CERCLA Liability Redefined: An Analysis of the Small Business Liability Relief and Brownfields Revitalization Act and Its Impact on State Voluntary Cleanup Programs

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CERCLA LIABILITY REDEFINED:
AN ANALYSIS OF THE SMALL BUSINESS LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION ACT AND ITS IMPACT ON STATE VOLUNTARY CLEANUP PROGRAMS

INTRODUCTION

As cities try to reinvent themselves, reverse urban decay, and promote “smart growth” strategies, an instinctive technique is to address the laws that some believe have crippled urban development and have thereby contributed to urban sprawl.1 Indeed, one of the greatest opportunities for change may be the reform of draconian liability schemes imposed by state and federal law upon owners of polluted property and those found to have contributed to its contamination.2

The redevelopment of contaminated properties under the federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)3 and its state analogues carries such high risk that, in many cases, it has become cheaper for a landowner to take his property off the market than to either (1) remediate it or (2) call attention to the contamination by selling it.4 The result has been the proliferation of brownfields: “real property [underutilized and often abandoned or idle], the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”5

2. See id.
Besides providing a visual symbol of urban decline, brownfield sites not undergoing remediation often continue to release unknown amounts of toxic pollutants into the environment, thereby placing our communities and our environment at continued risk.\(^6\)

Currently, the most visible example of urban revitalization in the Atlanta area is the development of Atlantic Station, a 138-acre site located in Midtown, Atlanta. With the help of state and local development officials, the former Atlantic Steel site is morphing into a twelve million square foot complex of mixed office, residential, and retail uses.\(^7\) Although it is not a traditional brownfield remediation effort due to the fact that its developers secured federal funding for site remediation through an Environmental Protection Agency ("EPA") program independent from CERCLA, the redevelopment of the century-old Atlantic Steel Mill is, by most counts, a success story in urban revitalization.\(^8\) It is the type of urban revitalization that advocates for Superfund liability relief hope will result from the 2002 amendment to CERCLA, the Small Business Liability Relief and Brownfields Revitalization Act.\(^9\)

This Note addresses the problem of urban decline in the context of the proliferation of brownfield sites, such as the Atlantic Steel site, since the enactment of CERCLA. It analyzes the most recent federal

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8. Poncey, supra note 7, at 248. But see Bozeman, supra note 7, at 638 (arguing that the mixed-use development will produce more air pollution than the steel mill did). The Atlantic Steel site is the “first major urban redevelopment project in the nation to be approved under [the EPA’s] Project XL.” Arnall Golden & Gregory, supra note 7. Project XL (cXcellence in Leadership) is a Clinton administration initiative that allows developers regulatory flexibility when they propose a development project that will achieve “superior environmental performance.” Poncey, supra note 7, at 249.
and Georgia amendments that seek to break down barriers to brownfield redevelopment. Part I provides an overview of CERCLA and the historical context of its enactment.10 Part II describes CERCLA’s chilling effect on brownfield development and federal efforts thus far to create incentives to redevelop brownfield properties.11 Part III outlines and analyzes the most recent federal response to the brownfield redevelopment problem: the Small Business Liability Relief and Brownfields Revitalization Act of 2002.12 Part IV describes state-led efforts to revitalize brownfield redevelopment commonly adopted in the form of Voluntary Cleanup Programs, and the ways in which these efforts may benefit from the federal government’s newly codified policy of deference.13 Part V discusses Georgia’s efforts to regulate hazardous waste and promote brownfield redevelopment, and includes a discussion of recent changes to Georgia’s statutory authority.14 This Note concludes that the long-awaited federal Small Business Liability Relief and Brownfields Revitalization Act is a welcome, affirmative response to the problem of brownfield redevelopment. Advocates hope that the amendment will provide needed relief to small business owners, facilitate private investment in brownfield properties, and bolster existing state voluntary cleanup programs. If the amendment can achieve these goals without jeopardizing the high standards of environmental integrity pursued under CERCLA, then, over time, the amendment should remove a potentially significant barrier to brownfield redevelopment.

10. See infra Part I.
11. See infra Part II.
12. See infra Part III.
13. See infra Part IV.
14. See infra Part V.
I. THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980

A. Historical Context

With the rapid expansion of the petrochemical industry after World War II came the proliferation of highly toxic industrial waste streams in the United States. Largely unregulated, hazardous waste generators subscribed to the “out of sight, out of mind” philosophy and crudely disposed of their waste with little regard for its impact on the environment. Although burial of waste had been the common practice since the Industrial Revolution, by the middle of the 20th century, the content of industrial waste had become far more dangerous, the chemicals were much more complex, and their effects were more persistent; the earth could no longer provide a sufficient barrier to protect human health from the effects of hazardous waste.

Eventually, the result of decades of unregulated hazardous waste disposal made itself dramatically known with the occurrence of several very localized incidents of extreme toxic pollution in the late 1970s. In 1978, residents of Love Canal, New York awoke to find toxic waste seeping into their basements after heavy rains. They later discovered that their homes had been constructed directly on top of a former industrial and chemical dumping site. Investigators identified over 80 chemical compounds in the liquid waste, many of which were carcinogenic. The discovery of the hazardous waste coincided with a dramatic rise in local incidents of birth defects,

15. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 196 (3d ed. 2000). The generation of hazardous waste in the United States increased from 500,000 tons per year at the end of World War II to 50 times that 50 years later. Id.
16. Id. at 196-97.
17. See UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, EPA 540-R-00-007, SUPERFUND: 20 YEARS OF PROTECTING HUMAN HEALTH AND THE ENVIRONMENT 3 (2000) [hereinafter EPA 20-YEAR REPORT].
20. PERCIVAL ET AL., supra note 15, at 263. By the time Love Canal residents discovered the pollution, the dump site contained “about as much dioxin as was sprayed by the Army as a defoliant during the Vietnam War.” Walt, supra note 19.
respiratory illness, cancer, and miscarriages.\textsuperscript{21} The disaster resulted in the relocation of 1000 families and the demolition of homes built on the waste site.\textsuperscript{22}

Love Canal and similar incidents of alarming proportion drew national attention and an emotional response from the voting public.\textsuperscript{23} Mounting public concern and agency studies resulted in legislative action.\textsuperscript{24} Finding the Resource Conservation and Recovery Act of 1976 ("RCRA")\textsuperscript{25} inadequate to address the growing need for the remediation of past contamination, the United States Congress enacted CERCLA, also commonly known as the Superfund program, in 1980.\textsuperscript{26}

B. CERCLA’s Goals

Congress designed CERCLA to facilitate the cleanup of existing hazardous waste sites and to deter future contamination.\textsuperscript{27} Philip Cummings, chief counsel of the Senate Environment Committee at the time of CERCLA’s drafting, stated that CERCLA "is not primarily an abandoned dump cleanup program . . . . The main purpose of CERCLA is to make spills or dumping of hazardous substances less likely through liability, enlisting business and

\begin{itemize}
\item \textsuperscript{21} EPA 20-YEAR REPORT, \emph{supra} note 17, at 2. In a survey of the local population, the Love Canal Homeowners Association found that 56% of children born between 1974 and 1978 had some type of birth defect. \textit{Id.}
\item \textsuperscript{22} \textit{Id.} at 3-4; PERCIVAL \textit{et al.}, \emph{supra} note 15, at 263.
\item \textsuperscript{23} \textit{See} PERCIVAL \textit{et al.}, \emph{supra} note 15, at 197, 264; Rubenstein, \emph{supra} note 6, at 151. \textit{See generally} EPA 20-YEAR REPORT, \emph{supra} note 17, at 5-6 (relaying incidents of severe toxic waste threats in the late 1970s: Bridgeport, New Jersey; Riverside, California; Toone, Tennessee; and Elizabeth, New Jersey).
\item \textsuperscript{24} \textit{See} PERCIVAL \textit{et al.}, \emph{supra} note 15, at 197. In a 1980 study, the Environmental Protection Agency (EPA) found the nation’s groundwater to be at high risk for contamination by hazardous industrial wastes. \textit{Id.} The study found that industrial surface impoundments received fifty billion gallons of liquid wastes daily; "[seventy] percent of these impoundments were unlined and 2,600 . . . were sitting directly on top of groundwater sources within one mile of a water supply well." \textit{Id.} (citing \textit{HOUSE COMM. ON GOV’T OPERATIONS, INTERIM REPORT ON GROUNDWATER CONTAMINATION: ENVIRONMENTAL PROTECTION AGENCY OVERSIGHT, H.R. REP. NO. 96-1440, at 6 (1980))
\item \textsuperscript{25} 42 U.S.C. §§ 6901-6992(k) (2003). As opposed to CERCLA, which imposes strict liability for past releases of hazardous substances, the purpose of RCRA is to prevent current releases of hazardous waste into the environment via a "cradle-to-grave" regulatory scheme; the EPA closely regulates the waste from its creation as useful chemicals or industrial materials to its eventual disposal. PERCIVAL \textit{et al.}, \emph{supra} note 15, at 201.
\item \textsuperscript{26} 42 U.S.C. §§ 9601-9675 (2003).
\item \textsuperscript{27} PERCIVAL \textit{et al.}, \emph{supra} note 15, at 265.
\end{itemize}
commercial instincts for the bottom line in place of traditional regulation.”

C. CERCLA's Liability Scheme

In practice, the heart of CERCLA is its comprehensive liability scheme and the statutory creation of the federal Superfund. CERCLA authorizes the President to respond to any release or threatened release “which may present an imminent and substantial danger to the public health or welfare.” The EPA may then seek reimbursement from all potentially responsible parties, and if unsuccessful, the federal Superfund may reimburse the EPA for funds it has expended in response to the nation’s most severely contaminated hazardous waste sites—those on the National Priorities List (“NPL”). Alternatively, the EPA may direct potentially responsible parties to carry out removal and remediation actions by court or administrative order.

