Answers to Chairman John Shimkus, Subcommittee on Environment and the Economy, Energy and Commerce Committee
from Mayor J. Christian Bollwage
Regarding April 21, 2016, hearing entitled
"EPA's Brownfields Program: Empowering Cleanup and Encouraging Economic Redevelopment"

1) "Mothballed" sites are properties that the owner allows to lay vacant or underutilized with no intention of redeveloping or selling. As it relates to brownfields, many "mothballed" properties are held onto by owners because they suspect that there is environmental contamination on the property and they would potentially be held liable to clean it up. Many owners would rather not risk that and so, as a result, many of these properties remain blighted eyesores within the community. If a community or a state does not allow the use of eminent domain, those properties can remain unused for decades since there are few tools available to compel an owner to redevelop or better utilize that site.
    A. Currently, the cleanup grants are capped at $200,000 per site. For the more difficult brownfield sites, this is not enough of an incentive to convince a developer to take on the property. By increasing the cleanup grants to a million or even two million in special cases might provide enough "gap funding" to make a difference in the redevelopment of a project. As for liability concerns, please see the attached document, which addresses public and private sector liability as it relates to potentially addressing mothballed properties.

    B. Please see the attached two documents that provide some excellent strategies as well as legislative language to address mothballed properties as they relate to both the public and private sector. In addition to these suggestions, it is a common practice in other countries to allow an owner to carve up their property and sell off the non-contaminated land and utilize the money from the sale to address the contaminated sections of the land as part of a comprehensive plan. I'm not sure if that has been tried here, but it might be an interesting approach as long as the properties in question were large enough to apply the method.

National League of Cities

NACO National Association of Counties
The Voice of America's Counties

The United States Conference of Mayors

Northeast-Midwest Institute
Center for Policy Initiatives

IMLA International Municipal Lawyers Association
Advancing Excellence in the practice of Local Government Law

October 30, 2009

The Honorable Ed Markey
U.S. House of Representatives
2108 Rayburn House Office Building
Washington, DC 20515

The Honorable Frank Pallone, Jr
U.S. House of Representatives
237 Cannon Building
Washington, D.C. 20515-3006

The Honorable Joe Sestak
U.S. House of Representatives
1022 Longworth House Office Building
Washington, DC 20515

Dear Representatives Markey, Pallone, and Sestak:

RE: EPA Brownfields Reauthorization and Public Entity Liability

We understand that your offices are considering taking a lead sponsor role on a bill to reauthorize the U.S. Environmental Protection Agency (EPA) Brownfields program. We, the undersigned individuals and organizations, are writing to express our support for reauthorization of the EPA Brownfields Program and request consideration of an amendment that would clarify and bolster liability protections for public entities when they acquire contaminated land.

America's communities face a daunting but critically important task in attempting to clean up brownfields sites for new uses. Cities are in the process of transitioning their economies from industry and manufacturing to new sources of economic growth. The

most environmentally responsible way to accommodate the new engines of growth is to locate the new uses right where the old industrial plants were established, with infrastructure in place and the workforce nearby. However, with an estimated 450,000 to 1,000,000 brownfields sites nationally, the task at hand faces numerous obstacles. Some of those obstacles would be significantly reduced if Congress adopts the recommendations of the National Brownfields Coalition for reauthorizing the EPA Brownfields Program.

One of the Coalition's proposals is to clarify and expand liability protections for public entities that acquire contaminated brownfields sites where the public entities had no involvement in the contamination. This proposal is of great interest to the many localities that are, out of necessity, taking ownership of brownfields properties. Some brownfields sites are unlikely to be redeveloped through private investment. If these sites are blighting influences that prevent neighborhood revitalization, the only option that will work is public acquisition.

Through a variety of means including tax liens, foreclosures, purchase, and the use of eminent domain, local governments can take control of brownfields in order to clear title, consolidate multiple parcels into an economically viable size, conduct site assessments, remediate environmental hazards, address public health and safety issues, and otherwise prepare the property for development by the private sector or for public and community facilities.

Although property acquisition is a vital tool for facilitating the development of brownfields, many local governments have been dissuaded by fears of incurring liability for contamination they had no role in creating or releasing. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) includes liability defenses and exemptions that may protect local governments that "involuntarily" acquire brownfields. However, the majority of the sites acquired by local government are either unprotected (which is the case for voluntary acquisition), or are subject to widely varying interpretations of what is meant by "involuntary acquisition." Even properties acquired through tax delinquency (one of the examples cited in the law and often presumed to be protected) may not necessarily be exempt if the local government took affirmative ("voluntary") steps in the tax delinquency process.

