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WARNING
CONTAMINATED AREA
KEEP AWAY

CAUTION RECLAIMED WATER DO NOT DRINK

CAUTION

CAUTION RADIATION AREA

CAUTION



RADIOACTIVE MATERIAL



New Bill May Help Brownfields **Grow Green**

By Daniel E. Johnson

CONTAMINATED PROPERTIES KNOWN AS BROWNFIELDS MAY GROW GREEN UNDER THE SMALL BUSINESS LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION ACT SIGNED INTO LAW BY PRESIDENT BUSH ON JANUARY 11, 2002. THE ACT PROVIDES NEW MONEY AND IMPETUS FOR STATE AND VOLUNTARY CLEANUP AND REDEVELOPMENT PROGRAMS FOR BROWNFIELD SITES, WHICH ARE DEFINED BY THE ACT AS "REAL PROPERTY, IN WHICH THE EXPANSION, REDEVELOPMENT, OR REUSE OF MAY BE COMPLICATED BY THE PRESENCE, OR POTENTIAL PRESENCE OF A HAZARDOUS SUBSTANCE, POLLUTANT, OR CONTAMINANT." DEFINED IN THIS MANNER, BROWNFIELD SITES NUMBER FAR MORE THAN THE OFTEN-CITED 500,000 TO 1 MILLION ESTIMATED BY THE ENVIRONMENTAL PROTECTION AGENCY (EPA).

SUMMARY OF THE ACT

Specifically, the Act outlines four distinct areas of reform:

- 1) increased funding
- 2) liability protection for landowners
- 3) relief for small businesses
- 4) an enforcement bar on administrative orders and cost recovery efforts at brownfield sites.

Federal funding for brownfields redevelopment is to be increased from \$90 million to \$250 million per year for the next five years, beginning January 2002. State and tribal programs will receive \$50 million in funding grants, while the remaining \$200 million funds will go to brownfield assistance for assessment and remediation. Under the Act, 25 percent of the assessment and remediation funding is to be used for facilities that contain petroleum contamination (i.e. releases from petroleum storage tanks).


Maximum individual grants will be \$200,000 for assessment and \$1 million for remediation. State programs must contain specific elements, including an inventory of sites; public participation; oversight and enforcement by authorities to ensure that cleanups will protect public health, and be conducted in compliance with applicable federal law; and a mechanism for approval of cleanup plans and confirmation of cleanup completion.

The Act reforms the federal Superfund law, which has been a major obstacle for brownfields cleanup efforts. The Superfund backdrop has been a web of liability for landowners, tenants and lenders. For this reason, the Act provides Superfund liability protection for prospective purchasers, providing that all disposal of hazardous substances took place before they acquired the property; and provided that they undertook all appropriate inquiry, notified appropriate authorities of the release, exercised appropriate care, and cooperated with the authorities. As a stipulation of this protection, the property owner must not have contributed to the contamination, either directly or indirectly.

Other liability clarifications, such as for contiguous property owners and innocent landowners, are also included in the Act, although their practical effects may be limited. The protection for contiguous property owners, for example, requires that the person conducted all appropriate inquiry and did not know or have reason to know that the property was contaminated by releases on the other property. For many brownfield situations, the contiguous property owner will have ample reason to suspect releases from an upgradient property, and confirmation of the fact that the release has migrated to his downgradient property would suggest the new defense is not available.

Fifteen years after the first legislation was introduced to clarify what constitutes "all appropriate inquiry" under Superfund, the Act adopts the now outdated ASTM Standard Practice for Environmental Site Assessment (ASTM E-1527-97) for transactions after May 1997. The current ASTM standard, adopted in 2000 (ASTM -1527-00), provides more flexibility for the practitioner than the previous standard. In any event, the Act requires the EPA to adopt regulations within two years, establishing standards for "appropriate inquiry," which would supercede (or simply adopt) ASTM standard practices.

The Act makes two important revisions to Superfund's broad liability scheme. First, a de micromis exemption is created, for those who, before



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April 1, 2001, generated or transported materials containing hazardous substances in small amounts (110 gallons or 200 pounds of solids). Second, businesses with fewer than 100 employees (or who are otherwise defined as small businesses) are no longer liable for generating municipal solid waste that is disposed of at a Superfund site. Both exemptions can be “pulled back,” if the EPA finds that the wastes contributed significantly to the cost of a response action, or if the business owner was previously convicted of an environmental hazard violation. In both cases, the liability exemption does not apply.

The bill bars the EPA from issuing administrative orders and seeking cost recovery at sites being addressed in accordance with an eligible state program. The enforcement bar can be lifted under certain circumstances (where contamination migrates across a state line, where an imminent and substantial endangerment exists, or where new information is discovered).

Consequently, conducting a comprehensive investigation prior to cleanup will continue to be important for property owners. New information about the site could increase the possibility of having the new federal enforcement bar lifted. On the other hand, the EPA is unlikely to lift the enforcement bar unless the new information suggests a truly substantial risk. Otherwise property owners will be reluctant to avail themselves of the new protections afforded by the Act.

FUTURE OF BROWNFIELD REDEVELOPMENT

The Act should accelerate the pace of brownfields development in a number of ways. First, even the relatively modest increase in federal funding included in the Act will result in more assessments and cleanups of brownfield sites where money otherwise might not have been available. Second, availability of federal assistance and the enforcement bar will provide incentives for states that currently do not have brownfield programs to adopt such programs. States that already have programs may reexamine them to confirm that they are eligible for the federal enforcement bar. Finally, corporations and others who own portfolios of contaminated properties may now be able to clean up those properties under voluntary brownfield programs with a greater sense of finality.

Who else will be affected by the Act? In particular, the bill will likely influence land purchasing decisions by developers and lenders. Potential brownfield developers in states with brownfield programs will better understand the circumstances in which they will receive both federal and state liability protection. Developers, therefore, may view brownfield properties as better opportunities than they currently do. Properties previously considered unmarketable because of contamination may become marketable. Reduced liability risk will increase the price of contaminated properties. As a result, lenders may be more willing to extend financing for contaminated properties.

The Act represents the first significant effort by Congress to revitalize brownfield properties across the United States. When coupled with the initiatives already underway by executive agencies of the federal government, and by the many innovative programs underway at the state level, the prognosis for brownfield revitalization is promising. Many brownfields soon may begin to grow green once again— in more ways than one.