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INTRODUCTION

The United States Environmental Protection Agency (EPA) has defined brownfields as "abandoned, idled or underused industrial and commercial sites where expansion and redevelopment is complicated by real or perceived environmental contamination that can add cost, time or uncertainty to a redevelopment project."\(^2\) The United States Office of Technology Assessment includes in the brownfields definition sites whose "redevelopment may be hindered not only by potential contamination, but also by poor location, old or obsolete infrastructure, or other less tangible factors often linked to neighborhood decline."\(^3\) The greatest concentration of such sites is in urban centers, where former industrial practices or
waste disposal activities resulted in contamination. However, brownfields exist in rural areas as well. It is estimated that 150,000 to 650,000 brownfields sites exist, and these estimates likely fail to account for many sites at which the existence of contamination has not been investigated.  

Many brownfields sites were abandoned as a result of deindustrialization trends. Barriers to redevelopment of these sites include the uncertainty regarding costs associated with cleanup, insufficient financing for such costs, ambiguous federal, state and local policies regarding redevelopment, absence of a comprehensive redevelopment framework, and competition from pristine, or “greenfield” sites. Clearly, fear of environmental contamination and liability associated with such contamination has been a major factor hindering redevelopment.

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) is widely considered to be a major contributor to the brownfields problem. CERCLA creates a massive statutory net of liability for current and former own-

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4. Brownfields Law and Practice, § 1.02 (Matthew Bender & Co., Inc., 2001) [hereinafter Brownfields Law and Practice] (noting that a range of 150,000 to 450,000 brownfields sites can be attributed to both the varying definitions of brownfields and the reality that many sites have not been investigated). See also Mark S. Dennison, Brownfields Redevelopment: Programs and Strategies for Rehabilitating Contaminated Real Estate (1998) (recognizing that the City of Chicago has noted over 2000 brownfields in the metropolitan area and that the U.S. Government Accounting Office estimates as many as 650,000 brownfields across the United States).

5. See Brownfields Law and Practice, supra note 4, at § 1.03 (noting that initial disinvestment decisions related to demographic changes resulted in brownfields and that such decisions were wholly unrelated to environmental considerations).


8. It should be noted that CERCLA is not the only source of perceived environmental liability affecting the decision to redevelop brownfields. Other federal environmental laws, including the Clean Water Act, the Resource Conservation and Recovery Act, and the Clean Air Act potentially impose liability on the owner of brownfields for existing contamination. Also, many states have enacted statutory programs which mirror CERCLA and therefore provide a basis for liability which creates a disincentive for brownfields redevelopment. See generally Wendy E. Wagner, Learning From Brownfields, 13 J. Nat. Resources & Envtl. L. 217, 220-27 (1998) (discussing the role of federal environmental laws in creating the brownfields problems); John S. Applegate, Risk Assessment, Redevelopment, and Environmental Justice: Evaluating the Brownfields Bargain, 13 J. Nat. Resources & Envtl. L. 243 (1998).
ers of contaminated property as well as parties which contributed to the contamination. Liability also can extend to lenders where they are involved in the operation of a facility. Liability under the statute is strict, joint, and several, and the costs associated with assessing and responding to contamination at Superfund sites is staggering. Consequently, fear of liability under CERCLA for ownership of or control over a Superfund site is a significant deterrent in brownfields redevelopment.

Conversely, many brownfields sites have enormous redevelopment potential because of their proximity to existing infrastructure and because the existence (or perceived existence) of contamination decreases the price of the property. Because these sites are abandoned or underutilized, they create a blight on the community. Once developed, they have the potential to contribute to the surrounding community and economy. Tax revenues and employment opportunities are significant benefits associated with brownfields redevelopment. Also, redevelopment of existing industrial sites, as opposed to developing open, pristine land, or greenfields, helps to curb urban sprawl and promotes "smart growth" or sustainability.

Federal efforts aimed at brownfields redevelopment have been diverse and wide-ranging. There have been many programs, but

10. 42 U.S.C. §§ 9601(20)(E) & (F), 9607(a).
11. Id. §§ 9601(32), 9607.
12. See supra note 8.
13. Sustainable development can be defined as "the requirement that current practices not undermine future living standards; present economic systems must maintain or improve the resource and environmental base, so that future generations will be able to live as well or better than the present one." William L. Thomas, Rio's Unfinished Business: American Enterprise and the Journey Toward Environmentally Sustainable Globalization 32 Envtl. L. Rep. 10873, 10875 (2002) (quoting MOSTAFA F. TOLBA & IWONA RUMMEL-BULSKA, GLOBAL ENVIRONMENTAL DIPLOMACY: NEGOTIATING ENVIRONMENTAL AGREEMENTS FOR THE WORLD: 1973-1992, at 7 (1998)). Brownfields initiatives can be linked to sustainability because they promote revitalization of underutilized areas instead of encouraging development on greenfields, which exacerbates urban sprawl. "Brownfields redevelopment can also promote the 'three Es' of sustainable development by encouraging environmental cleanup and the preservation of green space, promoting economic competitiveness by building on existing infrastructure and fostering business expansion, and enhancing social equity by encouraging job creation in areas that need it most." Jonathan D. Weiss, Local Sustainability Efforts in the United States: The Progress Since Rio, 32 Envtl. L. Rep. 10667, 10671 (2002); see also Kermit L. Rader, Congress Passes Landmark Legislation, A.B.A. Sec. of Envt't, Energy & Resources, at http://www.abanet.org/environ/ programs/teleconference/congress.html (last visited Mar. 25, 2003) (noting that "[s]ince redevelopment may avoid the need to build on currently open land, sometimes called 'greenfields,' encouraging brownfield redevelopment is also seen as a way to promote 'smart growth'".).
identifying a cohesive program or specialized sub-group is problematic. Federal efforts began in 1994 with the EPA's Brownfields Economic Redevelopment Initiative. The Initiative was designed to serve several purposes, including: (1) revitalizing urban communities in the Northeast and Midwest through manufacturing and other industries; (2) preventing unnecessary use of virgin land and resources; and (3) relieving increased demand for new manufacturing and industrial resources by redeveloping brownfields. As explained by the EPA, the Brownfields Economic Redevelopment Initiative was also designed to "empower the 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."16

In 1995, the EPA formally announced the Brownfields Action Agenda to "identify and address the goals of the Brownfields Economic Redevelopment Initiative." The Action Agenda was designed to address various identified legal obstacles to brownfields redevelopment and includes such components as Prospective Purchaser Agreements to shield purchasers from environmental liability, Memoranda of Agreement with states regarding federal enforcement efforts on voluntary cleanups, EPA's delisting of sites from its contaminated sites inventory, and pilot programs and grants. Additional strategies of the Initiative included funding pilot program and research efforts, clarifying liability issues, forging partnerships, conducting outreach activities and training programs, and addressing environmental justice concerns. To meet identified goals, studies were to be conducted and grants distributed to redevelop contaminated sites.

