

H.R. 2869--BROWNFIELDS REVITALIZATION AND ENVIRONMENTAL RESTORATION ACT OF 2001: A SUMMARY OF THE ACT

OVERVIEW

New federal legislation authorizes \$200,000,000 per year in grants for the next five years to redevelopment agencies, cities and other local public agencies to use for funding assessment and cleanup of environmentally impaired or potentially impaired properties, known as "brownfields", and removes liability and funding obstacles for innocent landowners, purchasers, lenders and developers. The legislation also provides a federal enforcement bar for qualifying sites. An additional \$50,000,000 per year is available to states for several purposes. H.R. 2869, passed by Congress on December 22, 2001, and signed into law by the President on January 11, 2002, (the "Act") complements state initiatives around the country that have made brownfield properties much more accessible for redevelopment over the last several years, and is expected to open the door to economic opportunity through development of an estimated 500,000 contaminated sites for productive commercial, industrial, residential, and recreational uses.

The Act amends the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as the "Superfund" law, and contains several components: (I) CERCLA exemptions for *de micromis* generators and generators of most municipal solid waste; (II)(A) a funding component that provides qualified grants to "eligible entities", which include redevelopment agencies, cities, counties, and other general purpose local agencies; (B) a liability component that shields "*bona fide prospective purchasers*" that acquire a brownfield site, *innocent landowners* (including owners of easements and leases) and *contiguous property owners* that agree to cooperate with cleanup efforts and allow access for any authorized response action, by establishing generally that the release of a hazardous substance occurred prior to acquisition, that the purchaser made all appropriate inquiries (such as by performing a phase I assessment), and that the purchaser took reasonable steps to stop any continuing and prevent any future release of a hazardous substance; and (C) a federal enforcement shield for brownfield sites that are the subject of remediation or other response action that is conducted in compliance with a state program, with a few exceptions (such as state-requested assistance or when contamination migrates across state lines.) A detailed section-by-section summary of the Act follows.

TITLE I--SMALL BUSINESS LIABILITY PROTECTION ACT

Section 102. Small Business Liability Relief.

(a) CERCLA section 107 (42 U.S.C. 9607) is amended by adding the following new subsections (o) and (p):

(o) 1. De Micromis Exemption. A person is not liable for response costs at a facility on the National Priorities List ("NPL"), if liability is based solely on paragraph 3 or 4 of subsection (a) relating to disposal or transport, or acceptance for disposal or transport of hazardous substances, and the person can demonstrate that:

- A. the total amount of "material containing hazardous substances" accepted for or arranged for disposal or treatment at the facility was less than 110 gallons of liquid or less than 200 pounds of solid materials, and
- B. all or part of the disposal, treatment or transport occurred before April 1, 2001.

2. Exceptions. Paragraph 1 shall not apply if
 - A. the President determines that
 - i. the particular hazardous materials have contributed "significantly" to the cost of the response action, *or*
 - ii. the person fails to comply with request for information, or impedes a response action, *or*
 - B. a person was convicted of a criminal violation for the conduct.
 3. No judicial review.
 4. Nongovernmental third-party contribution actions. Burden of proof is on party bringing action to demonstrate that exemption conditions are *not* met.
- (p)
1. Municipal Solid Waste Exemption. A person shall not be liable for response costs at a facility on the NPL under paragraph 3 of subsection (a) for municipal solid waste disposed of at the facility if the person is:
 - A. an owner, operator, or lessee of a residential property from which all the municipal solid waste was generated with respect to the facility, *or*
 - B. a business entity that during preceding 3 years employed 100 or less full-time employees, and is a small business concern within meaning of 15 U.S.C. 631 *et seq.*, from which all the municipal solid waste was generated with respect to the facility, *or*
 - C. a nonprofit organization that during the preceding year employed 100 or less paid employees, from which all the municipal solid waste was generated with respect to the facility.
 2. Exceptions. Paragraph 1 shall not apply if the President determines that:
 - A. the municipal solid waste has contributed "significantly" to the cost of the response action, *or*
 - B. the person failed to comply with request for information, *or*
 - C. impeded a response action.
 3. No judicial review.
 4. A. Municipal Solid Waste means waste material:
 - i. generated by a household (single or multifamily residence) and
 - ii. generated by a commercial, industrial, or institutional entity to the extent the waste material:
 - I. is "essentially the same" as "normal" household waste
 - II. is collected and disposed of with household waste as part of municipal solid waste collection services
 - III. contains no greater "relative quantity" of hazardous substances than that contained in waste generated by a "typical single-family household."
 - B. Examples of exempt waste material include: food and yard waste, paper, clothing, appliances, consumer product packaging, diapers, office supplies, school laboratory waste, food containers, and household hazardous waste.
 - C. Exclusions from the definition of "municipal solid waste" are:
 - i. ash generated by recovery or incinerator facilities
 - ii. waste from manufacturing or processing operations, including pollution control.

