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Joel A. Mintz

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New Loopholes or Minor Adjustments?: A Summary and Evaluation of the Small Business Liability Relief and Brownfields Revitalization Act

JOEL A. MINTZ*

In the final weeks of 2001, after years of controversy, debate and deadlock, Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act (the SBLRBRA).¹ This statute, which was signed into law by President Bush on January 11, 2002, combined two earlier bills: the proposed Brownfields Revitalization and Environmental Restoration Act of 2001² (which had passed the U.S. Senate on a 99-0 vote) and the Small Business Liability Protection Act³ (which had unanimously been passed by the House of Representatives). The Act contains a number of limited exemptions from the scheme of responsible party liability created by the Comprehensive Environmental Response, Compensation and Liability Act⁴ (CERCLA or the Superfund Act), along with the authorization for a set of federal grants and loans to encourage the clean-up and development of brownfield sites around the United States.⁵

This article is both a summary and an evaluation of these recent CERCLA amendments. It will begin by recounting the key modifications to the Superfund Act's liability provisions, which have been affected by the SBLRBRA. It will then treat the stat-

* Professor of Law, Nova Southeastern University Law Center Scholar, Center for Progressive Regulation; B.A. Columbia University, 1970; J.D. NYU School of Law, 1974; LL.M. Columbia University Law School, 1982; J.S.D. Columbia University Law School, 1989.

1. Small Business Liability Relief and Brownfields Revitalization Act of 2001, Pub. L. No. 107-118, 115 Stat. 2356 (codified as amended in scattered sections of 42 U.S.C.) [hereinafter "SBLRBRA"].

2. S. 350, 107th Cong. (2001).

3. H.R. 1831, 107th Cong. (2001).

4. 42 U.S.C. §§ 9601-9675 (1994 & Supp. 2002) [hereinafter "CERCLA"].

5. The SBLRBRA defines a brownfield site as "real property, the expansion, re-development, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." SBLRBRA § 211(a)(39) (2002).

ute's new funding mechanisms for revitalizing brownfield areas. Finally, it will assay the merits of the Act as an alteration of the longstanding liability precepts of CERCLA and as a financing measure for extending the scope of brownfields redevelopment.

I. Key Components of the Small Business Liability Relief and Brownfields Revitalization Act (SBLRBRA)

A. Modifications to the CERCLA Liability Scheme

In enacting the SBLRBRA, Congress established, codified or clarified six distinct exemptions, or defenses, for limited categories of parties who would otherwise have been held liable under the pre-existing liability regime of CERCLA. These exemptions include a "de micromis exemption," a municipal solid waste exemption, an exemption for parties with limited financial resources, an exemption for contiguous property owners, an exemption for prospective purchasers of brownfield sites, and some changes to CERCLA's innocent landowner defense. Although some of these exemptions merely codify the central provisions of prior EPA administrative policies and guidance documents, others break new ground by creating previously unavailable legal defenses for certain potentially responsible parties (PRP's), and by establishing limitations on the scope and availability of those defenses.

1. The De Micromis Exemption

In the SBLRBRA's initial substantive provision, Congress added a new subsection to CERCLA, § 107(o), which exempts certain PRP's who have contributed only very small volumes of low toxicity hazardous waste at hazardous waste sites listed on CERCLA's National Priorities List (NPL). Specifically, the new subsection provides that parties who would otherwise be liable as generators or transporters under CERCLA § 107(a)(3) or (4) are exempt from liability where they can demonstrate that prior to April 1, 2002, the total amount of hazardous substances that they contributed to a Superfund facility listed on the NPL was less than 110 gallons of liquid material or less than 200 pounds of solid materials.⁶

At the same time, however, new § 107(o) allows the President (and, presumably, the EPA, assuming that Agency will be delegated the pertinent administrative authority) to exercise a "pull-

6. SBLRBRA § 102(o)(1)(A). Notably, the Act gives EPA the authority to change these amounts by regulation. SBLRBRA § 102(o)(1)(A).

back” that will once again subject the generator or transporter in question to Superfund liability. In particular, the Act provides the de micromis exemption may not apply in cases in which the President determines that any of the following conditions exist:

- 1) the materials containing hazardous substances have contributed (or could contribute) significantly to the cost of the response action or natural resource restoration with regard to the facility in question; or
- 2) the person seeking the exemption has failed to comply with a CERCLA information request or administrative subpoena, or has impeded (or is impeding) the performance of a response action or natural resource restoration with respect to the facility; or
- 3) a person has been convicted of a criminal violation for the particular waste generation or transportation that the exemption would apply to (and that conviction has not been vitiated).⁷

2. The Municipal Solid Waste Exemption

At § 102, SBLRBRA creates a new subsection 102(p) of CERCLA. This provision establishes an exemption for certain generators of “municipal solid waste,” which is disposed of at facilities listed on the NPL.⁸ The term municipal solid waste (MSW) is defined by the Act as waste material that is either generated by a household or by a “commercial, industrial, or institutional entity” (to the extent that waste from the latter kind of entity meets each of these three conditions):

- 1) it is “essentially the same” as waste “normally generated” by a household;
- 2) it is collected and disposed of as part of normal municipal solid waste collection services; and
- 3) it contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances

7. SBLRBRA § 102(o)(2). Under the new Act, a governmental determination of the existence of one or more of these conditions is not subject to judicial review. SBLRBRA § 102(o)(3). The statute further provides that, in private party CERCLA contribution actions, the burden of proof is on the party bringing the action to show that the defendant is not a de micromis contributor. SBLRBRA § 102(o)(4).