Due to the large number of contaminated waste sites requiring attention, Congress mandated that the EPA evaluate and prioritize the sites posing the greatest danger to public health and the environment. The EPA is only authorized to spend Superfund

28. Id. at 265-66.
30. 42 U.S.C. § 9611 (2003). CERCLA initially authorized a fund of $1.6 billion, which increased to $8.5 billion by the 1986 amendments to CERCLA. EPA 20-YEAR REPORT, supra note 17, at 9. However, in 1995, Congress failed to renew the tax on industry that it had initiated to fund the Superfund, and President Bush has not yet asked Congress to consider reviving it. See John Heilprin, Report: Superfund Shortfall Keeps Dumps Toxic, CONTRA COSTA TIMES, January 9, 2004, available at http://www.contracostatimes.com/mlt/ctimes/news/7669291.htm. Now operating at a budget of around $3 billion, the Superfund was still short almost $175 million as of January 2004. Id.
31. 42 U.S.C. § 9604(a)(1) (2003); Rubenstein, supra note 6, at 152.
32. PERCIVAL ET AL., supra note 15, at 265; Rubenstein, supra note 6, at 152.
33. 42 U.S.C. § 9606 (2003); EPA 20-YEAR REPORT, supra note 17, at 22-23; Rubenstein, supra note 6, at 152. A “removal” is usually a short-term response to an environmental emergency that prevents, minimizes, or mitigates damage from a release or threatened release, whereas a “remediation” action is a long-term, permanent cleanup aimed at making the site safe for human health and the environment. EPA 20-YEAR REPORT, supra note 17, at 9. For example, a removal action may be the cleanup of waste spilled from a container or may involve blocking the migration of spilled waste with a physical barrier; a remediation action may be the excavation and incineration of soil containing toxic wastes. Id.
34. 42 U.S.C. § 9605 (2003). Some estimate that the number of brownfield sites nationwide exceeds 500,000. See Eisen, supra note 1, at 10420.
monies on the most highly contaminated sites and large-scale environmental emergencies. The Agency utilizes a Hazard Ranking System ("HRS") to numerically screen and assess the hazard to human health and the environment posed by each site. The EPA is most likely to consider those sites scoring high on the HRS a national priority and will therefore place them on the NPL. Thus, the EPA usually leaves less contaminated sites to the states to remediate under their own respective hazardous waste remediation laws.

CERCLA imposes broad liability for the costs of removal and remediation of hazardous waste sites incurred by either the federal government or private entities. Potentially responsible parties ("PRPs") who may be liable include: (1) any current owner or operator of a facility that releases or threatens to release hazardous substances, (2) any past owner or operator who was present at the time of disposal of any hazardous substance, (3) any party who arranged for disposal, treatment, or transportation of a hazardous substance, and (4) any party who transported these hazardous substances for treatment or disposal. In addition to its broad application of liability, CERCLA imposes strict, joint, and several liability retroactively upon the above-mentioned parties if the EPA finds that they have contributed to the contamination of a hazardous waste site. Thus, if the EPA finds only one of the above parties to be responsible for even a portion of the contamination, it can hold that party liable for the cost of the entire cleanup and remediation of

36. See EPA 20-YEAR REPORT, supra note 17, at 13.
37. Id. at 14.
38. See SUPERFUND BARRIERS, supra note 4, at 2.
41. EPA 20-YEAR REPORT, supra note 17, at 10. Although CERCLA does not directly and unambiguously refer to "strict, joint, and several liability," courts have almost uniformly interpreted it as such, regardless of the fact that express reference to such liability was stricken from the Senate bill that eventually became CERCLA. PERCIVAL, supra note 15, at 305-06. The courts' interpretation comes from section 101(32) of CERCLA, which defines liability and states that the term "shall be construed to be the standard of liability which obtains under section 1321 of Title 33 [§ 311 of the Federal Clean Water Act]." Id. at 306 (citing 42 U.S.C. § 9601(32) (2003)).
the site. It is then up to that responsible party to seek contribution from other PRPs to alleviate its financial burden. Since even current owners and operators are potentially responsible under CERCLA, an owner who purchases contaminated property becomes liable for remediation of that contamination, regardless of the fact that the discharge occurred prior to his ownership.

The intent of this broad liability scheme was to guarantee some extent of reimbursement of the federal Superfund and to serve as a powerful deterrent. As stated in the Senate committee report, "[b]y holding the factually responsible person liable, [the bill] encourages that person—whether a generator, transporter, or disposer of hazardous substances—to eliminate as many risks as possible.

D. Has CERCLA Worked?

At Congress's behest, Resources for the Future, a nonpartisan, independent think tank in Washington, D.C., examined the success of the Superfund program in July of 2001. Its report found that "[57%] of the 1280 sites on the NPL (excluding sites on federal property)" had been remediated sufficiently to remove "threats to humans from toxic exposure." As compared with 1991 data that suggested only 63 of the 1245 sites on the NPL had been remediated in the first eleven years of the program, the newer estimate of 57% remediation is certainly an accomplishment.

The Superfund no longer receives funding from the industry tax that Congress initially established to fund it, and it is now operating at around $3 billion, with $1.3 billion appropriated by Congress in fiscal year 2003 and with $1.7 billion recovered from responsible

42. See SUPERFUND BARRIERS, supra note 4, at 3.
44. PERCIVAL ET AL., supra note 15, at 268.
45. Id. (citing S. Rep. No. 96-848, at 33 (2d Sess. 1980)).
48. See Earl Lane, EPA Vows to Speed Waste Cleanups Goal to Triple Work at Superfund Sites, NEWSDAY, October 3, 1991.
parties in the same time frame.\textsuperscript{49} However, despite its funding, the Bush administration has averaged only 43 cleanups per year since 2001, a significant drop from the cleanup rate of 76 per year under the Clinton administration.\textsuperscript{50}

II. CERCLA’S CHILLING EFFECT ON BROWNFIELD REDEVELOPMENT

A. \textit{Unintended Urban Sprawl}

Although Congress has alleviated some of CERCLA’s original liability provisions through later amendments to the Act,\textsuperscript{51} relief has been slow to come, and some commentators argue that the broad liability scheme has served its deterrent purpose too effectively.\textsuperscript{52} In addition to deterring future releases of hazardous substances, CERCLA’s onerous liability provisions have discouraged virtually all private redevelopment of brownfield sites, leaving thousands of dilapidated industrial properties across the nation, typically prime urban real estate, to remain unused and unremediated.\textsuperscript{53}

Where contamination levels do not meet the requirements for inclusion on the NPL (and thus do not qualify for EPA response action) or where the extent of contamination is not known but only suspected, properties carry the potential of such extensive CERCLA liability that owners and prospective purchasers alike overlook brownfields; instead, they choose to develop “greenfields.”

\begin{itemize}
\item \textsuperscript{49} See Heilprin, \textit{supra} note 30.
\item \textsuperscript{50} \textit{Id}.
\item \textsuperscript{51} See, e.g., 42 U.S.C. § 9601(35) (2003) (creating an innocent landowner defense); 42 U.S.C. § 9613(f) (2003) (creating a statutory cause of action for contribution by potentially responsible parties against other potentially responsible parties who have not already entered into a settlement with the government); 42 U.S.C. § 9622(g) (2003) (creating a de minimis settlement provision for potentially responsible parties where the amount and toxicity of waste contributed by such party is minimal in comparison to other substances at the facility); 42 U.S.C. § 9627 (2003) (creating an exemption from CERCLA liability for those who arrange for recycling of recyclable material).
\item \textsuperscript{52} See, e.g., Rubenstein, \textit{supra} note 6, at 151-62 (arguing that CERCLA has contributed to the “brownfields effect” through its purchaser liability provisions, lender liability provisions, choice of law provisions, settlement provisions, and uncertain cleanup standards).
\end{itemize}
previously undeveloped areas on the outskirts of urban locales.\textsuperscript{54} Thus, not only do brownfields pose significant environmental and health risks, as well as depress the economic viability of urban communities, but they also contribute to urban sprawl because of the high risks associated with brownfield redevelopment.\textsuperscript{55}

**B. Federal Efforts to Alleviate CERCLA Liability and Create Incentives to Redevelop Contaminated Properties**

Some identify CERCLA's strict liability provisions as one of the primary impediments to cleanup and reuse of brownfields based on the unpredictability of cleanup costs; liability to EPA, state agencies, and private third parties; and the difficulty of securing funding.\textsuperscript{56} Consequently, in an effort to facilitate brownfield redevelopment, Congress has targeted CERCLA's liability provisions in an attempt to reduce the liability of those willing to remediate contaminated sites and thus promote the "smart growth" of cities.\textsuperscript{57}

\textsuperscript{54} See RECYCLING AMERICA'S LAND, supra note 5, at 10; REUSING LAND RESTORING HOPE, supra note 9, at 23 (citing JONATHAN P. DEASON ET AL., THE GEORGE WASHINGTON UNIVERSITY, PUBLIC POLICIES AND PRIVATE DECISIONS AFFECTING THE REDEVELOPMENT OF BROWNFIELDS: AN ANALYSIS OF CRITICAL FACTORS, RELATIVE WEIGHTS AND AREAL DIFFERENTIALS (2001), http://www.gwu.edu/~cem/Brownfields/project_report/report.htm (finding that redeveloping one acre of brownfield property preserves 4.5 acres of greenfield from development)).

