

THE SMALL BUSINESS LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION ACT: A CRITIQUE

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I. INTRODUCTION

In a sweeping attempt to facilitate the cleanup of hazardous substances released into the environment and the cleanup of inactive waste disposal sites, Congress in 1980 passed the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).¹ CERCLA’s authority extends both to Superfund sites, the most hazardous sites in the country, and to brownfield sites. Brownfield sites are defined by the EPA as “abandoned or underutilized industrial or commercial properties where redevelopment is hindered by possible environmental contamination and potential liability under Superfund for parties that purchase or operate these sites.”² CERCLA grants the Environmental Protection Agency (“EPA”) the authority to regulate cleanup of Superfund and brownfield sites.

Although Superfund sites are a top priority and are in the spotlight more often than brownfields, the negative effect of CERCLA on brownfield redevelopment has stirred a great deal of debate. Criticism has been directed at CERCLA’s actual approach to brownfield redevelopment, its effect on the redevelopment of brownfields, and environmental, economic, and environmental justice concerns that result from its enforcement.

The most often cited problem with CERCLA’s approach to brownfield redevelopment is its complex liability scheme. The liability scheme is criticized because of the unbalanced impact it has on

1. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2000) (commonly known as the federal Superfund statute).

2. EPA, Office of Solid Waste and Emergency Response, *Brownfields Glossary of Terms*, at <http://www.epa.gov/swerosps/bf/glossary.htm> (last modified September 30, 1997).

parties who have contributed minimal contamination to a site.³ Specifically, CERCLA holds all owners and operators of a brownfield site liable for contamination, regardless of whether or not they actually contributed to the contamination.⁴ CERCLA's liability scheme is blamed for scaring off potential investors because of uncertain liability.⁵ Another criticism of CERCLA is the authority it gives the EPA to intervene in state brownfield programs and demand additional cleanup conditions.⁶ This frustrates both developers and states in their efforts to complete brownfield cleanups.⁷

In addition to the complaints regarding the approach CERCLA takes to brownfield liability, another problem is its negative effect on brownfield redevelopment. Landowners often choose to abandon or mothball their property and develop on greenfields instead because of the uncertain liability they may face. Mothballing results in an increase in urban sprawl and reduces tax revenues. Additionally, environmental justice issues are raised because poorer communities often feel the brunt of the mothball problem since brownfields are usually located in the more depressed communities.

Numerous stakeholders, including the EPA, the business community, community activists, individual states, and academics, have debated for a number of years about how to rework CERCLA's broad regulatory approach towards brownfields. However, these interests appear inconsistent at times. The EPA, for one, is concerned both with preserving the environment and ensuring that environmental justice issues are addressed, but the agency is also keenly aware of the economic effects of its proposals.⁸ By the same token, the primary focus of business may be economic, but the pursuit of economic goals is closely linked with environmental concerns of communities where the businesses are located.

Although the EPA has tried various methods to alleviate the unwanted effect of CERCLA's provisions on brownfield redevelopment, the agency's methods have not been completely successful. In

3. 147 CONG. REC. H2,348, H2,349 (daily ed. May 21, 2001) (statement of Rep. Gillmor); *id.* at H2350 (statement of Rep. Duncan).

4. 42 U.S.C. § 9607(a) (2000).

5. 147 CONG. REC. S3,879, S3,892 (daily ed. April 25, 2001) (statement of Sen. Boxer).

6. *Id.* at S3884 (statement of Sen. Inhofe).

7. Environmental Financial Advisory Board, EPA, *Expediting Clean-Up and Redevelopment of Brownfields: Addressing Major Barriers to Private Sector Involvement – Real or Perceived*, at <http://www.epa.gov/efinpage.htm> (last modified June 28, 2000).

8. EPA, *About EPA / What We Do*, at <http://www.epa.gov/epahome/aboutepa.htm> (last modified February 19, 2003).

response, Congress passed the Small Business Liability Relief and Brownfields Revitalization Act (the "Act") on January 11, 2002.⁹ The Act is an attempt to reform the strict regulatory approach of CERCLA and address the environmental, economic and environmental justice concerns associated with brownfields and their redevelopment. Although the changes in CERCLA's provisions have been long awaited, the effect that the Act will have is unclear.

While the changes in the Act seem to focus adequately on the economic and environmental justice issues involved with brownfield redevelopment, the changes may have come at the expense of environmental concerns. Specifically, the Act's limitation of liability of certain purchasers of brownfield property is aimed at spurring development, increasing jobs, and encouraging the redevelopment of brownfields.¹⁰ However, this release from liability may have a negative impact on environmental cleanup because the government will be burdened with much of the liability and subsequent cost of cleanup. Further, the Act's increased grant of authority to states at the expense of the EPA, may be problematic for brownfield redevelopment since authorities can no longer rely on the threat of federal involvement to induce cleanup activities.

This article will detail the approach taken toward brownfield redevelopment by CERCLA, the EPA, and the states. This article will first examine the effect these changes have had upon brownfield redevelopment and discuss the various inadequacies that have become apparent in the brownfield approach over the years. The article will next turn to the changes the new Act has implemented and the intended effect of the changes. Finally, this article will compare and contrast the desired effects with the expected actual effects that the new Act will have upon brownfields.

II. THE BROWNFIELD PROBLEM DEFINED

The United States is home to between 500,000 and 1,000,000 brownfield sites.¹¹ Brownfields can range from well-located sites with light contamination and a strong private interest in redevelopment to severely contaminated and poorly located properties with poor pros-

9. Small Business Liability Relief and Brownfields Revitalization Act of 2002, Pub. L. No. 107-118, 115 Stat. 2356 (to be codified at 42 U.S.C. §§ 9601-9675). References will be to the future codification of the Act.

10. *Id.*

11. EPA, *President Signs Legislation to Clean Environment and Create Jobs*, at http://www.epa.gov/epahome/headline_011102.htm (last modified on March 19, 2002).

pects for redevelopment.¹² These sites range from abandoned gas stations to former industrial sites.¹³

Brownfields have been primarily regulated by CERCLA, which imposes liability on many parties to ensure that the private sector bears the cost of cleanups.¹⁴ As the agency implementing CERCLA, the EPA has two avenues to regulate cleanup: CERCLA's trust fund and the statute's liability scheme.¹⁵ The EPA uses the money in the trust fund to clean up orphaned sites where no party responsible for the contamination can be located, where the parties can be located but are bankrupt, or where the EPA is faced with an emergency action.¹⁶ A corporate tax imposed on industries provided the money for the trust fund, but the tax expired in 1995.¹⁷ Neither President Clinton nor President George W. Bush reauthorized the tax.¹⁸

The second avenue the EPA can take to regulate brownfield cleanup is CERCLA's three part liability scheme. First the statute provides for strict liability such that any party may be liable for polluting a site even if the party was making its best attempt to avoid damage.¹⁹ Second, the statute provides for joint and several liability where a party can be liable for the full cost of remediation even if

12. EPA, *Brownfields*, at <http://www.epa.gov/ebtpages/cleabrownfields.html> (last modified February 14, 2003).

13. EPA, *Proposal Guidelines for Brownfields Assessment, Revolving Loan Fund, and Cleanup Grants - Appendix 3. Guidance on Sites Eligible for Brownfields Funding Under CERCLA §104(k)*, at <http://www.epa.gov/brownfields/html-doc/10902a3.htm> (last modified December 11, 2002).