In 1995 the National Environmental Justice Advisory Council [hereinafter NEJAC] Waste and Facility Siting Subcommittee and

15. RECYCLING LAND, supra note 14, at 306.
18. COMPREHENSIVE GUIDE, supra note 2, at 25-27.
19. NEJAC'S PUBLIC DIALOGUES, supra note 17.
20. See RECYCLING LAND, supra note 14, at 305-07.
the EPA held a series of public dialogues to address environmental justice concerns relating to urban revitalization and brownfields.\textsuperscript{21} The NEJAC issued a final report on the dialogues that recommended interagency coordination.\textsuperscript{22} As a result of this recommendation, the EPA organized the Interagency Working Group "as a forum for Federal agencies to exchange information on brownfields-related activities and to develop a coordinated national agenda for addressing brownfields."\textsuperscript{23}

In 1997 the Interagency Working Group created the Brownfields National Partnership Action Agenda,\textsuperscript{24} which was designed to involve multiple federal agencies and private organizations in the cleanup and reuse of brownfields and to "link more effectively environmental protection with economic development and community revitalization programs, and guide the Brownfields Initiative into the future."\textsuperscript{25} Partnerships between both public and private organizations were established to encourage economic de-

\begin{itemize}
\item \textsuperscript{21} See id.; NEJAC'S PUBLIC DIALOGUES, supra note 17.
\item \textsuperscript{22} See id.; NEJAC'S PUBLIC DIALOGUES, supra note 17.
\item \textsuperscript{23} EPA, FEDERAL INTERAGENCY WORKING GROUP ON BROWNFIELDS (April 1997), [hereinafter WORKING GROUP ON BROWNFIELDS] at http://www.epa.gov/brownfields/pdf/intragwg.pdf. Multidimensional federal agencies participating in the Working Group included: the Department of Agriculture (USDA), Department of Commerce (DOC), Department of Defense (DOD), Department of Education (ED), Department of Energy (DOE), Department of Health and Human Services (HHS), Department of Housing and Urban Development (HUD), Department of the Interior (DOI), Department of Justice (DOJ), Department of Labor (DOL), Department of Transportation (DOT), Department of the Treasury (Treasury), Department of Veterans Affairs (VA), Environmental Protection Agency (EPA), Federal Deposit Insurance Corporation (FDIC), General Service Administration (GSA), and the Small Business Administration (SBA). Id.
\item \textsuperscript{24} The preamble to the Brownfields National Partnership Action Agenda noted the following laudable purpose:
\begin{quote}
The Brownfields National Partnership Action Agenda is based on the principle that we can assess, clean up and reuse contaminated properties. By linking environmental protection with economic development and community revitalization, we look to put in place a sustainable development program that differs from programs of the past. A program meeting community needs by bringing public and private organizations together to solve the problem of environmental contamination. The Brownfields National Partnership seeks to protect public health and the environment by cleaning up contaminated properties, creating jobs, providing opportunities for private investment and expanding local economies.
\end{quote}
\item \textsuperscript{25} WORKING GROUP ON BROWNFIELDS, supra note 23. See also EPA, MEMO FACILITATING REUSE OF BROWNFIELDS SUBJECT TO THE RESOURCE CONSERVATION AND RECOVERY ACT: RCRA BROWNFIELDS PREVENTION INITIATIVE (June 11, 1998)
velopment and environmental protection. This coordination was
designed to promote efficient government and to decrease the like-
lihood of duplicative efforts or confusion among programs. Mem-
oranda of Understanding (MOUs) were to be used between
agencies to create policies and procedures on brownfields
projects. Workforce development was encouraged by the
Brownfields National Partnership Action Agenda through educa-
tion, training, and the recruitment of students in the environmental
field. Brownfields Showcase Communities were created across
the country to demonstrate the success of the Brownfields Initiative
through public and private cooperation, technical assistance, finan-
cial support, and community involvement.

Additional pilot projects have taken place across the nation
since 1995. The Brownfields Assessment Demonstration Pilots
awarded funding to explore innovative approaches to the
brownfields problem through redevelopment, removal of regula-
tory barriers, and bringing together all affected parties. Communities without Brownfields Assessment Demonstration Pilots were

[hereinafter EPA BROWNFIELDS MEMO], at http://www.epa.gov/swerosps/rcrabf/pdf/
memo0698.pdf.

26. See EPA, THE BROWNFIELDS NATIONAL PARTNERSHIP ACTION AGENDA
(May 1997) [hereinafter BROWNFIELDS NATIONAL PARTNERSHIP ACTION AGENDA], at
http://www.epa.gov/brownfields/pdf/97aa_fs.pdf (noting more than 100 commitments
from more than 25 organizations representing a $300 million investment in brownfields
communities and an additional $165 million in loan guarantees).

27. See WORKING GROUP ON BROWNFIELDS, supra note 23 (noting that while
federal and state programs were in existence to address local concerns associated with
brownfields such as unemployment and outdated infrastructure, coordination was nec-
essary to facilitate sustainable redevelopment).

28. Id. The memoranda were designed to “establish policies and procedures be-
tween agencies and support projects of mutual interest.”

29. See REDEVELOPMENT INITIATIVE, supra note 16.

www.epa.gov/swerosps/bf/pdf/showfact.pdf. The goals of the Showcase Communities
were to:

[1] Promote environmental protection and restoration, economic redevelop-
ment, job creation, community revitalization, and public health protection
through the assessment, cleanup, and sustainable reuse of brownfields; [2]
Link federal, state, local, and non-governmental action supporting community
efforts to restore and reuse brownfields; and [3] develop national models dem-
onstrating the positive results of public and private collaboration in addressing
brownfields challenges.

Id. “In October 2000 . . . 12 Showcase Communities were designated. . . . includ[ing]
nine federally designated Empowerment Zones/Enterprise Communities, four small/
rural communities, two tribes, and one Base Realignment and Closure Community.”

Id.

31. See REDEVELOPMENT INITIATIVE, supra note 16.
to be assisted through the Targeted Brownfields Assessments pro-
gram. Targeted assistance by the EPA included funding and/or
technical assistance to conduct environmental assessments at CER-
CLA sites and was designed to supplement other efforts under the
Brownfields Initiatives.

The potential liability of organizations involved in brownfields
redevelopment was also acknowledged and addressed through EPA
guidance, Prospective Purchaser Agreements, Comfort/Status Let-
ters, and the archiving of many Superfund sites. However, most
of these actions failed to adequately calm the fears of parties relat-
ing to Superfund liability. Consequently, the Asset Conservation,
Lender Liability, and Deposit Insurance Protection Act of 1996
[hereinafter Lender Act] was passed and signed into law. The
Lender Act included an amendment on lender liability under CER-
CLA, which created a safe harbor for fiduciaries and lenders. The
Lender Act specifically excludes lenders that did not participate in
management from the definition of owner or operator under CERCLA.

Up to this point, the EPA mainly focused on CERCLA issues
relating to brownfields. Industries, city representatives, and other
stakeholders began looking beyond CERCLA to comprehensively
address brownfields sites.