\textsuperscript{55} Robertson, supra note 53, at 1077-79. Robertson notes that persistent brownfields drive down surrounding real estate values, erode the local tax base, and contribute to chronic unemployment in urban populations. Id.

\textsuperscript{56} RECYCLING AMERICA'S LAND, supra note 5, at 10; Amy L. Edwards, Federal and State Initiatives Supporting Brownfields Redevelopment and Voluntary Corrective Action, SG006 ALI-ABA 97, 99 (2002). Since some courts have found CERCLA liability to attach to lenders who had the authority to control a site, lenders have had to approach the financing of redevelopment efforts carefully, even if the developer was willing to risk his own liability. Kenneth J. Warren, Redevelopment of Brownfields: An Overview, at www.sbanet.org/environ/programs/teleconference/redevelopment.html; Eisen, supra note 1, at 10422.

\textsuperscript{57} Warren, supra note 56. For example, in 1995, the Office of the Comptroller of the Currency revised its regulations for implementation of the Community Reinvestment Act, 12 U.S.C. §§ 2901-2908 (2003). UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, EPA 500-F-97-100, COMMUNITY REINVESTMENT ACT (CRA): QUICK REFERENCE FACT SHEET (1997). The revised regulations provide that lenders subject to the Community Reinvestment Act may obtain "community development loan credits for loans made to help finance the environmental cleanup or redevelopment of an industrial site when it is part of an effort to revitalize the low- and moderate-income community in which the site is located." Id.; Federal Reserve System, 60 Fed. Reg. 22,156 (May 4, 1995). In addition, Congress amended the Brownfields Tax Incentive in December of 2000 to allow the environmental cleanup costs for properties meeting specific land use and contamination qualifications to be fully deductible in the year in which landowners incur the costs. UNITED STATES ENVIRONMENTAL
1. Third Party Defense

Congress has provided a "third party defense," which releases an owner of contaminated property from CERCLA liability when he can prove (1) the contamination arose solely from acts or omissions of a third party with whom he is not in a contractual relationship, (2) the owner exercised due care regarding the hazardous substances involved, and (3) the owner "took precautions against foreseeable acts or omissions of [a] third party" and against the foreseeable consequences of such acts or omissions.\(^{58}\)

2. Innocent Landowner Defense

In 1986, Congress further defined the term "contractual relationship," which had originally appeared in the third party defense above, and thereby created what is now known as the "innocent landowner" defense.\(^{59}\) The defense is available to a landowner who can prove he exercised due care and took precautions against foreseeable acts or omissions of third parties.\(^{60}\) He must also prove that any disposal of hazardous substances took place before the purchase and that the purchaser conducted "all appropriate inquiries" before the purchase, the result of which provided no reason to believe the property was contaminated.\(^{61}\)


\(^{60}\) 42 U.S.C. § 9601(35) (2003); Reisch, supra note 59, at 100.

\(^{61}\) 42 U.S.C. § 9601(35) (2003); Reisch, supra note 59, at 100.
3. The EPA’s Settlement Authority

In 1989, Congress gave the EPA the authority to enter into settlements with de minimus landowners and generators, limited by several factors outlined in section 9622(g). Essentially, the EPA can settle with a PRP whose share of response costs is proportionately small and who was either an innocent purchaser or contributed little to the amount or toxicity of hazardous wastes found at the site. In the settlement, the federal government typically “provides the [de minimis contributor] with a covenant not to sue and contribution protection.” In exchange, the de minimis contributor agrees either to clean up a portion of the site or to contribute financially to the cleanup effort. However, Congress reserved the EPA’s right to reopen a settlement should additional information become available that shows the agreement previously reached is no longer sufficient to protect public health and the environment.

4. Other Federal Guidance

In addition to legislative enactments such as those outlined above, the federal government has attempted to reduce fears of endless environmental liability and excessive remediation costs through the EPA’s adoption of a formal Brownfields Economic Redevelopment Initiative ("Brownfields Initiative"). The Brownfields Initiative “is designed to empower States, communities, and other stakeholders in

63. Rubenstein, supra note 6, at 160.
64. Kodish, supra note 62, at 398.
65. Id.
66. Id.
67. Superfund Program: Covenants Not to Sue, 52 Fed. Reg. 28,038, 28,041 (1987); Rubenstein, supra note 6, at 160. De minimis settlements are not available to prospective purchasers of contaminated property, but only to PRPs. Kodish, supra note 62, at 398.

See generally United States Environmental Protection Agency, Brownfields Economic Redevelopment Initiative Fact Sheet, www.epa.gov/brownfields [hereinafter Brownfields Initiative]. The EPA claims that, since 1995, public funding for its Brownfields Program (less than $700 million) has leveraged $5 billion from the public and private arenas for cleanup and redevelopment and has produced more than 24,000 new jobs. Reusing Land Restoring Hope, supra note 9, at 2.
economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields.\textsuperscript{68}

It funds pilot programs, engages in community outreach, clarifies liability issues, promotes job training programs, and aims to address environmental justice concerns.\textsuperscript{69}

Among other policies, the EPA has issued guidance regarding agreements with prospective purchasers of contaminated property;\textsuperscript{70} a policy regarding the liability of owners of uncontaminated property containing groundwater that a neighboring property has contaminated;\textsuperscript{71} and a policy on the EPA’s issuance of “comfort/status letters” regarding a particular piece of potentially contaminated, contaminated, or formerly contaminated property.\textsuperscript{72}

In sum, the federal government, through Congress, the EPA, and the Brownfields Initiative, has attempted to provide some limited defenses to CERCLA liability. For prospective developers, however, regulatory guidance and limited legislation did not offer the kind of security necessary to move redevelopment projects forward; Congressional action was necessary to specifically address the liability concerns inherent in the redevelopment of non-NPL brownfield sites.


\textsuperscript{69} Id. A 1999 study by the Council for Urban Economic Development found that the median income of people living near brownfield areas is 30% lower than the national average. Reusing Land Restoring Hope, supra note 9, at 24.

\textsuperscript{70} Announcement and Publication of Guidance on Agreements With Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34,792 (July 3, 1995) [hereinafter Guidance on Agreements] (stating the conditions under which the EPA will not pursue prospective purchasers for remediation costs of contamination existing prior to the purchase).

\textsuperscript{71} Announcement and Publication of Final Policy Toward Owners of Property Containing Contaminated Aquifers, 60 Fed. Reg. 34,790 (July 3, 1995) [hereinafter Contaminated Aquifers Policy] (conveying that the EPA does not intend to pursue a landowner whose groundwater has become contaminated through no fault of his own).

\textsuperscript{72} Policy on the Issuance of Comfort/Status Letters, 62 Fed. Reg. 4624 (Jan. 30, 1997) (outlining the EPA’s model responses to information requests on the status of agency action against a particular piece of property, on when and what type of comfort can be extended, and on the legal ramifications of such comfort letters). Although the comfort letters issued by the EPA do not provide liability relief, they do provide information that enables a prospective purchaser to more adequately weigh the risks involved with the purchase of a piece of contaminated property. Kodish, supra note 62, at 412-13.
III. **Federal Amendment—The Small Business Liability Relief and Brownfields Revitalization Act**

A. **Overview**

As the federal government gradually addresses the most highly contaminated sites nationwide (those on the NPL), state governments must address sites that do not qualify for federal attention because the contamination has not reached a level of national priority.\(^7\) Contaminated sites have come to be popularly known as “brownfield site[s],” and these non-NPL sites were primarily at issue when Congress passed the Small Business Liability Relief and Brownfields Revitalization Act in 2002.\(^4\) These sites include retired chemical dumps, decrepit manufacturing facilities, and abandoned corner gas stations, and they are prevalent throughout both urban and rural communities in the United States.\(^5\) There is no consensus on the exact number of brownfields or the extent of contamination nationwide.\(^6\) However, some estimates have reached as high as 500,000 sites, and in 2003, 192 U.S. cities reported that more than 95,000 acres of land in their jurisdictions have been abandoned or are under-utilized due to contamination.\(^7\) The three main reasons offered by cities for the condition of these lands were (1) a general lack of funding for cleanup, (2) liability concerns, and (3) the need for environmental assessments.\(^8\)

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73. See Edwards, supra note 56, at 104.
74. 42 U.S.C. § 9601(39)(A) (2003). CERCLA also identifies what types of sites are not brownfield sites, including: any site included on the NPL, any site undergoing a removal action, any facility subject to an administrative or court order, any facility which has received a permit under other federal environmental laws, any site subject to RCRA action, and any site where there has been a release of polychlorinated biphenyls (“PCBs”). Id. § 9601(39)(B).
76. Id.
77. Eisen, supra note 1, at 10420; RECYCLING AMERICA’S LAND, supra note 5, at 12.
78. RECYCLING AMERICA’S LAND, supra note 5, at 12. *But see Deason et al.*, supra note 54, §§ 7.1, 7.3.3 (finding that fears of liability are not necessarily a “real world” impediment to brownfield redevelopment, but citing crime (or the stigma or perceived threat of it), intergovernmental competition, property tax rates, and a shortage of large or consolidated brownfield properties as potentially significant deterrents).
The majority of cities responding to the same survey agreed that, if redeveloped, the brownfield properties in their jurisdictions could yield $790 million to $1.9 billion in tax revenues annually.\textsuperscript{79} Moreover, 148 cities believed that brownfield redevelopment could potentially create 570,000 new jobs.\textsuperscript{80}

Although there remains much to accomplish, the EPA's historical focus on streamlining the remediation process and providing greater opportunities for effective state involvement is moving the effort along. The most recent federal amendment to CERCLA codifies the EPA's support of state-led cleanup efforts, and it exemplifies Congress's acknowledgement that both state and federal programs must work in tandem to combat the proliferation of brownfields in our communities.\textsuperscript{81}