5. Burden of Proof. For an action brought under section 107 or 113, the burden of proof is on the party bringing the action that the conditions for exemption are *not* met, if the party is:
 - A. a non-governmental party, for waste disposed of on or after April 1, 2001, or
 - B. any party, for waste disposed of prior to April 1, 2001.
6. No Contribution Action for residential exemption set forth in paragraph 1.A.
7. Costs and Fees. Nongovernmental entities must pay the costs to defend for contribution actions brought against exempt persons, including attorneys' fees.

(b) Expedited Settlement. CERCLA section 122(g) is amended by adding the following new paragraphs:

7.
 - A. Reduced settlement. President may reduce settlement amount based on inability or limited ability to pay response costs.
 - B. President shall consider overall financial condition of the person and constraints on raising revenue.
 - C. Person requesting reduction shall provide all relevant information.
 - D. Alternative payment methods may be considered.
8. Additional conditions for expedited settlements are that:
 - A. responsible party must waive all claims against other PRPs for response costs
 - B. President may decline to offer settlement if responsible party failed to comply with requests for access or information, or impeded response action
 - C. responsible party must continue obligation under section 104(e)(3)(B) to provide access and information
9. Basis of determination of a request for settlement under this paragraph must be provided in writing.
10. Notification of eligibility. President shall notify a person of that person's eligibility for an expedited settlement, as soon as practicable.
11. No judicial review.
12. Notice of settlement. President shall notify all PRPs with unresolved liabilities of the settlement.

Section 103. Affect on concluded actions.

This title has no affect on any settlement or order issued prior to enactment.

TITLE II—BROWNFIELDS REVITALIZATION AND ENVIRONMENTAL RESTORATION

Subtitle A: Brownfields Revitalization Funding

Section 211. (a) *The Act adds a definition of "Brownfield Site" as a new subsection (39) to CERCLA section 101 (42 U.S.C. § 9601(39).) The definition is followed by several exclusions, but also authorizes the President, and thus EPA, to waive an exclusion under certain circumstances.*

- A. Definition of Brownfield Site. “The term ‘brownfield site’ means 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.” (Emphasis added.)
- B. Exclusions from Definition. Certain sites or facilities are excluded from the definition of brownfields, including:
 - i.-iv. a facility that is the subject of a planned or ongoing CERCLA removal action, a listed or proposed NPL site, the subject of a judicial or administrative order, or a site that has been issued a permit under the Solid Waste Disposal Act (SWDA), the Federal Water Pollution Control Act (FWPCA), the Toxic Substances Control Act (TSCA), or the Safe Drinking Water Act,
 - v.-vi. a facility that is the subject of a SWDA corrective action or closure notification,
 - vii. a federal facility (except land held in trust for an Indian tribe)
 - viii. a *portion* of a facility at which there has been a release of PCBs *and* is subject to remediation under TSCA,
 - ix. a *portion* of a facility receiving LUST Trust Fund assistance (Internal Revenue Code of 1986 §9508).
- C. Exceptions to Exclusions. For the purpose of funding, the President may include otherwise excluded sites and authorize financial assistance, by making a site-by-site determination that the assistance will protect human health and the environment, *and either* promote economic development *or* enable the creation or preservation of parks, recreational land, or property uses for nonprofit purposes. This exception likely applies to most sites that would otherwise be excluded.
- D. Sites Eligible for Grants. For the purpose of grants provided for in the Act, “brownfields” include a site that:
 - i. meets the definition of A through C of this section, *and*
 - ii. I. is contaminated by a controlled substance (as defined by Controlled Substances Act 21 U.S.C. § 802);
 - II. (aa) is contaminated by petroleum or petroleum product, *and*
 - (bb) is determined by EPA or the State to be
 - (AA) “relatively low risk”, *and*
 - (BB) there is no viable responsible party, *and* an “innocent” party will assess or remediate the site, *and*
 - (cc) not subject to any order issued under the SWDA, *or*
 - III. mine-scarred land.

