

## **Summary of the Small Business Liability Relief and Brownfields Revitalization Act**

*This document presents a summary of Public Law 107-118. It does not constitute a statement of EPA policy, interpretation, or guidance.*

### **Background**

- H.R. 2869 was introduced in the House of Representatives on September 10, 2001. It combined two bills (S. 350 and H.R. 1831) amending the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund)
- H.R. 2869 passed the House by voice vote on 12/19/01 and the Senate by unanimous consent on 12/20/01
- H.R. 2869 incorporates S. 350, the "Brownfields Revitalization and Environmental Restoration Act of 2001", which passed the Senate on April 25, 2001 by a vote of 99-0. S. 350 contained three titles dealing with funding and liability for assessing and cleaning up contaminated properties. Title I codified and expanded EPA's current brownfields program by authorizing funding for assessment and cleanup of brownfields properties. Title II exempted from Superfund liability contiguous property owners, prospective purchasers, and clarified appropriate inquiry for innocent landowners. Title III authorized funding for State response programs and limited EPA's Superfund enforcement authority at sites cleaned up under a State response program. All three titles were combined into a single title in H.R. 2869.
- H.R. 2869 also incorporates H.R. 1831, the "Small Business Liability Protection Act", which passed the House on May 22, 2001 by a vote of 419-0. H.R. 1831 exempts de minimis contributors of hazardous substances and household, small business, and nonprofit generators of municipal solid waste from liability for Superfund response costs at National Priority List sites. Additionally, the bill provides for expedited settlements with certain persons based on a limited ability to pay.
- H.R. 2869 was signed into law by the President on January 11, 2002 and enacted as Public Law 107-118

### **Section 102. Small Business Liability Relief**

- De Minimis Exemption
  - Exempts persons from Superfund response cost liability at National Priority List sites as generators and transporters if the person can demonstrate that:
    - the total amount of the material containing hazardous substances they contributed was less than 110 gallons of liquid materials or 200 pounds of solid materials and
    - all or part of disposal, treatment, or transport occurred before April 1, 2001

- Exceptions
  - materials contributed or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration
  - the person fails to comply with an information request
  - the person impedes or impeded, through action or inaction, a response action or natural resource restoration at the facility
  - the person has been convicted of a criminal violation for conduct to which the exemption would apply
  
- Contribution Actions - Private parties seeking contribution bear the burden of proof that the exemption does not apply
  
- Private party contribution plaintiffs are liable for costs and fees if the defendant is not liable under this exemption
  
- Municipal Solid Waste (MSW) Exemption
  - Exempts persons from Superfund response cost liability as generators for the disposal of municipal solid waste if the person is:
    - an owner, operator, or lessee of residential property
    - a business that employed on average not more than 100 individuals in the three years prior to notification of potential liability and is a 'small business concern' as defined by the Small Business Act
    - a nonprofit organization that employed not more than 100 individuals during the preceding year at the location from which the MSW was generated
  
  - Exceptions
    - waste contributes or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration
    - person fails to comply with an information request
    - person impedes or impeded, through action or inaction, a response action or natural resource restoration at the facility
  
  - Definition of Municipal Solid Waste
    - waste material generated by a household; and waste material generated by a commercial, industrial, or institutional entity, to the extent that the waste material
    - is essentially the same as waste normally generated by a household
    - is collected and disposed of with other MSW as part of normal MSW collection

- contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste generated by a typical single family household
- examples – food and yard waste, paper, appliances, consumer product packaging, elementary and secondary school science lab waste, household hazardous waste
- exclusions – combustion ash from resource recovery facilities or municipal incinerators and waste material from manufacturing and processing operations that is not the same as household waste
- Burden of Proof - To establish applicability of MSW exemption in 107 and 113 actions
  - Private party bears the burden of establishing exemption does not apply for waste disposed of after April 1, 2001
  - Private parties and government bear the burden of establishing exemption does not apply for waste disposed of before April 1, 2001
- Bars contribution actions by a party other than a Federal, State, or local government, against owners, operators, and lessees of residential property that generated MSW
- Private party contribution plaintiffs are liable for costs and fees if the defendant is not liable under this exemption
- Expedited Settlements based on Limited Ability to Pay
  - Provides for conditional expedited settlements with eligible persons that demonstrate an inability or limited ability to pay response costs based on whether the settlor can pay and still maintain basic business operations, includes consideration of financial condition and ability to raise revenues
  - Includes government notification requirements and provisions requiring settlors to cooperate with EPA