Both houses of Congress passed the Small Business Liability Relief and Brownfields Revitalization Act\textsuperscript{82} ("Brownfields Act") unanimously in December of 2001.\textsuperscript{83} Through the Brownfields Act, Congress addressed barriers to brownfield redevelopment created by CERCLA and the Act's impact on small businesses with "a combination of brownfields funding, liability reforms, and limitations on federal authority to require cleanups where a viable state program is already taking the lead."\textsuperscript{84}

While some of the Act's elements merely codify existing EPA policy, others create substantive change in brownfields law.\textsuperscript{85} Primarily, Congress updated and clarified the innocent landowner defense, enacted a "contiguous property owner defense," added a new "bona fide prospective purchaser" provision, and expressed

\begin{itemize}
\item \textsuperscript{79} \textit{Recycling America's Land}, supra note 5, at 13.
\item \textsuperscript{80} Id.
\item \textsuperscript{81} \textit{See generally Reusing Land Restoring Hope}, supra note 9.
\item \textsuperscript{83} Reisch, supra note 59, at 99.
\item \textsuperscript{84} Id.
\item \textsuperscript{85} \textit{See Joel A. Mintz, New Loopholes or Minor Adjustments?: A Summary and Evaluation of the Small Business Liability Relief and Brownfields Revitalization Act, 20 Pace Envtl. L. Rev. 405, 406 (2002).}
\end{itemize}
support for state-led remediation programs through funding and a statutory policy of deference. The new and refined liability exemptions are likely to reduce the number of PRPs in Superfund lawsuits, and this may prompt quicker, more efficient settlements among the big players. Combined with federal support for state programs and increased funding, the Brownfields Act is arguably “the most wide-reaching and comprehensive package of CERCLA amendments since the Superfund Amendments and Reauthorization Act (“SARA”) of 1986.”

B. Changes to CERCLA

1. Clarification and Expansion of the Innocent Landowner Defense

The Brownfields Act updates the innocent landowner defense by adding prerequisites, adding post-acquisition obligations, and by clarifying the statutory meaning of “all appropriate inquiry.” While prior to the Brownfields Act the demands on the innocent landowner were subject to interpretation because of ambiguities in the statute, the amendment makes clear that he now must provide “full cooperation” and comply with any applicable institutional controls, such as land use restrictions. In addition to proving that he exercised “due care” regarding hazardous substances and that he took “precautions” against foreseeable third party acts or omissions, the Act now provides that the innocent landowner must also prove that he provided “full cooperation, assistance, and facility access to the

86. Reisch, supra note 59, at 100-02.
89. 42 U.S.C. § 9601(35)(A)-(B) (2003); Reisch, supra note 59, at 100.
90. 42 U.S.C. § 9601(35)(A) (2003); Reisch, supra note 59, at 100. Congress added the “all appropriate inquiry” provision to the third party defense in 1986 to create the original “innocent landowner defense.” See supra Part II.B.2.
persons that are authorized to conduct response actions at the facility.”

The innocent landowner exemption still does not apply if the owner previously knew or had reason to know of contamination.

Since a party claiming the defense must show that he took all "reasonable steps" to mitigate releases and exposure to existing hazardous substances, liability will rest on the exact meaning of "reasonable steps." And, if the courts adopt a broad interpretation, the statute may, ironically, force an innocent landowner "to remediate the property to qualify for a defense for remediation liability.

Under the Brownfields Act, the EPA must issue regulations clarifying its definition of the term "all appropriate inquiry," but until it does so, § 9601(35)(B) guides developers. For transactions dated May 31, 1997 and later, compliance with the procedures set forth by the American Society for Testing and Materials ("ASTM") in its Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process satisfies all appropriate inquiry. Section 9601(35)(B)(iv)(I) sets forth several criteria for consideration whether the landowner has conducted "all appropriate inquiry" for transactions prior to May 31, 1997. When the EPA


92. Edwards, supra note 56, at 100.

93. See Reisch, supra note 59, at 100.

94. Id.

95. Id. The EPA's deadline to issue regulations clarifying this term was January 11, 2004. This deadline has passed, and as of publication, no regulation has been published. For a discussion of the EPA's regulatory efforts and the evolving standard for "all appropriate inquiry," see Michael Carvalho, EPA's Evolving 'All Appropriate Inquiry' Rule - Broad Implications for Real Estate Transactions, ENVTL. L. NEWSL., Fall 2003, at 8 (State Bar of Georgia, Atlanta, Ga.), http://www.gabar.org/pdf/Sections/envfall03final2.pdf.


issues its statutorily mandated regulations defining “all appropriate inquiry,” the interim distinctions provided in the statute will become void.⁹⁸

Depending on the substance of the regulations that the EPA will promulgate, this provision of the Brownfields Act may prove to have a significant impact on environmental due diligence.⁹⁹ The EPA’s interpretation of the “all appropriate inquiry” language may actually serve to incorporate an element of fault in CERCLA’s otherwise strict liability scheme.¹⁰⁰ In addition, the effect of the EPA’s definition of the term will carry over into other components of the Brownfields Act, fleshing out the new “bona fide prospective purchaser” defense and the newly codified defense for contiguous landowners.¹⁰¹

The issue of a landowner’s innocence will still be one for the courts to address, but the interim guidance and the forthcoming regulations should create a minimum level of responsibility and aid developers in assessing their liability more accurately.¹⁰² Moreover, in the context of litigation, the use of a uniform standard should increase the number of “all appropriate inquiry” determinations that courts resolve on summary judgment because it will make the fact of compliance with the standard easier to prove or disprove.¹⁰³

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(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.

Id.

⁹⁸. Reisch, supra note 59, at 100.


¹⁰⁰. See Weresh, supra note 87, at 209-10.

¹⁰¹. See infra Parts III.B.2-3.


¹⁰³. Wiegard, supra note 96, at 154-55.
2. **Contiguous Property Owner Defense**

The new "contiguous property owner defense" codifies the EPA’s pre-existing policy on landowners whose groundwater becomes contaminated due to the migration of pollutants from a contiguous tract of land; it also sets forth a policy toward other types of contamination resulting from a neighbor’s activities.\(^{104}\) Although a property owner has technically become an owner of contaminated property, this newly established defense prevents him from being liable as a current owner or operator under CERCLA.\(^{105}\)

To qualify for the defense, the owner must possess property that is contiguous or “similarly situated” to the property from which the release originated, and he must prove by a preponderance of the evidence that he (1) played no role in the creation of the release or threat of release, (2) is not affiliated with any party who is potentially liable for the release, (3) took reasonable steps to stop an ongoing release or prevent a future one, (4) cooperated with all remediation efforts, (5) complied with all institutional controls used in response actions (even if they decrease the value of his property), and (6) had no notice (after conducting all appropriate inquiry) that his property was at risk of contamination.\(^{106}\)

While the scope of the defense will require further definition by the EPA and the courts, the statute does provide some guidance for contiguous property owners.\(^{107}\) By adopting the same “full cooperation” and “all appropriate inquiry” required by the innocent landowner defense, Congress has provided landowners with fair notice of what they must do in order to be exempted from liability.\(^{108}\) Although a determination of what a property owner must do to

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104. 42 U.S.C. § 9607(q) (2003); Edwards, *supra* note 56, at 100. See generally Contaminated Aquifers Policy, *supra* note 71, at 34,790 (stating that the EPA does not intend to pursue a landowner whose groundwater has become contaminated through no fault of his own).


106. 42 U.S.C. § 9607(q)(1)(A)-(B) (2003). If contamination of groundwater occurs “solely as a result of subsurface migration in an aquifer,” the statute does not require the owner to investigate the extent of groundwater contamination or remediate except in accordance with the EPA’s existing policy. § 9607(q)(1)(D) (2003); see Contaminated Aquifers Policy, *supra* note 71.


prevent or limit exposure to contaminants on his land is a subjective
determination, the Act does indicate that it will not typically require
groundwater investigations and remediation systems.\textsuperscript{109}

However, those qualifying for the new “contiguous landowner
defense” should, in most cases, also qualify for CERCLA’s original
“third party defense.”\textsuperscript{110} This third party defense is somewhat easier
to establish in that it does not require affirmative action to “stop any
continuing release,” a showing of the landowner’s due diligence prior
to purchase, or a showing of “full cooperation” with the EPA
afterward.\textsuperscript{111} Thus, the new defense may be of limited utility in
practice.\textsuperscript{112}

3. \textit{Bona Fide Prospective Purchaser Exemption and Windfall

Lien}

Prior to the Brownfields Act, a prospective purchaser had to
consider the risk that, as a “current owner/operator,” the EPA would
hold him liable for remediation of any and “all contamination [of his
property] regardless of when the contamination occurred.”\textsuperscript{113} Since
1989, the EPA has provided a prospective purchaser agreement
program through which prospective purchasers could negotiate site-
specific settlements with the EPA similar to those available to de
minimis contributors.\textsuperscript{114} The EPA typically uses the agreements when
a purchaser needs financial aid to fund the cleanup and remediation
of a particular site.\textsuperscript{115} Although useful for purchasers, prospective
purchaser agreements generally offer no protection for the seller of
contaminated property, and they may be time-consuming and costly
to develop.\textsuperscript{116}

\textsuperscript{109} Robert D. Fox & Paul McIntyre, \textit{A Summary and Analysis of the Federal Small Business

Notably, the contiguous property owner exemption does not address the possibility of pollution
migrating to a neighbor’s land via soil leaching. Wiegard, \textit{supra} note 96, at 146.