The RCRA (Resource Conservation and Recovery Act)
Brownfields Prevention Initiative, launched in 1998, targeted
RCRA facilities with the potential for redevelopment, but whose
“reuse or redevelopment ... [was] slowed due to real or perceived

32. Id.
33. EPA, TARGETED BROWNFIELDS ASSESSMENTS (Nov. 1998), at http://
www.epa.gov/brownfields/pdf/tba.pdf. Notably, Target Brownfields Assessment fund-
ing was only authorized at sites contaminated with hazardous substances, not at sites
contaminated only with petroleum products. Id. Also, funding was not available under
the program where the owner was responsible for the contamination unless there was a
clear means for the EPA to recoup its expenditures. Id.
34. See REDEVELOPMENT INITIATIVE, supra note 16.
35. Samuel R. Staley, Environmental Policy and Urban Revitalization: The Role
of Lender Liability, 25 CAP. U. L. REV. 51 (1996) (discussing affect on lenders ability to
make loans for revitalization).
36. Asset Conservation, Lender Liability, and Deposit Insurance Protection Act
37. See RECYCLING LAND, supra note 14, at 327 (stating that the lender liability
law protected lenders that engaged in certain specified activities from liability under
CERCLA).
38. See id. at 329 (outlining the categories of exclusion from the law).
39. EPA BROWNFIELDS MEMO, supra note 25.
40. Id.
concerns about actual or potential contamination, liability, and RCRA requirements." Under this initiative, the EPA focused on barriers to brownfields redevelopment presented by RCRA and worked to develop solutions through the RCRA Brownfields Prevention Work Group.

In 2000, the USTfields Initiative was launched to cleanup petroleum contamination from federally regulated underground storage tanks. "Of the estimated 450,000 brownfields sites in the U.S., approximately one-half [were] thought to be impacted by underground storage tanks or by some type of petroleum contamination." Significantly, other EPA brownfields programs, which mainly operated under CERCLA, did not cover petroleum contamination because petroleum was generally excluded from CERCLA. Consequently, the USTfields Initiative was designed to facilitate the cleanup of high-priority petroleum-impacted brownfields sites.

Financial incentives also existed to assist the redevelopment of brownfields. In 1995 the Office of the Comptroller of Currency revised its regulations relating to the Community Reinvestment Act to create incentives for economic development in urban areas. Lenders, bankers, and developers could claim loan credits for loans made to redevelop and cleanup industrial sites. The Taxpayer Re-

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42. See EPA BROWNFIELDS MEMO, supra note 25 (the memo, distributed to senior RCRA and CERCLA policy managers, specifically solicited regional participation on the RCRA Brownfields Prevention Work Group).
43. See EPA, USTfields Initiative Revitalizing Petroleum Contaminated Properties, at http://www.epa.gov/swerustl/ustfield/index.htm (last visited Sept. 12, 2002) [hereinafter USTfields Initiative] (noting that the initiative was designed to address petroleum contamination generally excluded from brownfields revitalization programs and "to take advantage of the many advances in the Brownfields work that and should be applied to the numerous (and often smaller and more rural) USTfields sites").
44. USTfields Initiative, supra note 43.
45. Id.
46. Id. Touted as using "similar problem-solving methods" and relying on "much of the existing Brownfields infrastructure for implementation," the USTfields Initiative awarded ten states up to $100,000 each in 2000 and announced an additional forty USTfields pilots to be awarded in 2002. Id.
49. Id.; RECYCLING LAND, supra note 14, at 319.
lied Act of 1997\textsuperscript{50} included the Brownfields Tax Incentive to encourage the cleanup and redevelopment of both rural and urban brownfields sites.\textsuperscript{51} However, any sites listed or proposed to be listed on the National Priorities List (NPL) were not eligible for this tax incentive, which expires in 2003.\textsuperscript{52} Clearly, although many initiatives existed to encourage brownfields redevelopment, the primary obstacles continued to be fear of liability and lack of financing. The 2002 legislation was designed to specifically address these obstacles.

I. THE ACT

As the title of the Act—Small Business Liability Relief and Brownfields Revitalization Act—suggests, the Act is a union of two bills. The Senate passed the brownfields revitalization portion of the legislation by a 99-0 vote on April 25, 2001.\textsuperscript{53} The small business liability portion of the legislation was introduced by the House as H.R. 1381 and passed the House by a vote of 419-0 on May 22, 2001. Once the bills left their respective chambers they languished until combined as H.R. 2869.\textsuperscript{54} At that point the combined bill found broad support in both chambers and was signed by President Bush on January 11, 2002. While much of the media attention focused on the brownfields revitalization provisions (in fact, President Bush gave little attention to the Superfund reform provisions), the relationship between the Superfund reform provisions and brownfields revitalization cannot and should not be overlooked.

The Act consists of two titles. Title I is the Small Business Liability Protection Act\textsuperscript{55} and provides two primary exemptions from Superfund liability: one for de minimus contributors\textsuperscript{56} to Superfund sites and one for parties contributing only municipal solid waste\textsuperscript{57}

\textsuperscript{51} See EPA, BROWNFIELD TAX INCENTIVE (Aug. 2001), available at http://www.epa.gov/swerosps/bf/bftaxinc.htm [hereinafter BROWNFIELD TAX INCENTIVE] (noting that the CRA made financing redevelopment property more attractive by providing credit to large lenders while aiding the communities in which the lenders operated).
\textsuperscript{52} Id.
\textsuperscript{53} COMPREHENSIVE GUIDE, supra note 2, at xxxv.
\textsuperscript{54} Id. at xxxv n.2.
\textsuperscript{56} 42 U.S.C. § 9607(o) (2002).
\textsuperscript{57} Id. § 9607(p).
to Superfund sites. Title I also addresses expedited settlements, limits liability under Superfund based upon ability to pay, and specifically addresses the effect of the new provisions on concluded actions. Title II, the Brownfields Revitalization and Environmental Restoration Act of 2001, sets forth provisions relating to brownfields funding, and also addresses certain exemptions from Superfund liability. Further, Title II addresses state response programs, creates a bar on federal enforcement actions for sites participating in state programs, and allows the EPA to defer NPL listing under certain circumstances. NPL sites are considered by the EPA to represent the greatest threat to health or the environment.

A. **Primary Superfund Reforms**

When signed by President Bush in January 2002, most media attention devoted to the Small Business Liability Relief and Brownfields Revitalization Act focused on the brownfields revitalization provisions. While these were certainly noteworthy, Title II of the legislation, focused on Superfund reform, is equally deserving of attention. The new legislation creates four new exemptions from Superfund liability and attempts to further clarify the existing innocent landowner defense.