A 2006 report by the National Association of Local Government Environmental Professionals concluded that the term "involuntary acquisitions" is subject to wide interpretation and local governments find it "inconsistent, ambiguous, and confusing." The report further finds that EPA's various guidance documents on the subject only serve to "muddy the waters."

This lack of clarity and certainty has a chilling effect on strategic acquisition-redevelopment activities. In some cases, local governments have adopted conservative policies that strictly limit the acquisition of contaminated properties. These policies keep localities out of the courtroom, but they also leave many contaminated sites as

neglected blighting influences on their surrounding communities. In other cases, local governments have taken a risk by acquiring properties, essentially "rolling the dice" in favor of community revitalization.

A secondary problem is that many potential brownfields projects on publicly-owned sites have been ruled ineligible for EPA funding because the localities cannot satisfy the requirements to establish "involuntary acquisition." Aside from the loss of funding, localities rightly fear that, if EPA has determined them to be ineligible for funding, that is tantamount to determining that the locality is a potentially responsible party.

The undersigned organizations favor amending CERCLA to provide for greater clarity and a higher level of protection for acquisition activities that clearly serve public purposes. The amendments should:

- Eliminate the term "involuntary" in describing the protected activities.
- Add a plain language exemption for local governments that acquire contaminated properties for redevelopment purposes, as long as the governmental entities have not created or released the contamination.
- Modify and expand the current protections under the category of "rendering care and advice" to include actions taken by local government to address public health and safety issues at sites, so long as the governmental entity acts responsibly in doing so.

We encourage you to consider improving liability protections so that governmental entities will not have to "roll the dice" when pursuing activities that are so clearly benefitting the public – addressing public health and safety concerns, attracting jobs and investment to distressed communities, and re-positioning vital assets for environmentally-responsible economic growth.

If you have any questions, please contact Chuck Thompson at the International Municipal Lawyers Association (202-742-1016, CThompson@imla.org), Evans Paull at the Northeast-Midwest Institute (202-329-4282, epaull@nemw.org), or Judy Sheahan at the U.S. Conference of Mayors (202-861-6775, jsheahan@usmayors.org).

Sincerely,

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cc: The Honorable Henry A. Waxman
The Honorable Joe Barton
The Honorable Fred Upton, Ranking Member

Members of the House Energy and Commerce Committee

Proposal for the

RECYCLING AMERICA'S BROWNFIELDS ACT

National Brownfields Coalition:

The U.S. Conference of Mayors
National Association of Counties
Northeast-Midwest Institute
National Association of Local Government Environmental Professionals
National Conference of Black Mayors
International City/County Management Association
Local Initiatives Support Corporation
National Association of Towns and Townships
National Association of Development Organizations
International Council of Shopping Centers
Community Revitalization Alliance
The Real Estate Roundtable
National Association of Home Builders
National Association of Industrial & Office Properties
Environmental Bankers Association
National Brownfield Association
National Brownfield Nonprofit Network Initiative
Cherokee Investment Partners, LLC
Smart Growth America
Scenic America
Groundwork USA
Trust for Public Land

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DRAFT

"RECYCLING AMERICA'S BROWNFIELDS ACT"

SUMMARY - KEY PROVISIONS

FUNDING THAT MEETS AMERICA'S BROWNFIELDS NEEDS

1. ***Increase Total Brownfield Grant Program Funding*** – Congress should increase overall EPA funding for brownfields grants, beginning with $350 million in FY10 and increasing by $50 million annually to a total of $600 million in FY14 and beyond.

2. ***Increase Cleanup Grant Amounts*** – Congress should recognize the complexity of the cleanup process at larger or more complicated sites by increasing the funding limit for cleanup of a single site to up to $1 million. Under special circumstances, EPA could waive the limit and go up to $2 million per site

3. ***Establish Multi-Purpose Brownfield Grants*** – Congress should allow eligible entities to have the option to apply for multi-purpose grants that can be used for the full range of brownfield-funded activities (assessment, cleanup, reuse planning, etc,) on an area-wide or community-wide basis. Such multi-purpose grants should be available in grant amounts of up to $1.5 million. Applicants would be required to demonstrate a plan and the capacity for using this multi-purpose funding within a set timeline in order to qualify for such funding.