14. S. Rep. No. 848, 96th Cong., 2d Sess. at 13 (1980); H.R. Rep. No. 96-1016 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, at 6136.

15. 42 U.S.C. § 9607 (2000); 42 U.S.C. § 9611 (2000).

16. EPA, *Superfund Frequently Asked Questions*, at http://cfpub.epa.gov/superapps/index.cfm/fuseaction/faqs.viewAnswer/question_id/176/category_id/3/faqsanswr.cfm (last modified June 30, 2002); 42 U.S.C. § 9611.

17. Katherine Q. Seelye, *Superfund Dwindles, Cleanup Plans Cut*, SEATTLE TIMES, February 24, 2002 at A1. The monies in the trust fund are dwindling rapidly, and unless the fund is replenished, the trust fund will be empty by 2003. *Id.*

18. *Id.*

19. 42 U.S.C. § 9607(a); 126 CONG. REC. H11787, (daily ed. Dec. 3, 1980) (remarks of Rep. Florio) ("The standard of liability . . . is intended to be the same as that provided in section 311 of the Federal Water Pollution Control Act; that is strict liability."), reprinted in 2 SUPERFUND: A LEGISLATIVE HISTORY 168 (Helen Cohn Needham, ed. 1984); *id.* at H11788 (view of Dept. of Justice expressed in letter to Rep. Florio) ("Caselaw construing section 311 clearly indicates that not only are the defenses to be narrowly construed but the plain meaning of the regime establishes a strict liability standard."), reprinted in SUPERFUND, *supra* at 169; S. Rep. No. 848, 96th Cong., 2d Sess. 13, reprinted in 2 SUPERFUND, *supra* at 483; H. Rep. No. 1016, 96th Cong., 2d Sess. 33, reprinted in 1980 U.S.C.C.A.N. 6136; H. Rep. No. 253, Pt. 1 at 74 (SARA) ("liability under CERCLA is strict, that is, without regard to fault or willfulness").

others caused the contamination.²⁰ Third, the statute is retroactive where a party who obeyed the laws prior to the passage of CERCLA may nevertheless be held liable for cleaning up the site.²¹ Although a few exceptions to liability are included in the statute, they are difficult to establish.²² The EPA can bring administrative orders or legal actions against potentially responsible parties (“PRPs”).²³ Additionally, the EPA has this same power against “the current owner or operator of a site where hazardous substances are released into the environment, prior owners or operators who are connected to the release, certain transporters of hazardous substances to the site, and the generators of the hazardous substances.”²⁴

In addition to the federal CERCLA, regulation of brownfields is also governed by each state’s version of CERCLA. Like the federal CERCLA, a state’s environmental laws establish a fund to finance the state-led cleanups and gives the state the authority to force PRPs to cleanup contamination.²⁵ For example, the State of Washington’s pollution cleanup law, the Model Toxics Control Act (MTCA),²⁶ contains a framework almost identical to CERCLA; both statutes providing for joint and several liability, setting forth specific groups of liable people, and providing for affirmative defenses.²⁷ CERCLA and MTCA differ in some areas, however. For example, they treat petroleum production differently.²⁸ Also, CERCLA requires that reme-

20. 42 U.S.C. § 9607(a).

21. 42 U.S.C. § 9607; *United States v. Shell Oil*, 841 F. Supp. 962 (C.D. Cal. 1993).

22. 42 U.S.C. § 9601(35)(A)(i) (2000). *See also* *Shell Oil*, 841 F. Supp. at 973 (Congress was careful, however, to ensure that the innocent landowner exception is narrow. Thus, section 101(35)(B) requires: “To establish that the defendant had no reason to know . . . , the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.” 42 U.S.C. § 9601(35)(B). Furthermore, in evaluating whether a defendant has fulfilled this requirement, the Court is directed to “take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.” *Id.*

23. EPA, *Superfund: Finding Those Responsible*, at <http://www.epa.gov/compliance/cleanup/superfund/find/> (last modified January 24, 2003).

24. Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARVARD L. REV. 553, 594 (2001); 42 U.S.C. § 9607 (2000).

25. TODD S. DAVIS & KEVIN D. MARGOLIS, *BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY* (1997).

26. WASH. REV. CODE § 70.105D (1992 and West. Supp. 2002).

27. *Id.* § 70.105D.040; 42 U.S.C. § 9607 (2000).

28. 42 U.S.C. § 9601 (14)(F) (2000); WASH. REV. CODE § 70.105D.020(7)(d) (2003).

dial actions be cost-effective while there is no corresponding requirement under MTCA.²⁹

Washington has used voluntary cleanup programs (“VCPs”) as one of the primary methods of implementing MTCA’s provisions. VCPs allow entities and individuals to avoid enforcement actions by obtaining letters from the State Department of Ecology (“DOE”) stating that the agency has no further intention to take action at the contaminated site. The EPA added to the authority of states in 1995 when the Agency similarly began providing state memorandums of agreement (“SMOA”) that granted assurances that the EPA will not require subsequent liability after compliance with the state VCP had been achieved.

CERCLA does not preempt state cleanup laws, and thus both the federal CERCLA and state’s environmental laws must be applied in determining the requirements and the liabilities for remediation of a brownfield.³⁰ Further, although no reformation has occurred in some states’ laws, such as the MTCA, it is likely that protections added to the reformed CERCLA will also be added to those laws because most other states’ cleanup laws are modeled after the CERCLA.

A. *The Problems with CERCLA*

1. CERCLA’s Approach

CERCLA’s broad liability scheme made sense at the time of the statute’s passage, because its drafting was in the wake of such events as Love Canal and Valley of the Drums.³¹ These situations highlighted the gap in the federal law for regulation of hazardous wastes.³² Before the passage of CERCLA, no liability scheme existed for wastes generated and disposed of before the passage of the Resource Conservation and Recovery Act (“RCRA”) of 1976.³³ Since RCRA applied only to *active* hazardous waste sites, the federal government had no mechanism to promptly and effectively respond to the problems created by *abandoned* hazardous waste sites. To fill the gap, Congress

29. WASH. REV. CODE § 70.105D.020; 42 U.S.C. §§ 9601(14), 9621(a) (2000).

30. Burlington N. R.R. Co. v. Time Oil Co., 738 F. Supp 1339, 1343 (W.D. Wash. 1990).

31. EPA, SUPERFUND: 20 YEARS OF PROTECTING HUMAN HEALTH AND THE ENVIRONMENT ch. 2, at 3 (Dec. 11, 2000), *available at* <http://www.epa.gov/superfund/action/20years/ch2pg3.htm> (last modified Aug. 1, 2002).

32. H.R. Rep. No. 1016, 96th Cong., 2d Sess. *reprinted in* 1980 U.S.C.C.A.N 6119, 6122-23.

33. *Id.* at 6125.

created CERCLA and its retroactive, strict, and joint and several liability scheme.³⁴ The scheme ensured that all potentially responsible parties would pay for the cleanup costs rather than the government.³⁵ The approach seems fair on its face because it imposes the burden of cleaning up the contamination on the parties involved with the site instead of the government or the taxpayers who were completely uninvolved with the contamination.