8. SBLRBRA § 102(p) (2002).

contained in waste material generated by a typical single-family household.⁹

Under the new CERCLA § 102(p), parties may be entitled to an exemption from Superfund liability as NPL site hazardous substance generators if they can demonstrate that they are either:

- 1) an owner, operator or lessee of residential property from which any Municipal Solid Waste (MSW) was generated;
- 2) a business entity that, during the three years prior to its notification of potential CERCLA liability, "employed an average of not more than 100 full-time individuals, or the equivalent thereof;" and that is a "small business concern" within the meaning of the Small Business Act; or
- 3) a tax-exempt, not-for-profit organization, as described in § 501(c)(3) of the Internal Revenue Code which, during the year preceding its receipt of notification of potential CERCLA liability, employed not more than 100 paid individuals at the location from which the MSW in question was generated.¹⁰

However, as under the *de micromis* exemption, the President may nullify the exempt status of the generator in question if the President makes a (non-judicially reviewable) determination that:

- 1) the MSW in question has contributed significantly (or could contribute significantly) to the cost of a response action or a natural resource restoration;
- 2) the generator failed to comply with an information request or administrative subpoena issued under CERCLA; or
- 3) the generator has impeded (or is impeding) a response action or natural resource restoration at the NPL site in question.¹¹

9. SBLRBRA § 102(p)(4)(A)(ii). The Act specifically lists the following items as "examples" of municipal solid waste: "Food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, elementary or secondary school science laboratory waste, and household hazardous waste." SBLRBRA § 102(p)(4)(B). It also provides that the term municipal solid waste does not apply to either combustion ash generated by resource recovery facilities or municipal incinerators, or to waste material from manufacturing or processing operations (including pollution control operations) that is not essentially the same as waste normally generated by households. SBLRBRA § 102(p)(4)(C).

10. SBLRBRA §§ 102(p)(1)(A)-(C).

11. SBLRBRA §§ 102(p)(2)(A)-(C).

The statute clearly bars contribution actions by non-governmental parties against owners or operators of residential property from which MSW was generated. It also provides that non-governmental entities that commence a CERCLA contribution action after the date of enactment of the SBLRBRA will be liable for the defendant's "reasonable costs" of defending such an action (including "all reasonable attorneys fees and expert witness fees"), if the defendant in that action is held to be entitled to either the MSW exemption or the de micromis exemption.¹² In addition, the SBLRBRA establishes that, in CERCLA cost-recovery actions pursuant to § 107 or § 113, the plaintiff (whether governmental or private) must bear the burden of proof as to the applicability of the MSW exemption (and the exceptions to it) with regard to MSW disposed of before April 1, 2001.¹³ However, only private parties are required to meet the same evidentiary burden in cost-recovery cases that involve MSW that was disposed of after April 1, 2001.¹⁴

3. Alternative Settlements For Parties With A Limited Ability To Pay

The SBLRBRA amends § 122(g) of CERCLA (regarding expedited settlements with de minimis parties) to authorize conditional expedited settlements with PRP's who demonstrate to the President an inability (or a limited ability) to pay Superfund response costs.¹⁵ Such persons are entitled to "alternative payment methods" that the President deems "necessary or appropriate."¹⁶

Drawing heavily upon pre-existing EPA administrative policy,¹⁷ the Act requires the President to take account of the party's ability to pay response costs and still remain in business (taking into account the party's overall financial condition and any constraints on its ability to raise revenues), when determining whether a party is unable to pay response costs.¹⁸ Moreover, persons who request a settlement on that basis must:

12. SBLRBRA §§ 102(p)(6)-(7) (2002).

13. SBLRBRA § 102(p)(5).

14. SBLRBRA § 102(p)(5).

15. SBLRBRA § 102(b).

16. SBLRBRA § 102(b)(7)(D).

17. See EPA, GENERAL POLICY ON SUPERFUND ABILITY TO PAY DETERMINATIONS (1997), available at <http://es.epa.gov/oeca/osre/970930-4.html>.

18. SBLRBRA §§ 102(b)(7)(A) and (B) (2002). Such determinations may not be subject to judicial review. SBLRBRA § 102(b)(11).