1. **De Micromis Exemption**

Prior to the creation of the de micromis exemption, potentially responsible parties were unable to raise a defense to liability for response costs by demonstrating that the material they sent to the site was so insignificant that it could not have logically caused or contributed to response costs at the site. Rather, these types of

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58. *Id.* § 9622(g).
59. *Id.* § 9622(g)(7).
60. *Id.* § 9607.
63. *Id.* § 9604(q).
64. *Id.* § 9604(k).
65. *Id.* § 9604(k).
66. *Id.* § 9622(g)(11).
67. The four new exemptions, discussed *infra* Parts I.A.1-1-.4, include the de micromis exemption, an exemption for municipal solid waste, a bona fide prospective purchaser exemption, and an exemption for landowners contiguous to contaminated property.
68. 42 U.S.C. § 9602 (b) (specifying defenses a party may raise).
parties had to either settle or demonstrate that costs associated with their wastes were divisible, an extremely time-consuming, expensive, and uncertain endeavor. Section 102 of the Act establishes a de micromis exemption from potential liability for response costs at a NPL site for waste generators that can demonstrate that the amount of waste disposed of at the site was less than 110 gallons of liquid materials or less than 200 pounds of solid materials. In addition, the party must be able to demonstrate that all or part of the disposal occurred before April 1, 2001. The Act provides that the de micromis amounts are determined by reference to "the total amount of the material containing hazardous substances that the person arranged for disposal . . . at the facility" and notes that the amounts may be modified by EPA regulation.

The de micromis exemption can be lost if the President determines any one of the following: that the material disposed of by the generator is contributing or could contribute significantly, either individually or in the aggregate, to the cost of the cleanup; that the generator has failed to comply with information requests or has impeded the cleanup; or that the generator has been convicted of a criminal violation associated with the disposal activity. As a practical matter many of these considerations will be difficult to apply. CERCLA liability actions have avoided the troublesome issues of causal connection as the joint and several liability scheme obviated the need for such determinations. The de micromis exemption reintroduces this difficult proof, particularly in large landfill cases where the evidence is commingled and it is difficult to demonstrate the relationship between a particular waste stream and specific response costs. Notably, any of the aforementioned determinations by the President are not subject to judicial review.

The legislation further modifies the existing Superfund litigation structure by shifting the burden of proof regarding the exemption depending upon the party initiating the action. When the government sues a party, that party presumably bears the burden of proving entitlement to the exemption. However, in a contribution

69. Id. § 9607(o)(1)(A).
70. Id. § 9607(o)(1)(B).
71. Id. § 9607(o)(1)(A).
72. Id. § 9607(o)(2).
73. Id. § 9607(o)(3). This provision may give rise to constitutional challenges. See, e.g., Robert Emmet Hernan & Gordon J. Johnson, The Brownfields and Superfund Small Business Relief Act: Relief for More Than Small Businesses, 17 NAT'L ENVTL ENFORCEMENT J., 3, 4 (2002) (questioning the constitutionality of the provisions which isolate presidential decisions under the legislation from judicial review).
action initiated by a third potentially responsible party (PRP), the burden of proof shifts to the party initiating the action to show that the exemption conditions have not been met. Further, and remarkably, where a non-governmental PRP initiates a contribution action, it will be held liable for the reasonable attorney and expert witness fees of the de micromis defendant if that defendant is found not liable. This is a significant departure from the litigation advantage formerly enjoyed by parties initiating Superfund claims.

2. Municipal Solid Waste (MSW) Exemption

The Act creates a new exemption from arranger liability for certain parties who arranged for the disposal, transport, or treatment of municipal solid waste (MSW) to a NPL site. Prior to the new exemption, parties that had disposed of only MSW at hazardous waste sites complained that site contamination and response costs were properly attributable to industrial waste generators. However, strict, joint and several liability formerly attached to the MSW generators, subject only to their ability to prove that the harm associated with their waste was divisible from other response costs. The new MSW exemption covers any owner, operator, or lessee of residential property; any small business concern and its parent, subsidiary, or affiliate; and any small charitable tax exempt organization. For business and charitable organizations, "small" requires that the entity not have employed more than 100 full-time individuals during the three taxable years preceding written notice of potential liability at the site, and that the organization be considered a small business concern within the meaning of the Small Business Act.

MSW includes any waste material generated by a residential property. It also includes waste generated by a commercial, industrial, or institutional entity if the waste "is essentially the same as a waste normally generated by a household," "is collected and

74. § 9607(o)(4) (providing that "[i]n the case of a contribution action ... brought by a party, other than a Federal, State, or local government ... the burden of proof shall be on the party bringing the action to demonstrate that the conditions [for the de micromis exemption] are not met").
75. Id. § 9607(p)(7).
76. Id. § 9607(p).
77. Id. § 9607(p)(1).
80. Id. § 9607(p)(4)(A)(ii)(I).
disposed of with other MSW as part of normal MSW collection services,"^81 and "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."^82 MSW specifically excludes "combustion ash generated by resource recovery facilities or municipal incinerators,"^83 and "waste material from manufacturing or processing operations that is essentially not the same as waste normally generated by households."^84

Like the de micromis exemption, the MSW exemption can be lost if the President determines that the material sent by the arranger is contributing, or could contribute significantly, either individually or in the aggregate, to the remedial costs at the NPL site or that the arranger claiming the exemption has failed to comply with government requests or is impeding the performance of the response action.^85 Also, as with the de micromis exemption, such determinations by the President are not subject to judicial review.^86

Similar to the de micromis exemption, the MSW exemption dramatically shifts the burden of proof in Superfund litigation for parties claiming the exemption. Notably, for waste disposed of prior to April 1, 2001, the burden of proof regarding the exemption rests on the party bringing the action, even if that party is the government.^87 For waste disposed of on or after April 1, 2001, the burden to prove application of the exemption falls on the party claiming the exemption, but only for government-initiated actions.^88 If a third party initiates the action and the waste was disposed of on or after April 1, 2001, the burden of proof remains on the party initiating the contribution action.^89 Also, if a nongovernmental party brings a contribution action and the defendant successfully raises the MSW exemption, the nongovernmental party is liable for the defendant’s costs of defending the action, including reasonable attorney’s and expert witness fees.^90 Finally, and most noteworthy, the MSW exemption explicitly prohibits nongovernmental contribution actions against owners, operators, or lessees of

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81. Id. § 9607(p)(4)(A)(ii)(II).
82. Id. § 9607(p)(4)(A)(ii)(III).
83. Id. § 9607(p)(4)(C)(i).
84. Id. § 9607(p)(4)(C)(ii).
85. Id. § 9607(p)(2)(A), (B).
86. Id. § 9607(p)(3).
87. Id. § 9607(p)(5).
88. Id. § 9607(p)(5).
89. Id. § 9607(p)(5).
90. Id. § 9607(p)(7).
residential property.91

3. Contiguous Property Owners

Under Superfund, property owners located adjacent to contaminated property could be held liable for contamination that migrated to their property. The Act provides a new exemption from liability for such contiguous property owners so long as the contiguous property owner does not contribute to the release and does not interfere with any response actions on or associated with the contaminated property.92 To qualify for the exemption, the contaminated property must be owned by someone other than the contiguous property owner or anyone affiliated with the contiguous property owner.93 In addition, the contiguous property owner must satisfy certain conditions, including the following:

1) "[T]he landowner must provide full cooperation, assistance, and access to persons that are authorized to conduct response actions."94

2) The landowner must be in "compliance with any land use restrictions established or relied on in connection with the response action."95

