move towards a use based system of decision making on remediation targets – “how clean is clean” – in both CERCLA and RCRA remediation projects. This could be a huge step forward because, traditionally, EPA has been subjected to a great deal of pressure from state and local governments, citizen groups, the news media, and legislators to require cleanup to unlimited residential or even pristine standards even where there was virtually no possibility that the site could ever be used for residences, parks, schools, etc. All too often, EPA has acceded to this pressure and required what many people thought were unrealistic – and often, scientifically unachievable – cleanup goals.

Now, EPA spokespersons have said that if an approved Brownfields re-use program has been adopted early enough in the process, it will give serious consideration to basing its cleanup targets on what is necessary to facilitate the planned reuse. As with the Congressional action in the Brownfields Act, EPA’s statements are not an unmixed blessing. First, the Agency spokespersons have indicated that the first problem – and a vexing one – is how to write regulations to implement the new policy. EPA must determine what is an “approved” reuse plan, who must approve it, and what the approval criteria will be. Almost certainly, the approval process is going to involve review and approval by local government after consideration of public comments. This could be a problem, but it could also turn out to be a means to, in effect, expedite planning and zoning reviews.

It also remains to be seen what EPA will consider to be “early enough in the process.” This may not be so much of a problem, though, because, for several years, EPA has been following a policy of deferring enforcement actions where voluntary or State-led remediation efforts promise to adequately remediate sites. The Brownfields Act specifically authorizes EPA to defer listing an eligible site on the Superfund list if it determines that the State or a private party is conducting a satisfactory response action or that the State is actively pursuing an agreement for such an action. With this general movement toward

Federal deferral, therefore, it may be anticipated that EPA will exhibit patience in waiting for the adoption of an approved Brownfields reuse plan.

Meanwhile, even as EPA wrestles with its regulations, efforts are going forward to try to implement legislation at the State level to take advantage of the increased interest in Brownfields. One of the first efforts was that of the National Conference of Commissioners on Uniform State Laws, which issued a discussion draft Uniform Environmental Reuse Agreements Act in April of 2002. The discussion draft would have attempted to preempt many traditional areas of State law, such as recording, land use controls, marketable title standards, and standing to enforce land use controls in litigation, to mention a few. Somewhat similar legislation has actually been introduced in the Michigan Legislature and is being carefully followed by the Section Council. Obviously, well meaning proponents of Brownfields redevelopment can unwittingly raise a host of constitutional issues which could delay implementation of the program for years, but these efforts are a sign of the increased enthusiasm for the program. For the present, we must simply watch carefully as EPA administrative regulation drafting and the various legislative efforts move forward.

Exhibit A
**Excerpts from Small Business Liability Relief and Brownfields
Revitalization Act**

H. R. 2869

**One Hundred Seventh Congress
of the
United States of America**

AT THE FIRST SESSION

*Begun and held at the City of Washington on Wednesday,
the third day of January, two thousand and one*

An Act

To provide certain relief for small businesses from liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, and to amend such Act to promote the cleanup and reuse of brownfields, to provide financial assistance for brownfields revitalization, to enhance State response programs, and for other purposes.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the “Small Business Liability Relief and Brownfields Revitalization Act”.

**TITLE I—SMALL BUSINESS LIABILITY
PROTECTION**

SEC. 101. SHORT TITLE.

This title may be cited as the “Small Business Liability Protection Act”.

SEC. 102. SMALL BUSINESS LIABILITY RELIEF.

(a) EXEMPTIONS.—Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607) is amended by adding at the end the following new subsections:

“(o) DE MICROMIS EXEMPTION.—

“(1) IN GENERAL.—Except as provided in paragraph (2), a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under this Act if liability is based solely on paragraph (3) or (4) of subsection (a), and the person, except as provided in paragraph (4) of this subsection, can demonstrate that—

“(A) the total amount of the material containing hazardous substances that the person arranged for disposal or treatment of, arranged with a transporter for transport for disposal or treatment of, or accepted for transport for disposal or treatment, at the facility was less than 110 gallons of liquid materials or less than 200 pounds of solid materials (or such greater or lesser amounts as the Administrator may determine by regulation); and

“(B) all or part of the disposal, treatment, or transport concerned occurred before April 1, 2001.