- 1) promptly provide the President with all relevant information needed to determine the person's ability to pay response costs;¹⁹
- 2) waive all claims that they may have against other PRPs for response costs at the same facility (unless the President specifically finds that such a waiver would be "unjust");
- 3) comply with all Superfund-based requests for access or information, and any administrative subpoenas issued under CERCLA; and
- 4) not impede the performance of a response action with respect to the facility in question.²⁰

The President must notify any PRP who has requested an inability-to-pay settlement as to whether or not that party has been found to be eligible for such a settlement.²¹ The President's notice must include a written explanation of the reasons for any denial of such a request.²² Additionally, once every inability-to-pay settlement has become finalized, the Act requires the President to provide notice of the settlement to all PRPs at the facility who have not settled with the government prior to that time.²³

4. Exemption For Contiguous Property Owners

The SBLRBRA also creates a conditional exemption from Superfund liability for owners or operators of contaminated property that is contiguous to property, owned by another party, from which hazardous substances have been released.²⁴ Under this provision, (which is also substantially similar to a prior EPA CERCLA policy)²⁵ owners or operators of property that is so situated are exempt from owner or operator liability under Superfund § 107(a) so long as they:

- 1) did not cause, contribute or consent to the release or threatened release in question;
- 2) are not potentially liable or affiliated with any person that is potentially liable for the release;

19. SBLRBRA § 102(b)(7)(C).

20. SBLRBRA § 102(b)(8).

21. SBLRBRA § 102(b)(10).

22. SBLRBRA § 102(b)(9).

23. SBLRBRA § 102(b)(12) (2002).

24. SBLRBRA § 221(q)(1)(A).

25. See EPA, "POLICY TOWARD OWNERS OF PROPERTY CONTAINING CONTAMINATED AQUIFERS" (1995), available at <http://www.epa.gov/oeca/brownfields/html-doc/acquirer.htm>.

- 3) are not the result of reorganization of a business entity that was potentially liable for the release;
- 4) take "reasonable steps" to stop any continuing hazardous substance release, prevent any threatened future release, and prevent or limit human, environmental or natural resource exposure to any hazardous substance released from a neighboring property;
- 5) comply with CERCLA requests for information and administrative subpoenas;
- 6) provide all legally required notices with respect to the discovery or release of hazardous substances from their property;
- 7) provide full cooperation, assistance and access to persons authorized to conduct response actions or natural resource restorations at the vessel or facility from which there has been a hazardous substance release;
- 8) comply with all land use restrictions that concern response actions at the contaminated neighboring property;
- 9) do not "impede the effectiveness or integrity" of any "institutional control" employed in connection with a response action; and
- 10) conducted "all appropriate inquiry" with respect to their own property, at the time of purchase, and "did not know or have reason to know" that their property was or could be contaminated by a real or threatened release of hazardous substances from a contiguous property.²⁶

To qualify for the contiguous property owner exemption, a property owner must bear the burden of demonstrating, by a preponderance of the evidence, that he or she has satisfied all of the conditions stated above.²⁷ Once that demonstration has been made, the EPA administrator may grant the contiguous property owner an assurance that he or she will not be subject to federal government enforcement action under Superfund.²⁸ The administrator may also grant such a property owner a protection against third party contribution or cost-recovery actions.²⁹

26. SBLRBRA § 221(q)(1)(A). The Act makes clear that bona fide purchasers who are not eligible to be excluded from CERCLA liability solely as a result of having failed to satisfy the last of these conditions, may still be entitled to relief under the exemption for prospective purchasers. SBLRBRA § 221(q)(1)(C).

27. SBLRBRA § 221(q)(1)(B).

28. SBLRBRA § 221(q)(3) (2002).

29. SBLRBRA § 221(q)(3).

5. The Exemption For Prospective Purchasers

Under the SBLRBRA, "bona fide prospective purchasers," and their tenants, are entitled to an exemption from owner or operator liability under CERCLA § 107(a).³⁰ To qualify as a bona fide purchaser eligible for this exemption, a person must demonstrate, by a preponderance of the evidence, that:

- 1) he or she acquired ownership of a facility after January 11, 2002;
- 2) all disposal of hazardous substances occurred at the facility before he or she acquired it;
- 3) the person provided all legally required notices with respect to the discovery or release of hazardous substances at the facility;
- 4) he or she exercised "appropriate care" by taking "reasonable steps" to stop any continuing release from the facility, to prevent any threatened future release, and to prevent or limit public exposure to any previously released hazardous substance;
- 5) the person provided "full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at a vessel or facility;"
- 6) he or she is in compliance with any land use restrictions established or relied on in connection with a response action at the facility;
- 7) the person is not impeding the effectiveness or integrity of any institutional control employed at the facility in connection with a response action;
- 8) he or she complies with any CERCLA information request or administrative subpoena;
- 9) the person is not affiliated with any other person potentially liable for response costs at the facility; and
- 10) the person has made "all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices."³¹

With respect to the final condition to be demonstrated, the Act temporarily leaves in place most of the previously prevailing

30. SBLRBRA § 222(r).

31. SBLRBRA §§ 222(a)(40)(A)-(H). In the case of residential properties only, the statute provides that the "all appropriate inquiries" standard is satisfied where, at the time of purchase, a facility inspection and title search by the purchaser reveal no basis for further investigation. SBLRBRA § 222(a)(40)(B)(iii).

notion as to what constitutes "all appropriate inquiries . . . in accordance with generally accepted good commercial and customary standards and practices."³² Thus, in this context, the standards for Phase I Site Assessments, established by the American Society for Testing and Materials (ASTM), constitute the touchstone for deciding whether a land purchaser has made "all appropriate inquiries" regarding the property.

