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BROWNFIELDS REVITALIZATION AND ENVIRONMENTAL RESTORATION ACT OF 2001

MARCH 12, 2001.—Ordered to be printed.

Mr. SMITH, of New Hampshire from the Committee on Environment and Public Works, submitted the following

REPORT

[To accompany S. 350]

together with

ADDITIONAL AND MINORITY VIEWS

The Committee on Environment and Public Works, to which was referred the bill (S. 350) to amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to promote the cleanup and reuse of brownfields, to provide financial assistance for brownfields revitalization, to enhance State response programs, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

GENERAL STATEMENT

As a nation, our industrial heritage has left us with numerous contaminated "brownfield" sites that are abandoned or underutilized. A brownfield site is a parcel of real property at which expansion, redevelopment, or reuse may be hindered by the presence, or potential presence, of hazardous substances, pollutants, or contaminants. The U.S. Conference of Mayors and others have estimated that there are more than 450,000 brownfield sites nationwide that blight our communities, pose health and environmental hazards, erode our cities' tax base, and contribute to urban sprawl and loss of farmland. The cleanup and redevelopment of brownfield sites presents the opportunity reduce the environmental and health risks in our communities, particularly those which are dispropor-

tionately affected by these sites, capitalize on existing infrastructure, create a robust tax base for local governments, attract new businesses and jobs, and reduce the pressure to develop open spaces.

Many State and local governments have developed and implemented innovative and effective brownfield programs. State laws, however are unable to address Federal liability. More importantly, absent a specific statutory exemption, the Federal brownfields grant and loan program has been required to comply with the regulatory provisions of the National Contingency Plan, which is relieved under this legislation. By providing Federal funding, eliminating Federal liability for developers under Superfund, and reducing the regulatory burdens, State and local governments will improve upon what they are already doing.

BACKGROUND

The nation's laws governing abandoned hazardous waste sites date back to the late 1970's and the discovery of thousands of barrels of toxic waste buried illegally outside of Buffalo, New York. The U.S. Congress responded to Love Canal and other sites by enacting the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, commonly referred to as Superfund. CERCLA was intended to clean up the nation's worst sites and identify responsible parties to bear the cost of cleanups. Litigation over CERCLA's strict, joint and several liability ensued. The fear of prolonged entanglements in Superfund's liability scheme has been reported by some to be an impediment to the cleanup of even lightly contaminated sites, today known as brownfields.

Under CERCLA, parties can be held liable for the entire cost of cleanup, even if they purchased the property after the contamination occurred or were otherwise innocent parties. With many brownfield sites, the extent of contamination is unknown, and there is no entity available to assess the site conditions or pay for cleanup. Therefore, at abandoned sites, even those with little or no contamination, the fear that cleanup costs could exceed the property value can reduce incentives for redevelopment. The perceived risk associated with purchasing and developing lightly contaminated properties can drive parties away from these former industrial or commercial sites and toward less risky green and open spaces.

In their report "Recycling America's Land," the U.S. Conference of Mayors cited high cost and fear of CERCLA liability as the primary factors that prevent the successful redevelopment of brownfield sites. Because brownfield sites are generally abandoned industrial or commercial sites, the responsible party may not be available to pay the costs of cleanup. These sites may lay fallow indefinitely unless someone is willing to take on the risk associated with purchasing contaminated land and has the financial resources to pay for site investigation and cleanup. The perceived risk of Superfund liability is one of many factors that may influence a developer's willingness to acquire a brownfield site. In addition, even if there are parties willing to take the risk, they are sometimes unable to bring the necessary resources to the site because lenders

may be unwilling to issue loans on properties with unknown contamination, and which therefore provide uncertain collateral for the loan.

During the past decade, Federal, State, and local actions aimed at reclaiming the nation's abandoned contaminated properties and putting them to productive use. No provision in the current Superfund statute specifically authorizes the types of activities that have come to be known as brownfield cleanup and redevelopment. Other than annual line-item appropriations, the only enacted brownfield provisions are tax incentives for remediation created originally in the Taxpayer Relief Act of 1997 (Public Law 105–34). That law allows parties to expense the costs of remediation at brownfield sites during the year in which the expenses were incurred. This tax incentive will expire on December 31, 2004.

The U.S. Environmental Protection Agency (EPA) administratively created the existing brownfield grant program in 1995 to provide additional incentives for brownfields redevelopment. The purpose of these grants is to investigate property for potential contamination to facilitate its reuse. In 1997, EPA also began providing grants to State and local governments to establish revolving loan funds to fund site cleanup. Because EPA's brownfields program was created administratively under Superfund, it has been legally required to apply the provisions of the National Contingency Plan (NCP) to the brownfields grants and loans programs. Because the NCP is intended to address the nation's worst hazardous waste sites, many of its requirements are not appropriate in the context of funding for brownfields assessment and remediation. Further, its application to the brownfield grant process has proven cumbersome and has become a significant barrier to greater participation in the program.

Notwithstanding concerns discussed above, States have taken a lead role in the redevelopment of lightly contaminated sites. Many States have developed programs, tailored to sites and conditions specific to their State, which promote a voluntary approach to site remediation. The need is clear. While less than 1,500 sites have been listed on the National Priorities List (NPL), there are estimated to be more than 450,000 brownfield sites nationwide. Successful State programs have been so largely because of their ability to address larger numbers of sites, and their ability to waive State liability if a cleanup is performed in a manner acceptable to the State. Despite protection from State liability as an incentive to invest in these types of sites, testimony before the committee confirmed that the fear of incurring Federal liability sometimes drives developers and lenders toward open spaces. In addition, some States do not have fully developed State programs, and this legislation would provide funding and assistance to help develop these programs.

To address these existing problems, the Brownfield Revitalization and Environmental Restoration Act of 2001 (BRERA) was introduced on February 15, 2001 by Senators Chafee, Bob Smith, Reid, Boxer, Warner, Baucus, Specter, Graham, Campbell, Lieberman, Grassley, Carper, Clinton, Corzine, and Wyden. BRERA seeks to revitalize communities through the investigation, assessment, and remediation of brownfield sites across the nation, making them

suitable for redevelopment or other beneficial reuse. The intent of the bill is to direct more public and private resources toward restoring contaminated properties that are not likely to be addressed by the Federal Government.

OBJECTIVES OF THE LEGISLATION

The bill authorizes $150 million for each of 5 years to inventory, investigate, assess and clean up abandoned and underutilized brownfield sites, which will address potential human health and environmental threats and create jobs, increase tax revenues, and preserve and create open space and parks.

The bill provides legal protections for innocent parties who meet specified conditions, such as contiguous property owners, prospective purchasers, and innocent landowners.

The bill authorizes $50 million for each of 5 years for the enhancement of State cleanup programs, and limits, where appropriate, enforcement by the Federal Government at sites cleaned up under a State response program. It provides a balance of certainty for prospective purchasers, developers and others while ensuring protection of the public health.

The bill provides for States to create public records of brownfield sites, and enhances community involvement in site cleanup and reuse of these sites.

The bill provides for deferral of listing sites on the National Priorities List if the State is taking action at the site.

SECTION-BY-SECTION SUMMARY

Section 1. Short Title; Table of Contents

This section designates the title of the bill as the "Brownfields Revitalization and Environmental Restoration Act of 2001" and establishes a table of contents.

TITLE I BROWNFIELDS REVITALIZATION FUNDING

Section 101. Brownfields Revitalization Funding

SUMMARY

New Section 128 of CERCLA provides funding to identify, investigate, assess, and clean up properties that are abandoned or underutilized. A "brownfield site" is defined in general 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." This is consistent with EPA's current definition of a brownfield site. For the purposes of funding under Title I, the term "brownfield site" excludes certain sites or facilities for which the awarding of financial assistance would be inappropriate.

This section authorizes EPA to establish a grant program for brownfield site characterizations, assessments, and to conduct planning. The maximum grant amount for site characterization and assessment is $200,000 for any individual brownfield site, except the Administrator may waive the limitation to permit a brownfield site to receive a grant not to exceed $350,000. Entities

that are eligible to receive the grants are State and local governments, quasi-governmental land clearance authorities, regional councils, State-chartered redevelopment agencies and Indian Tribes. A mechanism to permit eligible entities to capitalize and administer revolving loan funds (RLF) for brownfields remediation also is provided. Based on certain considerations outlined in the bill, grants for remediation may be made either directly from EPA or from the RLF at the discretion of the eligible entity. The bill authorizes $150 million per year for fiscal years 2002 through 2006 to carry out this section. The committee expects this money to be funded through general revenues and to be in addition to appropriate Superfund funding. It is the expectation of the committee that funding of these programs created under section 128 will fall under section 104, as does the current program.

DISCUSSION

The United States Conference of Mayors and many others have identified the lack of funding as an obstacle to brownfields redevelopment. Sites may qualify as brownfield sites simply due to fear that contamination may be present at a site. Many of the estimated 450,000 brownfield sites may be ripe for redevelopment, and merely lack a site assessment that confirms that a site is not contaminated. Often, funding is unavailable to conduct these site assessments or site characterizations. If the site assessment does confirm contamination at a brownfield site, private funding is often unavailable, but a small amount of Federal seed money can leverage other moneys that can be used for remediation.

To address the funding needs at brownfield sites, the bill creates new section 128, which codifies and builds on EPA's brownfield program. The definition of the term "brownfield site" in S. 350 is intended to foster reuse of abandoned or idled sites that are contaminated to a lesser degree, if at all, relative to those higher risk sites that are more appropriately addressed by other State and Federal programs. Federal brownfield expenditures are appropriately limited to sites where, due to the threat of real or perceived contamination, no reuse is likely and no federally directed or funded cleanup is underway or imminent. The language ensures that the limited resources available under this section are not expended on sites that will be cleaned up under other provisions of Federal law. Thus, the term "brownfield site" excludes any property:

- where there is an ongoing Superfund removal action (a site at which a removal action has occurred in the past is clearly eligible as a brownfield site, if none of the other exclusionary factors apply);
- that has been listed, or proposed for listing on the NPL;
- where there is ongoing cleanup work prescribed by an administrative or judicial order under CERCLA, the Resource Conservation and Recovery Act (RCRA), the Federal Water Pollution Control Act (FWPCA), the Toxic Substances Control Act (TSCA) or the Safe Drinking Water Act (SDWA);
- that is subject to corrective action under 3004(u) or 3008(h) of Solid Waste Disposal Act (SWDA) and to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures;

- that is a hazardous waste disposal unit for which a closure notification has been submitted, and that has closure requirements specified in a closure plan or permit;
- that is federally owned or operated;
- that is a portion of a facility where there has been a release of polychlorinated biphenyls and that is subject to remediation under TSCA; or
- that has received assistance from the Leaking Underground Storage Tank (LUST) Trust Fund.

The bill allows the President to make a site-specific determination to authorize financial assistance under section 128 at certain excluded sites if 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 of, parks, greenways, undeveloped property, other recreational property, or other property used for public, non-profit purposes. Sites on the NPL or proposed NPL sites, facilities subject to an order or consent decree under CERCLA, and Federal facilities are ineligible for inclusion. The bill makes clear that former drug labs and mine-scarred land are eligible for funding unless they are otherwise excluded. The bill also recognizes that excluded sites may nonetheless have significant redevelopment potential. Accordingly, a savings clause in section 128(j) provides that exclusion of a site from the definition of "brownfield site" under section 128 shall have no effect on eligibility for assistance under any other provision of Federal law.

Section 128(a) defines the term "eligible entities" to mean State and local governments, quasi-governmental land clearance authorities, regional councils, State-chartered redevelopment agencies and Indian Tribes. Any entity not in compliance with an administrative or judicial order issued under CERCLA, the Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), the Toxic Substances Control Act (TSCA) or the Safe Drinking Water Act (SDWA) cannot be an eligible entity.

Section 128(b) directs the Administrator to create a brownfield site characterization and assessment grant program. Eligible entities can apply to the Administrator for grants for site characterization, assessment or to conduct planning. Site characterizations can include a process to identify and inventory potential brownfield sites. EPA can also use money to directly perform targeted site assessments at brownfield sites in a continuation of current practice. No individual site may receive in excess of $200,000 under this subsection. The Administrator may waive the limit to permit the site to receive a grant not to exceed $350,000, based onsite-specific factors, such as the level of contamination, the size of the facility, or the status of ownership of the facility. Site assessments funded by grants under this subsection shall be in accordance with standards and practices, which the Administrator will promulgate under 101(35)(B)(ii) or interim standards specified under 101(35)(B)(iv), as amended.