\textsuperscript{110} See Reisch, \textit{supra} note 59, at 101; Mitchell, \textit{supra} note 88.

\textsuperscript{111} Reisch, \textit{supra} note 59, at 101.

\textsuperscript{112} Id.

\textsuperscript{113} Dunsky, \textit{supra} note 43, at 1.

\textsuperscript{114} See Guidance on Agreements, \textit{supra} note 70; \textit{supra} Part II.B.3.

\textsuperscript{115} Warren, \textit{supra} note 56.

\textsuperscript{116} Id.; Rader, \textit{supra} note 99.
To minimize the risks associated with brownfield redevelopment, Congress has now provided a more efficient and inclusive approach to prospective purchasers: the bona fide prospective purchaser exemption.\(^{117}\) This new provision may be the most effective tool created by the Brownfields Act to promote brownfield redevelopment.\(^{118}\)

By making a bona fide prospective purchaser exemption available, the Brownfields Act generally eliminates the need for party-specific agreements.\(^{119}\) The Amendment allows prospective purchasers to "have the liability protection by operation of law currently available only through a prospective purchaser agreement without the time and expense of negotiating such an agreement . . . or committing to perform a cleanup."\(^{120}\) The exemption furthers the EPA's long-standing policy of non-involvement in private real estate transactions.\(^{121}\) In addition, by limiting the CERCLA liability of qualifying bona fide prospective purchasers, the Brownfields Act makes a federal covenant not to sue, typically acquired through a prospective purchaser agreement, unnecessary.\(^{122}\)

To qualify, the prospective purchaser must establish essentially the same elements required for the contiguous landowner defense, but he does not need to show that he had no reason to know of the contamination at the time of purchase.\(^{123}\) In fact, the purpose of the

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\(^{118}\) See Mitchell, supra note 88.

\(^{119}\) See Warren, supra note 56.

\(^{120}\) Id.; Rader, supra note 99, at 2-3.

\(^{121}\) Memorandum from Barry Breen, Director, Office of Site Remediation Enforcement to Superfund Senior Policy Managers and Regional Counsels 3 (May 31, 2002) (on file with Georgia State University Law Review).

\(^{122}\) Id. The Memorandum highlights some instances where:
the public interest will be served by entering into [Prospective Purchaser Agreements] or some other form of agreement . . . . First, where there is likely to be a significant windfall lien and the purchaser needs to resolve the lien prior to purchasing the property . . . . Second, . . . projects in which a [Prospective Purchaser Agreement] is necessary to ensure that the transaction will be completed and the project will provide substantial public benefits to, for example, the environment, a local community because of jobs created or revitalization of long blighted, under-utilized property, or promotion of environmental justice.

\(^{123}\) Id. at 3-4 (footnotes omitted).

\(^{123}\) Reisch, supra note 59, at 101.
exemption is to protect and encourage those with full knowledge of the contamination to purchase and redevelop the property.\textsuperscript{124}

There is a possibility that this liability exemption may result in speculative real estate purchases by buyers who have no intention of redeveloping the site but who are only holding it in hopes that its value will rise.\textsuperscript{125} To quell this risk, Congress enacted a windfall lien provision as a caveat to the bona fide prospective purchaser exemption.\textsuperscript{126} Should the EPA expend more resources than initially projected in remediation of a site that is subject to a prospective purchaser agreement, the United States will have a lien “equal to the amount by which the agency’s cleanup increased the fair market value of the property” on the facility for the unrecovered response costs.\textsuperscript{127}

Critics point out that this provision seems to contradict the underlying purpose of the Brownfields Act to spur redevelopment efforts.\textsuperscript{128} It may introduce too many unknowns for a prospective purchaser’s comfort, thereby reducing the exemption’s effectiveness until the EPA issues clarifying regulations or until the EPA’s use of the regulation answers developers’ questions.\textsuperscript{129} In addition, the fact that the defense is affirmative means that a purchaser can plead this defense in the context of litigation.\textsuperscript{130} In contrast to the old strategy of negotiating a party-specific prospective purchaser agreement prior to the purchase of the property, a purchaser may not raise the affirmative defense until after he has expended resources both on the purchase of the brownfield property and on his legal defense.\textsuperscript{131} Thus, while reducing red tape for the EPA, Congress has created a situation

\textsuperscript{124} See Duskey, \textit{supra} note 43; Mitchell, \textit{supra} note 88.
\textsuperscript{125} Collins, \textit{supra} note 4, at 322-23.
\textsuperscript{127} Duskey, \textit{supra} note 43.
\textsuperscript{128} Weresh, \textit{supra} note 87, at 208.
\textsuperscript{129} Duskey, \textit{supra} note 43. For example, it is unclear whether the lien covers only those costs incurred by the EPA after acquisition by the prospective purchaser or all pre-acquisition costs as well. \textit{See} Mitchell, \textit{supra} note 88. Also, critics have questioned whether the lien will be subordinate to other lien interests. \textit{See} Kelley Drey, \textit{Taming the Superfund Juggernaut: Impacts of the Small Business Liability Relief and Brownfields Revitalization Act – Part II, The Metropolitan Corp. Couns. (Mid-Atlantic Edition)}, June 2002, at 12.
\textsuperscript{130} See Wiegard, \textit{supra} note 96, at 149-50.
\textsuperscript{131} \textit{See} id.
that offers less certainty to prospective purchasers as they consider an investment in a brownfield property, and it has created a legal defense for which parties may not be sure they qualify until it is too late.\textsuperscript{132}

4. Generator Liability Reforms

The Brownfields Act also provides liability relief to small businesses that may be liable as generators or transporters under CERCLA through its "de micromis" and "municipal solid waste" exemptions.\textsuperscript{133}

a. De Micromis Exemption

While CERCLA already provided an exemption for de minimis generators or transporters,\textsuperscript{134} the Brownfields Act further provides relief from liability to parties who disposed of or transported very small quantities of hazardous wastes.\textsuperscript{135}

However, this de micromis exemption only applies if the party sent the waste to an NPL site—one of the 1200 or so most contaminated sites in the country; the party will still be liable for wastes he sent to less contaminated sites.\textsuperscript{136} In addition, the defense only functions to remove liability for response costs, and thus, it may not relieve a de micromis PRP from liability for damage to natural resources or liability under other federal or state statutes for the same waste.\textsuperscript{137}

\begin{footnotes}
\footnote{132. See id.; John Watson, The Wrath of Superfund May Be Softening: The Brownfields Revitalization Act is the Latest in a Number of Attempts to Breathe New Life into Toxic Lands, 26 NAT'L L. J., at S1 (2003).}
\footnote{133. Reisch, supra note 59, at 102.}
\footnote{134. See supra Part II.B.3.}
\footnote{135. See Mitchell, supra note 88; Dunskey, supra note 43. The Brownfields Act states that a party qualifies if all or part of the disposal, transport, or treatment occurred before April 1, 2001 and if “the total amount of the material . . . was less than 110 gallons of liquid materials or less than 200 pounds of solid materials.” 42 U.S.C. § 9607(o)(1)(A)-(B) (2003); Reisch, supra note 59, at 102. However, the EPA Administrator may change these limits through regulation. 42 U.S.C. § 9607(o)(1)(A) (2003).}
\footnote{136. Reisch, supra note 59, at 102.}
\footnote{137. See Kelley Drye, Taming the Superfund Juggernaut: Impacts of the Small Business Liability Relief and Brownfields Revitalization Act – Part III, THE METROPOLITAN CORP. COUNS. (NORTHEAST EDITION), July 2002, at 11.}
\end{footnotes}
Thus, the statute greatly limits the use of the exemption in private litigation, and it can only provide limited liability relief.\textsuperscript{138}

\textit{b. The Municipal Solid Waste Exemption}

The "municipal solid waste" ("MSW") exemption is similarly limited to wastes disposed of at NPL sites, and it exempts from liability individual households, businesses, and non-profit organizations that contributed potentially hazardous municipal solid waste if they also employed fewer than one hundred full-time employees.\textsuperscript{139} As with the de micromis exemption, Congress’s limitation of this exemption’s use to actions regarding waste sent only to NPL sites greatly curtails the exemption’s utility in private litigation.\textsuperscript{140} The MSW exemption takes into account both the type of waste sent and the identity of the party sending it.\textsuperscript{141} Under the Brownfields Act, municipal solid waste encompasses items from "food and yard waste" and "disposable diapers" to "glass and metal food containers" and "household hazardous waste."\textsuperscript{142}

Neither the de micromis exemption nor the MSW exemption applies if the government determines that the waste for which the business is responsible contributed significantly, either individually or in the aggregate, to the cost of the response action or if the party seeking the exemption failed to provide the requisite cooperation to the EPA.\textsuperscript{143} Moreover, the above determinations as to a party’s eligibility for the exemption are not subject to judicial review.\textsuperscript{144}

\textsuperscript{138} See Mitchell, supra note 88, at 7 (noting that a party could still argue in private litigation that the court should consider his de micromis status as an "equitable factor").

\textsuperscript{139} 42 U.S.C. § 9607(p) (2003). Municipal solid waste is "household [waste and/or] commercial, industrial, or institutional . . . waste [that] is essentially the same as waste normally generated by a household." \textit{Id}. 

\textsuperscript{140} Mitchell, supra note 88.

\textsuperscript{141} 42 U.S.C. § 9607(p) (2003) (exempting a party otherwise liable as a generator if he disposed only of municipal solid waste and if the party is 1) an owner, operator, or lessee of residential property; 2) a small business concern employing an average of not more than 100 full-time employees over the past three years; or 3) a charitable organization that employs not more than 100 individuals).


\textsuperscript{143} \textit{Id.} § 9607(o)-(p) (2003); Mitchell, supra note 88.