However, the statute directs that, within two years, EPA is to promote regulations which define good "standards and practices" for purchasers of land, based upon ten criteria set forth in the statute.³³ Once those Agency regulations are in final form, they are to replace the ASTM Phase I standards as the substantive basis for determining the appropriateness and acceptability of a potential purchaser's pre-transactional inquiries.

Notably, the exemption for prospective purchasers described above is less than absolute. The SBLRBRA provides the United States with a "windfall lien" on Superfund properties (including those facilities to which the owners, operators or tenants have demonstrated their eligibility for a prospective purchaser exemption). This windfall lien is to cover unrecorded federal government-

32. See SBLRBRA § 222(a)(40)(B)(i).

33. SBLRBRA § 223(B)(ii) (2002). The ten criteria the Agency must consider in promulgating its regulations are:

- I) The results of an inquiry by an environmental professional;
- II) Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility;
- III) Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed;
- IV) Searches for recorded environmental clean-up liens against the facility that are filed under federal, state, or local law;
- V) Reviews of federal, state, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility;
- VI) Visual inspections of the facility and of adjoining properties;
- VII) Specialized knowledge or experience on the part of the defendant;
- VIII) The relationship of the purchase price to the value of the property, if the property was not contaminated;
- IX) Commonly known or reasonably ascertainable information about the property;
- X) The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

SBLRBRA § 223(2)(B)(iii).

tal response costs in situations where the government's response action has given rise to an increase in the fair market value of the facility in question.³⁴ The amount of the United States' windfall lien may not exceed the increase in the value of the facility attributable to the response action;³⁵ and the lien must continue in effect until the government recovers the relevant portion of its expenditures.³⁶

6. The Innocent Landowner Defense

Finally, the SBLRBRA includes a provision that amends and clarifies CERCLA § 101(35), Superfund's so-called "innocent landowner defense."³⁷ Under the pre-SBLRBRA version of CERCLA, owners and operators of hazardous waste facilities were entitled to avoid liability where, *inter alia*, they acquired their real property after hazardous substances were placed on their land, and they did not know, and had no reason to know, of the release or the presence of hazardous substances there.³⁸ To have the benefit of this defense, the owner or operator had to show that, prior to taking title, he or she had made "all appropriate inquiries. . . in accordance with. . . good commercial or customary practices," so as to minimize liability.³⁹ Moreover, the Superfund Act directed the courts to take account of certain specific factors in determining whether a land purchaser had, in fact, made all appropriate inquiries prior to purchasing contaminated land.⁴⁰

Without changing the fundamental thrust of the innocent landowner defense, the SBLRBRA amends and clarifies one of its key statutory phrases: "all appropriate inquiries." The new Act directs the EPA, within two years, to promulgate regulations that establish standards and practices, which will satisfy this statutory requirement, taking into account a detailed, enumerated list of considerations.⁴¹ It also establishes "interim standards" intended

34. SBLRBRA § 222(r)(3).

35. SBLRBRA § 222(r)(4).

36. SBLRBRA § 222(r)(4).

37. SBLRBRA § 223.

38. CERCLA §§ 101(35), 107(b) (2002).

39. SBLRBRA § 222(a)(40)(B)(i) (2002).

40. CERCLA § 107(b)(3). These factors include any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection. *Id.*

41. See SBLRBRA §§ 223(B)(ii)-(iii).

to give substantive meaning to the “all appropriate inquiries” notion until EPA’s regulations become effective.

Under those temporary standards, with regard to commercial property purchased before May 31, 1997, an analysis of whether a purchaser made appropriate pre-purchase inquiries must take into account five factors set forth in the statute.⁴² However (as is also true with regard to the exemption for prospective purchasers), with respect to commercial property purchased on or after May 31, 1997, the good commercial and customary practices that create the standard of appropriateness for pre-purchase inquiries are to be based solely upon ASTM Phase I Site Assessment standards.⁴³

B. New Funding For Brownfields Revitalization

Beyond modifying the Superfund liability scheme, the SBLRBRA contains a number of important provisions intended to encourage the revitalization of brownfield sites, and to assist state and local governments in the establishment of improvement of brownfields response programs.⁴⁴ The new Act contains a new statutory definition of brownfields, it authorizes new federal funding (for brownfield assessment and clean-up, training, research and state response activities), and it modestly limits both EPA’s CERCLA enforcement authority and the Agency’s ability to list new hazardous waste facilities on the NPL.⁴⁵

1. Revised Brownfields Definition

In the SBLRBRA, Congress defined a brownfield site 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.”⁴⁶ This new statutory defi-

42. SBLRBRA §§ 223(B)(iv)(I)(aa)-(ee). These five factors are identical to those that previously applied in the context of the CERCLA innocent landowner defense. *See supra* note 33 for an enumeration.

