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The Small Business Liability Relief and Brownfields Revitalization Act of 2002: Promoting a Multi-Jurisdictional Policy

JESSE M. KEENAN¹

In recent years, King County, including the City of Seattle, Washington has been a “Showcase Community” for the U.S. Environmental Protection Agency (“EPA”).² This community, together with public and private entities, formed an Environmental Extension Service (“EES”) in March 1988 as part of the EPA’s Brownfields Showcase Community Program.³ The function of this program was to demonstrate cooperation with federal, state, local and private entities, as they pursue and implement a comprehensive local strategy for redeveloping brownfield sites.⁴

The EES served as a center point by which the community could do everything from assessing sites to leveraging funding to capitalize remediation loans. In fact, the Seattle EES leveraged over \$1.5 million from private funding alone to assess and remediate local sites.

The Seattle program demonstrates a real policy trend in the EPA regarding the redevelopment of brownfields. The policy of the EPA, in recent years, has been to address the redevelopment of brownfields with a multi-jurisdictional element, by giving state and local governments an expanded role. This article examines the Small Business Liability Relief and Brownfields Revitalization Act (“the Act”)⁵ in light of this policy trend. This examination will focus on state and local governments’ new roles, as refined in

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2. EPA, King County/Seattle: Reclaiming Industrial Lands, 500-F-02-165 (Dec. 2002), at http://www.epa.gov/swerosps/bf/pdf/ss_seatl.pdf.

3. *Id.*

4. *Id.*

5. The Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (codified at 42 U.S.C. §§ 9601, 9604, 9605, 9607, and 9622(g)(2002)).

the Act, which is consistent with an overall policy trend towards the implementation of a multi-jurisdictional element. This article will examine the key provisions of the Act, including the liability provisions as they relate to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as well as the funding provisions within the Act itself.

The author takes the position in the first portion of the article that the Act helps facilitate a shift towards the state clean-up programs and away from the federally administered programs. In addition, the author takes the position in the second portion of the article that state and local governments, particularly local governments, are now able to take an expanding role in redevelopment through a series of funding opportunities under the Act. Subsequently, it is the overall position of the author that the Act is consistent with an overall policy, which dictates that state and local governments take an ever-expanding role in brownfield development through the implementation of a multi-jurisdictional policy.

Before turning to an examination of the provisions of the Act, it is beneficial to take a brief look at the nature of the brownfield redevelopment problems that lead to the passage of the Act. Toxic substances contaminating brownfields represent one of the most elusive regulatory problems affecting land use.⁶ Toxic contaminants, through their widespread use and migrating properties, know no boundaries or jurisdictional limits. In addition, the public health ramifications from widespread exposure to toxic contaminants are truly daunting.⁷ One area which is most relevant to the intersection of toxic regulation and land use, is brownfield redevelopment.

Brownfields are essentially pieces of property, typically in urban areas, which are either being used for low intensity use or no use at all. The reasons for such inactivity usually rest upon the tremendous liability that comes along with the prospective purchase of such properties under CERCLA.⁸ Brownfields are not only an aesthetic blight upon the urban landscape, but the problems of such sites, ranging from health to environmental jus-

6. See JOHN S. APPEGATE, ET AL., *THE REGULATION OF TOXIC SUBSTANCES AND HAZARDOUS WASTE* 40-46 (2000).

7. See George W. C. McCarter, *Medical Sue-Veillance: A History and Critique of Medical Monitoring Remedy in Toxic Tort Litigation*, 45 RUTGERS L. REV. 227 (1993).