\textsuperscript{144} 42 U.S.C. § 9607(o)(3), (p)(3) (2003). Additionally, the de micromis exemption is not available to a party who has been criminally convicted because of conduct related to the disposal. \textit{Id.} § 9607(o)(2)(B).
Thus, the Brownfields Act allows government officials to deny a party’s eligibility unilaterally.\(^{145}\)

5. **Burden of Proof**

The Brownfields Act clarifies who bears the burden of proof in enforcement cases.\(^{146}\) Generally, if a federal, state, or local government brings an enforcement action, the defendant claiming the exemption must bear the burden of proof; however, where private parties initiate the litigation, the plaintiff must prove that the defendant does not qualify for the exemption that he claims.\(^{147}\) Additionally, in cases where a non-governmental PRP brings a contribution action and fails to prove that the defendant does not qualify for the de micromis or MSW exemption, the PRP is liable for the defendant’s attorney and expert witness fees.\(^{148}\) This new clarification is already affecting CERCLA litigation because the regulated community is acknowledging that the importance of good record-keeping is now even more paramount and because the pool of PRPs from which one could seek contribution may, for practicality’s sake, be shrinking.\(^{149}\)

6. **Changes to the EPA’s De Minimis Settlement Authority**

Section 122 of CERCLA authorizes the President to enter into settlement agreements with PRPs to perform any remedial action determined by the President to be “in the public interest . . . in order to expedite effective remedial actions and minimize litigation.”\(^{150}\) Subsection (g) encourages the President to enter into such settlement agreements when the settling party contributed a comparatively minimal amount of substances that are also comparatively minimal in their toxicity.\(^{151}\)

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146. Edwards, supra note 56, at 101.
147. Id.; Reisch, supra note 59, at 102.
148. Fox & McIntyre, supra note 109, at 22; Weresh, supra note 87, at 204.
149. Drye, supra note 137, at 11; Reisch, supra note 59, at 102.
151. Id. § 9622(g).
The Brownfields Act further empowers the President (or the EPA as his representative) to "offer expedited de minimis settlements to parties that have a 'limited ability to pay'" and adds additional conditions for expedited settlements. The Amendment also requires a party that settles with the EPA to waive its claims against other PRPs (e.g., for a later contribution action), and it declares that a settling party is still subject to EPA information requests. While the EPA can refuse to settle on the basis of a party's noncompliance with an information request or on the basis of a party's interruption of the cleanup process, it must promptly determine eligibility for a settlement and give written notification of the reasons for its decision. Notably, in § 9622(g)(11), Congress allows no judicial review of the EPA's settlement decisions, leaving parties seeking to settle somewhat at the mercy of federal regulators.

C. Deference to State Cleanup Programs

Upon a state's request, the President "generally shall" decline to list an eligible site on the NPL if he determines that a state's own response action is adequately addressing the site. One year after the proposal of the site for the NPL, however, the President may re-evaluate the site to gauge the progress made toward cleanup, and if unsatisfactory, the President may then list the site on the NPL.

The Brownfields Act also limits the President's ability to initiate administrative or judicial action against a site that is undergoing a state-led response action. However, this increase in states' authority to regulate brownfield redevelopment does not come without cost. While gaining some regulatory muscle, state

154. 42 U.S.C. § 9622(g)(8)(B), (g)(9) (2003); Reisch, supra note 59, at 102.
157. Id. § 9605(h)(2).
158. Reisch, supra note 59, at 102.
159. See Collins, supra note 4, at 305.
authorities may suffer because they will have less ability to spur remediation efforts by threatening federal involvement.160

D. Promotion of State Brownfields Programs

Since much of CERCLA and the EPA’s activities under CERCLA are directed at only the most contaminated sites nationwide, “[n]o mechanism exists for a landowner to resolve its cleanup liability at contaminated sites that are not the subject of EPA action, nor does EPA have sufficient resources to approve private cleanups.”161 In the wake of slow-moving federal initiatives and a general lack of direction, congressional inaction has left the states to remediate hazardous waste contamination of non-NPL sites on their own.162 However, because CERCLA’s rigorous liability scheme applies to all contaminated properties (not just those listed on the NPL), the EPA’s failure to collaborate with state programs on liability relief has weakened state attempts to break down barriers to brownfield redevelopment.163 Since state programs cannot offer relief from federal enforcement actions, developers have faced potentially open-ended liability.164 The EPA does not channel state brownfield programs through an approval process, and prior to enactment of the Brownfields Act, it did not formally defer to state programs in the absence of a memorandum of agreement between the EPA and that particular state.165

160. Id.
161. Rader, supra note 99.
162. See Edwards, supra note 56, at 104. Since Minnesota enacted the first voluntary cleanup program (“VCP”) in 1988, at least forty-seven other states and the District of Columbia have followed suit. Id.; see also Eisen, supra note 1, at 10422 (noting that “[t]he primary impetus for brownfields redevelopment at the state level has come from programs known broadly as voluntary cleanup programs”).
163. See Rader, supra note 99.
164. See id. Developers who pursue brownfield cleanup efforts under a state program may resolve their liability under the state statute, but the risk of federal action under CERCLA still stands. Id. While federal action is less likely against a site that a party has remediated under a state program, it is still a possibility that may reasonably dissuade potential developers. Id.
165. Rader, supra note 99. As of February of 2002, the EPA had entered into memorandum of agreement with seventeen states, thereby officially accepting those states’ voluntary cleanup programs. Edwards, supra note 56, at 109.
1. **Enforcement Bar**

Under the Brownfields Act, the EPA must now refrain from initiating administrative or cost recovery actions against sites currently undergoing a state response plan initiated after February 15, 2001.\(^\text{166}\) Congress has barred the EPA from enforcement only if the state "(i) maintains a record of sites where response actions have been completed, (ii) indicates whether the site is suitable for unrestricted use, and (iii) identifies any institutional controls relied upon in the remedy."\(^\text{167}\)

However, the EPA may still have authority to bring an administrative or enforcement action if the state requests this action, if hazardous waste migrates across state lines, if new information has come to bear on the property since approval of the state cleanup action, or if the EPA determines that the site poses an imminent and substantial danger.\(^\text{168}\) Additionally, the bar only applies to parties conducting or completing a response action and, as such, may not protect future owners or others involved in the development who are not actively involved in conducting the site remediation.\(^\text{169}\) Other shortcomings of the enforcement bar are that it does not provide protection from EPA enforcement actions at petroleum-contaminated sites and that it does not extend to bar federal enforcement under RCRA or the Toxic Substances Control Act.\(^\text{170}\)

The extent to which the EPA exercises its authority to reopen settled state remediation efforts will clarify the extent to which developers can reasonably rely on the EPA's self-imposed bar to federal enforcement actions.\(^\text{171}\)

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168. *Id*; Rader, *supra* note 99. Although Congress has not defined "imminent and substantial endangerment," past judicial interpretation of similar language indicates that courts will interpret it broadly. Rader, *supra* note 99.
170. *Id*.
2. Memoranda of Agreement

A completed memorandum of agreement with an individual state certifies that the EPA will refrain from pursuing sites that “have been the subject of successful action in a [voluntary cleanup program ("VCP")].”\textsuperscript{172} When the EPA enters into a memorandum of agreement with a state, it effectively acknowledges that state’s VCP and partners with that state in collaborative remediation efforts.\textsuperscript{173} The EPA’s commitment to memoranda of agreement, the Brownfields Act, and the realistic unlikelihood that the EPA will expend its limited resources pursuing a site that a party has already remediated under a state program have “erased enough uncertainty [about federal liability] to lead to a dramatic increase in the number of sites addressed in VCPs.”\textsuperscript{174}

E. Increased Funding

Perhaps most importantly, the Brownfields Act increases federal funding for brownfield redevelopment from $90 million per year to $250 million per year for the next five years.\textsuperscript{175} Although the language only authorizes and does not actually appropriate funding, Congress directed $150 million per year for site assessment, $50 million per year for site cleanups, and $50 million per year specifically for cleanup of sites contaminated with petroleum products.\textsuperscript{176}

\textsuperscript{172} Eisen, supra note 1, at 10424.
\textsuperscript{173} See GERRARD, supra note 102, § 22.02[3][b]. The memorandum of agreement typically outlines the roles and responsibilities of the EPA and the state during the cleanup process. Id. For a map of the states with current memoranda of agreement with the EPA, see United States Environmental Protection Agency, \textit{Map of States with Memoranda of Agreement on State Voluntary Cleanup Programs}, http://www.epa.gov/brownfields/html-doc/usmoamap.htm.
\textsuperscript{174} Eisen, supra note 1, at 10424.
\textsuperscript{175} Rader, supra note 99; Edwards, supra note 56, at 102-03.
\textsuperscript{176} Edwards, supra note 56, at 102-03. This appropriation to petroleum cleanup is a marked departure from CERCLA because petroleum is not a "hazardous substance" regulated under the statute. See 42 U.S.C. § 9601(14) (2003). However, even with this direction, President Bush only requested $200 million for brownfields redevelopment in 2003. Weresh, supra note 87, at 218. The EPA considers its first round of funding under the Brownfields Act to have been "tremendously successful," and in 2003, it distributed $73.1 million under the new funding programs. REUSING LAND RESTORING HOPE, supra note 9, at 50. The EPA awarded $30.7 million in 117 assessment grants, $12 million in 69 cleanup grants, and $30.4 million in 28 revolving loan fund grants. GERRARD, supra note 102, § 27.04[2][j].
Local and state government agencies should benefit from $50 million per year in grants awarded for state brownfield initiatives. To qualify for federal grant money under the Brownfields Act, "state programs must contain specific elements including an inventory of sites, oversight and enforcement authorities to ensure that cleanups will protect public health and be conducted in compliance with applicable federal law, public participation and a mechanism for approval of cleanup plans and confirmation of cleanup completion."  