43. SBLRBRA § 223(B)(iv)(II). As is the case with respect to the prospective purchaser exception, the statute further provides that a pre-purchase facility inspection and title search will constitute an “appropriate inquiry” regarding purchases of residential properties. SBLRBRA § 223(B)(iv)(II).

44. SBLRBRA § 211(k) (2002).

45. SBLRBRA § 211.

46. SBLRBRA § 211(a)(39). This definition varies from the brownfield site definition previously employed by the EPA: “abandoned, idled or underused industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.” *See* Environmental Protection Agency, *at* <http://www.epa.gov/suerosps/bf/glossary.html#brow> (last visited Nov. 14, 2002).

nition expressly includes mine-scarred lands, sites that are contaminated with controlled substances, and (notwithstanding Superfund's pre-existing "petroleum exclusion") orphan sites that are contaminated with petroleum.⁴⁷ On the other hand, however, the new Act also enumerates specific exceptions to the brownfield site definition. Specifically, that term excludes facilities which:

- 1) are the subject of planned or ongoing Superfund removal actions;
- 2) are listed on the CERCLA NPL (or proposed for listing there);
- 3) are the subject of CERCLA unilateral administrative orders, court orders, administrative orders on consent or judicial consent decrees;
- 4) have valid permits under the Solid Waste Disposal Act, the Federal Water Pollution Control Act, the Toxic Substances Control Act or the Safe Drinking Water Act;
- 5) are subject to corrective action under the Solid Waste Disposal Act (and as to which corrective action permits or orders have been issued);
- 6) are the source of closure notifications under the Solid Waste Disposal Act Subtitle C (and as to which closure requirements have been specified);
- 7) are subject to the jurisdiction, custody or control of a department, agency or instrumentality of the United States (except for land held in trust by the United States for an Indian tribe);
- 8) have (in some portion) been the site of a release of polychlorinated biphenyls (PCBs) that is subject to remediation under the Toxic Substances Control Act; and
- 9) have (as to some portion) obtained assistance for response activity under subtitle I of the Solid Waste Disposal Act (i.e. the Leaking Underground Storage Tank Trust Fund).⁴⁸

Notwithstanding these exclusions, however, the Act authorizes the President to make financial assistance available as to a number of the kinds of facilities excluded from the brownfield site definition where the President finds that "financial assistance will protect human health and the environment, and either promote economic development or enable the creation of, preservation of, or addition to parks, greenways, undeveloped property, other rec-

47. SBLRBRA § 211(a)(39)(D).

48. SBLRBRA § 211(a)(39)(B).

reational property, or other property used for nonprofit purposes.”⁴⁹

2. Funding For Brownfield Revitalization

The SBLRBRA authorizes \$200 million per year for each of five fiscal years for brownfield site characterization, assessment and remediation.⁵⁰ This sum is to include \$50 million per year (or 25% of the total amount funded if less than \$200 million is appropriated for brownfields in any given year) for the clean-up of petroleum-contaminated facilities.⁵¹

The new Act directs the President to establish programs for grants and loans to “eligible entities.” This term is defined to include:

- 1) a general purpose unit of local government;
- 2) a land clearance authority operating under the supervision and control of a general purpose unit of local government;
- 3) a government entity created by a State legislature;
- 4) a State chartered (or state sanctioned) redevelopment agency;
- 5) a State;
- 6) an Indian Tribe (except in Alaska); and
- 7) an Alaska Native Regional or Village Corporation.⁵²

The EPA Administrator is authorized to establish programs for grants of up to \$200,000 to eligible entities to inventory, characterize, assess and conduct planning at brownfield sites.⁵³ Moreover, the new Act directs the President to establish a program to provide grants of up to \$1,000,000 per state or community to capitalize state and local revolving loan funds, as well as grants of up to \$200,000 per site to eligible entities or non-profit organizations to be used directly for remediation of brownfields.⁵⁴ In determining whether to make grants for loan funding and remediation, the President is required to take into consideration:

49. SBLRBRA § 211(a)(39)(C).

50. SBLRBRA § 211(k)(12)(A) (2002).

51. SBLRBRA § 211(k)(12)(B).

52. SBLRBRA § 211(k)(1).

53. SBLRBRA § 211(k)(3). The EPA Administrator may waive the \$200,000 grant limitation to permit a brownfield site to receive a grant of up to \$350,000, based upon the anticipated level of contamination, size, of status of ownership of the site. SBLRBRA § 211(k)(4)(A)(i).