Section 128(c) authorizes the President to provide grants to: (1) eligible entities to capitalize remediation revolving loan funds; and (2) eligible entities, or nonprofit organizations under certain circumstances, to be used directly for remediation of one or more

brownfield sites. Eligible entities may apply for RLF capitalization grants on a site-by-site or community-wide basis, but may not receive more than $1 million. The Administrator may make additional grants to eligible entities in subsequent years, after taking into consideration: the number of sites and number of communities that are addressed by the RLF; the demand for funding by eligible entities that have not previously received funding under this section; the demonstrated ability of the eligible entity to enhance remediation and provide funds on a continuous basis; and any other factors that the Administrator considers appropriate. Eligible entities that establish RLFs may provide one or more loans to other eligible entities, site owners, site developers, or other persons. The bill does not limit the amount of funding an eligible entity may provide to any one site for remediation, but the ability to enhance remediation and provide funds on a continuous basis is a factor that will be considered if an eligible entity applies for supplemental capitalization grants. No more than $200,000 per site may be granted directly by the Administrator to an eligible entity or nonprofit organization to carry out cleanup activities.

Under the current EPA brownfields program, funding for remediation exists only in the form of loans. Brownfield sites that will be cleaned up and maintained as recreational property, open space, or other non-economic uses may not generate the future revenue stream to repay a loan and therefore, it has been difficult to arrange private or public funding for cleanup of these areas. In addition, disadvantaged communities often cannot repay a loan. While the loans are generally preferred because repayment of the loans will extend the life and expand the utility of Federal expenditures under this program, this subsection allows EPA or eligible entities to provide direct grants for remediation (to parties that are not potentially liable) under certain circumstances. In determining whether a grant for remediation is warranted under 128(c)(1)(B) or 128(c)(2)(B), the President or the eligible entity shall take into consideration: the extent to which a grant will facilitate the creation of, preservation of, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for non-profit purposes; the extent to which a grant will meet the needs of a community that has an inability to draw on other sources of funding for environmental remediation and subsequent redevelopment of the area in which a brownfield site is located because of small population or low income of the community; the extent to which a grant will facilitate the use or reuse of existing infrastructure; the benefit of promoting the long-term availability of funds from a revolving loan fund for brownfield remediation; and other such factors as the Administrator considers appropriate.

Section 128(d) prohibits any part of a grant or loan from being used to pay for a penalty or fine, a Federal cost-share requirement, an administrative cost, a response cost at a brownfield site for which the recipient of the grant or loan is potentially liable under section 107, or a cost of compliance with any Federal laws that are not applicable to the cleanup. For the purposes of this section, "administrative costs" do not include the cost of investigation and identification of the extent of contamination, design and performance of a response action, or monitoring of a natural resource. Sec-

tion 128(d)(3) allows a local government that receives funding under this section to use up to 10 percent of the grant funds to develop and implement a brownfields program that may include monitoring the health of populations exposed to hazardous substances and monitoring and enforcement of any institutional controls used to prevent human exposure to hazardous substances at a brownfield site.

In addition, section 128(e) provides requirements for applications by eligible entities for assistance under section 128(b). One of the major complaints of EPA's current brownfields program is that under the law, funding applications must be made in accordance with the National Contingency Plan (NCP). Many witnesses before the committee, and others interviewed by staff, have pointed out that since the NCP was designed to address the nation's worst sites, applying the NCP to brownfield sites is unnecessary and onerous in most cases. The bill provides explicitly that the requirements of the NCP shall not be included in any requirement for submission of an application, unless the Administrator determines that a particular NCP requirement is relevant and appropriate to the program under this section. It is intended that this will greatly simplify the application and assistance process.

EPA must issue guidance to assist eligible entities in applying for grants under subsection (e). It is expected that applications will be made to EPA regional offices. A single application can, at the discretion of the applicant, include grant requests for one or more brownfield sites. The Administrator is directed to coordinate with other Federal agencies so that applicants are made aware of assistance available from other Federal agencies for related purposes. The Administrator is directed to establish a system for ranking grant applications that includes in the criteria the extent to which a grant will stimulate the availability of other funds for environmental assessment or remediation, and subsequent reuse, of an area in which one or more brownfield sites are located. The ranking criteria also must give preferential recognition to applications for projects that:

- stimulate economic development;
- address or facilitate the identification and reduction of threats to human health and the environment;
- use or reuse existing infrastructure;
- create additional park, greenway or recreational acreage;
- meet the needs of a community that has an inability to draw on other sources of funding for environmental remediation because of small population or low income;
- the extent to which the applicant is eligible for funding from other sources;
- the grant will further the fair distribution of funding between urban and non-urban areas; and
- the grant provides for involvement of the local community in the decisionmaking process.

The Administrator is directed to complete, at least annually, a review of applications for grants received from eligible entities and award grants to those eligible entities that the Administrator determines have received the highest rankings under the ranking criteria.

The eligible entity must provide a matching share, which may be in the form of a contribution of labor, material, or services, of at least 20 percent, from non-Federal funding sources, unless the Administrator determines that the matching share would place an undue hardship on the eligible entity.

The bill allows the Administrator to provide, or fund eligible entities or other nonprofit organizations to provide, training, research, and technical assistance to individuals and organizations to facilitate the inventory of brownfield sites, site assessments, remediation of brownfield sites, community involvement, or site preparation. The total Federal funds to be expended by the Administrator for this purpose are limited to 15 percent or less of the total amount appropriated in any given year.

The bill provides in section 128(g) that the Inspector General of EPA shall periodically audit all grants and loans established under this section in accordance with procedures established by the Comptroller General. Since the funds provided under this section are limited compared to the total universe of brownfield sites that can be cleaned up, it is intended that assistance received under this section will be used as seed money to leverage other financial resources. To this end, section 128(h) clarifies that eligible entities may use grant funds received under this section in conjunction with other sources of money.

Section 128(k) provides an authorization of $150 million per year for fiscal years 2002 through 2006 to carry out this section. The committee expects this money to be funded through general revenues and to be in addition to appropriate Superfund funding. It is the expectation of the committee that funding of these programs created under this bill will fall under section 104, as does the current program.

In order to avoid disruption of EPA's existing program, the provisions of section 128 apply to RLFs established prior to the date of enactment of this section.

TITLE II BROWNFIELDS LIABILITY CLARIFICATIONS

Section 201. Contiguous Properties

SUMMARY

Section 201 creates a new section 107(o) that provides liability protection for landholders whose property may be contaminated by a contiguous contaminated site if they did not contribute to the contamination and meet other conditions. These landowners must cooperate with the Federal or State enforcement authority and provide facility access for site cleanup activities.

DISCUSSION

New section 107(o) is added to Superfund's liability section to clarify that a person who owns real property contaminated by a hazardous substance that has migrated from another person's land that is contiguous or similarly situated will not be considered to be a potentially liable owner or operator under section 107 for that release, so long as they meet certain conditions. The provision is similar to EPA guidance on the topic entitled Final Policy Toward

Owners of Property Containing Contaminated Aquifers (OSWER Memorandum dated May 24, 1995), which clarifies that EPA will not bring enforcement actions against owners of property that has been impacted by contaminated groundwater migrating from a neighboring facility.

Section 107(o)(1)(A) establishes the conditions which a person must demonstrate by a preponderance of the evidence for the liability protection to apply:

- the person cannot have caused, contributed to or consented to the release or threat of release;
- the person must not be potentially liable, or affiliated through a familial relationship or any contractual, corporate, or financial relationship (other than one created by a contract for the sale of goods or services) with another party that is or was potentially liable at the facility. In addition, the person must not be an entity created through the reorganization of a business entity that was potentially liable;
- the person must have taken reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resources exposure to any hazardous substance released on or from property owned by that person;
- the person must provide full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release;
- the person must be in compliance with any land use restrictions and not impede the effectiveness or integrity of any institutional control employed in connection with a response action;
- the person must be in compliance with any request for information or administrative subpoena issued by the President under this Act;
- the person must provide all legally required notices with respect to the discovery or release of any hazardous substances found at the facility;
- at the time at which the person acquired the property, the person must have conducted all appropriate inquiry within the meaning of 101(35)(B) and did not know or have reason to know that the property was or could be contaminated by a release or threatened release from a contiguous property not owned or operated by the person.

With respect to contamination that exists due to subsurface migration of hazardous substances in an aquifer, section 107(o)(1)(D) specifies that a person shall not be required to conduct ground water investigations or to install ground water remediation systems, except in accordance with the Final Policy Toward Owners of Property Containing Contaminated Aquifers (OSWER Memorandum dated May 24, 1995).

Section 107(o) protects parties that are essentially victims of pollution incidents caused by their neighbor's actions. It is not intended to require parties raising section 107(o) as an affirmative defense to alleged liability to undertake full-scale response actions with respect to migrating contaminated plumes passing through their property. It requires that they take reasonable steps, which

typically will include actions such as notifying appropriate Federal, State and local officials regarding the situation; erecting and maintaining signs or fences to prevent public exposure; or maintaining any existing barrier or other elements of a response action on their property that address the contaminated plume. Except under exceptional circumstances as outlined in EPA's May 24, 1995 contaminated aquifer policy, such as at a site where the operation of a drinking water well could impact the migration of a plume, these persons are not expected to conduct ground water investigations or install remediation systems, or undertake other response actions that would more properly be paid for by the responsible parties who caused the contamination.

Section 107(o)(3) provides the Administrator discretion to issue assurances, known as "comfort letters," that no enforcement action will be initiated against a person meeting the requirements of this section. EPA also may enter into settlements that would insulate a person meeting the requirements of the section from a cost recovery or contribution action under CERCLA.

The section also clarifies that a person who may not qualify under this section because the person had, or had reason to have, knowledge that the property might be contaminated, may still qualify as a bona fide prospective purchaser under section 101(40) if the person meets the requirements of section 101(40).

Section 202. Prospective Purchaser and Windfall Liens

SUMMARY

Section 202 adds a new section 107(p) that provides liability relief under section 107(a) for purchasers of contaminated property who establish by a preponderance of the evidence that they did not contribute to the contamination if they do not impede the performance of a cleanup or restoration at a site they acquire after enactment, exercise appropriate care with respect to hazardous substances, provide cooperation and access to persons authorized to clean up the site, conducted appropriate inquiries prior to the purchase, and are in compliance with institutional controls and requests for information. This section authorizes the United States to place liens on properties at which unrecovered response costs exist and at which the fair market value of the property was enhanced by the Federal cleanup.

DISCUSSION

Two provisions are added to CERCLA to provide protection to persons who wish to purchase contaminated property without incurring Superfund liability. Fear of potential Superfund liability is frequently cited as a barrier to redevelopment of contaminated sites. EPA has attempted to address this problem on a case-by-case basis with so-called prospective purchase agreements. The process of negotiating these agreements, however, is cumbersome and resource-intensive.

The new provisions add a definition of "bona fide prospective purchaser" to CERCLA's definitions. Section 107 would be amended to exclude persons who qualify as bona fide prospective purchasers from liability under CERCLA.

A bona fide prospective purchaser is a person, or tenant of the person, who acquires property after the date of enactment of the Brownfields Revitalization and Environmental Restoration Act of 2001 and can establish each of the following conditions by a preponderance of the evidence. First, for purposes of this exemption, all disposal of hazardous materials must have occurred at the facility before the person acquired the property. Second, the person must have made all appropriate inquiry into the previous ownership and uses of the facility and the real property in accordance with generally accepted commercial and customary standards and practices as set forth in section 101(35)(B). Such inquiry should include reviews of historical sources and documents, such as deeds, easements, leases, covenants, and other title and restriction documents which may indicate prior uses and site conditions. It should also include searches for liens filed against the real property. These standards and practices will be established by a regulation issued by the Administrator within 2 years of enactment of this section. Until the Administrator promulgates the regulation, the interim standards and practices described in 101(35)(B)(iv) shall apply. The section recognizes that appropriate inquiry for residential property is appropriately different from appropriate inquiry for commercial property. If the purchaser of property for residential or a similar use is not a governmental or commercial entity, a facility inspection and title search that reveals no basis for further investigation will generally satisfy this requirement. A purchaser also must provide any required notices if there is a discovery or release of any hazardous substance.