8. See Nicholas Capuano, *Silent Blight: New York's Brownfields & Environmental Justice*, 20 PACE ENVTL. L. REV. 811 (2003).

tice concerns, are far reaching.⁹ The environmental consequences range from the immediacy of potential toxic exposure¹⁰ of surrounding communities to the proliferation of suburban sprawl.¹¹ For these reasons and many others, the U.S. Conference of Mayors has made brownfield development a major initiative.¹² In fact, the EPA estimates that there are between 500,000 and 1,000,000 brownfield sites in the U.S. alone.¹³

Subsequently, local governments' interests in cleaning up brownfields are not purely aesthetic. The U.S. Conference of Mayors estimates that brownfield redevelopment could generate up to \$2.4 billion in tax revenues.¹⁴ So, when President George W. Bush signed a new piece of brownfields development legislation into law on January 11, 2002, it was touted not only as a tool for cleaning up the environment, but also as a powerful new tool towards revitalizing the urban areas where labor workforces had been hit disproportionately hard by the downturn in the economy.¹⁵

It was in this political context that the Act materialized in response to the ever growing challenges and problems related to brownfield development. As previously noted, the liability scheme under CERCLA is the most crucial legal hurdle to overcome for potential developers and state and local governments in their pursuit of redeveloping a brownfield site.¹⁶ The Act was heralded by many to be a major step in the right direction in clearing up many of the issues resulting in CERCLA litigation, which is often a ma-

9. *Id.* ; T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1073-74 (1991).

10. John S. Applegate, *Risk Assessment, Redevelopment, and Environmental Justice: Evaluating the Brownfields Bargain*, 13 J. NAT. RESOURCES & ENVTL. L. 243, 247-48 (1998).

11. Joel B. Eisen, *A Case Study of Sustainable Development: Brownfields*, 32 ENVTL. L. REP. 10,420 (2002).

12. Major Provisions of H.R. 2869 - The Small Business Liability Relief and Brownfields Revitalization Act, at http://www.usmayors.org/uscm/us_mayor_newspaper/documents/01_14_02/brownfields2.asp (last modified Jan. 14, 2002).

13. President Signs Legislation to Clean the Environment & Create Jobs, at http://www.epa.gov/epahome/headline_011102.htm (last modified June 8, 2004) [hereinafter President Signs Legislation]; Small Business Liability Relief and Brownfields Revitalization Act, Pub.L. 107-118. *See generally* Thomas, *Legislative History on the Internet*, at <http://thomas.loc.gov/> (providing the full text of the brownfield amendment and legislative history).

14. President Signs Legislation, *supra* note 13.

15. *Id.*

16. Michael B. Gerrard, et al., *We Shall Be Released: New Forms of Legal Protection*, 499 PRACTICING L. INST. REAL EST. L. & PRAC. COURSE HANDBOOK SERIES 759 (2003).

jor impediment to brownfields development.¹⁷ In addition, the Act provided consistent funds that capitalize brownfield redevelopment for years to come.¹⁸

The Act will have a far reaching impact on state and local governments, as well as developers, who aspire to revitalize these idle land uses.¹⁹ In order to fully understand the local land use implications of the Act, it is necessary to first examine the key elements of it in terms of the alteration of the liability scheme under CERCLA. It should be noted that CERCLA does not preempt state analog legislation.²⁰ In fact, it has been noted that "[s]ubtitle C of the Act specifically limits the federal government's authority to pursue administrative or judicial action against an owner or operator when that person's land already is undergoing cleanup pursuant to a state-approved plan."²¹ States are left with a great deal of room in terms of setting their own land use policies in regard to brownfields.²² In fact, states in theory may choose to implement and amend their own analog legislation. Ultimately, states may have the same criticisms of the Act that have been noted by some practitioners in the field.²³ It should be noted that even prior to the passage of the Act, the states already had considerable leverage in dictating what sites should be cleaned up. In 1995, the EPA provided states with State Memoranda Agreements that allowed parties engaged in voluntary cleanup with the state to be exempt from further liability via a suit by the EPA, if such parties fully complied with state remedial standards.²⁴

17. 147 CONG. REC. S3,879, S3,890 (daily ed. Apr. 25, 2001) (statement of Sen. Reid); Lawrence P. Schnapf, *New Solutions to Environmental Problems in Business & Real Estate Deals 2003: Due Diligence in Corporate Transactions*, 499 PRACTICING L. INST. REAL EST. L. & PRAC. COURSE HANDBOOK SERIES 175 (2003).

18. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9604(k) (Supp. I 2001).

19. See Adrienne G. Southgate & Susan B. Kaplan, *Brownfields Law Takes Center Stage*, 51 R.I.B.J. 3:13(May/June 2003).

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

21. Heather D. Vandenberg, *The Brownfields Revitalization Act of 2001: New Hope for Urban Development*, 23 A.B.A. CONSTRUCTION LAW 39 (2003).

22. See Flannary P. Collins, *Note: The Small Business and Liability Relief and Brownfields Revitalization Act: A Critique*, 13 DUKE ENVTL. L. & POL'Y F. 303 (2003).

23. See Robert P. Dahlquist & Tiffany A. Barzal, *Ah, Relief from CERCLA, But Where is the Relief?*, 12 A.B.A. BUS. L. TODAY 39 (2003).

24. Amy L. Edwards, *Institutional Controls: The Converging Worlds of Real Estate and Environmental Law and the Role of the Uniform Environmental Covenant Act*, 35 CONN. L. REV. 1255, 1256 (2003).

Despite CERCLA's lack of preemption and the pre-existing state memoranda policy, the new liability scheme under the Act is still relevant in terms of current local land use practices to the extent that liability is often one of the primary issues preventing redevelopment of brownfield sites. Arguably, the most facially controversial section of the Act is the *de micromis* exemption for small businesses.²⁵

Prior to the Act, the EPA had the statutory authority under CERCLA section 122(g)²⁶ to settle with *de micromis* contributors, but settlement did not equal an exemption from liability.²⁷ Subsequently, under the Act,²⁸ parties who contribute, whether it be by disposing, treating, or transporting, less than 200 pounds of solid hazardous waste or less than 110 pounds of liquid material are exempt from liability.²⁹ This exemption only applies to sites on the National Priority List ("NPL").³⁰ In addition to the limitation that the exemption be applied only in the context of a NPL site, the exemption will not apply if it is determined that (1) the materials could or did contribute significantly to the cost of the remediation of a site; or (2) the person or entity failed to comply with an information request of an administrative subpoena; or (3) the person or entity was convicted of a criminal violation for the conduct for which the exemption would apply.³¹

These exemption provisions have a direct consequence on parties opting to remediate under state programs, in lieu of a federally administered program. Considering the relatively few sites that are on the NPL in comparison to the total number of contaminated sites, including brownfields, this is a toothless exemption. Again, despite this *de micromis* exemption, CERCLA liability is still by and large preserved as a powerful leveraging tool for states that choose to set their own prerogative in state remedial actions. Therefore, parties will be more inclined to remediate their sites under state plans, instead of possibly relying, if qualified, on toothless exemptions in the Act.

25. 42 U.S.C. § 9607(o) (Su.p. I 2001).

26. *Id.* § 9622(g) (2000).

27. See ALLAN J. TOPOL & REBECCA SNOW, SUPERFUND LAW AND PROCEDURE § 5.11 (1992 & Supp. 2003).

28. Small Business Liability Relief and Brownfields Revitalization Act, *Pub. L. No. 107-118* § 102, 115 Stat. 2356 (2002).

29. 42 U.S.C. § 9607(o)(1)(A).

30. *Id.* § 9607(o)(1).

31. *Id.* § 9607(o)(2).

In addition, there is another exemption for small businesses contributing to municipal solid waste sites on the NPL.³² Unlike the *de micromis* exemption, this exemption has no reference to limitations on specific amounts of material.³³ The implications of this exemption for small businesses could have a marked effect on state and local governments. This exemption, and others, could limit the tools by which local municipalities and authorities implement site clean-up, at least in terms of joint and several liability.³⁴ It can be argued that if the exemptions are easy to obtain, then parties may gravitate towards a federally administered cleanup. However, if the exemptions are difficult to obtain, like many other exemptions and defenses under CERCLA, then parties may gravitate toward state administered cleanups.