“(2) EXCEPTIONS.—Paragraph (1) shall not apply in a case in which—

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“(B) FAILURE TO COMPLY.—The President may decline to offer a settlement to a potentially responsible party under this subsection if the President determines that the potentially responsible party has failed to comply with any request for access or information or an administrative subpoena issued by the President under this Act or has impeded or is impeding, through action or inaction, the performance of a response action with respect to the facility.

“(C) RESPONSIBILITY TO PROVIDE INFORMATION AND ACCESS.—A potentially responsible party that enters into a settlement under this subsection shall not be relieved of the responsibility to provide any information or access requested in accordance with subsection (e)(3)(B) or section 104(e).

“(9) BASIS OF DETERMINATION.—If the President determines that a potentially responsible party is not eligible for settlement under this subsection, the President shall provide the reasons for the determination in writing to the potentially responsible party that requested a settlement under this subsection.

“(10) NOTIFICATION.—As soon as practicable after receipt of sufficient information to make a determination, the President shall notify any person that the President determines is eligible under paragraph (1) of the person’s eligibility for an expedited settlement.

“(11) NO JUDICIAL REVIEW.—A determination by the President under paragraph (7), (8), (9), or (10) shall not be subject to judicial review.

“(12) NOTICE OF SETTLEMENT.—After a settlement under this subsection becomes final with respect to a facility, the President shall promptly notify potentially responsible parties at the facility that have not resolved their liability to the United States of the settlement.”.

SEC. 103. EFFECT ON CONCLUDED ACTIONS.

The amendments made by this title shall not apply to or in any way affect any settlement lodged in, or judgment issued by, a United States District Court, or any administrative settlement or order entered into or issued by the United States or any State, before the date of the enactment of this Act.

TITLE II—BROWNFIELDS REVITALIZATION AND ENVIRONMENTAL RESTORATION

SEC. 201. SHORT TITLE.

This title may be cited as the “Brownfields Revitalization and Environmental Restoration Act of 2001”.

Subtitle A—Brownfields Revitalization Funding

SEC. 211. BROWNFIELDS REVITALIZATION FUNDING.

(a) DEFINITION OF BROWNFIELD SITE.—Section 101 of the Comprehensive Environmental Response, Compensation, and Liability

Act of 1980 (42 U.S.C. 9601) is amended by adding at the end the following:

“(39) BROWNFIELD SITE.—

“(A) IN GENERAL.—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 substance, pollutant, or contaminant.

“(B) EXCLUSIONS.—The term ‘brownfield site’ does not include—

“(i) a facility that is the subject of a planned or ongoing removal action under this title;

“(ii) a facility that is listed on the National Priorities List or is proposed for listing;

“(iii) a facility that is the subject of a unilateral administrative order, a court order, an administrative order on consent or judicial consent decree that has been issued to or entered into by the parties under this Act;

“(iv) a facility that is the subject of a unilateral administrative order, a court order, an administrative order on consent or judicial consent decree that has been issued to or entered into by the parties, or a facility to which a permit has been issued by the United States or an authorized State under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), the Federal Water Pollution Control Act (33 U.S.C. 1321), the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), or the Safe Drinking Water Act (42 U.S.C. 300f et seq.);

“(v) a facility that—

“(I) is subject to corrective action under section 3004(u) or 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6924(u), 6928(h)); and

“(II) to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures;

“(vi) a land disposal unit with respect to which—

“(I) a closure notification under subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.) has been submitted; and

“(II) closure requirements have been specified in a closure plan or permit;

“(vii) a facility that is subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States, except for land held in trust by the United States for an Indian tribe;

“(viii) a portion of a facility—

“(I) at which there has been a release of polychlorinated biphenyls; and

“(II) that is subject to remediation under the Toxic Substances Control Act (15 U.S.C. 2601 et seq.); or

“(ix) a portion of a facility, for which portion, assistance for response activity has been obtained under subtitle I of the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.) from the Leaking Underground Storage

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Tank Trust Fund established under section 9508 of the Internal Revenue Code of 1986.