(b) Grant Programs. The Act creates a grant program for “Brownfields Revitalization”. CERCLA section 104 is amended by adding a subsection (k) as follows:

- (k) 1. Eligible Entities. “Eligible entity” is defined for purposes of grant funding as any one of the following:
 - A. “general purpose” unit of local government
 - B. land clearance authority
 - C. government entity created by State legislature
 - D. regional council or group of general purpose units of local government
 - E. redevelopment agency
 - F. state
 - G. tribe (other than in Alaska)
 - H. Certain Alaskan tribal organizations

2. Site Characterization and Assessment Grant Programs.

- A. EPA administrator shall establish program to
 - i. provide grants to inventory, characterize, assess and conduct planning for brownfield sites
 - ii. perform targeted site assessments at brownfield sites
- B. Assistance for Site Characterization and Assessment
 - i. EPA may make grant to an Eligible Entity for programs to characterize, inventory, assess, and conduct planning related to 1 or more sites.
 - ii. site characterization and assessment to be carried out per 101(35)B “standards and practices”—consistent with good commercial or customary practice

3. Grants and Loans for Remediation Programs.

- A. President shall establish program to provide grants to:
 - i. Eligible Entities to capitalize revolving loan funds, *and*
 - ii. Eligible Entities or nonprofit organizations to be used directly for remediation of sites owned by the entity or organization that receives the grant, up to \$200,000.
- B. Eligible Entities receiving grants under 3(A)(i) shall provide assistance for brownfields remediation in the form of:
 - i. one or more loans to Brownfield stakeholders, including developers
 - ii. one or more grants to Eligible Entities or nonprofit organization
- C. In determining whether a grant is warranted, the President or Eligible Entity shall consider several factors, including:
 - i. the extent to which a grant will facilitate the creation or preservation of a park, undeveloped property, or property used for nonprofit purposes,
 - ii. the extent to which a grant will meet community needs in low income area
 - iii. the extent to which a grant will facilitate the use/reuse of existing infrastructure
 - iv. long-term availability of funds from revolving loan fund
 - v. other “similar” factors as EPA considers appropriate.

4. General provisions of Grants and Loans for Remediation Programs:

- A. Maximum amount of grant
 - i. site characterization and assessment grant
 - (I) not more than \$200,000 per site
 - (II) Administrator may waive limit and grant up to \$350,000 per site based on the anticipated level of contamination, size, or status of ownership of the site.
 - ii. brownfield remediation grants to capitalize revolving loan funds are not more than \$1,000,000 per eligible entity; with an additional \$1,000,000 possible in a subsequent year taking the following factors into consideration:
 - (I) number of sites and communities addressed by revolving loan fund,
 - (II) the demand for funding from eligible entities that have received a grant,
 - (III) demonstrated ability of recipient entity to enhance remediation
 - (IV) other “similar” factors as the Administrator considers appropriate.