4. ***Establish Pilots for Sustainable Reuse and Alternative Energy on Brownfields*** – The Act should authorize $20 million for pilots that demonstrate sustainable reuse, green buildings, and alternative energy. Pilots should allow use of funds for site assessments, cleanup, site planning, feasibility analysis, and engineering studies related to environmentally beneficial site improvements, such as, high performance/green buildings, green infrastructure, ecosystem restoration, and/or renewable energy production.

5. ***Establish Pilots for Waterfront Brownfields*** – The Act should authorize $20 million for EPA to fund demonstration pilots and create an interagency taskforce to help communities overcome the unique challenges of waterfront brownfields restoration along rivers, coastal lands, lakes, ports, and other waterbodies. Pilots should allow use of funds for site assessments, cleanup, site planning, feasibility analysis, and engineering studies related to environmentally-beneficial site improvements, such as, riparian zones, green infrastructure, low impact development, remediation and management of sediments, and flood damage prevention.

MAKING BROWNFIELDS GRANTS WORK BETTER AT THE LOCAL LEVEL

1. ***Eliminate Eligibility Barriers for Petroleum Brownfield Sites*** - Grantees that seek to use assessment, cleanup or multi-purpose grants on sites with petroleum contamination should not be required to make the difficult demonstrations that the site is "low risk" and that there is "no viable responsible party" connected with the site. Replace the "No Viable Responsible Party" language with a prohibition on using funds to pay for cleanup costs at a

brownfield site for which the recipient of the grant is potentially liable under the petroleum statutes (parallels the language for non-petroleum brownfields sites).

2. ***Establish that Non-Profits are Eligible for Assessment and RLF Grants*** – The law should clarify that non-profits and related community development entities are eligible to receive brownfields assessment, cleanup, revolving loan fund, and job training grants. Currently non-profits are only eligible for cleanup and job training grants.

3. ***Clarify Eligibility of Publicly-owned Sites Acquired Before 2002*** – Congress should allow local government applicants to obtain funding at sites acquired prior to the January 11, 2002 enactment of the Brownfields Revitalization Act – when there was no required standard for "all appropriate inquiries" – provided that the applicant did not cause or contribute to the contamination and performed "appropriate care." For these sites, applicants would not have to demonstrate that they performed all appropriate inquiry.

4. ***Allow Funding for Reasonable Administrative Costs for Local Brownfields Programs*** -- Brownfield grant recipients should be allowed to use a small portion (10 percent) of their grant to cover reasonable administrative costs such as rent, utilities and other costs necessary to carry out a brownfields project.

TOOLS TO HELP FREE MOTHBALLED BROWNFIELD SITES

1. ***Remove Barriers to Local and State Governments Addressing Mothballed Sites*** – The Act should exempt local and state government from CERCLA liability if the government unit (a) owns a brownfield as defined by section 101(39); (b) did not cause or contribute to contamination on the property; and (c) exercises due care with regard to any known contamination at the site. Alternative language would amend section 101(20) (D) to clarify that properties acquired through eminent domain qualify for the CERCLA exemption for local governments involved in "Involuntary Acquisitions."

"RECYCLING AMERICA'S BROWNFIELDS ACT"

I. FUNDING THAT MEETS AMERICA'S BROWNFIELDS NEEDS

"RECYCLING AMERICA'S BROWNFIELDS ACT"

INCREASE OVERALL BROWNFIELDS GRANT FUNDING

CURRENT SITUATION & PROBLEM – The current brownfields law authorizes $250 million a year for the brownfields program: $200 million a year for assessment and cleanup and other grants; and $50 million a year to support state voluntary cleanup programs.

By any measure, the EPA Brownfields program has been tremendously successful. EPA has invested about $800 million in the assessment and cleanup of brownfields since 1995. According to EPA, this relatively modest investment has leveraged more than $9 billion in cleanup and redevelopment monies – a return of more than ten to one. In addition, this investment has resulted in the assessment of more than 8,000 properties and helped to create more than 37,000 new jobs.

While the EPA Brownfields Program has helped numerous communities, much remains to be done. Experts estimate there remain as many as one million brownfield properties nationwide. These sites continue to blight neighborhoods, discourage new investment, and undermine economic progress in many communities.