“(C) SITE-BY-SITE DETERMINATIONS.—Notwithstanding subparagraph (B) and on a site-by-site basis, the President may authorize financial assistance under section 104(k) to an eligible entity at a site included in clause (i), (iv), (v), (vi), (viii), or (ix) of subparagraph (B) if the President finds that financial assistance will protect human health and the environment, and either promote economic development or enable the creation of, preservation of, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes.

“(D) ADDITIONAL AREAS.—For the purposes of section 104(k), the term ‘brownfield site’ includes a site that—

“(i) meets the definition of ‘brownfield site’ under subparagraphs (A) through (C); and

“(ii)(I) is contaminated by a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

“(II)(aa) is contaminated by petroleum or a petroleum product excluded from the definition of ‘hazardous substance’ under section 101; and

“(bb) is a site determined by the Administrator or the State, as appropriate, to be—

“(AA) of relatively low risk, as compared with other petroleum-only sites in the State; and

“(BB) a site for which there is no viable responsible party and which will be assessed, investigated, or cleaned up by a person that is not potentially liable for cleaning up the site; and

“(cc) is not subject to any order issued under section 9003(h) of the Solid Waste Disposal Act (42 U.S.C. 6991b(h)); or

“(III) is mine-scarred land.”

(b) BROWNFIELDS REVITALIZATION FUNDING.—Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9604) is amended by adding at the end the following:

“(k) BROWNFIELDS REVITALIZATION FUNDING.—

“(1) DEFINITION OF ELIGIBLE ENTITY.—In this subsection, the term ‘eligible entity’ means—

“(A) a general purpose unit of local government;

“(B) a land clearance authority or other quasi-governmental entity that operates under the supervision and control of or as an agent of a general purpose unit of local government;

“(C) a government entity created by a State legislature;

“(D) a regional council or group of general purpose units of local government;

“(E) a redevelopment agency that is chartered or otherwise sanctioned by a State;

“(F) a State;

“(G) an Indian Tribe other than in Alaska; or

“(H) an Alaska Native Regional Corporation and an Alaska Native Village Corporation as those terms are defined in the Alaska Native Claims Settlement Act (43

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U.S.C. 1601 and following) and the Metlakatla Indian community.

“(2) BROWNFIELD SITE CHARACTERIZATION AND ASSESSMENT GRANT PROGRAM.—

“(A) ESTABLISHMENT OF PROGRAM.—The Administrator shall establish a program to—

“(i) provide grants to inventory, characterize, assess, and conduct planning related to brownfield sites under subparagraph (B); and

“(ii) perform targeted site assessments at brownfield sites.

“(B) ASSISTANCE FOR SITE CHARACTERIZATION AND ASSESSMENT.—

“(i) IN GENERAL.—On approval of an application made by an eligible entity, the Administrator may make a grant to the eligible entity to be used for programs to inventory, characterize, assess, and conduct planning related to one or more brownfield sites.

“(ii) SITE CHARACTERIZATION AND ASSESSMENT.—A site characterization and assessment carried out with the use of a grant under clause (i) shall be performed in accordance with section 101(35)(B).

“(3) GRANTS AND LOANS FOR BROWNFIELD REMEDIATION.—

“(A) GRANTS PROVIDED BY THE PRESIDENT.—Subject to paragraphs (4) and (5), the President shall establish a program to provide grants to—

“(i) eligible entities, to be used for capitalization of revolving loan funds; and

“(ii) eligible entities or nonprofit organizations, where warranted, as determined by the President based on considerations under subparagraph (C), to be used directly for remediation of one or more brownfield sites owned by the entity or organization that receives the grant and in amounts not to exceed \$200,000 for each site to be remediated.