In addition to the *de micromis* exemption and the solid waste exemptions, the Act allows for a contiguous land owner defense.³⁵ Again, an examination of these exemptions is relevant to the extent that parties may opt to remediate under state administered plans, because of the problems associated with such exemptions and defenses. In the case where a property owner contiguous to a contaminated piece of property finds that her property has been contaminated, the contiguous landowner is not considered an owner or operator for liability purposes under section 9607(a)(1) or (2).³⁶ Some commentators have noted that this defense is rather limited in two regards. First, it only applies to water contamination, and does not address soil leaching.³⁷ Second, this new addition is slightly futile in the sense that there was already a third-party defense available to upgradient property owners that does not require due diligence or cooperation with the EPA.³⁸ Nonethe-

32. *Id.* § 9607(p).

33. *Id.*

34. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983) (holding parties to be joint and severally liable under CERCLA).

35. 42 U.S.C. § 9607(q).

36. *Id.* § 9607 (q)(1)(A).

37. Timothy Harmon & Karen Williams, *Brownfields Revitalization Act: Big Promises Not Delivered in New Brownfields Law*, ENVIRONS (Summer 2002) (suggesting the Brownfields Act fails to live up to its promises), available at <http://www.lanepowell.com/pressroom/newsletters/detail.asp?xnltpeid=12&nid=318>; See Spencer M. Wiegard, *The Brownfields Act: Providing Relief for the Innocent or New Hurdles to Avoid CERCLA Liability?*, 28 WM. & MARY ENVTL. & POL'Y REV. 127 (2003).

38. Anthony R. Chase, et. al, *CERCLA: Convey to a Pauper and Avoid Cost Recovery under Section 107(A)(1)?*, 33 ENVTL. L. 393 (2001)(citing 42 U.S.C. § 9601(35)(A) and (B), and noting that 42 U.S.C. § 9607(b)(3) also requires the purchaser to "establish that it exercised due care once it became aware of the contamination"); Scott

less, the Act has established a series of elements that must be met in order to claim this defense: (1) the person did not contribute to the release; (2) the person is not related to the party responsible for the contamination; (3) the person took reasonable steps to prevent any further contamination; (4) the person provides full cooperation with the authorities; (5) the person does not impede the remediation process; and (6) the person is in compliance with all land use restrictions.³⁹

This final requirement is of particular importance, to the extent that it provides a greater role for local governments in the remediation process. The implications of requiring a potential party or contiguous land owner to be in compliance with local land use restrictions are not entirely clear. However, this does appear to give the local land use authorities a tremendous amount of indirect power in dictating the liability of this potential party.⁴⁰ For example, a local government may view the contiguous property owner as part of the overall problem and potentially responsible for the contamination, even though the EPA or state regulators may not have made such a finding. The local government could therefore rezone the property, and hence subject the contiguous property owner to liability because the property owner would be, for illustrative purposes, in possession of a facility which is a non-conforming use.⁴¹ Nevertheless, local politics could dictate just the opposite result. Subsequently, this final element, requiring that the contiguous land owner be in compliance with local land use restrictions, shifts much of the decision making power to the local government.

In addition to the previously mentioned requirements, the contiguous property owner who claims the new defense must show that she made "all [the] appropriate inquiries" at the time she purchased the property, and did not have any knowledge of the

Reisch, *The Brownfields Amendments: New Opportunities, New Challenges—Part I*, 31 COLO. LAW. 99, 101 (June 2002); Heather D. Vandenberg, *The Brownfields Revitalization Act of 2001: New Hope for Urban Development*, 23 A.B.A. CONSTRUCTION LAW 39 (2003).

39. 42 U.S.C. § 9607(q)(1)(A) (Supp. I 2001).

40. See EPA Memorandum OSWER Directive Number: 9355.7-04, at <http://www.epa.gov/brownfields/html-doc/landuse.htm> (last visited Feb. 3, 2005) (encouraging discussions among local land use planning authorities and communities to be conducted early in the site assessment process. This directive ensures that site remedies meeting future land use objectives and protecting human health and the environment are selected).

41. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 4.31 (2003).

contamination.⁴² Regarding the application of an “all appropriate inquiries”, one commentator has noted that the “new contiguous property owner exemption [has] the same standard that has been in place for many years for a different CERCLA liability exemption — the innocent purchaser exemption. The innocent purchaser exemption has proven to be, for all practical purposes, very difficult to effectively assert.”⁴³ Again, if the defense is difficult to obtain, then parties may gravitate away from federally administered cleanups and towards state administered cleanups, which offer protection through State Memoranda Agreements.

The crux of the problem in asserting the contiguous property owner defense revolves around the property owner’s conundrum; if she finds the contamination she loses her defense, and if she does not find the contamination it can be argued that she did not comply with the “all appropriate inquiries” requirement.⁴⁴ However, the Act⁴⁵ directs the EPA to publish regulations defining “all appropriate inquiries,” and on May 9, 2003 the EPA attempted to clarify some of the underlying issues regarding this rather ambiguous language.⁴⁶

The federal regulations clarifying the “all appropriate standard” are modeled on the American Society for Testing Materials (“ASTM”) phase I assessment.⁴⁷ Although there is some uniformity in the standard, there may not always be uniformity in the application of the test, since it is a subjective assessment done by an environmental professional that does not require soil or water samples to be taken from the site.⁴⁸ Subsequently, considering how difficult it may be for the contiguous land owner to claim this defense, it appears that these changes introduced by the Act have done little to change the overall liability structure of CERCLA, which may have the indirect effect of driving parties towards a state-administered cleanup.

An additional liability release stemming from the Act, which relates to the “all appropriate inquiries” language is the release of

42. 42 U.S.C. § 9607(q)(1)(A)(viii) (Supp. I 2001).

43. Dahlquist, *supra* note 23.

44. *Id.*

45. Small Business Liability Relief and Brownfield Revitalization Act, Pub. Law No. 107-118 § 223.

46. 42 U.S.C. § 9601(35)(B) (Supp. I 2001); 40 C.F.R. Pt. 312.1 (2004); 68 Fed. Reg. 24,888 (June 9, 2003) (clarifying innocent landowner defense).

47. *Id.*

48. *Id.*

Bona Fide Prospective Purchasers.⁴⁹ A buyer of land purchased after the Act's enactment who conducted all appropriate inquiries into the prior uses of the property and subsequently found contamination is exempted from liability,⁵⁰ assuming the prospective purchaser has made all required disclosures, prevented any further contamination, used due care with any releases, and did not interfere with any institutional controls for remediation.⁵¹ This exemption for those property owners who bought property after discovering that it was contaminated effectively eliminates the need for prospective purchaser agreements with the EPA.⁵²

The uncertainty of the bona fide prospective purchaser defense, and others, is significant to the extent that it deters parties from opting to remediate under a federally administered plan. It could be argued that this defense will be difficult to attain,⁵³ leaving parties more inclined to avail themselves to state oversight rather than federal oversight. It may be less risky for a party to seek a state prospective purchase agreement rather than attempt to use the federal affirmative defense of a *bona fide* purchaser. With the prospective purchaser agreement the party will know exactly how much their liability will be, and such a state agreement cannot be preempted by the federal statute.⁵⁴ In addition, there is a transactional litigation cost associated with the federal statutory scheme because the bona fide purchaser exemption is an affirmative defense, and this may be an additional reason that parties may opt to clean up sites under state supervision.⁵⁵ Another reason that parties may opt for a state prospective purchaser agreement is that under CERCLA section 107(r), if the government has un-recovered cleanup costs and the fair market value of the property has increased after the remediation process,

49. 42 U.S.C. §§ 9601(40), 9607(r) (Supp. I 2001).

50. *Id.* § 9607(r)(1).

51. *Id.* § 9601(40)(C) - (F).

52. Spencer M. Wiegard, *The Brownfields Act: Providing Relief for the Innocent or New Hurdles to Avoid CERCLA Liability?*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 127, 149 (2003).