Although CERCLA's broad regulatory approach did generate the cleanup of numerous contaminated sites and put the cleanup costs on the accountable parties, the statute also had unforeseen and unwanted consequences.³⁶ The same scheme that caught culpable parties also caused potential developers to shy away from redeveloping brownfield sites due to ambiguous liability and uncertain litigation and cleanup costs.³⁷ The retroactive, strict, and joint and several liability scheme provided a serious disincentive for developers since all operators and owners of a site could be held liable even though they had not actually contributed to the contamination.

CERCLA also provided little flexibility in cleanup standards. It required that stringent cleanup and liability standards be applied to all brownfield sites.³⁸ Thus, even if a developer complied with a state VCP, the EPA could still impose additional cleanup requirements. The ability of the EPA to intervene in state supervised cleanup projects and impose additional cleanup standards became a serious source of frustration for developers and potential developers.³⁹ Despite these frustrations, the EPA had valid reasons for intervening in brownfield redevelopment. The EPA's main reason for intervention was due to their rightful concern about the ineffectiveness of state law. In its role as principal federal regulator, EPA has a significant responsibility to ensure that the appropriate parties are bearing the cost of

34. *Id.* at 6136; 42 U.S.C. § 9607 (2000).

35. H.R. Rep. No. 1016, 96th Cong., 2d Sess. *reprinted in* 1980 U.S.C.C.A.N. 6136; 42 U.S.C. § 9607 (2000).

36. Thomas A. Newlon, *Will Changes Speed Brownfield Cleanups?*, SEATTLE DAILY J. COM., at 1 (Aug. 21, 1997), *available at* <http://www.djc.com/special/enviro97/10030764.html>.

37. *Id.* at 1-2.

38. ENVIRONMENTAL FINANCIAL ADVISORY BOARD, EPA, EXPEDITING CLEAN-UP AND REDEVELOPMENT OF BROWNFIELDS: ADDRESSING MAJOR BARRIERS TO PRIVATE SECTOR INVOLVEMENT – REAL OR PERCEIVED (Dec. 1997), *available at* <http://www.epa.gov/efinpage/brncle.htm> (last modified June 28, 2000).

39. *Id.*

brownfield cleanup.⁴⁰ Therefore, even though states have taken an active and often successful role in the redevelopment of brownfields, EPA's ultimate responsibility as the primary regulator has likely caused the agency to resist relinquishing its ultimate authority.

The inflexible nature of the statute also provides no mechanism for taking the potential future land use of a site into account in determining the extent of cleanup that is required. Although complete cleanup of contamination is desirable, the cost of cleaning up a site for unrestricted human use is often not proportional to the actual protection needed.⁴¹ For example, allowing for less stringent cleanup of a site with a future industrial use, where higher levels of on-site contamination are acceptable, may make more sense than requiring cleanup for unrestricted use.⁴²

On the other hand, allowing for partial cleanup is worrisome for numerous reasons. First, the future expected use of the site may change, making the already completed cleanup inadequate. Inadequate cleanup further raises questions about the potential release from liability. Namely, if the contaminator cleans up a site to the specified allowable level, that cleanup may release the person or entity from liability for future cleanup. This release from future liability could be problematic if additional contamination is discovered on the site. Another problem with allowing partial cleanup is that it may require costly, ongoing monitoring by the EPA.⁴³ Finally, choosing the level of cleanup depending on future use is controversial since it may provide an additional incentive to industrialize urban neighborhoods, further causing concern that environmental injustice would be furthered.⁴⁴

2. The Effects of CERCLA's Approach

The problems created by CERCLA's provisions, especially in its liability scheme, have created a whole range of environmental, economic, and environmental justice issues. One of the major brownfield

40. EPA, *Costs*, at <http://www.epa.gov/ebtpages/cleacosts.html> (last modified Mar. 19, 2003).

41. George Wyeth, *Land Use and Cleanups: Beyond the Rhetoric*, 26 ENV. L. REP. 10358, 10358 (1996).

42. *Id.* at 10358.

43. *Id.* at 10362.

44. Greg Watson, *Can the Natural Assets of Cities Help Address Urban Poverty?*, in NATURAL ASSETS: DEMOCRATIZING ENVIRONMENTAL OWNERSHIP Ch. 14 (James Boyce ed., 2003).

issues is the increase of mothballed property.⁴⁵ Owners prefer to leave brownfield sites idle rather than expose themselves to ambiguous liability and uncertain litigation costs by redeveloping the property.⁴⁶ If the owner chooses to redevelop the property, she risks being held liable for cleanup by the EPA, the public, or state regulatory agencies.⁴⁷ However, so long as she leaves the land idle, she can avoid being held immediately liable for cleanup costs because it is unlikely the government will investigate idle sites for possible contamination and thus require the owner to pay any cleanup costs.⁴⁸ Thus, although the owner may place herself in a better position by mothballing the site, the community ultimately suffers by having an eyesore in its midst and by losing out on economic opportunities. Choosing to leave the land idle instead of redeveloping also negatively affects tax revenue.⁴⁹

Mothballing property raises environmental justice issues. The EPA defines environmental justice as the “fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development of environmental laws, regulations, and policies.”⁵⁰ Environmental justice, one of the newest paradigms for environmental protection, developed in the 1980s and 1990s as a response to the “disproportionate siting of waste facilities and ‘dirty’ industry in poor communities of color.”⁵¹ The environmental justice concern became significant enough for President Clinton to issue an Executive Order requiring federal agencies to focus on the issue.⁵² The EPA responded to the Executive Order by

45. 147 CONG. REC. S3,879, S3,890 (daily ed. April 25, 2001) (statement of Sen. Reid).

46. K. A. Dixon, *Reclaiming Brownfields: From Corporate Liability to Community Assets*, Political Economy Research Institute, University of Massachusetts – Amherst, Working Paper Series, at 4 (Jan. 2001).

47. *Id.*; 147 CONG. REC. S3,879, S3,893 (statement of Sen. Lieberman).

48. *Id.*; D. Van Hook, *Area-Wide Brownfields Planning, Remediation and Development*, 11 FORDHAM ENVTL. L. J. 743, 744 (2000).

49. EPA, *Brownfields Cleanup and Redevelopment: Brownfields Tax Incentive*, at <http://www.epa.gov/swerosps/bf/bftaxinc.htm> (last modified Oct. 17, 2002). The Brownfield Tax Incentive, amended in December 2000 as part of Public Law 106-554, was intended to remove many of the financial disincentives preventing the cleanup and reuse of such property. While this tax incentive costs the government approximately \$300 million in annual tax revenue, it is expected to leverage \$3.4 billion in private investment and return 8,000 brownfields to productive use. This private investment will in turn generate tax revenue. *Id.*

50. EPA, *Environmental Justice*, at <http://www.epa.gov/compliance/environmentaljustice/index.html> (last modified Feb 27, 2003).

51. H. Patricia Hynes, *The Chelsea River: Democratizing Access to Nature in a World of Cities*, in NATURAL ASSETS: DEMOCRATIZING ENVIRONMENTAL OWNERSHIP Ch. 15 (James Boyce ed., forthcoming May 2003).