- B. Prohibitions--
 - i. Grant funds may not be used for the payment of:
 - (I) penalty or fine
 - (II) Federal cost-share requirement
 - (III) administrative cost
 - (IV) response costs where recipient is a potentially responsible party
 - (V) cost of compliance with Federal law (other than cleanup)
 - ii. A prohibited "administrative cost" does *not* include
 - (I) investigation of contamination
 - (II) design and performance of response action
 - (III) monitoring of natural resource
 - C. Local government can use up to 10% to develop and implement a program that may include:
 - i. monitoring health of populations exposed to brownfield site
 - ii. monitoring and enforcement of an institutional control to prevent human exposure
 - D. A grant recipient may use portion to purchase insurance.
5. Grant Applications.
- A. Submission
 - i. in general
 - (I) to EPA Administrator
 - (II) Administrator may include NCP requirement only as relevant and appropriate
 - ii. Administrator shall coordinate the program with other Federal resources.
 - iii. Administrator shall publish guidance to assist with application.
 - B. Approval. The Administrator shall:
 - i. complete a review of applications at least annually, and
 - ii. award grants to Eligible Entities that have highest rankings under criteria below.
 - C. Ranking criteria—The Administrator shall establish a ranking system that includes the following criteria:
 - i. the extent to which a grant will stimulate other funds
 - ii. the potential of the project to stimulate economic development
 - iii. the extent to which a grant would identify and reduce threats to human health and environment
 - iv. the extent to which a grant would facilitate use/reuse of existing infrastructure
 - v. the extent to which a grant would facilitate the creation or preservation of a park, etc.
 - vi. the extent to which a grant meet needs of a community that has inability to draw on other sources of funding for remediation
 - vii. the extent to which the applicant is eligible for other funds
 - viii. the extent to which a grant would assist in fair distribution of funding between urban and nonurban areas
 - ix. the extent to which a grant provides for community involvement
 - x. the extent to which a grant would identify and reduce specific threats

6. Implementation of Programs.
 - A. Administrator may provide, or fund Eligible Entities or nonprofit organizations to provide programs for technical assistance
 - B. These programs may not utilize more than 15% of total amount of grants funds appropriated per year.
7. Audits.
 - A. EPA shall conduct audits of grants
 - B. using procedures of the General Accounting Office
 - C. violation of grant/loan conditions may cause termination of grant/loan, repayment, other legal remedies
 - D. report to Congress in three years providing description of program management.
8. Leveraging. An Eligible Entity may use funds under this program at a site where funding is received from other sources
9. Additional Requirements. Agreements for grant recipients shall:
 - A. include NCP requirement *only* if relevant and appropriate, as determined by Administrator, *and*
 - B. (i) recipient required to
 - (1) comply with law
 - (2) ensure that cleanup protects human health and the environment
 - (ii) use grant/loan exclusively for purposes set forth in the program
 - (iii) pay matching share of at least 20% for grants used to capitalize revolving loan funds, unless places undue hardship on the recipient
10. Other Federal Programs. Facilities other than brownfield sites are not affected in eligibility for assistance under any other Federal programs.
11. Other Authority. This subsection does not affect any liability or response authority under other Federal laws.
12. Authorization of Appropriation: \$200,000,000 for 5 years.

Subtitle B: Brownfields Liability Clarifications

Section 221. *The Act provides liability protection for defined classes of property owners. The Act amends CERCLA section 107 by adding the following subsection (q):*

(q) Contiguous Properties

1. Contiguous Property Owners Shielded from Liability. A person is not an owner/operator of a site (and therefore not liable for a release of a hazardous substance), if the person:
 - A. owns real property that is merely contiguous, and is or may be contaminated by a release or threatened release or a hazardous substance from real property not owned by that person, and the person:
 - i. did not cause or contribute to the release

- ii.
 - I. is not related to responsible party,
 - II. is not the result of business reorganization of responsible party
 - iii. takes reasonable steps to
 - I. stop any continuing release
 - II. prevent any threatened future release
 - III. prevent or limit human, environmental, or natural resource exposure
 - iv. gives full cooperation and assistance (including access) for authorized response actions
 - v.
 - I. is in compliance with land use restrictions in connection with the response action
 - II. does not impede institutional control employed in connection with the response action
 - vi. complies with information request issued by President
 - vii. reports releases and discoveries, *and*
 - viii. at time when land was acquired,
 - I. conducted all appropriate inquiry
 - II. did not know nor have reason to know that property was or could be contaminated by release of 1 or more hazardous substances
 - B. To qualify for the Contiguous Property Owner liability protection, a person must establish by a preponderance of evidence that meets A.i. – viii.
 - C. A contiguous property owner may qualify for liability protection as a Bona Fide Prospective Purchaser even if there is actual knowledge of release after conducting appropriate inquiry
 - D. Contiguous property owners are not liable to conduct ground water investigations or remediate releases from offsite sources
- 2. No limitation on other protections. Nothing in this subsection:
 - A. limits any defense to liability under any other provisions of law
 - B. imposes liability that is not otherwise imposed by CERCLA section 107(a)
- 3. Assurances from EPA. The Administrator may issue to contiguous property owners
 - A. comfort letter or
 - B. covenant not to sue