53. *Id.*

54. *See Burlington N. R.R. Co. v. Time Oil Co.*, 783 F. Supp. 1339, 1343 (W.D. Wash. 1990).

55. RONALD H. ROSENBERG, COMMUNITY RESOURCE GUIDE FOR BROWNFIELDS REDEVELOPMENT 27 (2d ed. 2002) (citing Office of Solid Waste and Remedial Response, Environmental Protection Agency, No. 542-B-97-001, Tool Kit of Information Resources for Brownfields Investigation and Cleanup (1997)).

then the government can put a lien on the property to recover such a cost.⁵⁶

However, what determines fair market value? There are a variety of methods by which a certified and licensed commercial appraiser could appraise a piece of property. Appraisers will look at like and best uses, book values, and discounted cash flow methods.⁵⁷ At the same time, they will try to reconcile the multiple valuation techniques.⁵⁸ But certainly one important, if not crucial, factor for determining the valuation of a piece of property is the tax value.⁵⁹ Tax valuation is done primarily done through the county or local jurisdiction's tax assessors office. This raises several key points. First, it could be assumed that these local bureaucratic institutions are highly susceptible to local political pressures, and therefore the objectiveness of their valuation techniques are often questionable and not uniform.⁶⁰ Second, the tax commissioners are often elected officials, and are susceptible to particular political pressures.⁶¹ Third, and most importantly, the policy of the tax offices are almost always dictated by the local government. This implies that local governments will have a great deal of power to control the indeterminate financial liability of a redevelopment project.⁶² However, it is important to keep in mind that state legislators often have the ultimate say in *ad valorem* taxation for real property.⁶³ The State of Georgia has even passed legislation addressing the issue of fair market valuation for brownfield property,⁶⁴ giving preferential assessment to owners of brownfield property.⁶⁵ Nevertheless, the county board of tax assessors retains some vested discretion in the granting of preferential tax assessment for brownfield properties.⁶⁶ Again, financial stability and predictability are reasons why developers would

56. 42 U.S.C. § 9607(r)(2) (Supp. I 2001); Walter Mugdan, et. al, *The Small Business and Liability Relief and Brownfields Revitalization Act: A Summary and Discussion*, SH058 ALI-ABA 117 (Feb. 12-14, 2003).

57. GEORGE LEFCOE, REAL ESTATE TRANSACTIONS 600-11 (Lexis Law Publishing 1999).

58. *Id.*

59. *Id.*

60. *Id.*; Anthony Downs, *Today's Appraisals Are Unreliable*, NAT'L REAL EST. INVESTOR Feb. 1992, at 46.

61. LEFCOE, *supra* note 57.

62. *Id.*

63. *Id.*

64. GA. CODE ANN. § 48-5-2(3)(F)(2004).

65. *Id.* § 48-5-7.6.

66. *Id.* § 48-5-7.6(c).

choose to contract to limit their liability under a state plan, which cannot be preempted by federal statute.⁶⁷ As a result, states retain a greater, ever expanding role in brownfield development.

In addition to modifications of and amendments to CERCLA, the Act also provides a long-awaited infusion of funding to facilitate the redevelopment process for brownfield development.⁶⁸ The Act offers an unprecedented new role for local governments. Local governments now have the financial tools and the opportunity to work with developers and private citizens in a capacity that transcends the conventional role of local government.

The Act provides for three important types of funding which local governments and redevelopment authorities may utilize: (1) clean up grants, (2) revolving loan fund grants, and (3) assessment grants.⁶⁹ In fact, the Act provides for up to \$200 million a year for the funding of such grants.⁷⁰ This allotted expenditure is up almost 100% from the 2002 brownfields funding allocations, of approximately \$98 million.⁷¹ However, if the EPA is correct in determining that there are close to one million brownfield sites in the U.S., then this funding allocation is just a drop in the bucket in the overall cost of locating, identifying, assessing, and cleaning up brownfields.⁷²

Before looking at the available funding options which increase state and local governments' involvement in the remediation process, it should be noted that local governments are statutorily included as eligible for the different grant programs.⁷³ In fact, the Act envisions some sort of quasi-governmental entity, which could handle, supervise, and perhaps fund a redeveloped brownfield site.⁷⁴ This local entity may very well be the platform to most efficiently coordinate and take advantage of the brownfields funding allocation.