52. Exec. Order No. 12898, 59 Fed. Reg. 7629, reprinted in 42 U.S.C. § 4321 (1995).

creating the Environmental Justice Strategy, which focuses on achieving environmental justice for communities and people nationwide. The EPA's Environmental Justice Strategy requires that environmental justice be considered at all stages of policy, guidance and regulation development.⁵³ The focus on environmental justice has increased the number of community-based organizations.⁵⁴ The organizations have begun reclaiming their assets by rebuilding depressed areas and restoring vacant degraded land into community gardens.⁵⁵ These programs have worked well to benefit blighted areas.⁵⁶

Regardless of these concerns, the choice to mothball remains prominent. The choice to leave a site mothballed may seem counterintuitive since leaving a contaminated site unattended could potentially cause the cleanup costs to increase because of worsened contamination or because of a potential federal enforcement action. However, this disincentive is lessened by the administrative reality that the EPA is unable to investigate and prosecute many CERCLA violations.⁵⁷ Again, developers' decision to build on greenfields negatively affect local communities, since the mothballed brownfield site stays in their midst, the contamination remains, and no new jobs are created.

Another result of CERCLA's uncertain liability is the increase of urban sprawl. Since developers tend to shy away from brownfield redevelopment, and owners choose to mothball their property, development occurs on pristine property known as greenfields. Development on greenfield sites and the resulting sprawl increases traffic congestion, results in loss of wildlife habitat, and lowers water and air quality.⁵⁸

53. EPA, *Integration of Environmental Justice into OSWER Policy, Guidance and Regulatory Development*, at <http://www.epa.gov/swerosps/ej/ejndx.htm#aa> (last modified Nov. 20, 2002).

54. EPA, *EJ Small Grants Program*, at http://www.epa.gov/compliance/environmentaljustice/grants/ej_smgrants.html (last modified Feb. 27, 2003).

55. Hynes, *supra* note 51, at 5.

56. *See id.* *See also* EPA, *Emerging Tools for Local Problem Solving*, at http://www.epa.gov/compliance/resources/publications/ej/ej_smgrants_emerging_tools.pdf (last modified Feb. 27, 2003).

57. Revesz, *supra* note 24, at 599.

58. Thomas A. Newlon, *Prospective Purchaser Agreements and Other Tools for the Redevelopment of Brownfields*, ENVTL. CORP. COUNS. REP., February 1995, at 1.

B. *EPA's Response to CERCLA's Negative Effects on Brownfield Redevelopment*

As the federal agency with the authority to implement CERCLA, the EPA attempted to remedy CERCLA's negative effects by adopting several approaches to encourage brownfield redevelopment. The agency's different approaches include providing financing, clarifying liability, and educating the public about brownfields.⁵⁹

The EPA created the Brownfield Initiative ("Initiative") in 1993 as one attempt to remedy CERCLA's unintended effects. The Initiative was designed to "empower states, cities, tribes, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields."⁶⁰ Specifically, the Initiative provides grant money to assess contamination at brownfield sites, thereby leading to cleanup and redevelopment.⁶¹ The Initiative also uses different mechanisms, like covenants not to sue for prospective purchasers, in order to clarify liability.⁶² Another goal of the Initiative is to build partnerships amongst organizations to develop a coordinated approach to brownfield redevelopment.⁶³ Finally, the Initiative aims to educate the community and provide job training to facilitate brownfield cleanup and prepare the trainees for work in the environmental field.⁶⁴

Although the EPA has heralded the success of the Initiative by highlighting the money spent on brownfield revitalization, the claimed increase of jobs due to the revitalization and the accomplishments of the various partners involved in the Initiative have been challenged.⁶⁵ The House Commerce Committee began a review of the Initiative in 1997. The Committee has raised serious doubts about the effectiveness of the Initiative's approach to brownfield cleanup and redevelopment stating in a November 2000 Report that the "EPA cannot account for any significant environmental achievements re-

59. Dixon, *supra* note 46, at 5.

60. EPA, *Brownfields Economic Redevelopment Initiative Fact Sheet*, at <http://www.epa.gov/swerosps/bf/html-doc/econinit.htm> (last updated Oct. 2, 2002).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. EPA, *The Brownfields National Partnership Action Agenda Accomplishments Report*, at <http://www.epa.gov/brownfields/pdf/npaa99/npaa9901.pdf> (November 23, 1999).

sulting from its Brownfields Initiative.”⁶⁶ The report cited various problems with the EPA’s brownfield program, including “poor management, lack of guidance and oversight by EPA, burdensome and inflexible regulatory requirements, questionable grant awards by EPA and use of grant funds by recipients, and EPA’s failure to track the results of its programs and incorporate changes as necessary to improve performance.”⁶⁷ The report also found that states voluntary cleanup programs had been more successful than EPA’s Initiative. The Report concluded that the EPA should focus on assisting, rather than competing, with states and should improve its own approach by analyzing state brownfield programs.⁶⁸

The effect of EPA’s Brownfield Initiative was also questioned by the Environmental Financial Advisory Board (“Board”), a part of the Environmental Finance Program (“Program”). The EPA created the Program in order to give technical assistance to communities and advice and recommendations to the EPA on environmental finance issues.⁶⁹ The Board consists of private and public sector independent finance experts and prepares reports on diverse environmental finance matters of interest to the EPA.⁷⁰ In 1997, the Board prepared “*Expediting Clean-Up and Redevelopment of Brownfields: Addressing the Major Barriers to Private Sector Involvement—Real or Perceived.*” The report indicated a real need for the EPA to rework numerous areas of its Initiative in order to adequately address its goal of encouraging private sector investment in the redevelopment of brownfields.⁷¹ Areas the Board focused on included limiting the liability of innocent purchasers and providing more cleanup flexibility in the statute.⁷² The report further recommended that the EPA encourage regions to enter into State Memorandums of Agreement and develop a clear policy statement detailing the circumstances under which the EPA would reopen an investigation of a site that has already gone through state approved cleanup.⁷³

66. The Committee on Com., U.S. House of Rep., *The Reality Behind the Rhetoric: EPA’s Brownfields Initiative*, at <http://com-notes.house.gov/brown/brown.htm> (Nov. 2000).

67. *Id.*

68. *Id.*

69. EPA, *Environmental Finance Program – EFP, an Overview*, at <http://www.epa.gov/efinpage/efp.htm> (last modified August 17, 2001).

70. Environmental Financial Advisory Board, EPA, *supra* note 7.

71. *Id.*

72. *Id.*

73. *Id.*

The EPA's efforts to improve CERCLA's functionality also included attempts at introducing flexibility into the statute. As mentioned previously, the State Memorandums of Agreement were one attempt by the EPA to make brownfield redevelopment more flexible.⁷⁴ The EPA also introduced flexibility with a 1995 guidance letter allowing consideration of the final use of the property in determining what cleanup standard would apply to a specific site.⁷⁵ The guidance letter allowed a higher level of contamination to remain for a site chosen for a future industrial land use.⁷⁶

Although the EPA tried various devices to alleviate CERCLA's negative effects on brownfield redevelopment, many of CERCLA's negative effects remained. Both the House Report and the Environmental Financial Advisory Board's publication noted that the Brownfield Initiative was flawed. The Report and the Board Publication focused on various problems, including the failure of the Initiative to spur cleanup and the EPA's poor management in executing the Initiative.⁷⁷ Beyond this, the approaches of the EPA, including state memorandums of agreement and state voluntary cleanup programs, have not been fully successful. The failure of the EPA to fully utilize the state memorandums of agreement and their continued second-guessing of the state voluntary cleanup programs have contributed to their lack of success.⁷⁸ EPA's unsuccessful approach to the brownfield problem, the problematic liability scheme, the increasing amount of brownfield and mothballed property, and the heightened focus on environmental justice were among the many forces compelling Congress to act to change CERCLA's inflexible provisions.