“(B) LOANS AND GRANTS PROVIDED BY ELIGIBLE ENTITIES.—An eligible entity that receives a grant under subparagraph (A)(i) shall use the grant funds to provide assistance for the remediation of brownfield sites in the form of—

“(i) one or more loans to an eligible entity, a site owner, a site developer, or another person; or

“(ii) one or more grants to an eligible entity or other nonprofit organization, where warranted, as determined by the eligible entity that is providing the assistance, based on considerations under subparagraph (C), to remediate sites owned by the eligible entity or nonprofit organization that receives the grant.

“(C) CONSIDERATIONS.—In determining whether a grant under subparagraph (A)(ii) or (B)(ii) is warranted, the President or the eligible entity, as the case may be, shall take into consideration—

“(i) the extent to which a grant will facilitate the creation of, preservation of, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for nonprofit purposes;

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“(ii) the extent to which a grant will meet the needs of a community that has an inability to draw on other sources of funding for environmental remediation and subsequent redevelopment of the area in which a brownfield site is located because of the small population or low income of the community;

“(iii) the extent to which a grant will facilitate the use or reuse of existing infrastructure;

“(iv) the benefit of promoting the long-term availability of funds from a revolving loan fund for brownfield remediation; and

“(v) such other similar factors as the Administrator considers appropriate to consider for the purposes of this subsection.

“(D) TRANSITION.—Revolving loan funds that have been established before the date of the enactment of this subsection may be used in accordance with this paragraph.

“(4) GENERAL PROVISIONS.—

“(A) MAXIMUM GRANT AMOUNT.—

“(i) BROWNFIELD SITE CHARACTERIZATION AND ASSESSMENT.—

“(I) IN GENERAL.—A grant under paragraph (2) may be awarded to an eligible entity on a community-wide or site-by-site basis, and shall not exceed, for any individual brownfield site covered by the grant, \$200,000.

“(II) WAIVER.—The Administrator may waive the \$200,000 limitation under subclause (I) to permit the brownfield site to receive a grant of not to exceed \$350,000, based on the anticipated level of contamination, size, or status of ownership of the site.

“(ii) BROWNFIELD REMEDIATION.—A grant under paragraph (3)(A)(i) may be awarded to an eligible entity on a community-wide or site-by-site basis, not to exceed \$1,000,000 per eligible entity. The Administrator may make an additional grant to an eligible entity described in the previous sentence for any year after the year for which the initial grant is made, taking into consideration—

“(I) the number of sites and number of communities that are addressed by the revolving loan fund;

“(II) the demand for funding by eligible entities that have not previously received a grant under this subsection;

“(III) the demonstrated ability of the eligible entity to use the revolving loan fund to enhance remediation and provide funds on a continuing basis; and

“(IV) such other similar factors as the Administrator considers appropriate to carry out this subsection.

“(B) PROHIBITION.—

“(i) IN GENERAL.—No part of a grant or loan under this subsection may be used for the payment of—

“(I) a penalty or fine;

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“(II) a Federal cost-share requirement;

“(III) an administrative cost;

“(IV) a response cost at a brownfield site for which the recipient of the grant or loan is potentially liable under section 107; or

“(V) a cost of compliance with any Federal law (including a Federal law specified in section 101(39)(B)), excluding the cost of compliance with laws applicable to the cleanup.

“(ii) EXCLUSIONS.—For the purposes of clause (i)(III), the term ‘administrative cost’ does not include the cost of—

“(I) investigation and identification of the extent of contamination;

“(II) design and performance of a response action; or

“(III) monitoring of a natural resource.

“(C) ASSISTANCE FOR DEVELOPMENT OF LOCAL GOVERNMENT SITE REMEDIATION PROGRAMS.—A local government that receives a grant under this subsection may use not to exceed 10 percent of the grant funds to develop and implement a brownfields program that may include—

“(i) monitoring the health of populations exposed to one or more hazardous substances from a brownfield site; and

“(ii) monitoring and enforcement of any institutional control used to prevent human exposure to any hazardous substance from a brownfield site.