54. SBLRBRA § 211(k)(4)(A)(ii). These grants require a 20% non-federal matching share. SBLRBRA § 211(k)(9)(B)(iii) (2002).

- 1) the extent to which a grant will facilitate the creation of, prevention of, or addition to a park, greenway, undeveloped property, recreational property, or other property used for non-profit purposes;
- 2) the extent to which a grant will meet the environmental remediation and redevelopment needs of a low income or small population community;
- 3) the extent to which a grant will facilitate the use or reuse of existing infrastructure;
- 4) the benefit of promoting the long-term availability of funds from a revolving loan fund for brownfield remediation; and
- 5) any other factors that the Administration considers appropriate to consider.⁵⁵

The Act further sets forth ten specific criteria that EPA is to follow in establishing a ranking system for grant applications it receives from eligible entities.⁵⁶

Under the SBLRBRA, local governments that receive federal grant funds to develop and implement a brownfields program, may use up to 10% of their grant funds to monitor the health of people exposed to hazardous substances at brownfield sites, and to monitor and enforce any institutional control designed to prevent human exposure to hazardous substances from such sites.⁵⁷ Recipients may also use grant or loan funds to purchase insurance for site characterization, assessment or remediation;⁵⁸ and the EPA Administrator is empowered to make available up to 15% of the brownfields grant funds that Congress appropriates to provide "training, research and technical assistance to individuals and organizations."⁵⁹

At the same time, the new Act does contain a set of funding prohibitions. Most significantly, it provides that no part of any brownfields grant or loan may be used to pay:

- 1) a penalty or fine;
- 2) a Federal cost-share requirement;
- 3) an administrative cost (except for the cost of investigating and identifying the extent of contamination, designing and performing a response action, and/or monitoring a natural resource);

55. SBLRBRA § 211(k)(3)(C).

56. SBLRBRA § 211(k)(5)(C).

57. SBLRBRA § 211(k)(4)(C).

58. SBLRBRA § 211(k)(4)(D).

59. SBLRBRA § 211(k)(6).

- 4) a response cost at a brownfield site for which the grant or loan recipient is a PRP; or
- 5) a cost of compliance with any Federal law. . . , excluding the cost of compliance with laws applicable to the clean-up.⁶⁰

3. Funding For State Response Programs

The SBLRBRA authorizes a sum of \$50 million per year, for each of five fiscal years, for federal grants to establish or enhance “state response programs.”⁶¹ States or Indian tribes may use grants they receive from these funds for one or more of three purposes:

- 1) to establish or enhance a response program;
- 2) to capitalize a revolving loan fund for brownfield remediation; and
- 3) to purchase insurance or develop a risk sharing pool, an indemnity pool, or an insurance mechanism to provide financing for response actions.⁶²

To be eligible for response program grants, states or tribes must either sign a memorandum of agreement with the EPA or have a response program that includes each of the following elements:

- 1) a timely survey and inventory of brownfield sites in the state;
- 2) oversight and enforcement authorities adequate to ensure that response actions will protect human health and the environment and be conducted in accordance with applicable law, and that all necessary response activities are completed in all response actions;
- 3) mechanisms and resources to provide “meaningful” opportunities for public participation” (including public access to relevant documents, prior notice and opportunity for public comment, and a mechanism for permitting and appropriately responding to public requests for site assessments); and
- 4) mechanisms for approvals or clean-up plans and for certification that response actions at brownfield sites have been completed.⁶³

60. SBLRBRA § 211(k)(4)(B)(i) (2002).

61. SBLRBRA § 128 (a)(3).

62. SBLRBRA §§ 231(a)(1)(B)(i)-(ii).

63. SBLRBRA § 231(a)(2).

4. Limitations On EPA Enforcement Actions

The new Act provides that, in cases where a person conducts a response action at a brownfield site that is in compliance with the state or tribal response program, the President may not bring an administrative or judicial enforcement action under § 106(a) of CERCLA, or take a judicial action to recover response costs under Superfund § 107(a).⁶⁴ However, the statute creates numerous, significant exceptions to that prohibition. Specifically, the kinds of Superfund enforcement actions referred to above may be taken if:

- 1) the state requests that the President provide assistance in the form of a response action;
- 2) the EPA Administrator determines that contamination has migrated or will migrate across a State line and/or onto federally owned property;
- 3) the EPA Administrator finds that a release or threatened release may present “an imminent and substantial endangerment to public health or welfare or the environment,” and that additional response actions are likely to be necessary to “address, prevent, limit or mitigate” the release or threatened release; and/or
- 4) the EPA administrator determines that, subsequent to the approval or completion of clean-up activities at a brownfields site, new information has been discovered indicating that contamination or conditions at the facility present a threat requiring further remediation.⁶⁵