3) The landowner must not "impede the effectiveness of any institutional control employed" at the contaminated property.96

4) The landowner is in compliance with any EPA information request or subpoena.97

5) The landowner has "provid[ed] all required notices with respect to the discovery" of the contamination.98

6) The landowner has "conducted all appropriate inquir[ies] [at the time the property was acquired and] did not know or have reason to know that the property was or could be contaminated" as a result of its proximity to the contaminated property.99

The Act expressly notes that the duty to take reasonable steps to prevent releases and/or harm does not require the contiguous property owner to assume responsibility for groundwater investiga-

91. Id. § 9607(p)(1)(A), (p)(6).
92. Id. § 9607(q).
93. Id. § 9607(1)(A)(ii).
94. Id. § 9607 (q)(1)(A)(iv).
95. Id. § 9607 (q)(1)(A)(V)(I).
96. Id. § 9607 (q)(1)(A)(V)(II).
97. Id. § 9607 (q)(1)(A)(vi).
98. Id. § 9607 (q)(1)(A)(vii).
99. Id. § 9607(q)(1)(A).
tion or remediation, except in accordance with EPA policy. The burden falls upon the contiguous property owner to demonstrate that it meets the conditions set forth in the exemption, but the Act provides that the EPA may issue an assurance that it will not take an enforcement action against the contiguous property owner and/or that it will provide contribution protection to exempt contiguous property owners. However, this exemption will not protect a property owner that knew contamination existed prior to acquiring the property, but such a party may otherwise qualify for the bona fide prospective purchaser defense discussed below.

4. Bona Fide Prospective Purchasers

The Act provides a defense to Superfund liability for the “bona fide prospective purchaser” of contaminated property who purchases after January 11, 2002 (the effective date of the legislation). Prospective purchasers can avail themselves of this defense if they show that they:

1) acquired the property after the disposal of hazardous substances;

2) made appropriate inquiry regarding the property in accordance with certain standards and practices similar to those required of innocent purchasers discussed below, except that they need not show that they were not aware that the contamination existed;

3) completed all required notices associated with the releases of hazardous substances;

4) “exercis[ed] appropriate care to stop continuing releases, prevent[ed] any threatened future releases, and prevent[ed] or limit[ed] ... exposure” to previous releases;

5) “provid[ed] full cooperation, assistance, and access to persons ... conduct[ing] response actions;”

6) complied with any applicable institutional controls and any requests for information; and

100. Id. § 9607(q)(1)(D).
101. Id. § 9607(q)(1)(B).
102. Id. § 9607(q)(3).
103. Id. § 9601(40).
104. Id. § 9601(40)(A).
105. Id. § 9601(40)(B).
106. Id. § 9601(40)(C).
107. Id. § 9601(40)(D).
108. Id. § 9601(40)(E).
109. Id. § 9601(40)(F), (G).
7) had no affiliation with any responsible party.\textsuperscript{110}

It is noteworthy that this exemption from liability applies even when the prospective purchaser knows of the existence of contamination on the property, as contrasted with the contiguous property owner exemption and the innocent landowner defense. The exemption can be lost if the purchaser impedes the cleanup, fails to comply with a governmental order, or stops exercising appropriate care.

One interesting additional component to this exemption is the governmental windfall lien.\textsuperscript{111} While the prospective purchaser who qualifies for the defense is not liable for response costs at the property, the Act allows the federal government to obtain a lien on the property if the government spends or has spent response costs in connection with the property and those response costs result in an increase in the property's value.\textsuperscript{112} The lien is limited to the increase in value on the property attributable to the cleanup and cannot be recovered by the government until the purchaser sells the property.\textsuperscript{113} This windfall lien contradicts in some respects the Act's provisions which create incentives for brownfields development. The possibility of a federal lien on a property could be perceived as a disincentive both for redevelopers and for lenders.\textsuperscript{114}

5. Innocent Landowners

The final protection accorded owners of property under the new legislation is clarification of the existing innocent landowner defense under CERCLA.\textsuperscript{115} The CERCLA defense had provided owners protection against liability where they could show that they did not know the property was contaminated at the time of

\textsuperscript{110} Id. § 9601(40)(H).
\textsuperscript{111} Id. § 9607(r).
\textsuperscript{112} Id. § 9607(r)(2).
\textsuperscript{113} Id. § 9607(r)(3).
\textsuperscript{114} See William S. Hatfield, The Brownfields Revitalization and Environmental Restoration Act of 2001: Two New Defenses to CERCLA Liability—Do They Accomplish the Goals of Congress?, 14 METROPOLITAN CORP. COUNS., No. 6, at 3 (June 2002). The author noted that:
More problematic ... is that the windfall lien provision creates new uncertainties and risks for financial institutions that historically have been skittish when lending on properties that have environmental risk. This trade-off by Congress does not appear to be well reasoned if the purpose of the Brownfield amendments was to remove uncertainty and to provide incentives to the marketplace.
Id.
purchase despite having conducted "all appropriate inquiries" into the past and present uses of the property.\textsuperscript{116} Prior to the passage of the new law, there was no standard definition of what constituted an appropriate inquiry and courts were left to determine under what circumstances a property owner could meet the condition of the defense. The Act corrects this deficiency by requiring the EPA to adopt regulations that clearly identify what must be done to satisfy the standard.\textsuperscript{117} In addition, the Act sets forth criteria the EPA should consider in adopting those regulations, including the results of an inquiry by environmental professionals, interviews with past and present owners, reviews of historical sources, and searches of environmental liens.\textsuperscript{118}

The Act also provides interim standards which are based upon the date of purchase. For property purchased before May 31, 1997, the court, in addressing the application of the defense, will take into account such factors as the specialized knowledge or experience of the defendant, the purchase price of the property, commonly known or obvious information about the property, and the ability of the defendant to detect the contamination by appropriate inspection.\textsuperscript{119} For property purchased on or after May 31, 1997, the Act requires compliance with the American Standard for Testing and Materials (ASTM) procedures, including the standard entitled \textit{Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process}.\textsuperscript{120} For residential property, the defense may be demonstrated on the basis of a facility inspection and title search that reveal no basis for further investigation.\textsuperscript{121}

The standards include the same reasonable steps required of other owner exemptions under the Act, including the requirement that the owner prevent continuing or future releases, prevent or limit exposure to past releases, and provide full cooperation and access to individuals involved in response actions.\textsuperscript{122} Clearly the prospective purchaser and innocent landowner defenses are critical new components to brownfields redevelopment. Because parties were formerly subject to CERCLA liability on the basis of ownership alone and without regard to fault, fear of liability based on

\begin{itemize}
\item \textsuperscript{116} \textit{Id.} § 9601 (B)(i)(I).
\item \textsuperscript{117} \textit{Id.} § 9601(35)(B)(ii).
\item \textsuperscript{118} \textit{Id.} § 9601(35)(B)(iii).
\item \textsuperscript{119} \textit{Id.} § 9601(35)(B)(iv)(I).
\item \textsuperscript{120} \textit{Id.} § 9601(35)(B)(iv)(II).
\item \textsuperscript{121} \textit{Id.} § 9601(35)(B)(v).
\item \textsuperscript{122} \textit{Id.} § 9601(35)(B)(i)(II); \textit{see supra} notes 92 and 107-08.
\end{itemize}
taking ownership of brownfields greatly impeded redevelopment. The relaxation or removal of this legal obstacle should therefore encourage the reuse of such property.