Section 222: Prospective Purchasers and Windfall Liens

(a) *This subsection defines a “bona fide prospective purchaser” by adding a subsection (40) to CERCLA section 101, as follows:*

- (40) Bona Fide Prospective Purchaser Is Shielded from Liability. A “bona fide prospective purchaser” is a person that acquires ownership of a facility after the date of enactment of the Act, and establishes each of following by a preponderance of evidence:
- A. Disposal occurred prior to acquisition
 - i. person made all appropriate inquiries with in accordance with generally accepted good standards and practices
 - ii. the “standards and practices” in clauses (ii.) and (iv.) of CERCLA section 101(35)(B) *as amended* satisfy this requirement
 - iii. for residential-only use, title search and facility inspection satisfactory
 - C. Provides reports of releases or discoveries of hazardous substances
 - D. Exercises appropriate care by taking reasonable steps to:
 - i. stop any continuing release

- ii. prevent any threatened future release
- iii. prevent or limit human, environmental, or natural resource exposure
- E. Provides full access and cooperation for authorized response actions
- F. Respects and complies with institutional controls
- G. Provides information requested by the President
- H.
 - i. Person has no affiliation with responsible party, including
 - I. no direct or indirect familial relationship
 - II. no business or contractual relationship
 - ii. person is not the result of a business reorganization of a responsible party

(b) CERCLA section 107 is amended by adding the following subsection (r):

(r) United States may have lien for unrecovered response costs.

1. When a Bona Fide Prospective Purchaser is not liable for a release
2. The United States has a lien for unrecovered response costs if all of the following conditions are met:
3. Conditions:
 - A. United States carried out response action at the facility, *and*
 - B. Response action increases the fair market value of the facility above that which existed before initiation of response action
4. Duration/Amount of Lien
 - A. amount shall not exceed the increase in fair market value
 - B. arises at time costs first incurred
 - C. subject to requirements of CERCLA section 107(l)(3) Post-Closure Liability Fund, *and*
 - D. shall continue until
 - i. satisfaction by sale, or
 - ii. Recovery of all response costs incurred

Section 223: Innocent Landowners are Shielded from Liability. CERCLA section 101(35) is amended as follows:

1.
 - A. *Includes owners of easements and leases*, in addition to deeds
 - B. Landowner must give full cooperation and access to persons conducting authorized response actions, is in compliance with any land use restrictions, does not impede effectiveness of institutional control (See similar conditions for bona fide prospective purchaser.)
2. A new paragraph B is added as follows:
 - B. To establish that landowner had no reason to know of the release, the landowner must demonstrate to court that he or she:
 - i.
 - I. Made all appropriate inquiries per clauses (ii.) and (iv.) below,
 - II. Took reasonable steps to
 - aa. stop any continuing release
 - bb. prevent any threatened future release
 - cc. prevent or limit any human, environmental, or natural resources exposure

- ii. Administrator shall adopt Standards and Practices for satisfying the requirement to carry out all appropriate inquiries under clause (i.)
- iii. Criteria: Administrator shall include each of the following as criteria in establishing standards and practices:
 - I. results of inquiry by environmental professional
 - II. interviews with past/present owners, operators
 - III. historical searches
 - IV. recorded environmental cleanup liens
 - V. review of government records
 - VI. visual inspection
 - VII. specialized knowledge
 - VIII. relationship of purchase price to fair market value if not contaminated
 - IX. commonly known facts about property
 - X. degree of obviousness of problem
- iv. Interim standards:
 - I. for property purchased before May 31, 1997:
 - aa. specialized knowledge
 - bb. relationship of price to fair market value if not contaminated
 - cc. commonly known information
 - dd. obviousness of presence or likely presence of contamination
 - ee. ability to detect by inspection
 - II. for property purchased on or after May 31, 1997: ASTM Standard E1527-97 Phase I
- v. For residential use: facility inspection and title search enough

Subtitle C: State Response Programs

Section 231 *A key provision of this subtitle is a federal enforcement bar provided to brownfield sites that are the subject of a state response action.*

(a) *CERCLA section 101 is amended by adding a subsection (41) as follows:*

(41) Eligible Response Site.