In the case of a property at which hazardous substances are found, any bona fide prospective purchaser must exercise appropriate care by taking reasonable steps to stop any continuing releases, prevent any threatened release, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance. Like the contiguous landowner, a bona fide prospective purchaser must provide full cooperation, assistance and site access in the course of any necessary response action (including site assessment and investigation activities). In addition, the prospective purchaser must comply with any land use restrictions at the site and must not impede the effectiveness or integrity of any institutional control employed at the facility (such as damaging a cap, removing signs or fences, or otherwise failing to maintain an institutional control, etc.). In order to satisfy the definition, a person also must comply with any request for information or administrative subpoena issued under this Act. Finally, a bona fide prospective purchaser must not be potentially liable, or affiliated through a familial relationship or any contractual, corporate, or financial relationship (other than one created by a contract for the sale of goods or services) with another party that is or was potentially liable at the facility. Also, the person must not be an entity created through the reorganization of a business entity that was potentially liable.

The liability limitation for a bona fide prospective purchaser is created in new section 107(p)(1). A bona fide prospective purchaser shall not be liable under CERCLA section 107(a) if the person establishes by a preponderance of the evidence that liability is based

solely on the party's status as an owner or operator of a facility by reason of the purchase, provided that the purchaser does not impede the performance of a response action or natural resource restoration.

While bona fide prospective purchasers are protected from liability, new section 107(p)(2) prevents these parties from reaping a windfall due to the increase in a property's value as a result of the Federal Government's cleanup efforts. If the Federal Government incurs response costs at a facility, this section creates a Federal windfall lien on the property. The amount of the lien would be equal to the lower of the Federal Government's unrecovered response costs or the increase in the fair market value of the property due to the government's cleanup efforts. In the event that the Federal Government recoups part of its unrecovered response costs, such that the value of the lien exceeds the unrecovered costs, the government's lien will be reduced to the amount of unrecovered costs. The windfall lien provision recognizes that the cost of cleanup may exceed the fair market value of the property (which may be valueless unless it is cleaned up). The windfall lien would be satisfied from the proceeds when the bona fide prospective purchaser resells or otherwise disposes of the property.

Section 203. Innocent Landowners

SUMMARY

Section 203 amends section 101(35)(B) to clarify the obligations of any party who seeks to use the innocent landowner defense currently in section 107(b)(3). The bill provides that the appropriate inquiry requirement is satisfied by conducting an environmental site assessment that meets specific standards to be promulgated by the Administrator within 2 years of enactment or as provided in interim standards outlined in the bill.

DISCUSSION

CERCLA provides an affirmative defense for innocent purchasers of real property who prior to the date of purchase had no reason to know of any release or threatened release of a hazardous substance that was disposed of on, in, or at the facility. This section amends CERCLA section 101(35) to clarify the obligations of parties that seek to use this defense.

First, a party using this defense must provide full access, assistance and cooperation in the conduct of any response actions at the facility. In addition, the landowner must not impede the effectiveness or integrity of any institutional controls at the facility. A landowner seeking to use the defense also must demonstrate that he or she had no reason to know of the contamination. This is intended to mean that at, or prior to, the date the property was acquired, the landowner undertook all appropriate inquiry into the previous ownership and uses of the facility and the associated real property in accordance with standards and practices established by regulation by the Administrator within 2 years of enactment of this section, or prior to promulgation of the regulations in accordance with this section. A defendant must establish it took reasonable steps

regarding the release as provided in (B)(i)(II). These requirements are in addition to the due care requirement of section 107(b)(3).

In order to increase certainty and provide clarity, this section provides specific criteria that the Administrator shall include in regulations that establish standards and practices. One such criteria is the review of historical sources. The provision lists examples to demonstrate types of historical sources which may be relied upon, but does not contain an exhaustive list of such sources. In satisfying all appropriate inquiry, it is not intended that a person specifically produce each historical source listed. If the property was purchased before May 31, 1997, a court shall take into account 1) a defendant's specialized knowledge or experience, 2) the relationship of the purchase price to the value of the property, if the property was not contaminated, 3) commonly known or reasonably ascertainable information about the property, 4) the obviousness of the presence or likely presence of contamination, and 5) the ability of the defendant to detect the contamination by appropriate inspection. For property purchased after May 31, 1997, and before the regulations are promulgated, the procedures published by the American Society for Testing and Materials, including the document known as 'Standard E1527–97', entitled *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process* can satisfy the all appropriate inquiries requirement. This section recognizes that all appropriate inquiry for residential property is different than for commercial property. If the property is for residential use or other similar use and the purchaser is not a governmental or commercial entity, a facility inspection and title search that reveals no basis for further investigation satisfies the all appropriate inquiries requirement.

A landowner also must demonstrate the exercise of appropriate care, defined at new section 101(40)(D). This is the same standard that applies to owners or operators who qualify for the bona fide prospective purchaser exemption under section 107(p).

TITLE III STATE RESPONSE PROGRAMS

Section 301. State Response Programs

SUMMARY

Section 301 adds a new CERCLA section 129, authorizing EPA to provide funding to States and Indian tribes to establish and enhance State programs when the State's or tribe's program meets certain elements, they are making reasonable progress toward meeting the elements, or they have entered into a Memorandum of Agreement with EPA. The bill authorizes $50,000,000 to be appropriated for each of fiscal years 2002–2006 to carry out these provisions.

This section also provides additional deference for cleanups conducted under a State program by precluding subsequent Federal enforcement by the President under sections 106(a) or recover response costs under section 107(a) except: (1) at the State's request; (2) in connection with migration across a State line or onto Federal property; (3) if the Administrator determines that an imminent and substantial endangerment to public health or welfare or the environment exists, after considering the response actions already

taken at the site, and determines that additional response actions are likely to be necessary; or (4) if the Administrator determines new information as to the site conditions or contamination is discovered and the contamination and conditions of the site present a threat requiring further remediation to protect public health, welfare, or the environment. States are required to maintain and update at least annually a public record of sites, in order for sites cleaned up under a State program to be eligible for funding or for the bar on enforcement.

DISCUSSION

The vast majority of contaminated sites across the Nation will not be cleaned up by the Superfund program. Instead, most sites will be cleaned up under State authority. For example, while there are an estimated 450,000 brownfield sites, there are fewer than 1,300 NPL sites. In recognition of this fact, and the need to create and improve State cleanup capacity, new section 129(a) provides financial assistance to States and Indian tribes to establish or enhance voluntary response programs. It is the expectation of the committee that funding of these programs created under this bill will fall under section 104, as does the current brownfields program. In addition, the State or tribe may use part or all of a grant under this subsection to capitalize a revolving loan fund established under section 128(c) or develop a risk sharing pool, an indemnity pool, or insurance mechanism to provide financing for response actions under a State response program. In order for a State or Indian tribe to qualify to receive a grant under this section for an existing or new program, it must demonstrate that the program includes the elements listed in section 129(a)(2) or that it is taking reasonable steps to include each of the elements in section 129(a)(2). This provision regarding State programs where the State is "taking reasonable steps to include" the elements is meant to encourage States that are in the midst of revising their programs in a timely fashion to meet the elements specified in the bill and not to penalize them in the annual funding discussion with EPA if they have not completed their program. It is not intended to be an open ended provision, however, and the committee would not expect the Administrator to continue funding States in a subsequent year without showing additional substantial progress toward meeting the elements.

The State program elements include oversight and enforcement authorities to ensure protection of human health and the environment, meaningful opportunities for public participation, a survey and inventory of brownfield sites in the State, and mechanisms for approval of cleanup plans and a requirement for verification that the response action has been completed. A State is automatically eligible for funding under this subsection if it is a party to a memorandum of agreement (MOA) with the Administrator for voluntary response programs. MOAs have helped to foster more effective and efficient working relations between EPA and the States that have entered into them, and the bill will encourage their use by providing automatic eligibility for funding to States with MOAs.

The bill clarifies the role of the Federal Government under Superfund at sites cleaned up under State response programs.

Similar to title I, title III focuses on relatively low risk sites, and excludes sites which are more appropriately addressed under Superfund or other Federal environment laws. However there are a few significant differences between the universe of sites covered in title I ("brownfield sites") and those addressed in title III ("eligible response sites"). Sites eligible for funding under title I but excluded from liability relief under title III include sites which might be eligible for inclusion on the NPL based on their "pre-score" (i.e., their preliminary score in the current EPA computer model, or its successor, to assess sites for possible inclusion on the NPL), but have not been proposed for listing and may not yet have had an HRS package prepared, unless the President determines that no further Federal action will be taken. The enforcement bar can be applied to a site excluded from coverage under title III at the discretion of the President, after consultation with the State in which the site is located. Where the President exercises discretion to add a site that would otherwise be excluded due to coverage under other laws, the responsible party is not relieved of any obligation under those laws.

The universe of sites to which this title applies is further limited by the effective date, which provides that the liability relief "applies only to response actions conducted after February 15, 2001" (the date of introduction of BRERA). The word "conducted" is used rather than "commenced" in order not to arbitrarily exclude a site at which a minor portion of the work is conducted prior to February 15, 2001. It is not the intent of the committee for the enforcement bar to apply to response actions which were commenced in order to qualify for the bar.

Section 129(b)(1) limits the authority of EPA at eligible response sites that have been or are being cleaned up in compliance with a State response program. The State program must be one that specifically governs response actions for the protection of public health and the environment. Section 129(b)(1) provides that EPA may not bring a cost recovery action under section 107(a) or take an administrative or judicial enforcement action under section 106(a) against a person that is conducting or has completed a response action, with respect to the specific release addressed by the response action (there may be separate releases at the same facility that are addressed separately, especially if they occur at different times, or have different parties responsible for them). Where more than one media is contaminated by a hazardous substance (e.g. soil and groundwater), these are to be considered separate releases for purposes of this bill. The limit on EPA's authority applies only to actions by EPA against the person conducting the cleanup. In addition, this title does not limit in any way the authority of EPA to itself take action under section 104 or other authority. In addition, there is no intent to limit EPA's authority to issue so-called "participate and cooperate" orders. That is, where some responsible parties at a site are conducting a cleanup, EPA's authority is not limited with respect to other responsible parties. They may be compelled to cooperate with the responsible parties that are conducting the cleanup.

There are four exceptions to the liability limitations:

(1) The State requests assistance in performance of a response action.

(2) The Administrator determines that contamination has migrated or will migrate across a State line, necessitating further response action, or the President determines that contamination has migrated or is likely to migrate onto property subject to the jurisdiction, custody or control of a department, agency, or instrumentality of the United States and may impact the authorized purposes of the Federal property.

The phrase "authorized purposes" is intended to be read broadly to include management responsibilities or statutory trust obligations of the department, agency or instrumentality. It is not limited to current uses of property where the property is intended to be used for multiple purposes.

(3) The Administrator determines, after taking into consideration response activities already taken, 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 the release or threatened release.

The current threshold for EPA to initiate an action under section 107 to recover response costs incurred at a site is "a release or threatened release . . . of a hazardous substance." In order for EPA to issue a unilateral administrative order under section 106, the President must determine that "a release or threatened release may present an imminent and substantial endangerment to human health or welfare or the environment."

The bill specifically uses phrases already contained in CERCLA, for many of which there already exist definitions, and for which there is a well-established body of CERCLA case law (for example, the term "imminent and substantial endangerment"). This was done with the express intent of incorporating this case law, and to avoid, as far as possible, new litigation. However, the bill contains two phrases that do not currently appear in CERCLA. First, it expressly states that EPA's determination on an imminent and substantial endangerment must be made "after taking into consideration response activities already taken." The purpose of this phrase is to make clear that EPA's imminent and substantial endangerment determination at a site addressed under a State cleanup program should be based on current conditions at the site, as of the time EPA is considering taking action, as contrasted with conditions as they existed before cleanup activities had began. Although this generally reflects EPA's current practice in connection with brownfield sites, it is important to confirm that EPA's determination under this provision be made in light of the site conditions as affected by prior response activities by a party under a State program. This provision is not intended to impose a requirement on EPA to conduct a historical search of response activities conducted in the past, but rather to ensure that determinations are made based on conditions at a site at the time the order is issued under section 106(a) or at the time of incurrence of response costs for which EPA seeks recovery under section 107.

Second, in addition to determining that there may be an imminent and substantial endangerment, EPA must determine that ad-

ditional response actions are likely to be necessary to address the release or threatened release. This reflects EPA's current practice at brownfield sites addressed under State programs and ensures that EPA's actions in the future will be appropriate. This current practice has resulted in EPA never having taken an enforcement action at a brownfield site being addressed under a State cleanup program without a request from the State.

(4) The Administrator determines that information that was not previously known by the State has been discovered, and that further remediation is necessary to protect human health or welfare or the environment.