“(D) INSURANCE.—A recipient of a grant or loan awarded under paragraph (2) or (3) that performs a characterization, assessment, or remediation of a brownfield site may use a portion of the grant or loan to purchase insurance for the characterization, assessment, or remediation of that site.

“(5) GRANT APPLICATIONS.—

“(A) SUBMISSION.—

“(i) IN GENERAL.—

“(I) APPLICATION.—An eligible entity may submit to the Administrator, through a regional office of the Environmental Protection Agency and in such form as the Administrator may require, an application for a grant under this subsection for one or more brownfield sites (including information on the criteria used by the Administrator to rank applications under subparagraph (C), to the extent that the information is available).

“(II) NCP REQUIREMENTS.—The Administrator may include in any requirement for submission of an application under subclause (I) a requirement of the National Contingency Plan only to the extent that the requirement is relevant and appropriate to the program under this subsection.

“(ii) COORDINATION.—The Administrator shall coordinate with other Federal agencies to assist in making eligible entities aware of other available Federal resources.

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“(iii) GUIDANCE.—The Administrator shall publish guidance to assist eligible entities in applying for grants under this subsection.

“(B) APPROVAL.—The Administrator shall—

“(i) at least annually, complete a review of applications for grants that are received from eligible entities under this subsection; and

“(ii) award grants under this subsection to eligible entities that the Administrator determines have the highest rankings under the ranking criteria established under subparagraph (C).

“(C) RANKING CRITERIA.—The Administrator shall establish a system for ranking grant applications received under this paragraph that includes the following criteria:

“(i) The extent to which a grant will stimulate the availability of other funds for environmental assessment or remediation, and subsequent reuse, of an area in which one or more brownfield sites are located.

“(ii) The potential of the proposed project or the development plan for an area in which one or more brownfield sites are located to stimulate economic development of the area on completion of the cleanup.

“(iii) The extent to which a grant would address or facilitate the identification and reduction of threats to human health and the environment, including threats in areas in which there is a greater-than-normal incidence of diseases or conditions (including cancer, asthma, or birth defects) that may be associated with exposure to hazardous substances, pollutants, or contaminants.

“(iv) The extent to which a grant would facilitate the use or reuse of existing infrastructure.

“(v) The extent to which a grant would facilitate the creation of, preservation of, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for nonprofit purposes.

“(vi) The extent to which a grant would meet the needs of a community that has an inability to draw on other sources of funding for environmental remediation and subsequent redevelopment of the area in which a brownfield site is located because of the small population or low income of the community.

“(vii) The extent to which the applicant is eligible for funding from other sources.

“(viii) The extent to which a grant will further the fair distribution of funding between urban and nonurban areas.

“(ix) The extent to which the grant provides for involvement of the local community in the process of making decisions relating to cleanup and future use of a brownfield site.

“(x) The extent to which a grant would address or facilitate the identification and reduction of threats to the health or welfare of children, pregnant women, minority or low-income communities, or other sensitive populations.

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“(6) IMPLEMENTATION OF BROWNFIELDS PROGRAMS.—

“(A) ESTABLISHMENT OF PROGRAM.—The Administrator may provide, or fund eligible entities or nonprofit organizations to provide, training, research, and technical assistance to individuals and organizations, as appropriate, to facilitate the inventory of brownfield sites, site assessments, remediation of brownfield sites, community involvement, or site preparation.

“(B) FUNDING RESTRICTIONS.—The total Federal funds to be expended by the Administrator under this paragraph shall not exceed 15 percent of the total amount appropriated to carry out this subsection in any fiscal year.

“(7) AUDITS.—

“(A) IN GENERAL.—The Inspector General of the Environmental Protection Agency shall conduct such reviews or audits of grants and loans under this subsection as the Inspector General considers necessary to carry out this subsection.

“(B) PROCEDURE.—An audit under this subparagraph shall be conducted in accordance with the auditing procedures of the General Accounting Office, including chapter 75 of title 31, United States Code.