B. Expedited Settlements

The Act further clarifies the EPA's expedited settlement process. Parties that can demonstrate an inability or limited ability to pay are eligible for a reduction in settlement or alternative payment methods. In determining whether a party has demonstrated an inability to pay, the President will consider "the ability of the person to pay response costs and still maintain its basic business operations, including consideration of the overall financial condition of the person and demonstrable constraints on the ability of the person to raise revenues." As a condition to the settlement, the settling party must waive all claims against other potentially responsible parties for response costs incurred at the site, including claims for contribution, unless the President makes a determination that requiring a waiver would be unjust. A party will not be eligible for the settlement reduction "if the President determines that the . . . party has failed to comply with any request for access or information . . . or has impeded or is impeding, through action or inaction, the performance of a response action with respect to the facility." Also, notwithstanding the settlement, the party remains obligated to provide access and information requested in connection with the response actions. Determinations by the President regarding eligibility for the settlement or the waiver requirement are not subject to judicial review. It will be interesting to monitor how this lack of judicial review for expedited settlements interacts with the other provisions in CERCLA that allow judicial oversight of consent decrees.

123. See § 9622(g)(7).
124. Id. § 9622(g)(7)(B).
125. Id. § 9622(g)(8)(A).
126. Id. § 9622(g)(8)(B).
127. Id. § 9622(g)(8)(C).
128. Id. § 9622(g)(11).
129. One author observes that "[t]his new [limitation on judicial review] likely will be used by the government to further impose orphan shares on other viable potentially responsible parties." Jay A. Jaffe & Thomas F. Quinn, CERCLA Amendment Creates New Exemptions and Defenses. Protects Against Liability for Cleanup Costs, Encourages Redevelopment of Brownfields, N.J.L.J. Feb. 25, 2002, at 679-81.
C. Effect on Concluded Actions

Section 103 of Title I, the Small Business Liability Protection Act, provides that the amendments in “this title” shall not apply to or affect any settlement or judgment issued by a United States District Court or any administrative settlement or order entered into or issued by the United States that are issued before the date of the enactment of the Act. Consequently, the de micromis and MSW exemptions found in Title I cannot be used to upset any of the aforementioned settlements, judgments, or orders. However, it is not clear what affect the contiguous property owner and bona fide prospective purchaser exemptions and the clarifications to the innocent purchaser defense may have on past settlements, judgments, or orders.

D. Additions to the NPL

CERCLA is amended to allow a state to request a deferral of the NPL listing when the state, or a party under agreement with the state, is conducting a response action at a site in compliance with a response program. The EPA should generally defer to the state’s request, provided that either the response action conducted pursuant to a state program is providing long-term protection of human health and the environment, or that the state is actively pursuing an agreement that will assure that form of a response action. The EPA may list the site after one year if the EPA determines that the site is not making reasonable progress in completing the response action. If the site is one in which the state is pursuing a clean up agreement, the EPA may either list the site on the NPL after one year, or it may defer the listing for an additional 180 days if such a deferral is warranted on the basis of the complexity of the site or evidence of substantial progress on the negotiations. The EPA may decline deferral of a listing if the state is an owner or operator of the site, is a significant contributor of hazardous substances to the site, or if conditions sufficient to issue a health advisory with respect to the site have been met.

132. Id. § 9605(h)(1).
133. Id. § 9605(h)(2).
134. Id. § 9605(h)(3).
135. Id. § 9605(h)(4).
E. Brownfields Initiatives

Title II of the Act is titled Brownfields Revitalization and Environmental Restoration Act of 2001. This title contains the primary brownfields initiatives as well as Superfund reforms relating to contiguous property owners, bona fide prospective purchasers, and clarifications to the innocent purchaser defense discussed above. While the EPA has had various brownfields programs for years, the Act represents the federal government's most significant effort to date to address the brownfields problem. The brownfields sections of the Act address (1) the definition of a brownfield, (2) federal grants and loans available to state and local governments to investigate and remediate brownfields, (3) state response programs, and (4) limitations on federal enforcement relating to sites remediated under state response programs.

1. Brownfields Definition

Section 211(a) of the Act sets forth the new CERCLA definition of a brownfields site. A brownfields site is defined as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant or contaminant." The definition includes mine-scarred land and sites that are contaminated by petroleum when the contamination is of low risk and the site has no other responsible party to complete the cleanup. This apparently very broad definition is then significantly limited by enumerated exclusions. The following properties are excluded from the definition of a brownfields site:

(i) a facility that is the subject of a planned or ongoing removal action . . . ;

137. 42 U.S.C. § 9607(q).
138. Id. § 9601(40).
139. Id. § 9601(35).
140. Id. § 9601(39).
141. Id. § 9604(k)(3).
142. Id. §§ 9601(41), 9628.
143. Id. § 9628(b).
144. Id. § 9601(39)(A).
145. Id.
146. Id. § 9601(39)(D)(ii)(III).
147. Id. § 9601(39)(D)(ii)(II).
(ii) a facility that is listed on the National Priorities List or is proposed for listing;
(iii) a facility that is the subject of a unilateral administrative order, a court order, an administrative order on consent or judicial consent decree that has been issued to or entered into [under CERCLA] . . . ;
(iv) a facility that is the subject of a unilateral administrative order, a court order, an administrative order on consent or judicial consent decree that has been issued to or entered into [under RCRA, the CWA, TSCA or the Safe Drinking Water Act] . . . ;
(v) a facility that is subject to corrective action under RCRA . . . ;
(vi) a [facility classified as a hazardous waste] land disposal unit . . . ;
(vii) [a federal facility] . . . ;
(viii) [a facility contaminated by polychlorinated biphenyl] . . . ; and
(ix) a . . . facility [that has received funds] . . . from the Leaking Underground Storage Tank Trust Fund . . . 148

However, the President may choose to provide assistance to sites excluded from the grant program under (i), (iv), (v), (viii), or (ix) if the President finds that the funding will "protect human health and the environment, and either promote economic development or enable the creation of, preservation of, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes."149 Because the Act only provides funding for brownfields sites, one must carefully consider this complex definition to determine whether the site in question is properly classified as a brownfield.