This reopener would apply in situations where the Administrator determines that new information concerning site conditions or contamination reveals that more cleanup is needed. If information was not contemplated by the State at the time of approval or completion of the cleanup, then it cannot be assumed that the cleanup addressed such conditions or contamination, and EPA should not be precluded from requiring any further response action in connection with that new information, or from recovering its response costs. By defining "new" information as that which the State did not know at a defined time, as reflected in cleanup documents, we intend to eliminate potentially lengthy disputes as to who knew what when, and provide more objective criteria and certainty for the determination.

This bill does not make the limitations on EPA authority contingent on EPA's prior review and approval of the State's response program. The circumstances of brownfields cleanups under State laws are unique in several significant respects.

First, the sites are cleaned up under programs established solely under State law, and are not the result of authorization or delegation from the Federal Government, as in the Clean Water Act or the Resource Conservation and Recovery Act, or other environmental laws. The absence of a Federal nexus distinguishes these purely State programs from programs implementing Federal environmental laws. And, as discussed above, this title applies to a limited universe of relatively low risk sites that generally are considered to be not of "Federal interest". In addition, the bill provides other safeguards to ensure that EPA's authority is not inappropriately limited. These include the exceptions—or "reopeners"—to the limitations, discussed above, and the condition on funding that State programs meet or take steps to meet threshold requirements. By conditioning funding on a State having met or taking reasonable steps to meet the specified elements, or being party to a MOA, the bill will promote State programs that contain these basic elements.

In addition, the limitations on EPA's authority apply only in States that maintain a public record of sites at which response actions have been conducted and are planned for the coming year, including whether they will be suitable for unrestricted use and what, if any, institutional controls are relied on. A number of stakeholders have indicated that it would be most useful for this information to be made available electronically. While the bill requires that the State update their records at least annually, more frequent updates would be appropriate in States that address

many sites each year. The public record can put communities on notice of cleanup activity, allowing them to inquire further, and it can serve as a tool for developers and others seeking to do business in the State.

New section 129(b)(1)(D) establishes a notification requirement whenever EPA intends to take an administrative or judicial enforcement action that may be barred. This permits the State governments to notify EPA of any State action at the site. The section requires EPA to notify a State of its intent to undertake an administrative or judicial enforcement action at a facility that may be covered by the bar and where there is a release or threatened release of a hazardous substance, prior to taking such action. The State has 48 hours to respond to the notice and inform EPA if the site is currently, or has been, subject to a State remedial action. Unless one of the reopeners under section 129(b)(1)(B) applies, the enforcement bar applies if the site is being addressed under a State program. This is simply a notice requirement and has no effect on the Federal-State relationship at the facility, but it is intended to help encourage communication and coordination between the Federal Government and the States. In the situation where the Administrator determines that one of the exceptions to the enforcement bar applies, the Administrator can take any appropriate action immediately. The Administrator still must give notice to the State, but there is no requirement to await State acknowledgment. If the Administrator does take an enforcement action under any of the reopeners (other than the State request for Federal intervention), the President shall submit to Congress, within 90 days after the initiation of an enforcement action, a report describing the basis for the enforcement action, including specific references to the facts demonstrating that enforcement action is permitted under a particular reopener.

Section 129(b)(2) provides a savings provision that allows the President to recover costs incurred prior to the date of enactment of BRERA or during a period in which the enforcement bar in section 129(b)(1)(A) was not applicable. In addition, the bill clarifies that nothing in section 129 modifies or otherwise affects a memorandum of agreement, memorandum of understanding, or any similar agreement between a State agency or an Indian tribe and the Administrator that is in effect on or before the date of enactment of BRERA. Similarly, nothing limits the discretionary authority of the President to enter into or modify an agreement with a State, Indian tribe, or other person relating to the implementation by the President of statutory authorities. Fifteen States have signed memoranda of agreement (MOA) with EPA. MOAs are valuable tools in establishing Federal and State priorities and dividing the workload and providing greater certainty that EPA will not bring enforcement actions at specified sites. They have proven effective at avoiding duplication of effort at sites. The committee expects that States and EPA will continue to develop and implement MOAs.

Section 129(c) confirms that nothing in section 129 affects liability or response authority under CERCLA (except as provided in subsection (b)), or any other Federal law.

Section 302. Additions to National Priorities List

SUMMARY

Section 302 creates a new section 105(h) that provides for the President to defer listing an eligible response site on the NPL at the request of a State, if the President determines that the State or other party is cleaning up a site under a State program or if the State is pursuing a cleanup agreement. The President may list a deferred site on the National Priorities List (NPL), after 1 year from proposed listing, if the State is not making reasonable progress toward completing the response action or a cleanup agreement has not been reached.

DISCUSSION

This section amends section 105 of CERCLA to add a new subsection (h) to address when the listing of a facility on the NPL should be deferred. Under new subsection (h)(1), the President is expected to defer listing a facility if a State, or another party under an agreement with or an order from the State, is conducting a response action at an eligible response site in compliance with a State program.

The President also is expected to defer final listing of a facility if a State is attempting to obtain an agreement from parties to perform a remedial action that will provide long-term protection of human health and the environment. The committee believes that this provision will create a strong incentive for parties to agree to work with State authorities to clean up a site. If, after 1 year from the deferral of listing a site on the NPL, an agreement has not been reached with the State, the President may defer the listing for an additional 180 days if the President determines deferring the listing would be appropriate based on the complexity of the site, the substantial progress made in negotiations, and other appropriate factors. This is intended to allow time for completion of ongoing negotiations which are nearing completion. In addition, the President may decline to defer, or elect to discontinue a deferral of, a listing if the President determines that a deferral would not be appropriate because: the State, as an owner or operator or a significant contributor of hazardous substances to the facility, is a potentially responsible party; the criteria under the National Contingency Plan for issuance of a health advisory have been met; or the conditions upon which the original deferral was based are no longer being met.

HEARINGS

On February 27, 2001, the Subcommittee on Superfund, Waste Control, and Risk Assessment met to consider S. 350, a bill to amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to promote the cleanup and reuse of brownfields, to provide financial assistance for brownfields revitalization, and to enhance State response programs, and for other purposes, receiving testimony from Hon. Christine Todd Whitman, Administrator, Environmental Protection Agency; Mayor J. Christian Bollwage, Elizabeth, NJ, on behalf of the United States Con-

ference of Mayors; Mayor Myrtle Walker, East Palo Alto, CA, on behalf of the National Association of Local Government Environmental Professionals; Philip J. O'Brien, New Hampshire Department of Environmental Services, Concord, NH; Mike Ford, Mike Ford Agency, Clark, NJ, on behalf of the National Association of Realtors; Alan Front, The Trust for Public Land; John G. Arlington, American Insurance Association; Grant Cope, United States Public Interest Research Group; Robert D. Fox, Manko, Gold and Katcher, Bala Cynwyd, PA; and Deeohn Ferris, Global Environmental Resources, Inc., Finesville, NJ.

LEGISLATIVE HISTORY

On February 15, 2001, Senators Chafee, Smith, Reid, Boxer, Warner, Baucus, Specter, Graham, Campbell, Lieberman, Grassley, Carper, Clinton, Corzine, and Wyden introduced S. 350, a bill to amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to promote the cleanup and resuse of brownfields, to provide financial assistance for brownfields revitalization, to enhance State response programs, and for other purposes. The Subcommittee on Superfund, Waste Control, and Risk Assessment conducted a hearing on the bill on S. 350 on February 27, 2001.

S. 350, as amended, was reported by the Committee on Environment and Public Works on March 8, 2001.

ROLLCALL VOTES

On March 8, 2001, the Committee on Environment and Public Works met to consider S. 350, the Brownfields Revitalization and Environmental Restoration Act of 2001. A manager's amendment offered by Senators Smith of New Hampshire, Reid, Chafee, and Boxer was agreed to by voice vote.

An amendment offered by Senator Inhofe to extend enforcement authority exemptions from the Toxic Substances Control Act failed to pass by a rollcall vote of 5 ayes to 13 nays. Voting in favor were Senators Bond, Crapo, Inhofe, Specter, and Voinovich. Voting against were Senators Baucus, Boxer, Campbell, Carper, Chafee, Clinton, Corzine, Graham, Lieberman, Reid, Smith of New Hampshire, Warner, and Wyden.

An amendment offered by Senator Inhofe to extend enforcement authority exemptions from the Resource Conservation and Recovery Act failed to pass by a rollcall vote of 5 ayes to 13 nays. Voting in favor were Senators Bond, Crapo, Inhofe, Specter, and Voinovich. Voting against were Senators Baucus, Boxer, Campbell, Carper, Chafee, Clinton, Corzine, Graham, Lieberman, Reid, Smith of New Hampshire, Warner, and Wyden.

An amendment offered by Senator Inhofe to extend enforcement authority exemptions from section 9003(h) of the Resource Conservation and Recovery Act failed to pass by a rollcall vote of 5 ayes to 13 nays. Voting in favor were Senators Bond, Crapo, Inhofe, Specter, and Voinovich. Voting against were Senators Baucus, Boxer, Campbell, Carper, Chafee, Clinton, Corzine, Graham, Lieberman, Reid, Smith of New Hampshire, Warner, and Wyden.

An amendment offered by Senator Inhofe to limit the expenditure of funds for EPA's administrative costs failed to pass by a rollcall vote of 4 ayes to 14 nays. Voting in favor were Senators Bond, Crapo, Inhofe, and Warner. Voting against were Senators Baucus, Boxer, Campbell, Carper, Chafee, Clinton, Corzine, Graham, Lieberman, Reid, Smith of New Hampshire, Specter, Voinovich, and Wyden.

A motion to report the bill as amended was agreed to by rollcall vote of 15 ayes and 3 nays. Voting in favor were Senators Baucus, Boxer, Campbell, Carper, Chafee, Clinton, Corzine, Graham, Lieberman, Reid, Smith of New Hampshire, Specter, Voinovich, Warner, and Wyden. Voting against were Senators Bond, Crapo, and Inhofe.

EVALUATION OF REGULATORY IMPACT

Section 11(b) of rule XXVI of the Standing Rules of the Senate requires publication of the report of the committee's estimate of the regulatory impact made by the bill as reported. No regulatory impact is expected by the passage of S. 350. The bill will not affect the personal privacy of others.

MANDATES ASSESSMENT

In compliance with the Unfunded Mandates Reform Act of 1995 (P.L. 104–4), the committee finds that this bill would impose no Federal intergovernmental unfunded mandates on State, local, or tribal governments. All of its governmental directives are imposed on Federal agencies. The bill does not directly impose any private sector mandates.

COST OF LEGISLATION

Section 403 of the Congressional Budget and Impoundment Act requires each report to contain a statement of the cost of a reported bill prepared by the Congressional Budget Office. Senate Rule XXVI paragraph 11(a)(3) allows the report to include a statement of the reasons why compliance by the committee is impracticable. The committee is unable to include a statement of the cost at this time because the Congressional Budget Office has not finished an analysis of the bill.

ADDITIONAL VIEWS OF SENATOR VOINOVICH

Our States have a vested interest in cleaning up waste sites on their own and in many instances, they are doing so more efficiently and more cost-effectively than the Federal Government. The result is healthier downtowns and an emphasis on preventing urban sprawl and preserving farmland and greenspaces. State programs are cleaning-up industrial eyesores in our urban centers, making them more desirable places to live. By their actions, States are putting abandoned sites back into productive use; they are the key to creating jobs in areas that have traditionally been hit-hard by unemployment.

Unfortunately, under current Federal law, disincentives to cleaning-up brownfields sites remain. It is important that we alleviate this problem by providing a waiver of Federal Superfund liability to parties that clean-up sites under State voluntary cleanup and enforcement programs. While S. 350 provides some relief from Federal liability to developers who clean-up these sites under State programs, I believe that States should be given the "opportunity to cure" before EPA initiates an enforcement action. The National Governor's Association (NGA) and the National Conference of State Legislatures both agree that States must be given adequate opportunity to respond before the Federal Government steps in.

Last summer, the NGA wrote to members of the Committee to express their strong support for provisions "that relieve the fear of Federal Superfund liability from prospective purchasers, innocent landowners, and contiguous property owners." The NGA has stated that they also strongly support significantly improved language that would provide "some degree of certainty that States can assure landowners who participate in State voluntary cleanup programs that they will not be engulfed in the Federal liability scheme."

As S. 350 moves forward, I look forward to working out a more workable process for State authority. It is important that this issue is addressed so we can return old industrial sites to productive use.

ADDITIONAL VIEWS OF SENATORS BOXER, BAUCUS, LIEBERMAN, CLINTON, AND CORZINE

Introduction

We are pleased to see that this committee was able to come together around the important issue of Brownfields legislation. We think that this bill generally makes important strides in addressing these sites. We think the bill could have been strengthened by the amendments we offered, as discussed below.