At current funding levels, EPA can only fund about one third of the applicants for Federal brownfields grants. EPA has turned away approximately 800 applicants over the past two years, including 460 applications for cleanup grants. Using the conservative assumption that it costs an average of $500,000 to clean up a brownfield site, there was $280 million in unmet cleanup funding needs during the past two years. In other words, during FY 2004 and 2005, EPA was only able to fund about 11 percent of the brownfields cleanup needs, as represented by applications. It has been estimated that, assessing and cleaning up the current set of brownfields in America, could require between $175 billion and $650 billion in federal, state, local, and private funds. Without critical seed funds, thousands of sites will continue to remain idle, blighting neighborhoods and undermining local revitalization.

PROPOSED APPROACH

The proposal calls for a total of $2.85 billion in federal brownfields funding over the next six years from FY 2010 through FY 2015. The proposal calls for a gradual increase in funding over the six year reauthorization period as follows: $350 million in FY 2010, $400 million in FY 2011, $450 million in FY 2012, $500 million in FY 2013, $550 million in FY 2014, and $600 million in FY 2015 and thereafter. As with the current law, 80 percent of the authorized funds would support brownfields assessment and cleanup and 20 percent of the funds would support state voluntary cleanup programs. While this funding level is far short of the hundreds of billions of dollars needed to the address the nation's brownfields, it will go a long way toward helping communities bring these properties back to productive use.

PROPOSED LEGISLATIVE LANGUAGE

Increase brownfields funding authorization for site assessment and cleanup: amend CERCLA Section 104(k) as follows:

* * *

(2) by striking paragraph (12) and inserting the following:

` (12) AUTHORIZATION OF APPROPRIATIONS- There is authorized to be appropriated to carry out this subsection $350,000,000 for FY2010, $400,000,000 for FY2011, $450,000,000 for FY2012, $500,000,000 for FY2013, $550,000,000 for FY2014, and $600,000,000 for FY2015 and in fiscal years thereafter.

Increase brownfields funding for supporting state response/VCP programs: Section 128(a)(3) of the Brownfields Revitalization Act is replaced as follows –

3) FUNDING.—There is authorized to be appropriated to carry out this subsection $70,000,000 for FY2007, $80,000,000 for FY2008, $90,000,000 for FY2009, $100,000,000 for FY2010, $110,000,000 for FY2011, and $120,000,000 for FY2012 and in fiscal years thereafter.

"RECYCLING AMERICA'S BROWNFIELDS ACT"

INCREASE THE LIMIT FOR BROWNFIELD CLEANUP GRANTS

CURRENT SITUATION & PROBLEM – Under the current brownfields law, communities are limited to applying for and receiving cleanup grants of $200,000 for the remediation of a particular site. This ceiling limits the ability of the brownfields program to effectively address a wide range of sites that could be cleaned and redeveloped.

Northeast-Midwest Institute reviewed data provided by EPA relative to cleanups on 271 sites funded through the brownfields program – the average cleanup of cost was $602,000. This number is probably on the low side because the more expensive cleanups are usually not submitted to EPA. In a review of about 100 sites that went through state voluntary cleanup programs, the International Economic Development Council found the average cost to be about $780,000. Clearly, there are many sites at which $200,000 in EPA support is not sufficient to overcome the cleanup barriers to redevelopment.

For many sites, the lack of cleanup funds remains the key barrier preventing reuse. In fact, the U.S. Conference Mayors' recently released 2005 survey of 200 cities indicated that the lack of cleanup funds remains the number one obstacle to brownfields redevelopment, for the fifth year in a row. The current cleanup grant limit of $200,000 per site significantly inhibits the ability of the brownfields program to help with more costly cleanups and assist many worthwhile brownfields redevelopment projects. Many observers have commented that the current EPA program has facilitated cleanup of the easier "low hanging fruit," but that greater resources will be needed to make progress on the remaining reservoir of more complicated brownfields sites.

EXAMPLES

- In a mid-sized, disadvantaged community in California, community leaders are striving to revitalize a 130-acre brownfield property that is contaminated from past pesticide and chemical production activities, into a mix of high-tech businesses creating up to 4,000 jobs plus waterfront park and recreation facilities. However, the city will need between $3 million and $5 million in cleanup funding in order to achieve the revitalization plan, far in excess of the allowable EPA grant of $200,000.
- In Buffalo, New York the quasi-public Buffalo Urban Development Corporation has acquired a 250-acre parcel to be redeveloped as Lakeside Commerce Park. Although the full extent of cleanup costs is unknown (just one parcel cost $3.2 million), economic development officials have characterized the EPA cleanup grants as minimally helpful.
- **Other sites**:

City	Site	Est cleanup $$ needed	Redevelopment planned
Kansas City	East Village	$15 million	$360 million mixed use
Trenton	Oxford Street	$500,000 - $3,000,000	TBD
Trenton	Magic Marker	$2 - $3 million	Residential
Trenton	Freightyards	$4 million	Park
Emeryville, CA	Dutro site	$1 million	Park
New York City	Mariner's Marsh	Possibly $1 million	Park

PROPOSED APPROACH

EPA should be authorized to award cleanup grants up to $1 million per site. In addition, under special circumstances, the Agency could waive the $1 million limit and award cleanup grants up to $2 million. Under this approach, EPA could still give provide cleanup grants of far less than $1 million. However, this approach would give EPA the authority and flexibility to assist many worthy brownfields projects with higher cleanup costs.

PROPOSED LEGISLATIVE LANGUAGE

Increase cleanup grants: Section 104(k)(3)(A)(ii) of CERCLA is amended as follows

> "(ii) eligible entities or nonprofit organizations, where warranted, as determined by the President based on considerations under subparagraph (C), to be used directly for remediation of one or more brownfield sites owned by the entity or organization that receives the grant and in amounts not to exceed $1,000,000 ~~$200,000~~ for each site to be remediated. The Administrator may waive the $1 million limitation per site to permit the brownfield site to receive a grant of not to exceed $2 million based on the anticipated level of contamination, size, or status of ownership of the site.

"RECYCLING AMERICA'S BROWNFIELDS ACT"

ESTABLISH MULTI-PURPOSE BROWNFIELD GRANTS

CURRENT SITUATION & PROBLEM

Under the current brownfields law, eligible entities must apply separately for assessment grants, cleanup grants, and RLF grants, and they can only apply once a year for federal assistance. They can apply for either a community-wide or a site-specific assessment grant, but they can only apply for a site-specific cleanup grant. Moreover, they can only apply for a cleanup grant once the assessment has been completed. While on the surface, this approach seems logical, the current system for awarding brownfield grants causes major time delays in cleanup, making it difficult for recipients to respond to the market in a timely fashion and compete with greenfield sites which are often cheaper, quicker, and easier to develop. Unless the funding can be used in a way that facilitates and meets the timing of private sector investment decisions, many important brownfield redevelopment opportunities will continue to be missed.

EXAMPLES

Virtually every EPA grantee has run into issues where their most immediate site needs do not fit the available grant funds. Generically, the following situations are typical:

1. Typically a community must decide in the summer what site to include in a brownfield cleanup grant application due to EPA in the fall. After the application is submitted, the applicant will not know if it will receive funding until the following spring, and it will not receive the funding until the following September. Thus a community generally will not know whether it succeeds in the effort to obtain scarce federal funding, or receive funding, until a year or more after it selects a site. Moreover, if the site is one at which the locality used EPA assessment funding, the locality cannot even apply for cleanup funding until the assessment is complete, which can take months. In the meantime, it is quite possible that the developer finds another site or project in which to invest its money. This causes deals to fall through and communities to spend substantial time negotiating with EPA about whether and how they can use the grant for a different site.

2. Often a community will apply for an area-wide brownfields assessment grant to address an area or corridor of brownfield properties. At the time the community applies for the grant, it typically is not clear which of the properties in the area will emerge as the ones at which brownfields revitalization is likely to take place. Over the course of the assessment grant implementation, the most promising brownfields prospects emerge, private sector investors move certain properties forward, and the sites that need the most cleanup funding assistance become apparent. However, localities are not able to access EPA cleanup grant funding until months or years after these brownfields opportunities emerge. In one small West Virginia community, an initial EPA grant helped the city conduct initial Phase I assessments at nine (9) properties in a downtown corridor area. During this process, two sites emerged as the most likely sites at which the private sector would conduct major brownfields redevelopment projects. But the city had no brownfields cleanup funding available to address these

opportunities as they emerged, because its assessment funding could not be used on cleanup, and the competitive cleanup grant application process would take too long to serve the project needs.

PROPOSED APPROACH

The proposed legislation should authorize EPA to provide community-wide multi-purpose grants of up to $1.5 million that could be used for both assessment and cleanup on multiple sites. This would not replace existing assessment-only or cleanup-only grants, but supplement them. Under the multi-purpose grant, a community could identify an area for which brownfields funding will be targeted. These multi-purpose grants would only be awarded to communities that demonstrate the capacity and ability to conduct the full range of brownfields assessment and cleanup activities, within the parameters of the brownfields act. At the time within the grant implementation period at which a site is identified for application of cleanup funds from the multi-purpose grant, the grantee would be required to demonstrate to EPA that that site is an eligible brownfields site. In addition, the proposal would require that communities expend the funding within three years of receiving the grant.