### **Section 103. Effect on Concluded Actions**

- The amendments made by the small business title shall have no effect on settlements lodged or judgments issued by a federal court, or administrative settlements or administrative orders entered into or issued by the United States or a State, before the date of enactment

## **TITLE II. BROWNFIELDS REVITALIZATION AND ENVIRONMENTAL RESTORATION ACT OF 2001**

### **Subtitle A. Brownfields Revitalization Funding**

#### **Section 211. Brownfields Revitalization Funding**

- Authorizes up to \$200 million per year for brownfields assessment and cleanup to carry out new section 104(k). Includes \$50 million per year or 25% of amount appropriated to carry out 104(k), for brownfields with petroleum contamination.
- Definition of Brownfields Site: 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
- Additions for purposes of section 104(k)
  - land contaminated by petroleum or petroleum products
  - land contaminated by a controlled substance as defined in the Controlled Substances Act (21 U.S.C. 802)
  - mine-scarred land
- Exclusions
  - subject to a planned or ongoing CERCLA removal action
  - listed or proposed for listing on the National Priorities List
  - subject to a unilateral administrative order, court order, administrative order on consent, or consent decree under CERCLA
  - subject of a unilateral administrative order, court order, administrative order on consent, consent decree, or permit under RCRA, CWA, TSCA, or SWDA
  - subject to corrective action under RCRA 3004(u) or 3008(h) to which a corrective action permit or order has been issued or modified requiring the implementation of corrective measures
  - land disposal units with closure notification submitted and closure plan or permit;
  - subject to the jurisdiction, custody, or control of federal government
  - with PCB contamination subject to remediation under TSCA
  - which have received assistance from the Leaking Underground Storage Tank for a response activity
- Provides authority to include some otherwise excluded sites on a site-by-site basis
- Eligible entities for brownfields funding include States, Tribes, local governments, land clearance authorities, regional councils, redevelopment agencies and other quasi-governmental entities created by States or local governments
- Imposes significant restrictions on charging administrative costs to grants
- Brownfields site characterization and assessment
  - authorizes grants of up to \$200,000 per sites to eligible entities to inventory,

- characterize, assess and conduct planning at brownfields sites
- authorizes targeted site assessments at brownfields sites
- National Contingency Plan (NCP) requirements may be imposed only when relevant and appropriate to the program

- **Brownfields remediation**

- authorizes grants of up to \$1 million to eligible entities to capitalize revolving loan funds to clean up brownfields
- authorizes grants of up to \$200,000 per site to eligible entities or non-profit organizations to clean up brownfields owned by the grant recipient
- grants generally require a 20% match
- construction, alteration and repair work funded all or in part with grant funds is subject to Davis Bacon Act
- NCP requirements may be imposed only when relevant and appropriate to the program

- **Brownfields program**

- establishes program to provide training, research and technical assistance to facilitate brownfields assessment and cleanup
- limited to 15% of amount appropriated to carry out 104(k)

**Subtitle B. Brownfields Liability Clarifications Section 221. Contiguous Properties**

- Exempts from owner or operator liability persons that own land contaminated solely by a release from contiguous, or similarly situated property owned by someone else, if the person:
  - did not cause or contribute to the release or threatened release
  - is not potentially liable or affiliated with any other person potentially liable
  - exercises appropriate care in respect to the release
  - provides full cooperation, assistance, and access to persons authorized to undertake the response action and natural resource restoration
  - complies with all land use controls and does not impede the performance of any institutional controls
  - complies with all information requests
  - provides all the legally required notices regarding releases of hazardous substances
  - conducted all appropriate inquiry at time of purchase and did not know or have reason to know of contamination