One might assume that the clean up grant itself would be the backbone of the brownfields funding allocation; however, it is not. The statute mandates that each applicant may only apply for and receive a one time \$200,000 grant, which is to be used exclusively

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

68. 42 U.S.C. § 9604(k) (Supp. I 2001).

69. *Id.*

70. *Id.* § 9604(k)(12).

71. *President Signs Legislation*, *supra* note 13.

72. *Id.*

73. 42 U.S.C. § 9604(k)(1) (Supp. I 2001).

74. *Id.* § 9604(k)(1)(B).

for remediation purposes.⁷⁵ Obviously, this is just a drop in the bucket when viewed in proportion to the total expenditures required to remediate most contaminated sites; however, the applicant may apply for up to five sites.⁷⁶

There are two important implications for local governments under the cleanup or remediation grants. First, the applicant must own the land and contribute at least 20% of the cost share.⁷⁷ This may help local governments who actually own the site, but it does nothing for local governments who are actively involved in trying to clean up sites owned by private individuals and developers. Second, in October of 2003, the EPA published proposed regulations establishing the criteria that will be used to establish the priority in releasing the funding under the grant program.⁷⁸ The criteria for remediation grants include a series of factors that give preference to sites that the local government has given the green light and projects where the local government is taking an active role in the overall cleanup process.⁷⁹ This gives local government, and perhaps quasi-governmental authorities, a tremendous amount of power in dictating not only potential liability, as discussed previously, but also in dictating the financial pro forma viability of proposed development projects.

The next funding program available under the Act is the brownfield site characterization and assessment grant program.⁸⁰ This program provides for "grants to [be used to] inventory, characterize, assess, and conduct planning related to brownfield sites."⁸¹ The EPA may award up to a \$200,000 grant to each applicant per site; however, this amount may be increased to \$350,000 when considering factors such as size and level of contamination of the site.⁸² Unlike the remediation grants, this grant program has no ownership requirements, which means that local govern-

75. *Id.* § 9604(k)(3)(A)(ii).

76. EPA, Brownfields Application Information, EPA-500-F-02-142 (Feb. 2004) available at <http://www.epa.gov/swerosps/bf/applicat.htm#pg> (last modified Feb. 10, 2004).

77. Scott Reisch & Catherine M. VanHeuven, "Dirty Money": EPA Issues Brownfield Grant Guidelines, 32 COLO. LAW. 69, 70 (2003).

78. 42 U.S.C. § 9604(k); Announcement of Proposal Deadlines for the Competition for the 2004 National Brownfields Assessment, Revolving Loan Fund, and Cleanup Grants, 68 Fed. Reg. 59,611 (Oct. 16, 2003).

79. 68 Fed. Reg. at 59,613.

80. 42 U.S.C. § 9604(k)(2) (Supp. I 2001).

81. *Id.* § 9604(k)(2)(A)(i).

82. *Id.* § 9604(k)(4)(A)(i)(I).

ment could receive funding under this program for a variety of use in regards to brownfield planning and assessment.⁸³

Although the grant program seems to provide “deep pockets of money” for local government use, there are two catches. First, local governments may not use more than 10% of the funding they receive from grants to (1) monitor the health of populations exposed to one or more hazardous substances from a brownfield sites and (2) monitor and enforce any institutional control used to prevent human exposure to any hazardous substance from a brownfield site.⁸⁴ This provision appears to strip some power away from local governments, and it seems perplexing that the federal government would limit the ability of local governments to protect the health and safety of their citizenry. Second, no money from the grant may be used towards administrative costs.⁸⁵ Thus the costs of applying for the grants may prove to be cost prohibitive in light of the cost burden that the local government must bear in just applying for the grant.⁸⁶ It is important to remember with these grant programs that just because an entity applies for the grant does not mean they are going to receive the funding, so it is a bit of gamble for local governments to take in terms of paying for the grant proposal.