The Brownfields Act authorizes a funding program to aid governmental or quasi-governmental redevelopment authorities in site inventory, characterization assessments, and remediation efforts. In addition, the Brownfields Act authorizes funding to support state voluntary remediation programs directly; states with acceptable brownfields programs or with VCPs that are already the subject of a Memorandum of Agreement with the EPA will receive these grants. A state that has not participated in a Memorandum of Agreement with the EPA, but nevertheless has developed a local brownfields program, will likely be eligible for funding if its program (1) requires adequate oversight of cleanup efforts, (2) provides opportunities for meaningful public participation, (3) employs standards that are protective of human health and the environment, (4) devotes sufficient resources to the program in order to ensure that response actions are timely and streamlined, and (5) shows financial capability to complete a response action should a volunteering party abandon it. States may use the grant money to "establish or enhance such programs, or to capitalize a revolving load [sic] fund

Although they represented 37 states and 7 tribes, most of the funded parties were cities and local governments who had been former participants in the EPA's brownfields pilot program. *Id.*

177. *Rader, supra note 99.*

178. *Id.*


for Brownfield remediations, or to purchase or create an insurance pool to provide response action funding.”

IV. STATE VOLUNTARY CLEANUP PROGRAMS ("VCPs")

Virtually every state has developed its own program to promote the redevelopment of brownfield sites within its borders. As compared to the roughly 1200 sites on the NPL, the nation's over 500,000 brownfield sites, which are not eligible for Superfund funding, impose an enormous responsibility on state and local governments. Partly because Congress originally enacted CERCLA to target large-scale, highly contaminated sites, states have had to contribute to the effort on a different level and on a scale appropriate to the smaller sites within their own jurisdictions. This division of labor is logical given the specialized knowledge of state and local governments when it comes to identifying opportunities for effective redevelopment in their own backyards. Further, cities may be deserving of an even larger role than that currently granted to them under CERCLA and many state laws.

The goal of state programs is typically to prevent contaminated property from falling through the cracks and to expedite investigation and remediation of non-NPL sites while providing prospective developers with some indication of their potential liability for cleanup costs. The programs are "voluntary" because they depend on landowners and developers to make the initial contact with the state program, perhaps with an investigation and remediation

183. Edwards, supra note 56, at 104; Eisen, supra note 1, at 10422 n.28 (noting that almost every state has "an enforcement-based approach for remediating contaminated sites modeled on the federal CERCLA law").
184. See Whitney, supra note 58, at 71 n.62.
185. Id. at 69.
186. Id. at 93-97 (arguing that cities are in a unique position to address the problem of brownfields redevelopment and thus CERCLA should treat them as "states" and enable them to bring stronger cost recovery actions).
187. Edwards, supra note 56, at 104.
proposal for a particular piece of property.\textsuperscript{188} In return, the state provides some form of liability protection such as written assurances that the state will bring no further enforcement actions, certificates of cleanup completion, or formal covenants not to sue.\textsuperscript{189} This developer-driven approach is advantageous in that it encourages active participation by the private sector and is therefore less labor-intensive for government administrators of the program.\textsuperscript{190}

A. \textit{Common Elements of State VCPs}

Although each program can vary widely from the next, three common provisions of state VCPs are: (1) release of participants from liability to the state if they follow state cleanup criteria; (2) varying levels of remediation standards; and (3) the use of physical barriers to block migration of hazardous substances.\textsuperscript{191} In addition, some state programs provide lender liability exemptions and financial incentives to render the redevelopment of a brownfield site a viable business option.\textsuperscript{192}

1. \textit{Flexible Remediation Standards}

In contrast to CERCLA, which imposes a uniform health-based cleanup standard, many states employ varying remediation standards, which depend on the intended future use of the site.\textsuperscript{193} For example, the standard will hold an industrial site that the owner will return to industrial use after remediation to a lower cleanliness standard than a site that the owner will use for residential development.\textsuperscript{194} State programs can rely on various engineering alternatives (for example, concrete capping of hazardous waste) and institutional controls (for

\textsuperscript{188} Eisen, \textit{supra} note 1, at 10422. Some states, such as Massachusetts, channel brownfields cleanup efforts through mandatory waste site cleanup regulations. \textit{GERRARD, supra} note 102, § 22.05[1].

\textsuperscript{189} Kodish, \textit{supra} note 62, at 414.

\textsuperscript{190} See Eisen, \textit{supra} note 1, at 10422.

\textsuperscript{191} John Bagwell, \textit{The Brownfields Revitalization Amendment Act: DC’s So-Slow Site Cleanup—Don’t it Make Your Brownfields Blue?}, \textit{26 WM. & MARY ENVTL. L. & POL’Y REV.} 855, 862-63 (2002); Robertson, \textit{supra} note 53, at 1101.

\textsuperscript{192} See Rubenstein, \textit{supra} note 6, at 170-71.

\textsuperscript{193} Bagwell, \textit{supra} note 191, at 868.

\textsuperscript{194} See Collins, \textit{supra} note 4, at 310.
example, deed restrictions to regulate future permissible uses of the property) that are not available at the federal level.\(^\text{195}\)

This flexible approach, applied with a statewide default standard, has proven to be instrumental to the success of many VCPs, and a report on the success of state VCPs has called it a "critical step."\(^\text{196}\) The costs of compliance with a state VCP are typically lower and more predictable than comparable compliance with the federal Superfund program.\(^\text{197}\) In addition, a tiered, risk-based approach to remediation can provide a greater degree of predictability and can allow developers to identify more precisely what the state program will require of them.\(^\text{198}\)

2. **Streamlined Administrative Procedures**

Many VCPs impose deadlines upon the government’s program administrators for actions such as the review of cleanup proposals and site mitigation reports.\(^\text{199}\) This is an important feature because developers are more likely to consider dealing with a more timely and streamlined administrative procedure.\(^\text{200}\)

3. **Financial Incentives**

States have also recognized the benefits of financial incentives to brownfield redevelopment, and many have incorporated some type of tax relief into their VCPs.\(^\text{201}\) Since the cost of brownfield remediation exceeds the resources of most local governments, state programs must stimulate significant private funding.\(^\text{202}\) Additionally, without financial incentives and adequate infrastructure, a local government attempting to regenerate its urban industrial neighborhoods has

\(^{195}\) Eisen, *supra* note 1, at 10423.


\(^{197}\) See Eisen, *supra* note 1, at 10423.

\(^{198}\) Edwards, *supra* note 56, at 105.

\(^{199}\) Bagwell, *supra* note 191, at 869.

\(^{200}\) See id.

\(^{201}\) Edwards, *supra* note 56, at 106.

\(^{202}\) DEASON ET AL., *supra* note 54, § 1.1.
difficulty competing with a more rural local government actively soliciting development of its greenfields. Developments can often complete their projects for less than the projected cost through greenfield development, while the same project in conjunction with a brownfield redevelopment effort may cost more than the projected cost largely because of the added expenses associated with the rejuvenation of the neglected brownfield community itself.

Thus, flexible cleanup standards, timely governmental action, and the availability of state funding delivered through financial incentives are key contributors to the success of state VCPs.

B. Criticisms of State VCPs

Critics of a flexible approach to cleanup standards argue that such variability will hurt the environmental and public health of communities.

One danger of the states’ more flexible approach is that the cleanup standards may turn out to be insufficient, and sites once certified as “clean” will require additional cleanup and will have exposed the unsuspecting public to hazardous pollution. Even if the cleanup is sufficient, varying degrees of site cleanliness throughout a city or state may become a monitoring burden for the EPA or state environmental agencies.

Additionally, compliance with institutional controls is a common element in many of the exemptions set forth in the Brownfields Act, but neither the EPA nor Congress has directed states to catalog this information in a readily accessible form. Although it currently satisfies the Act’s requirement of “all appropriate inquiry,” a routine

203. See id. § 8.4.
204. See id.
205. E.g., Collins, supra note 4, at 310.
206. Eisen, supra note 1, at 10424.
207. Collins, supra note 4, at 310. The EPA has reported that it is working with all levels of state and local governments to create a nationwide network to track institutional controls and long-term cleanup requirements assigned to remediated properties. REUSING LAND RESTORING HOPE, supra note 9, at 53.
ASTM Phase I Site Assessment typically will not reveal institutional controls on a piece of property; thus, prospective purchasers may need to explore further. 209 Responsible parties have already attempted to assign the burden of compliance with these institutional controls to the new or contiguous landowner. 210 Until the EPA issues more specific guidance, prospective purchasers should research the possibility of any institutional controls in place on their investment properties; failure to do so may create the risk of losing an otherwise viable defense to liability under CERCLA, as amended by the Brownfields Act. 211

Another concern is that leaving too many decisions about a property’s future use to developers instead of regulators will result in ad hoc, disjointed urban planning that will fail to meet the needs of developing (or redeveloping) cities. 212 A site cleaned to one standard one day may not be clean enough for proposed future uses, and owners may not clean remediated properties in a consistent manner that would support urban planning efforts. 213 In addition, because cleanup to a lower standard will be cheaper, a tiered system may encourage developers to industrialize already run-down urban neighborhoods, which are most at risk of suffering from environmental injustice. 214

Moreover, CERCLA’s overlapping state and federal jurisdiction over contaminated sites presents an inherent weakness in state voluntary cleanup programs, and this can jeopardize a state program if the state and federal roles are not clearly defined. 215

209. Id. Title companies are usually equally unhelpful in identifying institutional controls. Id.
210. Id. at 1279.
211. See id.
212. Eisen, supra note 1, at 10424. Eisen argues that one should not view site remediation as an individual project but as “components of an ongoing effort to revitalize a city,” and therefore, it should incorporate significant public participation. Id.
213. See Collins, supra note 4, at 310.
214. Id.
215. Kodish, supra note 62, at 415; see also UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, BROWNFIELDS LEGISLATION LISTENING SESSION: ENVIRONMENTAL AND LAND USE ORGANIZATIONS, Apr. 8, 2002, (expressing concerns about the dangers of the effect of federally funded planning on local planning efforts), http://www.epa.gov/swerosps/bf/pdf/eorgs.pdf.
Despite these concerns, Congress and the EPA have expressed their support for state brownfield programs through the Brownfields Act’s increase in both funding and deference to state programs. In fact, the House Commerce Committee’s November 2000 Report on the progress of the EPA’s Brownfields Initiative recommended that the EPA avoid competing with state programs and, instead, focus on supporting them.216 The Brownfields Act takes a step in that direction.