This approach would give communities the ability to meet the needs of the brownfields market in a timely fashion. If the community has an interested developer, it could conduct an assessment on a particular site, and then turn around and immediately use the funds for remediation in order to ready the site for redevelopment. In addition, multi-purpose grants would give communities the flexibility to address both large and small sites with their funds. These community benefits will translate into greater productivity to the whole program – money will be used more quickly, and gross leverage numbers will increase.

PROPOSED LEGISLATIVE LANGUAGE

Establish multi-purpose grants: Section 104(k) of CERCLA is amended by inserting a new section 104(k)(4) (and by renumbering current provisions 104(k)(4) through 104(k)(12) as 104(k)(5) through 104(k)(13)) as follows:

"(4) MULTI-PURPOSE BROWNFIELD GRANTS —

"(A) GRANTS PROVIDED BY THE PRESIDENT.—Subject to paragraphs (4) and (5) [switch to (5) and (6)], the President shall establish a program to provide multi-purpose brownfield grants to eligible entities or nonprofit organizations, where warranted, as determined by the President based on considerations under subparagraph (3)(C), to be used to inventory, characterize, assess, conduct planning, or remediate one or more brownfield sites within an area, in amounts not to exceed $1,500,000 per grant. In determining whether a multi-purpose grant is warranted, the President shall take into consideration, in addition to the considerations in subparagraph (3)(C), the extent to which the eligible entity or organization can demonstrate an overall plan for revitalization of brownfields in the targeted area in which the multi-purpose grant will be used, the extent to which the eligible entity or organization can demonstrate a capacity to conduct the range of eligible activities that will be funded by the multi-purpose grants, and the extent to which the eligible entity or organization can demonstrate that a multi-purpose grant

is appropriate for meeting the needs in the targeted brownfields area. Grants must be expended within three years of the actual award of grant funding to the eligible entity or organization, unless the President provides an extension of time for good and justifiable reasons. In addition, the grantee may not expend multi-purpose funding on remediation of a brownfields site until it obtains ownership of that site.

"RECYCLING AMERICA'S BROWNFIELDS ACT"

ESTABLISH PILOTS FOR SUSTAINABLE DEVELOPMENT AND ALTERNATIVE ENERGY REUSE OF BROWNFIELDS

CURRENT SITUATION & PROBLEM

Brownfield revitalization, with its emphasis on infill and pollution prevention strategies, is well suited to advance creative experimentation with sustainable reuse initiatives – which have the potential to realize substantial energy savings and diverse economic service and production efficiencies. These initiatives include construction of green buildings, alternative building approaches (such as green roofs or permeable parking lots), incorporation of green infrastructure, adoption of water-recycling, renewable energy, and similar approaches.

Sustainable reuse practices have a significant, positive influence on brownfield revitalization efforts. For instance, they can provide more acceptable and protective ways of addressing waterfront sites. They can minimize run-off at sites that may employ caps or other types of institutional controls, to reduce new environmental problems. They can show the viability of green approaches, serving as anchors and catalysts for additional, unsubsidized redevelopment.

However, such initiatives – even with their laudable environmental goals – can be difficult to implement. They typically are more costly, at least at their initial stages when competing capital needs are the greatest. Design and engineering costs associated with sustainable brownfield reuse may be greater, since it can be difficult to reconcile sustainable development practices, such as closed loop water systems, with brownfield practices such as institutional controls that include capping. And additional construction costs may make sustainable projects more difficult to finance conventionally because they do not fit traditional underwriting pro formas.

EXAMPLES

Sustainable building practices, and green infrastructure approaches, have been successfully incorporated with brownfield efforts at a small but growing number of projects, including:

- Genzyme corporate headquarters in Cambridge MA, a LEED platinum brownfield redevelopment;
- Robertson-on- the-River, a mixed use residential/commercial/river greenway project in Taunton, MA;
- Thames Street Landing, in Bristol RI, which incorporated innovative "break-away" building design as part of a flood control strategy in a harbor walk commercial revitalization;
- Louisville KY riverfront redevelopment, which included an amphitheater, parks, riverwalks and related commercial venues, and a marina built in a way to accommodate periodic Ohio River flooding and reduce erosion;
- Chicago Center for Manufacturing Technology, a LEED gold research and green manufacturing business incubator;
- Buffalo, New York where a vacant Bethlehem Steel plant was reused as a windfarm.