III. THE NEW BROWNFIELD LEGISLATION

A. *Changes in the Law*

Members of the public and private sector who have a stake in the redevelopment of brownfield sites have long recognized the need for a change in CERCLA's approach. The debate over amending CERCLA's regulation of brownfields began a number of years ago,

74. *Id.*

75. Office of Solid Waste and Emergency Response, EPA, Land Use in the CERCLA Remedy Selection Process, OSWER Directive No. 9355.7-04 (1995).

76. *Id.* at 3.

77. Environmental Financial Advisory Board, EPA, *supra* note 7.

78. 147 CONG. REC. S3,879, S3,894 (daily ed. April 25, 2001) (statement of Sen. Baucus) (explaining the delicate compromise between states and federal agencies in drafting the bill).

and the past eight congressional sessions have produced several different legislative proposals for a CERCLA retooling.⁷⁹ The brown-field debate ultimately culminated in the passage of the Small Business Liability Relief and Brownfields Revitalization Act on January, 11 2002. Merging two major legislative proposals into one,⁸⁰ the Act introduced into CERCLA several amendments to the liability scheme and other provisions affecting brownfields. Backed by both Democrats and Republicans, the Act has the support of a variety of stakeholders, including environmental organizations, business groups, the real estate industry, and state and local elected officials.⁸¹ Although the Act only applies to brownfield sites and not to Superfund sites, the changes are somewhat revolutionary because they are the first CERCLA amendments to be introduced that change its liability scheme.

1. Exemptions from CERCLA liability

a. Bona Fide Prospective Purchasers

Probably the most significant change in the Act is the release from liability for bona fide prospective purchasers even if they know about the existence of contamination at a site after conducting all appropriate inquiry.⁸² The exemption applies only to those purchasing property after the Act takes effect, and such a purchaser must show by a preponderance of the evidence, that: (1) all contamination occurred prior to the time that it acquired ownership, and (2) “all appropriate inquiries” were made into the prior uses of the property in accordance with “good commercial and customary standards and practices.”⁸³ The purchaser must also show that she has (1) made all legally required disclosures of the discovery or release of any hazardous substance at the facility, (2) taken reasonable steps to stop any continuing release and prevent any future releases, and (3) not impeded the effectiveness or integrity of any institutional controls.⁸⁴

79. Charles Openchowski, *Superfund in the 106th Congress*, 30 ENVTL. L. REP. 10648, 10648 (2000).

80. The Act merged the House of Representatives passed Small Business Liability Relief Act, H.R. 1831, 107th Cong., 1st Sess. (2001) and the Senate passed Brownfields Reform Legislation, S. 350, 107th Cong. (2001).

81. *Real Estate Applauds Landmark Brownfields Law*, U.S. NEWSWIRE, Jan. 11, 2002.

82. Openchowski, *supra* note 79, at 10648. (The Act directs EPA to develop its own regulations regarding what is all appropriate inquiry within next two years.)

83. 42 U.S.C.A. §9601(40) (West Supp. 2003).

84. 42 U.S.C.A. § 9601(40)(D) and (F).

b. Contiguous Landowner Defense

The Act also exempts certain contiguous property owners from liability.⁸⁵ To fall within the contiguous landowner defense, the landowner must show (1) that she did not cause or contribute to contamination, or consent to the release of a contaminant,⁸⁶ (2) that she is unrelated to the entity that caused the contamination,⁸⁷ and (3) that she took reasonable steps regarding all appropriate inquiry, disclosures, prevention of releases, and maintenance of institutional controls.⁸⁸ If the property owner had any prior knowledge of the contamination, then the defense is unavailable.⁸⁹

c. Innocent Landowner Defense Clarified

The innocent landowner defense is similar to the contiguous property owner defense in that the landowner must show she did not cause, contribute to, or consent to the release of the contaminant.⁹⁰ Further, the landowner must show that she took all reasonable steps regarding all appropriate inquiry, disclosures, prevention of releases, and maintenance of institutional controls.⁹¹ The defense does not apply if the owner had prior knowledge of the contamination.⁹² Although the Act preserves the previous innocent landowner defense, it does provide needed clarification.

2. Windfall Profit Lien Provision

Despite the exemptions for bona fide purchasers and contiguous property owners, if the EPA incurs response costs to clean up contaminated property and the value of the property increases as a result, then the EPA can impose a lien on the property to recover its response costs.⁹³

85. 42 U.S.C.A. § 9607(q) (West Supp. 2003).

86. 42 U.S.C.A. § 9607(q)(1)(A).

87. 42 U.S.C.A. § 9607(q)(1)(A)(ii)(I).

88. 42 U.S.C.A. § 9607(q)(1)(A)(iii) (requiring property owners to maintain institutional controls that may have been imposed on the contaminated property).

89. 42 U.S.C.A. § 9607(q)(A)(viii)(II).

90. 42 U.S.C.A. § 9601(35)(B) (West Supp. 2003).

91. 42 U.S.C.A. § 9601(B)(i).

92. 42 U.S.C.A. § 9601(35)(B).

93. 42 U.S.C.A. § 9607(r)(2).

3. De Micromis Exemption

Small businesses that contribute only small volumes to site contamination are also exempt from liability under the Act.⁹⁴ The Act exempts parties who have contributed less than 110 gallons of liquid materials or 200 pounds of solid hazardous materials that were disposed of, treated, or transported to a National Priorities List site prior to April 1, 2001.⁹⁵ However, the Act authorizes the government to withdraw this exemption from a particular party if: (1) it determines that the materials contributed significantly to the cost of the response action; (2) the person failed to comply with an information request; or (3) a person has been convicted of a criminal violation for the conduct to which the exemption would apply.⁹⁶

Residential households and businesses with fewer than 100 employees are also exempt from municipal solid waste⁹⁷ liability if they can show the waste they sent to a municipal landfill is not different from typical residential waste.⁹⁸ Again, the Act authorizes the government to withdraw this exemption from a party if they fall within factors similar to the above-mentioned factors applying to individuals who contribute small amounts of liquid material or solid hazardous material. Specifically, the liability exemption will not apply to municipal solid waste if: (1) the government determines that the materials contributed significantly to the cost of the response action; (2) the person failed to comply with an information request; or (3) a person has impeded the performance of a response action.⁹⁹

4. Increase of Funds for Redevelopment of Brownfield Sites

Another significant provision in the Act is the increase of funds for redevelopment of brownfields sites from \$98 million to \$200 million annually through 2006.¹⁰⁰ Entities eligible for the funds include local and state governments, non-profit entities that own brownfield

94. 42 U.S.C.A. § 9607(o).

95. 42 U.S.C.A. § 9607(o)(1)(A)(B).

96. 42 U.S.C.A. § 9607(o)(2).

97. 42 U.S.C.A. § 9607(p)(4). Municipal solid waste is waste material that is (1) generated by a household; and (2) generated by a commercial, industrial, or institutional entity if the material is: (a) essentially the same as waste normally generated by a household; (b) collected and disposed of with other municipal solid waste, and (c) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.