V. GEORGIA’S EFFORTS TO REGULATE HAZARDOUS WASTE AND PROMOTE BROWNFIELDS REDEVELOPMENT

Georgia is one state that has responded to the problem of brownfield redevelopment. In 2002 and 2003, the Georgia legislature passed legislation to remedy a shortfall in the state’s Hazardous Waste Trust Fund and to motivate redevelopment efforts.217

The 2002 Georgia General Assembly amended both the Georgia Hazardous Site Response Act (“HSRA”)218 and the Georgia Hazardous Site Reuse and Redevelopment Act (“Reuse Act”)219 via House Bill 1406 (“Bill”).220 Prior to the passage of the Bill, Georgia’s VCP provided little relief to developers because it was underfunded, covered only properties listed on the Georgia Environmental Protection Division’s Hazardous Site Inventory (“HSI”), and

216. Collins, supra note 4, at 314.
217. See Laurel A. David, Conservation and Natural Resources; Waste Management, 19 GA. ST. U. L. REV. 59, 59 (2002). Unfortunately, in the summer of 2003, legislators withdrew $4 million from the Hazardous Waste Trust Fund (leaving only $18 million to address cleanups at more than 40 contaminated sites) and $7 million from a similar fund (used specifically to clean up scrap tires) to balance the state budget. Lee Shearer, Decrease in Funds Could Slow Cleanup, AUGUSTA CHRONICLE, June 2, 2003, at A01; Stacy Shelton, Toxic Cleanups Stalled as State Diverts Funds, ATL. J. CONST., Dec. 28, 2003, at F1. Legislators are coming under attack for this move, which some claim amounts to a breach of trust and is sure to slow environmental cleanup efforts by the EPD. Shelton, supra, at F1.
provided very little flexibility with regard to HSRA’s onerous cleanup standards.  

The Act (1) altered the eligibility requirements for participation in Georgia’s VCP by broadening the class of eligible properties from only those listed on the HSI to any property that has experienced a “preexisting release”; (2) exempted a qualifying purchaser from testing and remediating groundwater contamination; and (3) revised HSRA’s fee structure and liability scheme in order to ensure the state will more effectively recover its response costs from responsible parties.  

Through its relaxation of developers’ responsibility for groundwater cleanup, the General Assembly aimed to encourage participation in Georgia’s VCP. Indeed, because groundwater is often the most difficult element of a site to analyze and remediate, this alleviation may be effective in encouraging VCP participation. However, critics wonder whether the exemption will ultimately prove to be too dangerous to public health and environmental integrity.  

The regulated community is cautiously awaiting additional rules and regulations to be promulgated by the Georgia Environmental Protection Division (“EPD”), which will more clearly define the protection. For example, it is unclear whether groundwater remediation, which the legislature has purported to exempt, will nevertheless have to be conducted to satisfy other provisions of the Act. Developers are also wondering if the Act still requires them to delineate the groundwater contamination to background 

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221. Id. But see Will Pinkston, Waste-Site Cleanup Fund Falls Short of Ga.’s Needs, WALL ST. J., Mar. 29, 2000, at S1 (acknowledging that, even with the funding shortfall, Georgia’s trust fund remained strong in comparison to neighboring states’ funds in terms of size and performance).  


224. Id.; David, supra note 217, at 61.  


226. See generally Interview with Marc Biondi, Attorney, Department of Natural Resources, in Atlanta, Ga. (October, 2002).  

227. Id.  

228. See Esrey, supra note 220, at 11.
concentrations.\textsuperscript{229} Even if the Bill does not require groundwater remediation, delineation of the vertical and horizontal extent of contamination alone is an expensive process, and it is a cost that a developer would have to consider in any decision to redevelop a brownfield.\textsuperscript{230}  

Similar to the federal Brownfields Act, Georgia’s HSRA also exempts bona fide prospective purchasers from liability to the state and to third party contribution claims.\textsuperscript{231} However, to qualify for the exemption, prospective purchasers must present a corrective action plan to the EPD and enter into a formal consent agreement prior to initiating cleanup.\textsuperscript{232} Only when the purchaser completes the cleanup in accordance with EPD standards will the EPD certify that purchaser’s status as a bona fide purchaser under the statute.\textsuperscript{233} Although the immunity dates to the execution of the consent order, a party’s failure to comply with EPD standards will cause an automatic revocation of such protection.\textsuperscript{234} In this way, Georgia’s bona fide purchaser liability relief may be more valuable to developers than the federal exemption because it offers developers specific expectations and a reasonable assurance of protection prior to purchase and remediation of brownfield property.\textsuperscript{235} Additionally, Georgia employs techniques typical of state VCPs such as varying remediation standards depending on the future use of the property and physical barriers to contain contamination.\textsuperscript{236}  

Since Georgia has not entered into a Memorandum of Agreement with the EPA, developers have no formal liability protection from federal claims brought against them under CERCLA and no protection from third party claims under alternate statutes.\textsuperscript{237} The EPA will, however, decline to bring an enforcement action against a

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Gerrard, supra note 102, § GA.01[6].
\item Id. § GA.01[3][a].
\item Id.
\item Id. § GA.01[6].
\item See supra Part III.B.3.
\item See supra Part III.B.3.
\item Esrey, supra note 220, at 11, 13.
\end{enumerate}
\end{footnotesize}
site that a party is remediating under a state VCP if the state program and the particular site meet certain conditions. Thus, the federal Brownfields Act should provide reasonable assurance that the EPA will not pursue this type of site even in the absence of a formal Memorandum of Agreement between the EPA and Georgia.

To further encourage brownfield redevelopment, the General Assembly passed a bill in 2003 providing for preferential tax treatment of contaminated properties that are undergoing EPD-approved corrective action. Approved by almost seventy percent of Georgia voters the previous November, the bill creates a separate tax classification for redeveloped brownfields. The tax incentive passed by the General Assembly allows prospective redevelopers who comply with EPD cleanup standards to freeze the “pre-clean” fair market value of an eligible site for up to ten years or until the developer has saved as much in taxes as he spent on site assessment and remediation. By taxing remediated hazardous waste sites at a different rate than non-contaminated property, legislators hope the new law will complement the state’s liability relief measures passed in 2002 and provide a needed financial incentive to redevelop brownfields in Georgia.

238. See supra Part IV.
239. See supra Part IV; GERRARD, supra note 102, § GA.01[7].
242. See Arnall Golden Gregory LLP, supra note 240.
CONCLUSION

The recent federal amendment to CERCLA represents a positive congressional initiative to promote and accelerate brownfield revitalization efforts. It clarifies some ambiguities that have thus far limited the use of some CERCLA defenses, provides new limitations on liability, and, perhaps most importantly, financially and substantively supports state-led efforts to return contaminated property to productive use.\textsuperscript{244} Congress’s authorization of increased funding for state programs should encourage states that do not have brownfield programs to develop and adopt them, and states that already have active programs will make sure they comply in order to be eligible for funding.\textsuperscript{245} Furthermore, this standardization of remediation programs will provide needed certainty to developers and state officials alike, and it should lead to an overall increase in the number of response actions initiated at the state level.\textsuperscript{246}

The responsibility now falls on the EPA and the courts to interpret certain facially ambiguous statutory provisions.\textsuperscript{247} For example, they must clarify uncertainties about the extent of the windfall lien before developers will rely on the bona fide prospective purchaser exemption to any great extent.\textsuperscript{248} Moreover, the true effect on the regulated community of the defenses requiring “all appropriate inquiry” will largely depend on the EPA’s forthcoming regulations.\textsuperscript{249}

Courts and agencies must interpret and enforce the statute in a way that advances the original goal of CERCLA: to remediate contaminated property so as to protect human health and the environment. But, once the courts and agencies clarify the new provisions through regulation and litigation, developers are likely to enjoy much more predictability and efficiency; they will be armed

\textsuperscript{244} See supra Part III.
\textsuperscript{245} See supra Part III.E.
\textsuperscript{246} See supra Part III.D.
\textsuperscript{247} See supra Part III.
\textsuperscript{248} See supra Part III.B.3.
\textsuperscript{249} See supra Part III.B.1.
with tools to more appropriately evaluate the environmental risks associated with brownfield redevelopment.

Other factors affecting the viability of a redevelopment effort remain, but this new guidance addresses one common impediment: the risk of liability. The amendment cannot single-handedly achieve large-scale urban revitalization. However, with appropriate regulation and enforcement to preserve CERCLA’s high standards for environmental and public health, it will likely aid in reversing the trend toward urban sprawl and promote needed land recycling in our nation’s urban cores.

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