2. Revitalization Funding

The Act provides sections relating to brownfields revitalization funding for eligible entities.150 These eligible entities include state and local governments, tribes, governmental entities or redevelopment agencies established by state governments, regional council or groups of general purpose units of local government, land clearance authority, or other quasi-governmental entities that operate under the supervision and control of local government, and certain enti-

148. Id. § 9601(39)(B).
149. Id. § 9601(39)(C).
150. Id. § 9604(k).
ties defined under the Alaska Native Claims Settlement Act.151 The brownfields Act then directs the EPA to establish two programs, one to provide grants to “inventory, characterize, assess, and conduct planning related to brownfields sites”152 and one to provide grants and loans for brownfields remediation.153

Grants issued under the Brownfield Site Characterization and Assessment Grant program may be awarded to an “eligible entity on a community-wide or site-by-site-basis, and shall not exceed, for an individual brownfield site . . . $200,000.”154 However, the EPA Administrator can waive this limitation and provide a characterization and assessment grant of not more than $350,000 if warranted by the site’s anticipated level of contamination, size, or status of ownership.155

Grants and loans issued for brownfields remediation may be used by the eligible entity directly for remediation or to capitalize revolving loan funds.156 Grants for remediation are awarded based on specified factors, which include: (1) the extent to which the grant will facilitate the creation or preservation of parks, greenways, undeveloped or recreational property or property used for nonprofit purposes; (2) the extent to which the grant is justified by the needs in a community that limited alternative sources of funding for environmental remediation and redevelopment; and (3) the extent to which the grant facilitates the use or reuse of existing infrastructure.157 Similar to grants under the Site Characterization and Assessment Program, grants may be awarded on a community-wide or site-by-site basis and may not exceed $1,000,000 per eligible entity.158 The Administration may issue additional grants based on the following factors: the number of sites and communities addressed by the revolving loan fund; the demand for funding by eligible entities that have not previously received a grant; the demonstrated ability of the eligible entity to use the revolving loan fund for remediation and continued funding purposes; and other factors the Administrator deems appropriate to further the pur-

153. Id. § 9604(k)(3).
154. Id. § 9604(k)(4)(A)(i)(I).
155. Id. § 9604(k)(4)(A)(i)(II).
156. Id. § 9604(k)(3)(A)(i).
157. Id. § 9604(k)(3)(C).
158. Id. § 9604(k)(4)(A)(ii).
poses of the program.\textsuperscript{159}

The Act provides instruction on grant applications\textsuperscript{160} and establishes a system to be used by the EPA to rank applications for grants.\textsuperscript{161} Ranking criteria under the Act include factors such as: the ability of the entity to receive other funding sources and the extent to which a grant under the program might stimulate such alternative funding; the potential of the proposed project to stimulate economic development or to create or preserve parks, greenways, and recreational property; the extent to which the grant would address threats to human health and the environment or to otherwise sensitive or disadvantaged populations; the extent to which the grant facilitates the use or reuse of existing infrastructure; and the extent to which the grant furthers the fair distribution of funding between rural and urban areas.\textsuperscript{162}

No part of a grant or loan under these programs may be used to pay penalties, fines, or administrative costs or response costs for which a party is liable under CERCLA.\textsuperscript{163} However, grants and loans may be used to pay for costs associated with the identification and investigation of the extent of contamination, the design and performance of a response action, or the monitoring of a natural resource.\textsuperscript{164} Also, a portion of the grant may be used to purchase insurance for the characterization, assessment, or remediation of a site.\textsuperscript{165} Local governments may not use more than ten percent of the grant funds for programs that monitor the health of populations exposed to a brownfields site or to monitor and enforce institutional controls used to prevent human exposure to a hazardous substance at a brownfields site.\textsuperscript{166}

3. State Response Programs

Under section 231 of the Act, states and tribes that have qualified response programs are eligible for grants to either enhance the response program,\textsuperscript{167} capitalize a revolving fund for brownfields remediation,\textsuperscript{168} or purchase insurance or develop a risk sharing

\begin{footnotesize}
\begin{itemize}
\item 159. \textit{Id.}
\item 160. \textit{Id.} \textsection 9604(k)(5)(A).
\item 161. \textit{Id.} \textsection 9604(k)(5)(C).
\item 162. \textit{Id.}
\item 163. \textit{Id.} \textsection 9604(k)(4)(B)(i).
\item 164. \textit{Id.} \textsection 9604(k)(5)(B)(ii).
\item 165. \textit{Id.} \textsection 9604(k)(4)(D).
\item 166. \textit{Id.} \textsection 9604(k)(4)(C).
\item 167. \textit{Id.} \textsection 9628(a)(1)(B)(i).
\item 168. \textit{Id.} \textsection 9628(a)(1)(B)(ii)(I).
\end{itemize}
\end{footnotesize}
pool for financing response action under the response program. The authorization for appropriation of funds under the state response program grant initiative is $50,000,000 for each fiscal year between 2002 and 2006.

To qualify for a grant, the state must demonstrate that its response program includes certain elements or that it is taking reasonable steps to incorporate the elements into its program. There are four primary elements the program must include. First, the program must require a timely survey and inventory of brownfields sites in the state. Second, the program must include oversight and enforcement authorities or mechanisms to ensure that response actions will protect human health and the environment and will be conducted in accordance with applicable law. The enforcement authorities or mechanisms must also ensure that persons conducting the response actions complete all necessary response activities, including long-term monitoring activities. Third, the state response program must provide sufficient opportunity for public participation, including public access to documents, as well as notice and opportunity for comment on proposed site activities. Finally, the state response program must provide a mechanism for approval of cleanup plans and the requirement that a response action, once complete, is verified and certified by the state, tribe, or a licensed site professional.

4. Enforcement Limitation

One of the most closely watched aspects of the legislation concerned the bar on EPA enforcement actions on properties participating in state voluntary cleanup programs. Many states and most development interests demanded federal enforcement protection for parties undergoing voluntary cleanups pursuant to state

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169. Id. § 9628(a)(1)(B)(ii)(II).
170. Id. § 9628(a)(3).
171. Id. § 9628(a)(1)(A)(I).
172. Id. § 9628(a)(2)(A).
173. Id. § 9628(a)(2)(B)(i).
174. Id. § 9628(a)(2)(B)(ii).
175. Id. § 9628(a)(2)(C).
176. Id. § 9628(a)(2)(D).
177. In fact, the Senate Committee Report noted, "Despite protection from State liability as an incentive to invest in these [brownfield] types of sites, testimony before the committee confirmed that fear of incurring Federal liability sometimes drives developers and lenders toward open spaces." S. REP. NO. 107-2, at 3 (2001).
programs. Contrary concerns addressed how to respond to inadequate cleanups. The Act addresses both concerns.

The Act provides that federal enforcement is barred at eligible response sites where a release or threatened release is being addressed by a response action "in compliance with the State program that specifically governs response actions for the protection of human health and the environment." There are several enumerated exceptions to the enforcement bar. The EPA can bring an administrative or judicial enforcement action during or after the completion of a response action if (1) the state requests assistance, (2) the EPA determines that contamination has migrated or will migrate across a state line or onto federal property, (3) the EPA determines that the release or threatened release may present an imminent and substantial endangerment to public health or the environment and that additional response actions are therefore necessary, or (4) the EPA determines that certain information about the site was previously unknown and such information gives rise to additional remediation.