PROPOSED APPROACH

The Act should authorize $20 million for pilots that demonstrate sustainable reuse, green buildings, and alternative energy. Pilots should allow use of funds for site assessments, cleanup, site planning, feasibility analysis, and engineering studies on sites that will be redeveloped with high performance/green buildings, green infrastructure, ecosystem restoration, and/or renewable energy production.

PROPOSED LEGISLATIVE LANGUAGE

Establish pilot program by inserting new Section 104(k)(4) provision [and renumber existing provisions 104(k)(4) to (k)(12) accordingly]; amend section 104(3)(B) so that the current restrictions that relate to grants and loans to private entities apply to the new section.

Section 104(K):

****

(4) GRANTS FOR SUSTAINABLE DEVELOPMENT AND ALTERNATIVE ENERGY REUSE OF BROWNFIELDS – Subject to paragraphs (5) and (6) [formerly (4) and (5)], the President shall establish a program to provide grants to eligible entities and non-profit organizations to be used at one or more brownfield sites that are proposed as models for sustainable development and alternative energy. A grant for sustainable development and alternative energy reuse shall not exceed $500,000 per entity. Such grants may be used for:

(A) Reuse planning and site characterization and assessment, including the planning, feasibility, and design of environmentally-beneficial site improvements, such as, high performance/green buildings, green infrastructure, greenway trails, ecosystem restoration, and/or renewable energy production.

(B) Cleanup of sites and implementation of other environmentally-beneficial site improvements, such as, green infrastructure, greenway trails, ecosystem restoration, and stormwater runoff control measures that demonstrate new methods or go beyond compliance,

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Add $20 million authorization for sustainable/alternative energy brownfields:

`(A) AUTHORIZATION OF APPROPRIATIONS- There is authorized to be appropriated to carry out subsection 211(K)(2) and 211(K)(3) $200,000,000 for each of fiscal years 2002 through 2006.

(B) AUTHORIZATION OF APPROPRIATIONS - There is authorized to be appropriated to carry out subsection 211 (K) (4) $20,000,000 for each of fiscal years 2007 through 2012.

Amend Section 104(k)(6)(A) as follows:

(6) IMPLEMENTATION OF BROWNFIELDS PROGRAMS.—
(A) 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, Sustainable Development and Alternative Energy Reuse Of Brownfields, or site preparation.

"RECYCLING AMERICA'S BROWNFIELDS ACT"

ESTABLISH WATERFRONT BROWNFIELDS DEMONSTRATION PILOTS

CURRENT SITUATION & PROBLEM

America's industrial heritage was established along the banks of its rivers, lakes and coasts. However, that legacy also includes many decades of environmental contamination along the waterfront. Abandoned factories, dilapidated mills and underutilized ports dot the shores of many metropolitan areas. As localities seek to reconnect with their waterfronts and revitalize their downtowns, brownfield barriers threaten to derail community efforts to increase tourism, create jobs, promote recreational opportunities, restore the ecology, and grow their tax base.

Waterfront brownfields present challenges beyond typical environmental assessment and cleanup projects. Hydrology, water quality, wetlands, endangered species, habitat, dredged materials, flooding, environmental infrastructure, navigation, and other considerations must be carefully addressed so as not to exacerbate existing site contamination. Typically, waterfront brownfields require the involvement of multiple governmental agencies. As such, waterfront brownfields require special attention and resources to overcome their larger hurdles.

EXAMPLES

Rochester, NY is undertaking a major community revitalization strategy to redevelop its port and waterfront area into a mixed use development, which will include housing, commercial, retail, and educational uses, enhanced recreation, new parks and open space, and improved public access to Lake Ontario, the Genesee River and the surrounding ecosystem. However, initial investigations have found that more than ten acres of the site contain up to several feet of slag from a former iron works. Portions of the site are impacted from petroleum releases and unsuitable fill materials. Old Genesee River deposits on the site and bank sediments have been shown to contain high levels of heavy metals cadmium and silver as well as pesticides and furans. The marina must also be dredged in order to allow for navigation and research vessels at a planned "Lake Ontario Research Center" through SUNY Brockport. Before the waterfront reuse can proceed, the Port of Rochester must first address an estimated $500,000 in environmental assessment issues related to contaminated sediments, beneficial reuse of sediments, groundwater contamination, and waste characterization related to the construction of the marina – and an unknown level of remediation.