98. 42 U.S.C.A. § 9607(p)(1).

99. 42 U.S.C.A. § 9607(p)(2).

100. 42 U.S.C.A. § 9604(k)(12)(A) (West, Supp. 2003).

sites, and Indian tribes.¹⁰¹ Eligible entities can seek funds for two reasons: (1) to either inventory, characterize, assess, and conduct planning related to brownfield sites; or (2) to perform targeted site assessments.¹⁰²

In order to secure a grant, the entity applies to the EPA. The EPA will rank the grant applications based on certain criteria, including the extent to which the grant will increase the availability of other funds for environmental assessment or remediation of a brownfield area and the potential of the proposed project to stimulate economic development and reduce threats to health and the environment.¹⁰³ Other criteria are the extent to which the grant would facilitate the use of existing infrastructure and the creation of parks and other property for nonprofit purposes.¹⁰⁴ The individual grants are not to exceed \$200,000,¹⁰⁵ but the EPA can waive the limitation and provide for grants up to \$350,000.¹⁰⁶ Further, the grants have some limits. The funds cannot be used for payment of a penalty or fine, an administrative cost, or the cost of compliance with any federal law.¹⁰⁷

5. Federal Enforcement Deferral

The Act further provides for a federal enforcement deferral, meaning that if a property has been cleaned up pursuant to a state response program then, with limited exceptions, the EPA will not take enforcement action against the site.¹⁰⁸ This federal enforcement deferral only applies if a state (1) maintains a public record of sites where response actions have been completed, (2) indicates whether a site is suitable for unrestricted use, and (3) identifies any institutional controls relied upon in the remedy.¹⁰⁹ The EPA will take a federal response action under CERCLA if a state requests federal assistance or the contamination has migrated across state lines.¹¹⁰ The EPA may also begin a response action if, after taking into account the actions that have been taken, they determine that the release presents an

101. 42 U.S.C.A. § 9604(k)(1).

102. 42 U.S.C.A. § 9604(k)(2).

103. 42 U.S.C.A. § 9604(k)(3)(C).

104. *Id.*

105. 42 U.S.C.A. § 9604(k)(4)(A)(i)(I).

106. 42 U.S.C.A. § 9604(k)(4)(A)(i)(II).

107. 42 U.S.C.A. § 9604(k)(4)(B)(i).

108. 42 U.S.C.A. § 9628(b) (West Supp. 2003).

109. 42 U.S.C.A. § 9628(b)(1)(C).

110. 42 U.S.C.A. § 9628(b)(1)(B).

imminent and substantial endangerment and that additional remedial action is needed.¹¹¹ Finally, the EPA may initiate a response action if there is new information that was not known at the time the initial cleanup was approved or completed, for example where the contamination is more toxic than originally expected.¹¹²

6. Excluded Sites

Certain specified sites are excluded from the definition of brownfields under the new law.¹¹³ For example, sites listed on the National Priorities List, where the nations most hazardous sites are listed, and sites undergoing a removal action, corrective action or those subject to closure under RCRA, are not considered brownfield sites.¹¹⁴ The excluded sites are generally precluded from receiving any funding authorized under the new legislation, although the government can determine on a case-by-case basis whether an excluded site is eligible for funding.¹¹⁵

B. *Rationale of Changes*

A variety of constituencies have expressed their support for the new Act. The real estate community touted it as “a win for the environment, a win for responsible economic development and a win for communities struggling to overcome the stigma of environmental contamination.”¹¹⁶ EPA Administrator Christine Whitman stated that “returning abandoned industrial sites to productive use can create jobs in areas where they are very much needed and also will improve the tax base of many communities.”¹¹⁷ Whitman also noted that the Act will make brownfield cleanup more efficient, lessen the amount of litigation, empower state cleanup plans, and deal with concerns facing prospective purchasers of brownfields by clarifying liability.¹¹⁸ The National Conference of State Legislatures commended the new Act for its creation of cleanup and redevelopment opportunities, new

111. 42 U.S.C.A. § 9628(b)(1)(B)(iii).

112. 42 U.S.C.A. § 9628(b)(1)(B)(iv).

113. 42 U.S.C.A. § 9601(39)(B) (West Supp. 2003).

114. *Id.*

115. 42 U.S.C.A. § 9601(39)(C).

116. *Real Estate Applauds Landmark Brownfields Law; New Law to Spur Economic Redevelopment in Blighted Communities*, U.S. NEWSWIRE, Jan. 11, 2002 (quoting Real Estate Roundtable Chairman Nelson C. Rising).

117. EPA Newsroom, *Whitman Praises Passage of Brownfield Legislation*, at http://www.epa.gov/epahome/headline_122101.htm (last modified March 19, 2002).

118. *Id.*

jobs, and new tax revenues.¹¹⁹ The reaction by the different constituencies reflects the fact that the environmental, economic, and environmental justice concerns of the various players are addressed by the Act in varying degrees.

The Act is not without its faults. One concern is what effect the lessening of liability and the empowerment to state VCPs will have on environmental cleanup. Another question is whether too much focus has been placed on economic development, rather than environmental cleanup. Further, it is unclear whether the amendments adequately address environmental justice needs.¹²⁰

The Act has two major goals: to encourage brownfield redevelopment and to preclude the unfair liability of small businesses. The following discussion focuses on the success of the new Act in achieving these two goals.

1. Encourage Brownfield Redevelopment

a. Change in Liability Scheme

CERCLA's liability scheme, which held all owners and operators of contaminated property liable for their cost of the cleanup, regardless of who actually caused the contamination, presented a major hindrance to brownfield redevelopment.¹²¹ The amendments try to remove this hindrance by releasing from liability innocent landowners and prospective purchasers who did not cause, contribute to, or consent to the release of hazardous substances, and who took reasonable steps to stop the contamination or future release.¹²² The Act also precludes liability for businesses that have contributed *de minimus* waste to sites or businesses with less than 100 workers who have disposed only of municipal solid waste at the site.

The Act's changes to CERCLA's liability scheme represent a modification of the statute's original strategy. The changes could be key in encouraging potential developers to invest in brownfields rather than greenfields. The changes might have a positive effect on lowering the amount of mothballed properties, even though liability for the actual owners of mothballed properties remains.¹²³ Under the

119. 147 CONG. REC. S3,879, S3,886 (daily ed. Apr. 25, 2001) (letter from the President of the National Conference of State Legislatures).

120. *Id.* at S3,893 (statement by Sen. Lieberman); *id.* at S3,894 (statement by Sen. Levin).

121. *See supra* notes 3, 5, & 7.

122. 42 U.S.C.A. § 9607(q)(1)(A) (West Supp. 2003) (defining "bona fide prospective purchasers"); 42 U.S.C.A. § 9607(r)(2) (defining "innocent landowner").

123. *See supra* text accompanying notes 90-92 (discussing "innocent landowner" defense).

Act, an owner could potentially sell the property to a new developer, who would benefit from the Act's exemptions from liability. However, in order to enjoy these exemptions from liability, the new developer must meet the requirements of a bona fide purchaser.¹²⁴ By encouraging developers to redevelop brownfield sites, the urban sprawl issue will also be addressed.¹²⁵ One incentive for redeveloping on brownfield sites is that the sites are often located in areas already supported by existing infrastructure, whereas greenfield sites may not have the same level of infrastructure support because they, by definition, have not been previously developed.