The enforcement bar is not effective unless the state compiles a public record inventorying a record of sites by name and location, which have undergone or are contemplating response actions pursuant to the state program. The record must be updated annually and must include certain information about the sites, including any use restriction or institutional controls at the site. Generally, if the EPA intends to initiate enforcement proceedings pursuant to an eligible response site, it must first notify the state and give the state an opportunity to reply. The enforcement bar does not preclude the EPA from recovering costs incurred prior to the enactment of the Act. Moreover, the legislation does not modify or otherwise affect memoranda of agreement, memoranda of understanding, or similar agreements between state and federal government in effect prior to the enactment of the legislation.

II. Comments

The brownfields initiatives create both incentives and risks for

179. Id. § 9628(b)(1)(B).
180. Id. § 9628(b)(1)(C).
181. Id.
182. Id. § 9628(b)(1)(D).
183. Id. § 9628(b)(2)(A).
184. Id. § 9628(b)(2)(B).
developers. Aside from the authorization for funds, most of the brownfields initiatives contained in the legislation are not new—they merely build on enforcement policies and pilot programs developed by the federal government in the last several years. However, there now is clear congressional authorization for those programs. Presumably this will enhance the profile and further encourage brownfields redevelopment. Moreover, the explicit enforcement bar may provide encouragement to developers whose primary resistance was fear or uncertainty of federal liability.185

The funding authorizations, while significant, should be closely examined. Authorizations for funding do not guarantee that the money will actually be appropriated. Indeed, while the legislation authorizes up to $250 million per year for the next five fiscal years, President Bush asked Congress to appropriate only $200 million for brownfields redevelopment in fiscal year 2003. While this is a significant increase over former funding levels, it is not the full amount authorized under the legislation.186 Also, while the legislation clearly envisions the federal government to defer to state brownfields programs, the EPA retains considerable discretion on many important issues. Therefore, it remains to be seen how the brownfields initiatives, both those relating to funding and to federal involvement, improve actual redevelopment efforts.

When the legislation was announced, much attention was focused on the brownfields provisions. The impact of the Superfund reforms should not be underestimated. Four new categories of formerly PRPs have effectively been carved out of contribution actions. The exemptions and shifting burdens of proof will likely have a great impact on remaining PRPs. It is worth noting that the exempt categories—de micromis, MSW, bona fide prospective purchasers, and contiguous property owners—were never the big players in massive Superfund lawsuits. The exclusion of these parties from the pool of PRPs may help facilitate settlement by the bigger parties, but only if the definitions provided by the legislation prove clear enough to avoid further complicating the litigation.

185. It is worth noting that the enforcement bar provides little concrete protection. The EPA has rarely initiated enforcement proceedings against parties actively participating in a voluntary response program. Nonetheless, the uncertainty regarding such exposure was a real impediment to redevelopment projects.

186. See Channing J. Martin, Congress Provides Superfund Liability Relief, VA. ENVTL. COMPLIANCE UPDATE, Apr. 2002, at 5 (noting that the $250 million authorized for each of fiscal years 2002 through 2006 is a $150 million increase over current funding but that authorization does not ensure that the funds will be appropriated).
nightmare that is CERCLA.\textsuperscript{187} In sum, while the exemptions appear to provide considerable relief to certain parties, considerable ambiguities exist that will likely give rise to additional litigation.

While environmental law is largely perceived to be a field fraught with partisan stalemates, it is no surprise that this legislation received bipartisan support and was passed by the Bush Administration. This is true, notwithstanding criticisms of the environmental record of the Administration.\textsuperscript{188} While certain aspects clearly support environmentalism, developers and industry benefit from enhanced support for brownfields development. Also, the legislation provides more protection to private parties under CERCLA. The clarifications to owner liability should also have a favorable affect on real estate transactions.\textsuperscript{189}

Clearly, some of the provisions could have further encouraged redevelopment.\textsuperscript{190} As far as the Bush Administration is concerned, however, the legislation should be perceived as an environmental success. CERCLA reform is long overdue and this legislation

\textsuperscript{187} As one commentator notes: "The Act is a step in the right direction, but one could ask of Congress, 'With friends like these, who needs enemies?"' Martin, supra note 186, at 6. The author concludes that while the new Superfund defenses are complicated and therefore difficult to prove, the Act is a "long-awaited step in the right direction to reforming what is clearly the most unfair law Congress has ever enacted." Id.; see also Thomas O. McGarity, Jogging In Place: The Bush Administration's Freshman Year Environmental Record, 32 ENVTL. L. REP. 10709 (2002) (noting that "the [Bush] Administration participated actively in the enactment of long-pending 'brownfields' legislation that will devote additional federal funds ... to help clean up contaminated urban sites and thereby promote redevelopment of inner city areas").

\textsuperscript{188} While the Act was passed under a Republican administration and received noteworthy bipartisan support, it should be acknowledged that the provisions are not a result of pure Bush Administration initiatives. As noted, the Act merely formalizes and, in some cases, expands on EPA enforcement policy prior to the date of the Act. See, e.g., McGarity, supra note 187 (noting that the brownfields legislation cannot be "properly characterized as a Bush Administration 'initiative'" and the author was "unable to identify a single important new rulemaking initiative undertaken by the Bush Administration to protect citizens from private polluting activities that was not in the works prior to January 20, 2001").

\textsuperscript{189} See, e.g., Amy L. Edwards, Am. Law Inst.-Am. Bar Ass'n Course of Study 97 (2002) (noting that, as a result of the Act, "interested parties are now able to evaluate environmental risk in a rational manner, rather than blindly abandoning even mildly contaminated properties ... [with a result] ... that is good for the environment, good for the community, and good for business").

\textsuperscript{190} As one author notes, "These changes have been a long time in development. They [ ] are not as sweeping as had been expected during the last initiative to modify Superfund during the Clinton years. However ... [the Act] is a step, albeit a small and quiet one, in the right direction." Ann M. Catino, Superfund Reform Exempts Entities. New Law is a Small, Quiet Step in the Direction of Superfund Reform, CONN. L. TRIBUNE, Feb. 25, 2002, at 2.
makes certain favorable strides. Moreover, any steps to encourage brownfields redevelopment certainly benefit the environment and help to quell urban sprawl. The legislation can be characterized as a small, but timely, step toward brownfields redevelopment and, ultimately, sustainable development.\textsuperscript{191}

\textsuperscript{191} Nations from around the world recently convened in Johannesburg to discuss issues relating to sustainability. This summit followed up on sustainability discussions by world leaders in 1992 in Rio de Janeiro. A central idea behind sustainable development is that goals of social equity, economic growth, and environmental protection should be considered while planning for the future. Jonathan D. Weiss, \textit{Local Sustainability Efforts in the United States: The Progress Since Rio}, \textit{32 EnvTL. L. REP.} 10667, 10667 (2002) (adding that "[i]n the United States, policies promoting sustainability have arisen most often out of concerns about the effects of sprawl and thus most sustainability practices have been increasingly referred to as ‘smart growth’"). The brownfields initiatives contained in the Act can properly be characterized as an effort, albeit small and quiet, toward "smart growth," or sustainability. See, Catino, \textit{supra} note 190, at 2. The legislation was therefore timely insofar as the world's nations reconvened in September 2002, in Johannesburg to revisit the sustainability agenda set forth in Rio.