Before EPA takes a Superfund enforcement action at a brownfield under color of one or more of these exceptions, the Agency must (in non-emergency circumstances) give state officials forty-eight hours advance notice of the action EPA intends to take. The state, in turn, must notify EPA, within forty-eight hours, of any state actions that are planned with regard to the brownfield site in question.⁶⁶

64. SBLRBRA § 231(b)(1)(A). The enforcement bar only applies at sites in states that maintain, update and make available to the public a record of sites that identifies whether or not the site, on completion of the response action, will be suitable for unrestricted use and, if not, what institutional controls have been relied upon in the remedy. SBLRBRA § 231(b)(1)(C). Moreover, the Act sets forth certain kinds of facilities at which the enforcement bar never applies. See SBLRBRA § 231(a)(41)(C) (2002).

65. SBLRBRA § 231(b)(1)(B).

66. SBLRBRA § 231(b)(1)(D).

5. Deferral of Listing on the NPL

Finally, the SBLRBRA directs the President to defer final listing of a brownfields site on the Superfund National Priorities list where a state (or another party under an agreement with or order from the state) is conducting a response action at the same site.⁶⁷ For this deferral to occur, the response action at the site must be “in compliance with a State program that specifically governs response actions for the protection of public health and the environment; and that will provide long-term protection of human health and the environment.”⁶⁸ Alternatively, the state must be “actively pursuing” an agreement to perform a response action at the site with a person whom the state has reason to believe is capable of performing that response action appropriately.⁶⁹

As is true of other similar provisions in the statute, however, the SBLRBRA contains a significant set of limitations on, and exceptions to, the NPL listing deferral requirement. Thus, if after one year following a proposal to list a brownfields site on the NPL, the President determines that the state is not “making reasonable progress towards completing a response action” at that site, the President may then list the site on the NPL.⁷⁰ Moreover, the President may decline to defer (or elect to discontinue deferral of) listing a site on the NPL if:

- 1) the statutory conditions that made the deferral appropriate are no longer being met;
- 2) deferral would be inappropriate because the state itself, as a hazardous waste generator or the owner or operator of a hazardous waste disposal facility, is a PRP; or
- 3) the criteria set forth in the National Contingency Plan for issuance of a health advisory have been satisfied.⁷¹

67. SBLRBRA § 232(h)(1).

68. SBLRBRA § 232(h)(1)(A).

69. SBLRBRA § 232(h)(1)(B).

70. SBLRBRA § 232(h)(2) (2002). The President also has authority under certain circumstances to extend, by 180 days, the one-year period by which a determination must be made as to whether the state has made reasonable further progress towards completing a response action at the site in question. SBLRBRA § 232(h)(3).

71. SBLRBRA § 232(h)(4).

II. How Drastic A Change?: An Assessment of the SBLRBRA and Superfund's Future Prospects

How significant are the changes in the Superfund program wrought by the SBLRBRA? To what extent has the new Act undercut CERCLA's liability scheme? Have the amendments created major "loopholes" which allow responsible parties to avoid responsibility for dangers caused by their haphazard disposal of hazardous substances? The fundamental answer appears to be that, while imperfect in some respects, the SBLRBRA has left the key liability structure of CERCLA substantially intact. The new exemptions it establishes are, in general, only available to classes of parties with a relatively compelling equitable basis for liability relief. Moreover, these exemptions are crafted and conditioned in a way that provides an ample margin of safety for protecting the environment and human health.

At the same time, the brownfield clean-up funding aspects of the SBLRBRA represent an important step forward. To the extent that the grant and loan programs it creates are appropriated adequate monies by Congress, they will go far towards ameliorating one set of continuing environmental and economic problems in a balanced and sensible way.

To be certain, the SBLRBRA does contain some shortcomings and ambiguities. One difficulty that it raises involves the definition of "small businesses" contained in the Act's municipal solid waste exemption. As noted before, the SBLRBRA creates an exemption from CERCLA liability for typical household wastes, generated by homeowners or by commercial, industrial or institutional entities, that are disposed of at hazardous waste facilities listed on the Superfund NPL.⁷² Among the parties entitled to this exemption are businesses which are both "small business concerns," as defined by the Small Business Act, and that "employed an average of not more than 100 full-time individuals, or the equivalent thereof," during the preceding three years.⁷³

As most people would view it, business entities that employ as many as one hundred full-time employees or their equivalent are medium-sized businesses. They are scarcely small businesses by any reasonable definition of that term. Similarly, non-profit organizations, which employ a similar number of persons, are not typi-

72. See *supra* notes 4-9.

73. SBLRBRA §§ 102(p)(1)(B)-(C).

cally viewed as “small” institutions. Thus, at first blush, this exemption seems too broad to fully safeguard the public interest.