However, the new amendments to liability have been challenged as creating a less efficient and effective Superfund program. For example, any adverse judicial interpretation of the prospective purchaser provisions could potentially result in considerable lessening of liability protection.¹²⁶ Also, elimination of state oversight may result in less effective state programs.¹²⁷ Further, the changes implemented to the liability scheme have been termed unnecessary¹²⁸ primarily because the EPA has offered prospective purchasers of contaminated property a covenant not to sue where the purchaser agreed to supply environmental benefits after purchasing site since 1989.¹²⁹ The Act's exemption simply codifies the existing policy of the EPA reflected by the covenant not to sue.

These changes to CERCLA liability will have an effect on participation of prospective property purchasers. CERCLA's previous liability scheme required the participation of prospective purchasers in the cleanup of contaminated sites.¹³⁰ By releasing all prospective purchasers from liability without having them provide anything in exchange, the new Act fails to exact any new environmental benefit. Thus, a person purchasing property only for monetary investment purposes, rather than redevelopment purposes, could defeat the Act's

124. 42 U.S.C.A. § 9607(q)(1)(A).

125. EPA Newsroom, *President Signs Legislation to Clean Environment & Create Jobs*, at http://www.epa.gov/epahome/headline_011102.htm (last modified February 19, 2003).

126. Dale A. Guariglia, Michael Ford, & Gerald DaRosa, *The Small Business Liability Relief and Brownfields Revitalization Act: Real Relief or Prolonged Pain?*, 32 ENVTL. L. REP. 10505, 10511 (April 2002).

127. Openchowski, *supra* note 79, at 10652.

128. *Id.* at 10660.

129. Office of Solid Waste and Emergency Response, EPA, Guidance on Settlements with Prospective Purchasers of Contaminated Property, OSWER Directive No. 9835.9, *reprinted in* 54 Fed. Reg. 34235 (Aug. 18, 1989), *modified at* 60 Fed. Reg. 34792 (July 3, 1995).

130. *See supra* note 3.

purpose resulting in the indefinite postponement of any brownfield remediation.¹³¹ For example, an investor could purchase a brownfield and instead of remediating the site, he could wait for the market forces to increase the value of the site, and then sell the site at a profit.

The Act attempts to alleviate these concerns. First, the possibility of an investor making money in such a scenario is not high because liability issues remain, reducing the value of the property.¹³² Second, the windfall lien provision in the Act provides some protection against the possibility of real estate speculation, but this provision has its own gaps and problems.¹³³ The lien still requires the EPA to expend resources to clean up a site, but the agency may not recover the full amount of the resources expended. Further, the lien provision ignores the EPA's goal in brownfield remediation of encouraging the participation of prospective purchasers in the cleanup of contaminated sites.¹³⁴

The new Act problematically changes the standard of care for prospective purchasers who find hazardous substances at the facility from "due care" to "appropriate care."¹³⁵ Before the amendments, an owner was required to exercise "due care" in order to be eligible for the prospective purchaser defense to liability.¹³⁶ While the Act introduces the standard of "appropriate care," it does not appear to define the term and thereby creates ambiguity as to the level of conduct expected of the prospective purchaser.¹³⁷ However, this concern will likely be remedied by the requirement that the EPA establish standards and practices within two years after the Act's passage in order to further clarify what "appropriate care" entails.¹³⁸

131. Openchowski, *supra* note 79, at 10659.

132. 42 U.S.C.A. § 9601(40) (West Supp. 2003) (bona fide prospective purchasers); 42 U.S.C.A. § 9607(q) (West Supp. 2003) (contiguous landowner defense); § 9601(35)(B) (innocent landowner defense); 42 U.S.C.A. § 9607(r)(2) (windfall profit lien provision); and § 9607(o) (de micromis exemption).

133. Such gaps include connecting the response action to the increase in fair market value, and dependence on fair market value assessment. See 42 U.S.C.A. § 9607(r)(4)(A).

134. EPA, *Brownfields Mission*, at <http://www.epa.gov/swerosps/bf/mission.htm> (last modified Sept. 30, 1997).

135. 42 U.S.C.A. § 9601(40)(F).

136. 42 U.S.C.A. § 9607.

137. *Id.*

138. 42 U.S.C.A. § 9601(35)(B)(ii).

b. Increase in Federal Funds

The Act also significantly increases the amount of federal funds spent on brownfields from \$98 million to \$200 million per year.¹³⁹ Although the cost of remediation for all of the nation's brownfields significantly exceeds this amount, the hope is that private entities and individuals will contribute private funds for remediation and reuse of the sites.¹⁴⁰

Although the amount of money might not be adequate for the cleanup of brownfields, any money is welcome. However, the plan has a large problem in the cap it places on grants for brownfield assessment. The money allocated for each grant is limited: \$200,000 for each brownfield site characterization and assessment grant and \$1,000,000 for eligible entities to be used for capitalization of revolving loan funds.¹⁴¹ Considering the cost of successfully applying for these grants, this cap is a drawback. Thus, receiving a \$200,000 grant may not be very beneficial when the application process represents a large percentage of the grant.

c. Empowerment to State Voluntary Cleanup Plans

The federal enforcement deferral eliminates federal/state involvement. Brownfield redevelopers can have increased confidence in state-approved voluntary cleanup efforts, since those efforts will no longer be second-guessed by the federal government. Before the amendments, the federal government reserved the right to seek additional liability from a developer even though there was compliance with a state's cleanup plan. Under the deferral provision, the federal government will not require additional cleanup work once a state has approved a voluntary cleanup plan.¹⁴² The new amendment's prohibition of federal enforcement allows the EPA to intervene only in a few specified instances, for example in cases where the state requests the EPA's assistance or when contamination has migrated across state lines.¹⁴³ The Act allows the prohibition to be overruled in situations where the EPA determines that a site poses a public health emer-

139. 42 U.S.C.A. § 9604(k)(12) (West Supp. 2003).

140. Elizabeth Shogren, *Congress OKs \$250-Million Brownfield Cleanup*, L.A. TIMES, Dec. 21, 2001, at 47 (quoting Linda Garczynski, director of the EPA's brownfield program, commenting that "[i]t's not a lot of money, but a little bit of federal money, or any sort of public money, goes a long way to leverage private investments").

141. 42 U.S.C.A. § 9604(k)(4) (West Supp. 2003).

142. 42 U.S.C.A. § 9601(a), (b) (West Supp. 2003).