“(C) VIOLATIONS.—If the Administrator determines that a person that receives a grant or loan under this subsection has violated or is in violation of a condition of the grant, loan, or applicable Federal law, the Administrator may—

“(i) terminate the grant or loan;

“(ii) require the person to repay any funds received;

and

“(iii) seek any other legal remedies available to the Administrator.

“(D) REPORT TO CONGRESS.—Not later than 3 years after the date of the enactment of this subsection, the Inspector General of the Environmental Protection Agency shall submit to Congress a report that provides a description of the management of the program (including a description of the allocation of funds under this subsection).

“(8) LEVERAGING.—An eligible entity that receives a grant under this subsection may use the grant funds for a portion of a project at a brownfield site for which funding is received from other sources if the grant funds are used only for the purposes described in paragraph (2) or (3).

“(9) AGREEMENTS.—Each grant or loan made under this subsection shall—

“(A) include a requirement of the National Contingency Plan only to the extent that the requirement is relevant and appropriate to the program under this subsection, as determined by the Administrator; and

“(B) be subject to an agreement that—

“(i) requires the recipient to—

“(I) comply with all applicable Federal and State laws; and

“(II) ensure that the cleanup protects human health and the environment;

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“(ii) requires that the recipient use the grant or loan exclusively for purposes specified in paragraph (2) or (3), as applicable;

“(iii) in the case of an application by an eligible entity under paragraph (3)(A), requires the eligible entity to pay a matching share (which may be in the form of a contribution of labor, material, or services) of at least 20 percent, from non-Federal sources of funding, unless the Administrator determines that the matching share would place an undue hardship on the eligible entity; and

“(iv) contains such other terms and conditions as the Administrator determines to be necessary to carry out this subsection.

“(10) FACILITY OTHER THAN BROWNFIELD SITE.—The fact that a facility may not be a brownfield site within the meaning of section 101(39)(A) has no effect on the eligibility of the facility for assistance under any other provision of Federal law.

“(11) EFFECT ON FEDERAL LAWS.—Nothing in this subsection affects any liability or response authority under any Federal law, including—

“(A) this Act (including the last sentence of section 101(14));

“(B) the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.);

“(C) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.);

“(D) the Toxic Substances Control Act (15 U.S.C. 2601 et seq.); and

“(E) the Safe Drinking Water Act (42 U.S.C. 300f et seq.).

“(12) FUNDING.—

“(A) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this subsection \$200,000,000 for each of fiscal years 2002 through 2006.

“(B) USE OF CERTAIN FUNDS.—Of the amount made available under subparagraph (A), \$50,000,000, or, if the amount made available is less than \$200,000,000, 25 percent of the amount made available, shall be used for site characterization, assessment, and remediation of facilities described in section 101(39)(D)(ii)(II).”.

Subtitle B—Brownfields Liability Clarifications

SEC. 221. CONTIGUOUS PROPERTIES.

Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607) is amended by adding at the end the following:

“(q) CONTIGUOUS PROPERTIES.—

“(1) NOT CONSIDERED TO BE AN OWNER OR OPERATOR.—

“(A) IN GENERAL.—A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real

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property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility under paragraph (1) or (2) of subsection (a) solely by reason of the contamination if—

“(i) the person did not cause, contribute, or consent to the release or threatened release;

“(ii) the person is not—

“(I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or

“(II) the result of a reorganization of a business entity that was potentially liable;

“(iii) the person takes reasonable steps to—

“(I) stop any continuing release;

“(II) prevent any threatened future release;

and

“(III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;

“(iv) the person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility);

“(v) the person—

“(I) is in compliance with any land use restrictions established or relied on in connection with the response action at the facility; and

“(II) does not impede the effectiveness or integrity of any institutional control employed in connection with a response action;

“(vi) the person is in compliance with any request for information or administrative subpoena issued by the President under this Act;

“(vii) the person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; and

“(viii) at the time at which the person acquired the property, the person—

“(I) conducted all appropriate inquiry within the meaning of section 101(35)(B) with respect to the property; and

“(II) did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous substances from other real property not owned or operated by the person.