Directing Assistance to Vulnerable Populations

The U.S. Conference of Mayors and many others have noted that brownfields create problems that afflict communities around the country. There was widespread agreement among the witnesses testifying before the committee that the status quo with regards to brownfields is unacceptable. We concur. While EPA's efforts have met with significant successes, this bill is needed to ensure that the Brownfields Initiative is able to expand to more effectively address the hundreds of thousands of contaminated sites around the country.

It is important that a brownfields bill maximize the assistance provided to communities that have been disproportionately impacted by brownfields; in particular, low-income minority communities that are least able to address the problems on their own. As Deeohn Ferris, President of Global Environmental Resources Incorporated testified, "Compared to their numbers in the general population, many of these properties are in minority and low-income neighborhoods. Thus, equity, race and class discrimination, the diminished tax base in municipalities, and suburban sprawl are inseparable from the blight and marginalized communities that accompany brownfields."

Children, pregnant women, and the elderly have been found to be particularly vulnerable to some of the contamination common to brownfields sites. As such, any brownfields bill should also give special attention to the unique needs of these vulnerable populations. Amendments filed by Senators Boxer, Clinton, and Corzine would have directed EPA to give priority to these communities and would have improved the bill as it applies to these communities. Unfortunately, the bill fails to adequately address either the specific health concerns of pregnant women, children, and the elderly or the needs of low-income, minority communities that have been disproportionately impacted by brownfields.

The bill could also go further in targeting resources to those communities faced with a higher-than-normal incidence of disease (including cancer, asthma, or birth defects). Many in the scientific and public health communities believe that diseases such as these may be linked to exposure to hazardous substances found in brownfields sites. Unfortunately, there are still significant gaps in our understanding about how exposure to these substances may impact human health, and particularly the health of children, the elderly, and other vulnerable subpopulations. Focusing much needed resources on the cleanup of sites in communities with a higher-than-normal incidence of disease would help to fill in the gaps in our understanding, while at the same time minimizing additional human

health risks in these communities that are already plagued by illness. Again, the bill fails to take such measures; we would strongly support changes to the bill that would provide for this.

Open Space

Brownfields remediation efforts have often focused on the need to clean up sites for future economic redevelopment. The benefits to be gained from the revitalization and re-use of these sites can not be overstated. Areas of blight can be restored so that they bring jobs and tax revenue back to local communities. However, many brownfields sites also have the potential to serve as parks, greenways, or areas of open space. Unlike past brownfields bills, this bill includes important language that gives priority to sites that will be cleaned-up in order to be used for outdoor recreational purposes.

As communities around the country face rapid, and often overwhelming, development pressures, we anticipate that the use of brownfields sites for open space purposes will become increasingly important. Deeohn Ferris testified, "In view of efforts of communities to preserve already limited green spaces within, in particular, the urban environment, it's encouraging that the bill favors grants that facilitate, among other activities, creation and preservation of parkland. While economic development in certain areas is highly desirable, quality of life is greatly enhanced by neighborhood beautification and amenities." Alan Front, Senior Vice President of the Trust for Public Land echoed this sentiment in his testimony about the bill's provision which encourages grants for parks and greenways. "This provision, which recognizes the importance of improving quality of life in brownfields-affected neighborhoods, places open-space and community recreation appropriately in the equation alongside revenue-producing economic redevelopment."

We strongly support the bill's provisions to give added emphasis to sites that will be used for open space and parkland.

No Effect on Other Federal Laws

The bill is designed to provide funding for and liability relief to brownfields sites addressed under CERCLA. As outlined in the discussion of eligible sites, the bill specifies that only sites with low levels of contamination be considered under this bill. The bill limits the bar on EPA's enforcement to actions taken under Sections 106 and 107 of CERCLA and only under the circumstances set forth in the bill. This provision is purposefully narrow even though some brownfields sites may be regulated by EPA or a State under these other statutes. The committee considered and rejected efforts to address liability under these other statutes; this has been critical to our support and that of many outside groups. Environmentalists and communities who have a very strong interest in cleaning up brownfields sites are also very concerned that we not compromise protections under these other statutes. Moreover, many members indicated a strong unwillingness to make changes in other laws without full hearings and other opportunities to fully appreciate how changes made in this bill might impact the other laws and their enforcement schemes. Given the sensitive nature of the liability relief and the enforcement bar that the bill creates under CERCLA, and the potential for inadvertent effects on other envi-

ronmental laws, the committee was unwilling to make similar changes for other statutes without thorough consideration of the implications.

Numerous witnesses testified that modifications to other statutes were not necessary for this bill to have positive benefits for developers, real estate interests, and others in encouraging brownfields cleanup. Indeed, Administrator Whitman testified, "The Administration believes that brownfields legislation is important enough to be considered independently from other statutory reform efforts, such as Superfund. . . I would urge that Superfund reform issues not hold up passage of S. 350." Mike Ford testified on behalf of the National Association of Realtors that "A shortage of cleanup funds and liability concerns continue to impede brownfields redevelopment. S. 350 effectively addresses these issues."

Eligibility for Only Low Level Sites

The bill includes important provisions specifying that only sites with low level contamination are eligible for inclusion under this bill. Ineligible sites include those that are listed on the National Priorities List or sites that have undergone a preliminary assessment and site investigation and have received a "pre-score" under EPA's site evaluation process that would indicate that the site could qualify for inclusion on the National Priorities List. This distinction between high-level and low-level contamination is vital to ensure that liability relief and limitations on EPA enforcement are in no way granted to "Superfund-caliber" sites. These higher-risk sites should remain under the stringent strict liability provisions found in CERCLA to ensure that they are dealt with in a way that meets the health and safety needs of the public. This provision was critical to our support for the bill, and to others supporting the bill.

Maintaining the Federal Safety Net

The bill allows only lightly contaminated sites to be eligible for limitations on Federal enforcement of CERCLA. Nevertheless, there may be situations where Federal intervention is necessary to ensure adequate cleanup occurs or to guarantee that the appropriate parties are held responsible. Accordingly, the bill is careful to maintain a strong Federal safety net that allows EPA to apply fully its enforcement options under CERCLA in the following circumstances: the State requests assistance; contamination has migrated or will migrate across a State line; contamination has migrated or is likely to migrate onto property that is subject to the jurisdiction, custody, or control of the United States and may impact the authorized purposes of the Federal property; a release or threatened release may present an imminent and substantial endangerment to public health or welfare or the environment; or new information becomes available to suggest that the contamination or conditions of the facility present a threat requiring further remediation to protect public health or welfare, or the environment.

These exceptions were carefully designed to ensure that in these important instances, EPA can intervene under its normal CERCLA authority. One of the most important of these "reopener" provisions deals with circumstances in which a site may present an imminent and substantial endangerment to public health or welfare or the

environment. This provision is purposefully based on an identical "imminent and substantial endangerment" standard found in CERCLA. This standard has been used, and its meaning litigated for over 20 years and its meaning is well understood by all the parties involved in brownfields efforts. The committee considered and rejected the use of an alternative standard in part out of concern that it would lead to massive amounts of new litigation. This, in turn, would provide less certainty to developers and others about EPA's enforcement role.

In determining whether a situation may present an imminent and substantial threat, the bill also requires the Administrator to give consideration to response activities already being taken and whether additional response actions are likely to be necessary. We are aware that some outside community and environmental organizations are very uncomfortable with making these additions, particularly in light of the fact that EPA has never overfiled in a single brownfields cases.

These additions, however, are not intended to change the meaning of the imminent and substantial standard. In fact, these changes were intended to adopt that standard to avoid unnecessary litigation and just address when this standard would be applied. The standard for imminent and substantial endangerment has been used in a number of other environmental statutes (e.g. Solid Waste Disposal Act, Clean Air Act, Clean Water Act); it is used in a number of State statutes relating to brownfields cleanup; and it is used in a number of MOA's between individual States and EPA governing the State's voluntary brownfields cleanup program. More importantly, the imminent and substantial standard has an established meaning under the case law and courts have upheld its use. The courts have held that endangerment need not be actual harm, but rather potential or threatened harm. Additionally, they have found that the harm itself need not be imminent for the standard to apply; the risk of such harm is sufficient. Nothing in this bill is intended to deviate from that interpretation.

The bill also purposefully includes language to ensure that EPA is not barred from taking enforcement action at sites where cleanup has been conducted before February 15, 2001. Sites where cleanup has been undertaken (prior to February 15, 2001), is well underway, or has been completed and are now being maintained or monitored should not be eligible for liability relief or the enforcement bar. This is because the argument in favor of the bar has been that potential liability discourages development and removing this potential liability will spur development. Clearly, if work has already commenced at a site there is no justification for a bar on Federal action.

History suggests that EPA will not apply a heavy hand in implementing this safety net. EPA Administrator Whitman testified that the agency has yet to ever overfile under CERCLA at a brownfields site. Nonetheless, it is vital that this option be maintained so that all enforcement tools can be employed if any of the aforementioned circumstances develop. Furthermore, the knowledge that EPA can intervene if a State or private party fails to adequately clean up a site may serve as an incentive to get the cleanups done right the first time. As Grant Cope of the U.S. Public Interest Research

Group testified, "State cleanup officials rely on EPA's order authority to force intransigent parties to negotiate in good faith, or risk involvement by Federal authorities."

Maintenance of a strong Federal safety net is particularly important because the bill lacks sufficient provisions for Federal review of State programs. Democratic bills in the past have, without exception, required EPA review and approval of State programs, to ensure citizens are truly protected from threats to their health and environment. With one exception relating to the maintenance of a public record, the bill does not require States to demonstrate that they are in compliance with a set of Federal criteria before their program is eligible for the enforcement bar. This means that there is little opportunity for quality control on cleanups except for EPA's ability to come in at a particular site when the site conditions warrant it. Any weakening whatsoever of this provision would tip the balance of the bill away from ensuring protection of human health and the environment. Concerns with this provision are exacerbated by the fact that State programs vary widely. Even States with strong programs have, in the past, had a variety of problems (e.g. running out of funding, State statutes that have sunsetted). It is only by maintaining a Federal backup for State programs that we can ensure that our constituents are protected.

Amendments by Senators Boxer, Clinton and Corzine would have strengthened the Federal safety net even further by allowing EPA to exert its full CERCLA enforcement authority at sites that would have placed children, pregnant women, or low income minority communities or communities with a higher proportion than normal incidence of disease at disproportionate risk.

Many witnesses testified in favor of maintaining a strong and clear Federal safety net. EPA Administrator Whitman, for instance, testified that "Brownfields legislation should direct EPA to work with States to ensure that they employ high, yet flexible cleanup standards, and allow EPA to step in to enforce those standards where that is necessary."

Pre-Approval of State Programs

As several witnesses testified, the quality of State brownfields programs varies dramatically from State to State. The bill requires that a State or tribal program include certain elements, or be taking reasonable steps to include these elements, before they are eligible for funding under the bill. These elements are vital components that reflect the minimum of a credible State or tribal voluntary cleanup program. These elements include: timely survey and inventory of brownfields sites; oversight and enforcement authorities; resources to ensure that adequate response actions will protect human health and the environment and comply with applicable Federal and State law; resources to ensure that if the person conducting the response fails, there is a mechanism for the necessary response activities to be completed; mechanisms for the public to participate in a meaningful way; and mechanisms for approval of a cleanup plan and a requirement for verification and certification.

Some States lack programs that contain some or all of these elements. The bill allows them to receive funding while they develop,

or enhance, their programs. The bill allows States to receive funding as long as they show that they are taking "reasonable steps" to develop the program elements outlined in the bill. This is intended to encourage State programs which lag behind to make improvements, but is meant to clearly require that they make demonstrable progress in their program. If States fail to make marked improvements in their program, additional State money would not be available to them.

We expect that the Administrator would evaluate annually the progress that States are making, assess whether they are indeed taking reasonable steps, and deny funding to those States that fail to make progress. Otherwise, this provision could serve as a loophole that would allow States to avoid incorporating the program elements into their program. Such behavior would constitute an abuse of the intent of this bill.

In previous versions of brownfields legislation, and in many other environmental statutes, Federal approval of State programs is required before funding or liability relief are provided. Indeed, other statutes allow for State implementation only on the condition that EPA give prior approval certifying that the State has met minimum criteria. This bill would have benefited from similar provisions, and Sen. Baucus filed an amendment to this bill which would have done just that. Specifically, the bill should have explicitly required that the elements described in the bill be in an approved State program before there were any restraints on EPA's actions, and should have established explicit steps that EPA would take to review and assess a State program. Alternatively, it should at least have clarified that there was a distinct period of time (e.g. within 2 years of enactment of the bill) during which the State could get its program in place and approved.