143. 42 U.S.C.A. § 9628(b)(1)(B) (West Supp. 2003).

gency and that the state response is inadequate.¹⁴⁴

The deference to the states may have a negative effect on forcing compliance. The federal enforcement deferral, coupled with the limited exceptions, introduces a much higher threshold for the EPA to act. Further, the potential threat of federal enforcement had an important place in the brownfield redevelopment, and the Act's grant of increased authority to state VCPs may actually be counterproductive. By eliminating federal oversight, the Act may undermine existing state programs, reduce incentives for private-party cleanup, significantly reduce the impact of the liability scheme, and even lessen participation opportunities.¹⁴⁵ A 1998 report by the General Accounting Office ("GAO") found that the potential application of the federal program is "an important element in obtaining the cooperation of responsible parties in the state program."¹⁴⁶ The GAO report further found that states believe that "a lessening of the Superfund program's more rigorous cleanup requirements or liability standards could negatively affect the state programs."¹⁴⁷ Additionally, as has been previously discussed, the EPA has already pursued a policy allowing for a State Memorandum of Agreement, which precludes further federal involvement in a cleanup site, so the necessity for the federal enforcement deferral is unclear.

d. Economic Development, Environmental Justice, and Tax Revenue

One by-product the Act hopes to produce is a benefit to communities burdened by brownfield sites. During the debate of the bill, Senator Harry Reid of Nevada, one of the Act's primary supporters, stated that the "real winners" are the people who live near the abandoned brownfield sites who will enjoy the renewed urban centers, the increase in development and employment, and the revitalization of the local communities.¹⁴⁸ If the Act succeeds in lessening the likelihood of mothballed property and encourages brownfield redevelopment, communities will likely see increased employment opportunities. Thus, if developers choose either to continue an existing industry or start a new one on a brownfield site, the community will be able to take advantage of new jobs. Additionally, redeveloping

144. 42 U.S.C.A. § 9628 (b)(1)(B)(iii)-(iv).

145. Openchowski, *supra* note 79, at 10660.

146. U.S. GEN. ACCT. OFF., Pub. No. GAO/RCED-99-39, at 15 (1998).

147. *Id.* at 3.

148. 147 CONG. REC. S3,879, S3,886 (daily ed. April 25, 2001) (statement of Sen. Smith).

brownfields will address environmental justice issues by reducing the number of brownfields located in depressed communities.¹⁴⁹ By returning idle land to active use, the depressed neighborhoods will ideally be energized and will benefit both economically and environmentally. Further, the return of land to an industrial or other active use will also benefit the depressed community and the local government by generating previously unrealized tax revenue.¹⁵⁰

2. Preclude Unfair Targeting of Small Businesses

Before the 2002 amendments to CERCLA, small businesses with little money, fault, or involvement in the polluting were pulled into court and made responsible parties for the cleanup costs associated with polluted commercial lands.¹⁵¹ Under the amended CERCLA, small businesses will not be held liable for cleanup if they did not contribute a significant amount of hazardous waste to the site.¹⁵²

Some commentators object to the exclusion of small businesses from liability, stating that the “exemptions appear to be included more for political reasons and out of habit.”¹⁵³ The reasoning behind the small business exemption of the Act is to avoid requiring small establishments to pay huge cleanup costs when they contributed only a *de minimis* amount of waste to the site.¹⁵⁴ However, the amendment may carry these exemptions too far because they cover disposal of hazardous waste as well as municipal solid waste.¹⁵⁵ Although the provision places a limit on the amount of solid waste an establishment can contribute, it allows the entity to avoid liability even if it released hazardous substances. Further, the necessity of a separate exemption is not entirely clear because numerous other provisions are available to provide liability relief to small businesses such as expedited settlements based on ability to pay and exemptions for prospective purchasers and contiguous landowners. Moreover, the need for the exemption is also placed in doubt in light of the numerous *de minimis*

149. *Id.* at S3,879 (daily ed. Feb. 14, 2001) (letter from The Trust for Public Land et. al.).

150. Environmental Financial Advisory Board, EPA, *Financing Strategies for Brownfield Redevelopment* (March 1996), at <http://www.epa.gov/efinpage/efabfins.htm> (last modified January 26, 2003); Environmental Financial Advisory Board, EPA, *Financing Brownfields Redevelopment: Linkages to the Empowerment Zone/Enterprise Community Program* (March 1996), at <http://www.epa.gov/efinpage/efabezec.htm> (last modified January 26, 2003).

151. 147 CONG. REC. H2348, H2350 (daily ed. May 21, 2001) (statement of Rep. Costello).

152. 42 U.S.C.A. § 9607(o) (West Supp. 2003); *New Brownfields Legislation to Provide \$250 Million Yearly*, ANDREWS HAZARDOUS WASTE REP. Jan. 18, 2002, at 12.

153. Openchowski, *supra* note 79, at 10658.

154. 42 U.S.C.A. § 9607(o).

155. *Id.*; 42 U.S.C.A. § 9607(p).

cash out settlements the EPA has given to small businesses over the past several years.¹⁵⁶

IV. CONCLUSION

Congress passed CERCLA in order to facilitate the cleanup of hazardous substances and the cleanup of inactive waste disposal sites. Although CERCLA was intended to provide a thorough and efficient system for the cleanup of contaminated sites, CERCLA's approach actually had a negative effect on brownfield cleanup and development. The outcome of CERCLA's approach to brownfield development has created problems in the arenas of the environment, economics, and environmental justice.

Two of the most commonly cited problems with CERCLA's approach are the complex liability scheme and the limited authority granted to state brownfield programs. The liability scheme, which holds all owners and operators of a site liable for contamination regardless of how much they contributed, actually resulted in increasing the amount of abandoned brownfield property. Potential investors became increasingly wary of developing on brownfield sites because of the uncertain liability they might face. Criticism has also been directed towards the EPA's oversight role of state brownfield programs. The EPA's ability to intervene in state programs created tension among developers, states, and the EPA and resulted in less brownfield redevelopment.

Although the EPA attempted to introduce flexibility into CERCLA in order to lessen the problems created by the statute's approach, its attempts were not completely successful. Thus, after a number of years of debate among government actors and environmental, community, and business groups, Congress passed the Small Business Liability Relief and Brownfields Revitalization Act. The recent changes in CERCLA's provisions represent a long awaited and needed overhaul of the statute.

The Act's amendments introduce a more streamlined process that is less dependent on the EPA. Although many of the amendments simply codify the existing EPA policy, the Act does add needed clarification of CERCLA. The Act's amendments are also aimed at lessening the negative environmental justice and economic impacts, while improving environmental protection. Although the effect the Act will actually have on these objectives is not entirely clear,

156. Openchowski, *supra* note 79, at 10658.

the legislation is a direct response to the long debated topic of CERCLA and its negative effects.

With its focus on lessening the liability for bona fide purchasers and contiguous property owners, introducing federal enforcement deferral, and creating a liability exemption for small businesses, the Act more than adequately addresses economic issues by encouraging economic participation in redevelopment of brownfield. If the Act's goal of encouraging brownfield redevelopment is realized, then environmental justice issues will be addressed by the resulting availability of job opportunities, redevelopment of idle land and the increased value and tax revenue of the sites.

Despite the economic and environmental justice benefits, the Act's economic bent may have come at the expense of environmental concerns. Although the Act's reduction of the number of liable parties may likely result in an increased redevelopment of brownfields, the amendments may force the government, and especially the EPA, to assume too much of the liability and its cost. The EPA's assumption of liability and cost is especially problematic given the 1995 termination of the tax provisions funding cleanups. Additionally, the curtailment of the EPA's oversight authority may raise problems for state brownfield programs since the states will no longer be able to use the threat of federal enforcement. The result may be a decrease in the extent of environmental cleanup. Overall, even though the changes in the Act may present a greater burden for both the federal and state governments, the Act represents a good faith, but possibly flawed, attempt to facilitate brownfield redevelopment.