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“(B) DEMONSTRATION.—To qualify as a person described in subparagraph (A), a person must establish by a preponderance of the evidence that the conditions in clauses (i) through (viii) of subparagraph (A) have been met.

“(C) BONA FIDE PROSPECTIVE PURCHASER.—Any person that does not qualify as a person described in this paragraph because the person had, or had reason to have, knowledge specified in subparagraph (A)(viii) at the time of acquisition of the real property may qualify as a bona fide prospective purchaser under section 101(40) if the person is otherwise described in that section.

“(D) GROUND WATER.—With respect to a hazardous substance from one or more sources that are not on the property of a person that is a contiguous property owner that enters ground water beneath the property of the person solely as a result of subsurface migration in an aquifer, subparagraph (A)(iii) shall not require the person to conduct ground water investigations or to install ground water remediation systems, except in accordance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.

“(2) EFFECT OF LAW.—With respect to a person described in this subsection, nothing in this subsection—

“(A) limits any defense to liability that may be available to the person under any other provision of law; or

“(B) imposes liability on the person that is not otherwise imposed by subsection (a).

“(3) ASSURANCES.—The Administrator may—

“(A) issue an assurance that no enforcement action under this Act will be initiated against a person described in paragraph (1); and

“(B) grant a person described in paragraph (1) protection against a cost recovery or contribution action under section 113(f).”.

SEC. 222. PROSPECTIVE PURCHASERS AND WINDFALL LIENS.

(a) DEFINITION OF BONA FIDE PROSPECTIVE PURCHASER.—Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601) (as amended by section 211(a) of this Act) is amended by adding at the end the following:

“(40) BONA FIDE PROSPECTIVE PURCHASER.—The term ‘bona fide prospective purchaser’ means a person (or a tenant of a person) that acquires ownership of a facility after the date of the enactment of this paragraph and that establishes each of the following by a preponderance of the evidence:

“(A) DISPOSAL PRIOR TO ACQUISITION.—All disposal of hazardous substances at the facility occurred before the person acquired the facility.

“(B) INQUIRIES.—

“(i) IN GENERAL.—The person made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices in accordance with clauses (ii) and (iii).

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“(ii) STANDARDS AND PRACTICES.—The standards and practices referred to in clauses (ii) and (iv) of paragraph (35)(B) shall be considered to satisfy the requirements of this subparagraph.

“(iii) RESIDENTIAL USE.—In the case of property in residential or other similar use at the time of purchase by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.

“(C) NOTICES.—The person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility.

“(D) CARE.—The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to—

“(i) stop any continuing release;

“(ii) prevent any threatened future release; and

“(iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.

“(E) COOPERATION, ASSISTANCE, AND ACCESS.—The person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at a vessel or facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response actions or natural resource restoration at the vessel or facility).

“(F) INSTITUTIONAL CONTROL.—The person—

“(i) is in compliance with any land use restrictions established or relied on in connection with the response action at a vessel or facility; and

“(ii) does not impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a response action.

“(G) REQUESTS; SUBPOENAS.—The person complies with any request for information or administrative subpoena issued by the President under this Act.

“(H) NO AFFILIATION.—The person is not—

“(i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through—

“(I) any direct or indirect familial relationship;
or

“(II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or

“(ii) the result of a reorganization of a business entity that was potentially liable.”.

(b) PROSPECTIVE PURCHASER AND WINDFALL LIEN.—Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607) (as amended by this Act) is further amended by adding at the end the following:

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“(r) PROSPECTIVE PURCHASER AND WINDFALL LIEN.—

“(1) LIMITATION ON LIABILITY.—Notwithstanding subsection (a)(1), a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser’s being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

“(2) LIEN.—If there are unrecovered response costs incurred by the United States at a facility for which an owner of the facility is not liable by reason of paragraph (1), and if each of the conditions described in paragraph (3) is met, the United States shall have a lien on the facility, or may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the Administrator, for the unrecovered response costs.