Clearly, this bill includes an inherent tradeoff between requiring State program elements and a strong Federal safety net. The bill just barely meets this balance. Any changes to the Federal safety net would compromise the integrity of the bill and provide too much deference to the States.

Improving Opportunities for Public Participation

Providing adequate opportunities for public participation has proven to be an effective tool in ensuring that clean ups are conducted in an efficient and cost-effective manner. By allowing local communities to participate directly in the decisionmaking process, concerns can be addressed early, thereby helping to avoid unnecessary complications and delays.

S. 350 takes a number of important steps to ensure adequate opportunities for public participation and involvement. The bill requires the inclusion of local community involvement as a grant application ranking criteria. It also includes mechanisms and resources for providing public participation opportunities as an element of State programs eligible for Federal funding. In addition, S. 350 links the bar on Federal enforcement to sites in States that maintain, update, and make available to the public a record of brownfields sites at which response actions have or will be taken.

In her testimony, Deeohn Ferris pointed out how S. 350 prioritizes public participation in the decisionmaking process:

"Community involvement and public participation assurances in the bill. . . . elevate the significance of meeting community needs and inclusion in the decision process." She also emphasized the importance of linking the increased flexibility that S. 350 confers upon the States with an increase in the opportunities for community and public involvement.

While we strongly support the public participation provisions that have been included in S. 350, we believe that they can be strengthened even further. We are particularly concerned that although States complying with the program elements already included in S. 350 must survey and inventory sites in the State, there may be sites in certain communities that are overlooked—particularly those communities that may be small or sparsely populated, low-income, minority, or otherwise socially or politically disenfranchised.

We believe that such situations could be avoided by allowing individuals that may be affected by a nearby brownfields site to have the ability to request that the site be assessed under a State program. Such a provision could have been included in S. 350 while still allowing States complete discretion and flexibility with regard to how such a request mechanism would be established.

MINORITY VIEWS OF SENATORS INHOFE, CRAPO, AND BOND

Over the last several years, the Senate Committee on Environment and Public Works (the "committee") has worked very hard on Superfund reform. With S. 350, the committee has decided, for now, to address only brownfields a single portion of the old comprehensive Superfund reform bills. However because of the overwhelming evidence that the statute is not working as intended, the committee must work on additional reforms to Superfund, including, small business and used oil recyclers liability relief as well as remedy and natural resource damages reforms—at a minimum.

If Congress is only going to do a small portion of the Superfund reform for now, Congress should do it right. S. 350 contains provisions, which would be a positive first step toward revitalizing brownfields in this country. However, there are issues that—if addressed—would make a real difference in our nation's ability to address brownfields and could be addressed in a bipartisan manner. Specifically, the issues are (1) the legislation's site cleanup finality provisions; (2) the scope of the legislation's cleanup finality provisions; and (3) an administrative cap on the bill.

First, Section 129 (b)(1)(B) (the exceptions provisions) are of great concern. Advocates of S. 350 State that the bill's purpose is to provide assurances to parties, who clean up brownfields under State plans, that the Federal EPA will not come back and force further Federal cleanups. S. 350 only provides developers with moderate assurances for Superfund-forced cleanups. Many developers and business groups (the parties who have to fund brownfields redevelopment) argue that the bill does nothing to this end.

Section 129 (b)(1)(B)(iv) of S. 350 is of particular concern. This provision would allow almost any new information to be used to allow EPA to re-enter a site. The mere existence of any information such that the contamination or conditions present any "threat" is a standard without boundaries. At a minimum, the committee should make it clear in legislative terms that the information must be "clear and compelling."

The States also need to be provided a greater role in the process by clarifying the State's role. The States should have the primary role to select a remedy, which should be protective of public health and the environment. Rather, it is more appropriate for the State to be expected to continue its responsibility at cleaning up the site before the Federal Government must expend time and cost at the site.

Secondly, the scope of the cleanup finality provision is of concern. If the power of EPA to force cleanups under Superfund is taken away, then the Federal EPA can simply side-step the bill by using the Resource Conservation and Recovery Act (RCRA) or the Toxic Substances and Control Act (TSCA) to force parties to cleanup sites—even after a cleanup has been performed under a State program. Assurances need to be provided that if clean up has been performed under a State program which is protective of public health and the environment, EPA does not utilize RCRA or TSCA to force additional requirements.

According to EPA's figures, there are 200,000 sites contaminated primarily from petroleum. This is roughly half of the approximately

450,000 brownfields in the U.S. By not addressing petroleum liabilities under RCRA in S. 350, Congress is preventing almost half of the brownfields in this country from being cleaned up and developed. Congress must address this issue. It is not right to allow so many brownfields to remain contaminated under this program.

Serious concerns remain that businesses will not feel adequately protected and, therefore, brownfields will not get cleaned up. It is true that EPA has never overfiled a State-approved brownfields cleanup under any statute. However, it is the perceived threat that makes businesses shy away from revitalizing brownfields. In the end, developers and businesses are the parties that will determine whether there is adequate protection for developers. These are the parties, which will decide whether it is financially viable to revitalize a brownfield. Remember this is not about whether a polluter pays. This is about providing a safety net for parties, who want to do something positive for the environment and, therefore, the community. If a business does not feel adequately protected from liability and, therefore, is not inclined to remediate a site, we have done nothing. Brownfields will remain abandoned and contaminated and communities, mayors, developers, environmental groups—and in fact, everyone,—loses.

Finally, we would like to work with the members of the committee and the Administration to place a cap on administrative costs set aside by the Federal EPA. A cost cap would ensure the States and parties, seeking to clean up and redevelop brownfields, are getting a vast majority of the funds for their brownfields programs and cleanups. EPA informed us that they current use approximately 16 percent of brownfields funds appropriated on administrative costs. This amount is unacceptable. Congress must place a cap on administrative costs. S. 350 was drafted to revitalize brownfields in communities all over this nation not fund a bureaucracy.

CHANGES IN EXISTING LAW

In compliance with section 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows: Existing law proposed to be omitted is enclosed in [black brackets], new matter is printed in *italic*, existing law in which no change is proposed is shown in roman:

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980

"SUPERFUND"

[As Amended Through P.L. 106–308, October 13, 2000]

* * * * * * *

SEC. 101. For purpose of this title—

(1) * * *

* * * * * * *

(35)(A) The term "contractual relationship", for the purpose of section 107(b)(3) includes, but is not limited to, land contracts, [deeds or] *deeds, easements, leases, or* other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that [he] *the defendant* has satisfied the requirements of section 107(b)(3) (a) and (b)[.]*, provides full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility), is in compliance with any land use restrictions established or relied on in connection with the response action at a facility, and does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action.*

[(B) To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time

of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account 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.]

(B) REASON TO KNOW.—

(i) ALL APPROPRIATE INQUIRIES.—To establish that the defendant had no reason to know of the matter described in subparagraph (A)(i), the defendant must demonstrate to a court that—

(I) on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquiries, as provided in clauses (ii) and (iv), into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; and

(II) the defendant took reasonable steps to—

(aa) stop any continuing release;

(bb) prevent any threatened future release; and

(cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.

(ii) STANDARDS AND PRACTICES.—Not later than 2 years after the date of enactment of the Brownfields Revitalization and Environmental Restoration Act of 2001, the Administrator shall by regulation establish standards and practices for the purpose of satisfying the requirement to carry out all appropriate inquiries under clause (i).

(iii) CRITERIA.—In promulgating regulations that establish the standards and practices referred to in clause (ii), the Administrator shall include each of the following:

(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 cleanup 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.

(iv) INTERIM STANDARDS AND PRACTICES.—

(I) PROPERTY PURCHASED BEFORE MAY 31, 1997.—With respect to property purchased before May 31, 1997, in making a determination with respect to a defendant described of clause (i), a court shall take into account—

(aa) any specialized knowledge or experience on the part of the defendant;

(bb) the relationship of the purchase price to the value of the property, if the property was not contaminated;

(cc) commonly known or reasonably ascertainable information about the property;

(dd) the obviousness of the presence or likely presence of contamination at the property; and

(ee) the ability of the defendant to detect the contamination by appropriate inspection.

(II) PROPERTY PURCHASED ON OR AFTER MAY 31, 1997.—With respect to property purchased on or after May 31, 1997, and until the Administrator promulgates the regulations described in clause (ii), the procedures of the American Society for Testing and Materials, including the document known as "Standard E1527–97", entitled "Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process", shall satisfy the requirements in clause (i).

(v) SITE INSPECTION AND TITLE SEARCH.—In the case of property for residential use or other similar use purchased by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no

basis for further investigation shall be considered to satisfy the requirements of this subparagraph.

* * * * * * *

(39) BROWNFIELD SITE.—

(A) IN GENERAL.—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.

(B) EXCLUSIONS.—The term "brownfield site" does not include—

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

(ii) a facility that is listed on the National Priorities List or is proposed for listing;

(iii) a facility that is the subject of a unilateral administrative order, a court order, an administrative order on consent or judicial consent decree that has been issued to or entered into by the parties under this Act;

(iv) a facility that is the subject of a unilateral administrative order, a court order, an administrative order on consent or judicial consent decree that has been issued to or entered into by the parties, or a facility to which a permit has been issued by the United States or an authorized State under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), the Federal Water Pollution Control Act (33 U.S.C. 1321), the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), or the Safe Drinking Water Act (42 U.S.C. 300f et seq.);

(v) a facility that—

(I) is subject to corrective action under section 3004(u) or 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6924(u), 6928(h)); and

(II) to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures;

(vi) a land disposal unit with respect to which—

(I) a closure notification under subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.) has been submitted; and

(II) closure requirements have been specified in a closure plan or permit;

(vii) a facility that is 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;

(viii) a portion of a facility—

(I) at which there has been a release of polychlorinated biphenyls; and

(II) that is subject to remediation under the Toxic Substances Control Act (15 U.S.C. 2601 et seq.); or

(ix) a portion of a facility, for which portion, assistance for response activity has been obtained under

subtitle I of the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.) from the Leaking Underground Storage Tank Trust Fund established under section 9508 of the Internal Revenue Code of 1986.

(C) SITE-BY-SITE DETERMINATIONS.—Notwithstanding subparagraph (B) and on a site-by-site basis, the President may authorize financial assistance under section 128 to an eligible entity at a site included in clause (i), (iv), (v), (vi), (viii), or (ix) of subparagraph (B) if 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 recreational property, or other property used for nonprofit purposes.

(D) ADDITIONAL AREAS.—For the purposes of section 128, the term "brownfield site" includes a site that—

(i) meets the definition of "brownfield site" under subparagraphs (A) through (C); and

(ii)(I) is contaminated by a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)); or

(II) is mine-scarred land.

(40) BONA FIDE PROSPECTIVE PURCHASER.—The term "bona fide prospective purchaser" means a person (or a tenant of a person) that acquires ownership of a facility after the date of enactment of this paragraph and that establishes each of the following by a preponderance of the evidence:

(A) DISPOSAL PRIOR TO ACQUISITION.—All disposal of hazardous substances at the facility occurred before the person acquired the facility.

(B) INQUIRIES.—

(i) IN GENERAL.—The person 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 in accordance with clauses (ii) and (iii).

(ii) STANDARDS AND PRACTICES.—The standards and practices referred to in clauses (ii) and (iv) of paragraph (35)(B) shall be considered to satisfy the requirements of this subparagraph.

(iii) RESIDENTIAL USE.—In the case of property in residential or other similar use at the time of purchase by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.

(C) NOTICES.—The person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility.

(D) CARE.—The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to—

(i) stop any continuing release;

(ii) prevent any threatened future release; and

(iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.

(E) COOPERATION, ASSISTANCE, AND ACCESS.—The person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at a vessel or facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response actions or natural resource restoration at the vessel or facility).

(F) INSTITUTIONAL CONTROL.—The person—

(i) is in compliance with any land use restrictions established or relied on in connection with the response action at a vessel or facility; and

(ii) does not impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a response action.

(G) REQUESTS; SUBPOENAS.—The person complies with any request for information or administrative subpoena issued by the President under this Act.

(H) NO AFFILIATION.—The person is not—

(i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through—

(I) any direct or indirect familial relationship; or

(II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or

(ii) the result of a reorganization of a business entity that was potentially liable.