It is important, however, to see this rather overly generous and inaccurate definition of small businesses and small not-for-profit institutions in context. The evident purpose of the municipal solid waste exemption is to exclude generators of typical domestic trash, whether they are individuals and families or institutions and business entities, from (sometimes costly) Superfund liability. To the extent that these generators contribute industrial hazardous waste to a disposal facility on the NPL—as opposed to mere typical household wastes—they may still be subject to liability under CERCLA. Moreover, parties who are otherwise eligible for the municipal solid waste exemption may still incur Superfund liability under several circumstances, including situations where the federal government determines that the waste they have generated contributes significantly to the cost of CERCLA response actions, or to the cost of restoration of damaged natural resources. Given these statutory safeguards, the imprecise manner in which the SBLRBRA has defined the parties eligible for this exemption seems unlikely to damage the integrity of Superfund’s current liability scheme.

Another area of potential concern regarding the new Act concerns its liability exemptions for contiguous property owners and for prospective purchasers. As we have seen, one of the conditions of the first of these exemptions is that the owner or operator of contaminated land must take “reasonable steps” to halt any continuing release from his or her own land, prevent any threatened future release, and prevent or limit human exposure to wastes that are released.⁷⁴ Regrettably, the statutory language in question is somewhat ambiguous. What specific actions by an owner or operator of contiguous property will conform to the “reasonable steps” standard declared in the statute? Does the owner need to install an expensive ground water remediation system? Is merely fencing the property to keep away trespassers a sufficient remedy? Are some measures intermediate to those mentioned above a better measure of “reasonableness” for contiguous property owners? Unfortunately the language of the Act provides no answers to these practical questions, which the EPA will need to grapple with as it administers the Superfund program.

74. SBLRBRA § 221(q)(1)(A)(iii).

A similar problem exists with respect to the prospective purchaser exemption. Among other things, the new Act requires prospective purchasers who seek that exemption to establish that they have exercised "appropriate care" to "stop any continuing release, prevent any future release and prevent or limit human. . . exposure to. . . hazardous substances."⁷⁵ Once again, however, the statute is utterly devoid of guidance as to the meaning of "appropriate care." Presumably, government officials will now need to define that phrase on a case-by-case basis as they respond to applications for bona fide prospective purchaser status, an approach that may yield illogical or inconsistent results.

Beyond these flaws the SBLRBRA is, at least in a few respects, needlessly confusing and opaque in its language and organizational structure. This is particularly true with regard to the Act's poorly drafted provision as to the burden of proof in CERCLA § 107 and § 113 actions that involve municipal solid waste.⁷⁶ In addition, from a rhetorical perspective, the legislation could have been improved by including all of its new Superfund liability exemptions in one place, rather than scattering them through the statute's two titles.

These cavils aside, however, the enactment of the SBLRBRA is a welcome development in federal environmental law. The fact that the basic structure of CERCLA—including its regime of strict, joint and several liability—survived intact another round of Congressional deliberation and amendment is indeed good cause for relief and satisfaction for the Superfund's defenders. Their staunch efforts over the past decade have defeated numerous legislative proposals that called for far more drastic (and ill-advised) changes.

The Act, which Congress did pass in the end is, in important respects, a codification of several prior, non-controversial EPA enforcement policies. These policies (and now the statutory law itself) provide liability relief, on a modest and balanced basis, to deserving parties while preserving the most fundamental goals and approaches of the underlying Superfund legislation. Beyond this, the SBLRBRA establishes a very important federal funding mechanism to redress, in an orderly and systematic fashion, the difficult problems posed by brownfield sites throughout the Nation.

75. SBLRBRA § 222(a)(40)(D) (2002).

76. SBLRBRA § 102(p)(5).

Notwithstanding these recent gains, however, in very important respects the future of the Superfund program remains unclear. The specialized tax on certain industries that had been used to finance the program was allowed to expire in 1995. As a result the balance in the Superfund trust fund has decreased from \$3.8 billion in 1996 to a projected \$28 million in 2003 and the program has undergone a painful contraction.⁷⁷

Although many members of Congress favor a reinstitution of the Superfund tax, the Bush administration has opposed such a step.⁷⁸ Thus, at this writing, the future scope and funding levels that will be available for all Superfund activities - including the new brownfield site revitalization effort, which Congress wisely authorized funding for in the SBLRBRA - is very much an open question. Its resolution will say much about our Nation's willingness to eliminate the brownfields problem efficaciously, and to finish its effort to protect human health and the environment from the perils posed by misdisposed hazardous substances.

77. Katharine Q. Seelye, *Bush Proposing Policy Changes on Toxic Sites*, N.Y. TIMES, Feb. 24, 2002, at A1. Notwithstanding this trust fund decrease, Resources For the Future has found that "EPA's need for Superfund monies will not decrease appreciably below Fiscal Year 1999 expenditures of \$1.54 billion until Fiscal Year 2006." KATHERINE N. PROBST & DAVID M. KONISKY, SUPERFUND'S FUTURE: WHAT WILL IT COST? xxi (Resources For the Future ed., 2001).

78. Seelye, *supra* note 77.