“(3) CONDITIONS.—The conditions referred to in paragraph (2) are the following:

“(A) RESPONSE ACTION.—A response action for which there are unrecovered costs of the United States is carried out at the facility.

“(B) FAIR MARKET VALUE.—The response action increases the fair market value of the facility above the fair market value of the facility that existed before the response action was initiated.

“(4) AMOUNT; DURATION.—A lien under paragraph (2)—

“(A) shall be in an amount not to exceed the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property;

“(B) shall arise at the time at which costs are first incurred by the United States with respect to a response action at the facility;

“(C) shall be subject to the requirements of subsection (1)(3); and

“(D) shall continue until the earlier of—

“(i) satisfaction of the lien by sale or other means;

or

“(ii) notwithstanding any statute of limitations under section 113, recovery of all response costs incurred at the facility.”.

SEC. 223. INNOCENT LANDOWNERS.

Section 101(35) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(35)) is amended—

(1) in subparagraph (A)—

(A) in the first sentence, in the matter preceding clause (i), by striking “deeds or” and inserting “deeds, easements, leases, or”; and

(B) in the second sentence—

(i) by striking “he” and inserting “the defendant”; and

(ii) by striking the period at the end and inserting “, provides full cooperation, assistance, and facility access to the persons that are authorized to conduct

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response actions at the facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility), is in compliance with any land use restrictions established or relied on in connection with the response action at a facility, and does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action.”; and

(2) by striking subparagraph (B) and inserting the following:

“(B) REASON TO KNOW.—

“(i) ALL APPROPRIATE INQUIRIES.—To establish that the defendant had no reason to know of the matter described in subparagraph (A)(i), the defendant must demonstrate to a court that—

“(I) on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquiries, as provided in clauses (ii) and (iv), into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; and

“(II) the defendant took reasonable steps to—

“(aa) stop any continuing release;

“(bb) prevent any threatened future release; and

“(cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.

“(ii) STANDARDS AND PRACTICES.—Not later than 2 years after the date of the enactment of the Brownfields Revitalization and Environmental Restoration Act of 2001, the Administrator shall by regulation establish standards and practices for the purpose of satisfying the requirement to carry out all appropriate inquiries under clause (i).

“(iii) CRITERIA.—In promulgating regulations that establish the standards and practices referred to in clause (ii), the Administrator shall include each of the following:

“(I) The results of an inquiry by an environmental professional.

“(II) Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.

“(III) Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed.

“(IV) Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law.

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“(V) Reviews of Federal, State, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility.

“(VI) Visual inspections of the facility and of adjoining properties.

“(VII) Specialized knowledge or experience on the part of the defendant.

“(VIII) The relationship of the purchase price to the value of the property, if the property was not contaminated.

“(IX) Commonly known or reasonably ascertainable information about the property.

“(X) The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

“(iv) INTERIM STANDARDS AND PRACTICES.—

“(I) PROPERTY PURCHASED BEFORE MAY 31, 1997.—With respect to property purchased before May 31, 1997, in making a determination with respect to a defendant described in clause (i), a court shall take into account—

“(aa) any specialized knowledge or experience on the part of the defendant;

“(bb) the relationship of the purchase price to the value of the property, if the property was not contaminated;

“(cc) commonly known or reasonably ascertainable information about the property;

“(dd) the obviousness of the presence or likely presence of contamination at the property; and

“(ee) the ability of the defendant to detect the contamination by appropriate inspection.

“(II) PROPERTY PURCHASED ON OR AFTER MAY 31, 1997.—With respect to property purchased on or after May 31, 1997, and until the Administrator promulgates the regulations described in clause (ii), the procedures of the American Society for Testing and Materials, including the document known as ‘Standard E1527–97’, entitled ‘Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process’, shall satisfy the requirements in clause (i).

“(v) SITE INSPECTION AND TITLE SEARCH.—In the case of property for residential use or other similar use purchased by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.”.