- A. An "eligible response site" is a site that meets the brownfield site definition set forth in paragraphs A and B of section 101(39) *as amended* by the Act, and B and C of this subsection.
- B. An "eligible response site" *includes*:
 - i. a portion of facility receiving LUST money or
 - ii. any other site that the President determines on case-by-case basis will protect human health and the environment, etc.
- C. An "eligible response site" *excludes* facilities where:
 - i. I. President has conducted preliminary assessment or site inspection, *and*
 - II. sufficient for possible listing as NPL site, *or*
 - ii. Sites that president determines "warrant particular consideration"

(b) *CERCLA is amended by adding a new section 128, establishing a grant program for states to establish or enhance a response program, capitalize a revolving loan fund for remediation, and acquire insurance, as follows:*
Section 128. State Response Programs.

a. Grants to states.

- 1. A. State qualifies for grant if

- i. has a response program as described below in paragraph 2
 - ii. has an MOA with Administration for voluntary response programs
 - B. Grants may be used to:
 - i. establish or enhance response program
 - ii.
 - I. capitalize revolving loan fund for remediation as set forth in section 101(k)(3)
 - II. purchase or pool insurance
2. Required elements of state response programs:
 - A. Timely survey and inventory of brownfield sites in state
 - B. Oversight and enforcement to ensure that
 - i. a response action will
 - I. protect human health and the environment
 - II. be conducted in accordance with Federal and state law
 - ii. if person conducting program fails to complete necessary response activities, the necessary response activities will be nonetheless be completed
 - C. "Meaningful" opportunities for public participation, including:
 - i. access to documents relied upon by state
 - ii. notice and opportunity to comment on plans
 - iii. a mechanism by which
 - I. "affected" person may "request the conduct" of site assessment
 - II. State shall consider and respond to request
 - D. Mechanisms to approve and verify clean up plan.

b. Enforcement Bar in Cases Subject to State Programs.

- 1. Enforcement Bar
 - A. The President may not use authority under CERCLA to take administrative or judicial enforcement action under section 106(a) or to recover response costs under section 107(a), as follows:
 - i. if there is a release or threatened release of hazardous substance, and
 - ii. "a person" is conducting or has completed a response action in compliance with state program
 - B. Exceptions to enforcement bar:
 - i. State requests assistance
 - ii. multi-state problem
 - iii. imminent and substantial endangerment to public health or the environment, and additional response actions are likely necessary
 - iv. Administrator determines that new information has been discovered regarding worse conditions at site, requiring further remediation
 - C. Enforcement bar of paragraph A applies *only* at sites in states that maintain inventory of sites with record of unrestricted/restricted use
 - D.
 - i. Prior to taking enforcement action, Administrator shall notify State and wait 48 hours for reply. If state fails to reply, Administrator may take immediate action.

- ii. Not later than 48 hours from notice, a state must notify Administrator that the site qualifies for enforcement bar.
 - iii. Administrator can take immediate action without notice to state if it determines that one or more exceptions apply.
 - E. President must submit report to Congress describing basis of enforcement actions excepted by paragraph B.
- 2. Savings provision
 - A. President can seek costs incurred prior to enactment of these amendments
 - B. All existing MOUs with states remain in effect
 - C. This section does not affect any liability or response authority under Federal law, including SWDA, FWPCA, TSCA

Section 232. Additions to National Priorities List.

CERCLA section 105 is amended by adding a new subsection (h) as follows:

(h) NPL Deferral.

- 1. President shall defer listing of eligible response site at state request, if:
 - A. state, or another party under an agreement with state, is conducting response action at the site in compliance with state program, *or*
 - B. state is "actively pursuing" an agreement to perform a response action
- 2. If the President determines that state not making reasonable progress within 1 year, deferral over and may list the site on the NPL
- 3. If a clean-up agreement has not been reached within 1 year, the President can defer for another 180 days based on complexity of site, substantial progress made in negotiations, or other "appropriate factors"
- 4. President may decline to defer, or discontinue deferral and list a site on the NPL if the President determines that the state, as a contributor of hazardous substances, is a potentially responsible party, or that the conditions in paragraphs 1-3 are not longer being met.