**Section 222. Prospective Purchasers and Windfall Liens**

- Exempts bona fide prospective purchasers (and their tenants) from owner or operator liability so long as the person does not impede the performance of a response action or natural resource restoration

- Definition of a Bona Fide Prospective Purchaser
  - all disposal took place before the date of purchase
  - person made all appropriate inquiry
  - person exercises appropriate care with respect to any release
  - provides full cooperation, assistance, and access to persons authorized to undertake response actions or natural resource restoration
  - complies with land use restrictions and does not impede performance of institutional controls
  - complies with all information requests
  - provides all legally required notices regarding releases of hazardous substances
  - person is not potentially liable or affiliated with any other person potentially liable
  
- Provides the US with a lien on the property if the US has unrecovered response costs and the response action increases the fair market value of the facility

### **Section 223. Innocent Landowners**

- Clarifies what actions landowners must take to satisfy the "all appropriate inquiries" requirement of the defense
- Directs EPA to promulgate within 2 years regulations establishing standards and practices for satisfying the all appropriate inquiries requirements
- Until EPA issues the required regulations two standards apply depending on the date the property was purchased
  1. Prior to May 31, 1997 - a court shall consider specialized knowledge of the defendant, relationship of purchase price to value of uncontaminated property, commonly known information, obviousness of contamination, ability of defendant to detect contamination by appropriate inspection
  2. After May 31, 1997 - ASTM "Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process"
- In the case of a facility purchased for residential use by a person who is not a government or commercial entity, a facility inspection and a title search satisfy the appropriate inquiry requirement

### **Subtitle C. State Response Programs Section 231. State Response Programs**

- Authorizes \$50 million per year for grants to assist States and tribes in the development of State response programs
- A State may be awarded funds if it is a party to a memorandum of agreement with EPA for its voluntary response program, or if the State includes, or is working toward including, the following elements in its program:

- timely survey and inventory of brownfields sites
- oversight and enforcement authorities to ensure protection of human health and environment
- meaningful public participation
- mechanism for approval of a cleanup plan and certification that response is complete
- Restricts Federal administrative or judicial enforcement action under 106(a) or cost recovery actions under 107(a) at any eligible response site at which there is a release, or threatened release, of a CERCLA-covered substance and at which a person is conducting a response in compliance with a State program that specifically governs response actions for protection of human health and the environment
- This limitation applies only to response actions conducted after February 15, 2001
- "Eligible response site" is a brownfields site with the following additions:
  - certain LUST sites
  - certain sites covered by RCRA, CWA, TSCA, or SDWA excluded from the definition of a brownfield site, if, as determined on a site-by-site basis, findings are made that not taking enforcement will still limitations on enforcement are appropriate and will (1) protect public health and the environment and (2) promote economic development or open space
- The following sites are not eligible response sites, and federal enforcement or cost recovery restrictions are not applicable:
  - facilities at which Federal preliminary assessments or site inspections are conducted and are qualified for listing on the NPL
  - facilities determined to warrant particular consideration, as identified by regulation -- e.g., threats to a drinking water aquifer or a sensitive ecosystem
- Federal enforcement actions may be brought at an eligible response site in the following cases (provided certain findings are made, generally related to risk at the site):
  - the State asks for Federal involvement
  - contamination has migrated, or will migrate, across a State line or onto Federal property
  - considering response actions already taken, a release or threatened release may present an imminent and substantial endangerment to human health or the environment
  - new information, not in the record for the cleanup, indicates a threat requiring further remediation
- Administrative requirements
  - limitations only apply in States that publicly maintain a list of sites with response actions under the State response program
  - State must be notified of EPA enforcement action that may be otherwise

- barred and has 48 hours to reply
- provisions exist for taking immediate Federal action, without awaiting State reply, under certain circumstances
- EPA must report to Congress 90 days after initiation of enforcement action that may be otherwise barred

**Section 232. Additions to National Priorities List**

- Requires deferral of NPL listing if State or other party is cleaning up a site under a State program or if the State is pursuing a cleanup agreement
- President may list a deferred site after one year if State is not making reasonable progress toward completing a response action

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