(41) ELIGIBLE RESPONSE SITE.—

(A) IN GENERAL.—The term "eligible response site" means a site that meets the definition of a brownfield site in subparagraphs (A) and (B) of paragraph (39), as modified by subparagraphs (B) and (C) of this paragraph.

(B) INCLUSIONS.—The term "eligible response site" includes—

(i) notwithstanding paragraph (39)(B)(ix), a portion of a facility, for which portion assistance for response activity has been obtained under subtitle I of the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.) from the Leaking Underground Storage Tank Trust Fund established under section 9508 of the Internal Revenue Code of 1986; or

(ii) a site for which, notwithstanding the exclusions provided in subparagraph (C) or paragraph (39)(B), the President determines, on a site-by-site basis and after consultation with the State, that limitations on enforcement under section 129 at sites specified in

clause (iv), (v), (vi) or (viii) of paragraph (39)(B) would be appropriate and will—

(I) protect human health and the environment; and

(II) promote economic development or facilitate the creation of, preservation of, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for nonprofit purposes.

(C) EXCLUSIONS.—The term "eligible response site" does not include—

(i) a facility for which the President—

(I) conducts or has conducted a preliminary assessment or site inspection; and

(II) after consultation with the State, determines or has determined that the site obtains a preliminary score sufficient for possible listing on the National Priorities List, or that the site otherwise qualifies for listing on the National Priorities List;

unless the President has made a determination that no further Federal action will be taken; or

(ii) facilities that the President determines warrant particular consideration as identified by regulation, such as sites posing a threat to a sole-source drinking water aquifer or a sensitive ecosystem.

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SEC. 105. (a) REVISION AND REPUBLICATION.— * * *

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(h) NPL DEFERRAL.—

(1) DEFERRAL TO STATE VOLUNTARY CLEANUPS.—At the request of a State and subject to paragraphs (2) and (3), the President generally shall defer final listing of an eligible response site on the National Priorities List if the President determines that—

(A) the State, or another party under an agreement with or order from the State, is conducting a response action at the eligible response site—

(i) in compliance with a State program that specifically governs response actions for the protection of public health and the environment; and

(ii) that will provide long-term protection of human health and the environment; or

(B) the State is actively pursuing an agreement to perform a response action described in subparagraph (A) at the site with a person that the State has reason to believe is capable of conducting a response action that meets the requirements of subparagraph (A).

(2) PROGRESS TOWARD CLEANUP.—If, after the last day of the 1-year period beginning on the date on which the President proposes to list an eligible response site on the National Priorities List, the President determines that the State or other party is not making reasonable progress toward completing a re-

sponse action at the eligible response site, the President may list the eligible response site on the National Priorities List.

(3) CLEANUP AGREEMENTS.—With respect to an eligible response site under paragraph (1)(B), if, after the last day of the 1-year period beginning on the date on which the President proposes to list the eligible response site on the National Priorities List, an agreement described in paragraph (1)(B) has not been reached, the President may defer the listing of the eligible response site on the National Priorities List for an additional period of not to exceed 180 days if the President determines deferring the listing would be appropriate based on—

(A) the complexity of the site;

(B) substantial progress made in negotiations; and

(C) other appropriate factors, as determined by the President.

(4) EXCEPTIONS.—The President may decline to defer, or elect to discontinue a deferral of, a listing of an eligible response site on the National Priorities List if the President determines that—

(A) deferral would not be appropriate because the State, as an owner or operator or a significant contributor of hazardous substances to the facility, is a potentially responsible party;

(B) the criteria under the National Contingency Plan for issuance of a health advisory have been met; or

(C) the conditions in paragraphs (1) through (3), as applicable, are no longer being met.

* * * * * * *

SEC. 107. (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

* * * * * * *

(o) CONTIGUOUS PROPERTIES.—

(1) NOT CONSIDERED TO BE AN OWNER OR OPERATOR.—

(A) IN GENERAL.—A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility under paragraph (1) or (2) of subsection (a) solely by reason of the contamination if—

(i) the person did not cause, contribute, or consent to the release or threatened release;

(ii) the person is not—

(I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or

(II) the result of a reorganization of a business entity that was potentially liable;

(iii) the person takes reasonable steps to—

(I) stop any continuing release;

(II) prevent any threatened future release; and

(III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;

(iv) the person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility);

(v) the person—

(I) is in compliance with any land use restrictions established or relied on in connection with the response action at the facility; and

(II) does not impede the effectiveness or integrity of any institutional control employed in connection with a response action;

(vi) the person is in compliance with any request for information or administrative subpoena issued by the President under this Act;

(vii) the person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; and

(viii) at the time at which the person acquired the property, the person—

(I) conducted all appropriate inquiry within the meaning of section 101(35)(B) with respect to the property; and

(II) did not know or have reason to know that the property was or could be contaminated by a release or threatened release of 1 or more hazardous substances from other real property not owned or operated by the person.

(B) DEMONSTRATION.—To qualify as a person described in subparagraph (A), a person must establish by a preponderance of the evidence that the conditions in clauses (i) through (viii) of subparagraph (A) have been met.

(C) BONA FIDE PROSPECTIVE PURCHASER.—Any person that does not qualify as a person described in this paragraph because the person had, or had reason to have, knowledge specified in subparagraph (A)(viii) at the time of acquisition of the real property may qualify as a bona fide prospective purchaser under section 101(40) if the person is otherwise described in that section.

(D) GROUND WATER.—With respect to a hazardous substance from 1 or more sources that are not on the property

of a person that is a contiguous property owner that enters ground water beneath the property of the person solely as a result of subsurface migration in an aquifer, subparagraph (A)(iii) shall not require the person to conduct ground water investigations or to install ground water remediation systems, except in accordance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.

(2) EFFECT OF LAW.—With respect to a person described in this subsection, nothing in this subsection—

(A) limits any defense to liability that may be available to the person under any other provision of law; or

(B) imposes liability on the person that is not otherwise imposed by subsection (a).

(3) ASSURANCES.—The Administrator may—

(A) issue an assurance that no enforcement action under this Act will be initiated against a person described in paragraph (1); and

(B) grant a person described in paragraph (1) protection against a cost recovery or contribution action under section 113(f).

(p) PROSPECTIVE PURCHASER AND WINDFALL LIEN.—

(1) LIMITATION ON LIABILITY.—Notwithstanding subsection (a)(1), a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

(2) LIEN.—If there are unrecovered response costs incurred by the United States at a facility for which an owner of the facility is not liable by reason of paragraph (1), and if each of the conditions described in paragraph (3) is met, the United States shall have a lien on the facility, or may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the Administrator, for the unrecovered response costs.

(3) CONDITIONS.—The conditions referred to in paragraph (2) are the following:

(A) RESPONSE ACTION.—A response action for which there are unrecovered costs of the United States is carried out at the facility.

(B) FAIR MARKET VALUE.—The response action increases the fair market value of the facility above the fair market value of the facility that existed before the response action was initiated.

(4) AMOUNT; DURATION.—A lien under paragraph (2)—

(A) shall be in an amount not to exceed the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property;

(B) shall arise at the time at which costs are first incurred by the United States with respect to a response action at the facility;

(C) shall be subject to the requirements of subsection (l)(3); and

(D) shall continue until the earlier of—

(i) satisfaction of the lien by sale or other means; or

(ii) notwithstanding any statute of limitations under section 113, recovery of all response costs incurred at the facility.

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SEC. 128. BROWNFIELDS REVITALIZATION FUNDING.

(a) DEFINITION OF ELIGIBLE ENTITY.—In this section, the term "eligible entity" means—

(1) a general purpose unit of local government;

(2) a land clearance authority or other quasi-governmental entity that operates under the supervision and control of or as an agent of a general purpose unit of local government;

(3) a government entity created by a State legislature;

(4) a regional council or group of general purpose units of local government;

(5) a redevelopment agency that is chartered or otherwise sanctioned by a State;

(6) a State; or

(7) an Indian Tribe.

(b) BROWNFIELD SITE CHARACTERIZATION AND ASSESSMENT GRANT PROGRAM.—

(1) ESTABLISHMENT OF PROGRAM.—The Administrator shall establish a program to—

(A) provide grants to inventory, characterize, assess, and conduct planning related to brownfield sites under paragraph (2); and

(B) perform targeted site assessments at brownfield sites.

(2) ASSISTANCE FOR SITE CHARACTERIZATION AND ASSESSMENT.—

(A) IN GENERAL.—On approval of an application made by an eligible entity, the Administrator may make a grant to the eligible entity to be used for programs to inventory, characterize, assess, and conduct planning related to 1 or more brownfield sites.

(B) SITE CHARACTERIZATION AND ASSESSMENT.—A site characterization and assessment carried out with the use of a grant under subparagraph (A) shall be performed in accordance with section 101(35)(B).

(c) GRANTS AND LOANS FOR BROWNFIELD REMEDIATION.—

(1) GRANTS PROVIDED BY THE PRESIDENT.—Subject to subsections (d) and (e), the President shall establish a program to provide grants to—

(A) eligible entities, to be used for capitalization of revolving loan funds; and

(B) eligible entities or nonprofit organizations, where warranted, as determined by the President based on considerations under paragraph (3), to be used directly for remediation of 1 or more brownfield sites owned by the entity or organization that receives the grant and in amounts not to exceed $200,000 for each site to be remediated.

(2) LOANS AND GRANTS PROVIDED BY ELIGIBLE ENTITIES.—An eligible entity that receives a grant under paragraph (1)(A) shall use the grant funds to provide assistance for the remediation of brownfield sites in the form of—

(A) 1 or more loans to an eligible entity, a site owner, a site developer, or another person; or

(B) 1 or more grants to an eligible entity or other nonprofit organization, where warranted, as determined by the eligible entity that is providing the assistance, based on considerations under paragraph (3), to remediate sites owned by the eligible entity or nonprofit organization that receives the grant.

(3) CONSIDERATIONS.—In determining whether a grant under paragraph (1)(B) or (2)(B) is warranted, the President or the eligible entity, as the case may be, shall take into consideration—

(A) the extent to which a grant will facilitate the creation of, preservation of, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for nonprofit purposes;

(B) the extent to which a grant will meet the needs of a community that has an inability to draw on other sources of funding for environmental remediation and subsequent redevelopment of the area in which a brownfield site is located because of the small population or low income of the community;

(C) the extent to which a grant will facilitate the use or reuse of existing infrastructure;

(D) the benefit of promoting the long-term availability of funds from a revolving loan fund for brownfield remediation; and

(E) such other similar factors as the Administrator considers appropriate to consider for the purposes of this section.

(4) TRANSITION.—Revolving loan funds that have been established before the date of enactment of this section may be used in accordance with this subsection.

(d) GENERAL PROVISIONS.—

(1) MAXIMUM GRANT AMOUNT.—

(A) BROWNFIELD SITE CHARACTERIZATION AND ASSESSMENT.—

(i) IN GENERAL.—A grant under subsection (b)—

(I) may be awarded to an eligible entity on a community-wide or site-by-site basis; and

(II) shall not exceed, for any individual brownfield site covered by the grant, $200,000.

(ii) WAIVER.—The Administrator may waive the $200,000 limitation under clause (i)(II) to permit the

brownfield site to receive a grant of not to exceed $350,000, based on the anticipated level of contamination, size, or status of ownership of the site.

(B) BROWNFIELD REMEDIATION.—

(i) GRANT AMOUNT.—A grant under subsection (c)(1)(A) may be awarded to an eligible entity on a community-wide or site-by-site basis, not to exceed $1,000,000 per eligible entity.

(ii) ADDITIONAL GRANT AMOUNT.—The Administrator may make an additional grant to an eligible entity described in clause (i) for any year after the year for which the initial grant is made, taking into consideration—

(I) the number of sites and number of communities that are addressed by the revolving loan fund;

(II) the demand for funding by eligible entities that have not previously received a grant under this section;

(III) the demonstrated ability of the eligible entity to use the revolving loan fund to enhance remediation and provide funds on a continuing basis; and

(IV) such other similar factors as the Administrator considers appropriate to carry out this section.

(2) PROHIBITION.—

(A) IN GENERAL.—No part of a grant or loan under this section may be used for the payment of—

(i) a penalty or fine;

(ii) a Federal cost-share requirement;

(iii) an administrative cost;

(iv) a response cost at a brownfield site for which the recipient of the grant or loan is potentially liable under section 107; or

(v) a cost of compliance with any Federal law (including a Federal law specified in section 101(39)(B)), excluding the cost of compliance with laws applicable to the cleanup.