The final funding program available under the Act is the Revolving Loan Fund Grant.⁸⁷ Applicants are allowed to apply for up to \$1 million to capitalize a revolving loan, which is used for the development or remediation of a brownfield project.⁸⁸ In addition, applicants may pool their applications together to be used in concert for one specific site.⁸⁹ This allows local governments to take the initiative and coordinate developers and private citizens, at least in terms of financing a redevelopment project.

83. *Id.* § 9604(k)(1).

84. *Id.* § 9604(k)(4)(C).

85. *Id.* § 9604(k)(4)(B)(i)(III).

86. *Id.*

87. *Id.* § 9604(k)(4)(A)(ii)(III) (Supp. I 2001).

88. EPA, Proposal Guidelines for Brownfields Assessment, Revolving Loan Fund, and Cleanup Grants, EPA-500-F-03-244 (Oct. 2002) *available at* http://www.epa.gov/swerosps/bf/pg/fy04_proposal_guidelines.htm (last modified Oct. 24, 2003) [hereinafter EPA, Proposal Guidelines]. As a side note, grants under the Brownfield Act may be used to cleanup and assess sites contaminated by petroleum, which as been long excluded under CERCLA. *See Capuano, supra* note 8. It is an interesting policy implication under the Bush administration, which has close ties to the oil industry, that the government is funding, or at least helping to fund, the clean up of petroleum sites.

89. EPA, Proposal Guidelines, *supra* note 88.

In fact, a specific quasi-governmental agency could be set up to handle such coordination, as envisioned by the statute.⁹⁰ Of course, the catch is that the applicants must share a certain percentage of the cost in proportion to the overall capitalization of the loans.⁹¹ However, local governments would be well suited to internalize the externalities of this requirement by providing services, labor, and expertise, which is an invaluable asset that many private citizens would not be able to utilize.⁹² In addition, local governments would be able to distribute, in subgrants, a percentage of the excess funds not being used in a revolving loan fund, which is a minimum of 60%.⁹³ Of course, this gives local governments more power and control over the entire financial feasibility of the redevelopment.

State and local governments, under the Act, have more and more control and power over the process of brownfield redevelopment. First, the Act indirectly facilitates a move away from federally administered cleanups to state administered programs. This shift is due to the difficult application of exemptions and defenses under the Federal statutory scheme, and the predictability under state programs.⁹⁴ As previously noted, key liability provisions under CERCLA have been largely preserved, in light of the toothless new exemptions and defenses under the Act, which may be difficult to obtain. In addition, several provisions make it more cost efficient for developers and private citizens to gravitate towards state cleanup statutes, which are not subject to federal preemption. Subsequently, the funding provisions under the Act, although somewhat limited in scope, allow for unprecedented partnerships from which state and local governments can facilitate and dictate the financial feasibility of site redevelopment. Although some have argued that the uneasy relationship between the EPA and state-led programs will lead to more and more developers neglecting to develop brownfield sites,⁹⁵ the reality is that market forces in the land speculation market will ultimately dictate that brownfields will be developed, whether it be urban infill

90. President Signs Legislation, *supra* note 13.

91. 42 U.S.C. § 9604(k)(a) (Supp. I 2001).

92. See generally *id.*

93. EPA, Proposal Guidelines for Brownfields Assessment, Revolving Loan Fund, and Cleanup Grants, S60-F-04-253 (Sept. 2004), available at http://www.epa.gov/swerosps/bf/pg/guidelines_2005.htm#section1 (last modified Oct. 1, 2004).

94. However, it must be noted that some states may have much more stringent liability schemes as compared with other states.

95. Dahlquist, *supra* note 23.

or large scale suburban like development. Nevertheless, it is the position of the author that state and local governments are taking an ever expanding role in Brownfield development through a multi-jurisdictional policy, which the Act indirectly promotes.