(B) EXCLUSIONS.—For the purposes of subparagraph (A)(iii), the term "administrative cost" does not include the cost of—

(i) investigation and identification of the extent of contamination;

(ii) design and performance of a response action; or

(iii) monitoring of a natural resource.

(3) ASSISTANCE FOR DEVELOPMENT OF LOCAL GOVERNMENT SITE REMEDIATION PROGRAMS.—A local government that receives a grant under this section may use not to exceed 10 percent of the grant funds to develop and implement a brownfields program that may include—

(A) monitoring the health of populations exposed to 1 or more hazardous substances from a brownfield site; and

(B) monitoring and enforcement of any institutional control used to prevent human exposure to any hazardous substance from a brownfield site.

(e) GRANT APPLICATIONS.—

(1) SUBMISSION.—

(A) IN GENERAL.—

(i) APPLICATION.—An eligible entity may submit to the Administrator, through a regional office of the Environmental Protection Agency and in such form as the Administrator may require, an application for a grant under this section for 1 or more brownfield sites (including information on the criteria used by the Administrator to rank applications under paragraph (3), to the extent that the information is available).

(ii) NCP REQUIREMENTS.—The Administrator may include in any requirement for submission of an application under clause (i) a requirement of the National Contingency Plan only to the extent that the requirement is relevant and appropriate to the program under this section.

(B) COORDINATION.—The Administrator shall coordinate with other Federal agencies to assist in making eligible entities aware of other available Federal resources.

(C) GUIDANCE.—The Administrator shall publish guidance to assist eligible entities in applying for grants under this section.

(2) APPROVAL.—The Administrator shall—

(A) at least annually, complete a review of applications for grants that are received from eligible entities under this section; and

(B) award grants under this section to eligible entities that the Administrator determines have the highest rankings under the ranking criteria established under paragraph (3).

(3) RANKING CRITERIA.—The Administrator shall establish a system for ranking grant applications received under this subsection that includes the following criteria:

(A) The extent to which a grant will stimulate the availability of other funds for environmental assessment or remediation, and subsequent reuse, of an area in which 1 or more brownfield sites are located.

(B) The potential of the proposed project or the development plan for an area in which 1 or more brownfield sites are located to stimulate economic development of the area on completion of the cleanup.

(C) The extent to which a grant would address or facilitate the identification and reduction of threats to human health and the environment.

(D) The extent to which a grant would facilitate the use or reuse of existing infrastructure.

(E) The extent to which a grant would facilitate the creation of, preservation of, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for nonprofit purposes.

(F) The extent to which a grant would meet the needs of a community that has an inability to draw on other sources of funding for environmental remediation and subsequent redevelopment of the area in which a brownfield site is located because of the small population or low income of the community.

(G) The extent to which the applicant is eligible for funding from other sources.

(H) The extent to which a grant will further the fair distribution of funding between urban and nonurban areas.

(I) The extent to which the grant provides for involvement of the local community in the process of making decisions relating to cleanup and future use of a brownfield site.

(f) IMPLEMENTATION OF BROWNFIELDS PROGRAMS.—

(1) ESTABLISHMENT OF PROGRAM.—The Administrator may provide, or fund eligible entities or nonprofit organizations to provide, training, research, and technical assistance to individuals and organizations, as appropriate, to facilitate the inventory of brownfield sites, site assessments, remediation of brownfield sites, community involvement, or site preparation.

(2) FUNDING RESTRICTIONS.—The total Federal funds to be expended by the Administrator under this subsection shall not exceed 15 percent of the total amount appropriated to carry out this section in any fiscal year.

(g) AUDITS.—

(1) IN GENERAL.—The Inspector General of the Environmental Protection Agency shall conduct such reviews or audits of grants and loans under this section as the Inspector General considers necessary to carry out this section.

(2) PROCEDURE.—An audit under this paragraph shall be conducted in accordance with the auditing procedures of the General Accounting Office, including chapter 75 of title 31, United States Code.

(3) VIOLATIONS.—If the Administrator determines that a person that receives a grant or loan under this section has violated or is in violation of a condition of the grant, loan, or applicable Federal law, the Administrator may—

(A) terminate the grant or loan;

(B) require the person to repay any funds received; and

(C) seek any other legal remedies available to the Administrator.

(h) LEVERAGING.—An eligible entity that receives a grant under this section may use the grant funds for a portion of a project at a brownfield site for which funding is received from other sources if the grant funds are used only for the purposes described in subsection (b) or (c).

(i) AGREEMENTS.—Each grant or loan made under this section shall—

(1) include a requirement of the National Contingency Plan only to the extent that the requirement is relevant and appropriate to the program under this section, as determined by the Administrator; and

(2) be subject to an agreement that—

(A) requires the recipient to—

(i) comply with all applicable Federal and State laws; and

(ii) ensure that the cleanup protects human health and the environment;

(B) requires that the recipient use the grant or loan exclusively for purposes specified in subsection (b) or (c), as applicable;

(C) in the case of an application by an eligible entity under subsection (c)(1), requires the eligible entity to pay a matching share (which may be in the form of a contribution of labor, material, or services) of at least 20 percent, from non-Federal sources of funding, unless the Administrator determines that the matching share would place an undue hardship on the eligible entity; and

(D) contains such other terms and conditions as the Administrator determines to be necessary to carry out this section.

(j) FACILITY OTHER THAN BROWNFIELD SITE.—The fact that a facility may not be a brownfield site within the meaning of section 101(39)(A) has no effect on the eligibility of the facility for assistance under any other provision of Federal law.

(k) FUNDING.—There is authorized to be appropriated to carry out this section $150,000,000 for each of fiscal years 2002 through 2006.

SEC. 129. STATE RESPONSE PROGRAMS.

(a) ASSISTANCE TO STATES.—

(1) IN GENERAL.—

(A) STATES.—The Administrator may award a grant to a State or Indian tribe that—

(i) has a response program that includes each of the elements, or is taking reasonable steps to include each of the elements, listed in paragraph (2); or

(ii) is a party to a memorandum of agreement with the Administrator for voluntary response programs.

(B) USE OF GRANTS BY STATES.—

(i) IN GENERAL.—A State or Indian tribe may use a grant under this subsection to establish or enhance the response program of the State or Indian tribe.

(ii) ADDITIONAL USES.—In addition to the uses under clause (i), a State or Indian tribe may use a grant under this subsection to—

(I) capitalize a revolving loan fund for brownfield remediation under section 128(c); or

(II) develop a risk sharing pool, an indemnity pool, or insurance mechanism to provide financing for response actions under a State response program.

(2) ELEMENTS.—The elements of a State or Indian tribe response program referred to in paragraph (1)(A)(i) are the following:

(A) Timely survey and inventory of brownfield sites in the State.

(B) Oversight and enforcement authorities or other mechanisms, and resources, that are adequate to ensure that—

(i) a response action will—

(I) protect human health and the environment; and

(II) be conducted in accordance with applicable Federal and State law; and

(ii) if the person conducting the response action fails to complete the necessary response activities, including operation and maintenance or long-term monitoring activities, the necessary response activities are completed.

(C) Mechanisms and resources to provide meaningful opportunities for public participation, including—

(i) public access to documents that the State, Indian tribe, or party conducting the cleanup is relying on or developing in making cleanup decisions or conducting site activities; and

(ii) prior notice and opportunity for comment on proposed cleanup plans and site activities.

(D) Mechanisms for approval of a cleanup plan, and a requirement for verification by and certification or similar documentation from the State, an Indian tribe, or a licensed site professional to the person conducting a response action indicating that the response is complete.

(3) FUNDING.—There is authorized to be appropriated to carry out this subsection $50,000,000 for each of fiscal years 2002 through 2006.

(b) ENFORCEMENT IN CASES OF A RELEASE SUBJECT TO STATE PROGRAM.—

(1) ENFORCEMENT.—

(A) IN GENERAL.— Except as provided in subparagraph (B) and subject to subparagraph (C), in the case of an eligible response site at which—

(i) there is a release or threatened release of a hazardous substance, pollutant, or contaminant; and

(ii) a person is conducting or has completed a response action regarding the specific release that is addressed by the response action that is in compliance with the State program that specifically governs response actions for the protection of public health and the environment;

the President may not use authority under this Act to take an administrative or judicial enforcement action under section 106(a) or to take a judicial enforcement action to recover response costs under section 107(a) against the person regarding the specific release that is addressed by the response action.

(B) EXCEPTIONS.—The President may bring an administrative or judicial enforcement action under this Act during or after completion of a response action described in subparagraph (A) with respect to a release or threatened re-

lease at an eligible response site described in that subparagraph if—

(i) the State requests that the President provide assistance in the performance of a response action;

(ii) the Administrator determines that contamination has migrated or will migrate across a State line, resulting in the need for further response action to protect human health or the environment, or the President determines that contamination has migrated or is likely to migrate onto property subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States and may impact the authorized purposes of the Federal property;

(iii) after taking into consideration the response activities already taken, the Administrator determines that—

(I) a release or threatened release may present an imminent and substantial endangerment to public health or welfare or the environment; and

(II) additional response actions are likely to be necessary to address, prevent, limit, or mitigate the release or threatened release; or

(iv) the Administrator determines that information, that on the earlier of the date on which cleanup was approved or completed, was not known by the State, as recorded in documents prepared or relied on in selecting or conducting the cleanup, has been discovered regarding the contamination or conditions at a facility such that the contamination or conditions at the facility present a threat requiring further remediation to protect public health or welfare or the environment.

(C) PUBLIC RECORD.—The limitations on the authority of the President under subparagraph (A) apply only at sites in States that maintain, update not less than annually, and make available to the public a record of sites, by name and location, at which response actions have been completed in the previous year and are planned to be addressed under the State program that specifically governs response actions for the protection of public health and the environment in the upcoming year. The public record shall identify whether or not the site, on completion of the response action, will be suitable for unrestricted use and, if not, shall identify the institutional controls relied on in the remedy. Each State and tribe receiving financial assistance under subsection (a) shall maintain and make available to the public a record of sites as provided in this paragraph.

(D) EPA NOTIFICATION.—

(i) IN GENERAL.—In the case of an eligible response site at which there is a release or threatened release of a hazardous substance, pollutant, or contaminant and for which the Administrator intends to carry out an action that may be barred under subparagraph (A), the Administrator shall—

(I) notify the State of the action the Administrator intends to take; and

(II)(aa) wait 48 hours for a reply from the State under clause (ii); or

(bb) if the State fails to reply to the notification or if the Administrator makes a determination under clause (iii), take immediate action under that clause.

(ii) STATE REPLY.—Not later than 48 hours after a State receives notice from the Administrator under clause (i), the State shall notify the Administrator if—

(I) the release at the eligible response site is or has been subject to a cleanup conducted under a State program; and

(II) the State is planning to abate the release or threatened release, any actions that are planned.

(iii) IMMEDIATE FEDERAL ACTION.—The Administrator may take action immediately after giving notification under clause (i) without waiting for a State reply under clause (ii) if the Administrator determines that 1 or more exceptions under subparagraph (B) are met.

(E) REPORT TO CONGRESS.—Not later than 90 days after the date of initiation of any enforcement action by the President under clause (ii), (iii), or (iv) of subparagraph (B), the President shall submit to Congress a report describing the basis for the enforcement action, including specific references to the facts demonstrating that enforcement action is permitted under subparagraph (B).

(2) SAVINGS PROVISION.—

(A) COSTS INCURRED PRIOR TO LIMITATIONS.—Nothing in paragraph (1) precludes the President from seeking to recover costs incurred prior to the date of enactment of this section or during a period in which the limitations of paragraph (1)(A) were not applicable.

(B) EFFECT ON AGREEMENTS BETWEEN STATES AND EPA.—Nothing in paragraph (1)—

(i) modifies or otherwise affects a memorandum of agreement, memorandum of understanding, or any similar agreement relating to this Act between a State agency or an Indian tribe and the Administrator that is in effect on or before the date of enactment of this section (which agreement shall remain in effect, subject to the terms of the agreement); or

(ii) limits the discretionary authority of the President to enter into or modify an agreement with a State, an Indian tribe, or any other person relating to the implementation by the President of statutory authorities.

(3) EFFECTIVE DATE.—This subsection applies only to response actions conducted after February 15, 2001.

(c) EFFECT ON FEDERAL LAWS.—Nothing in this section affects any liability or response authority under any Federal law, including—

(1) this Act, except as provided in subsection (b);

(2) the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.);

(3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.);

(4) the Toxic Substances Control Act (15 U.S.C. 2601 et seq.); and

(5) the Safe Drinking Water Act (42 U.S.C. 300f et seq.).

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