In **Philadelphia** the City and the Commonwealth of Pennsylvania have targeted a 13 acre site on 1300 feet of the Schuylkill River for waterfront redevelopment. Now occupied by two former bulk storage petroleum facilities, the site requires significant environmental cleanup and improvements that will involve dealing with abandoned buildings, vacated pipes, and river bank restoration. Philadelphia will select waterfront redevelopment proposals and require the establishment of a recreational trail and supporting green space along the waterfront.

Stockton, CA, is pursuing aggressive redevelopment of the downtown waterfront. The Stockton Deepwater Channel ends at the center of Stockton's historic Central Business District. Historic port activities have declined and the downtown waterfront became blighted. In the mid 1990's, the City realized that until the lingering contamination on these properties was evaluated and cleaned up, meaningful redevelopment could not occur. After completing two successful pilot programs under the U.S. Environmental Protection Agency's brownfields program, significant redevelopment has been completed, including waterfront parks, plazas, and an events center that includes a waterfront ballpark and 10,000 seat indoor arena. However, much still needs to be done to make the downtown a 24-hour community, especially the construction of market and affordable rate housing which has not occurred downtown in more than half a century. Since housing requires a higher level of cleanup, the City needs supplemental funds to remove heavy metals and hydrocarbon contaminants in both soil and groundwater that are pervasive on both sides of the Stockton Channel. In particular, an 8-acre parcel of waterfront property owned by the City will require between $1-3 million to clean up once more definitive site assessment has been completed this autumn.

Portland, OR, is situated at the confluence of two major continental rivers—the Columbia and the Willamette. For over 150 years, Portland has leveraged its strategic location to serve as an international seaport, and is now the third largest U.S. port on the West Coast. This substantial economic achievement, however, has come at a cost of serious land and water contamination—the part of the Willamette River running through Portland's industrial area was declared a Superfund site in 2000. In addition, runs of threatened salmon live in the Willamette, making Portland one of the few cities grappling directly with the Endangered Species Act. Portland is: currently completing a 20 year, $1.4 billion project to keep sewage from spilling into the River (an investment borne almost solely by Portland residents, with little state or federal support); playing a lead role in the Superfund process, which has involved about $50 million in studies to-date; working closely with businesses and environmental interests to update zoning to provide strong protection for both industrial and natural lands; and developing a new Working Harbor Reinvestment Strategy. The Strategy concludes that brownfields are the primary land redevelopment opportunity for Portland's harbor. Superfund liability for future in-water cleanup has been identified as a major impediment to waterfront development by new owners. Permitting challenges associated with contamination are delaying in-water improvements. Public investment in economical sediment management and disposal could be key to speeding the Superfund project and in-water improvements.

East Palo Alto, CA, which has long struggled to overcome poverty and urban decay, is restoring brownfield areas along the San Francisco Bay into a bayfront park, high-tech offices, mixed use development, and community spaces. East Palo Alto's brownfield efforts focus on 135 acres at the Ravenswood Industrial Area, which suffers from contamination from former industrial sites. Moreover, the revitalization of the Ravenswood area will require the prevention of flood damage from the San Franciquito Creek, the reuse of greywater for water supply for the area, and the protection of sensitive coastal ecosystems and salt marshes. These issues will substantially increase the cost of revitalization, and involve additional federal agencies including the Corps of Engineers and the U.S. Fish and Wildlife Service.

PROPOSED APPROACH

EPA should be authorized to establish a waterfront brownfields pilot demonstration program to provide local communities and other eligible entities defined by CERCLA Section 104(k)(1) with up to $500,000 per grantee to assist and showcase communities that are overcoming the unique

challenges of waterfront brownfields. This grant program is intended to foster innovative approaches to waterfront brownfields such as:

- the integration of land use and water quality;
- the use of low impact development, riparian buffers, stormwater protection, and green infrastructure;
- the cleanup and management of contaminated sediments;
- the integration of flood protection with waterfront parks, recreation, and appropriate development;
- the coordination of multiple interjurisdictional agencies involved in waterfront brownfields; and
- other unique waterfront challenges.

Grants may be used for a variety of waterfront brownfields-related purposes. Reuse planning, site assessment, and site characterization activities, including design and engineering of the types of improvements outlined above, may be undertaken by public agencies and non-profits on any eligible site. Cleanup activities (including water quality-related environmental improvements, if integral to the cleanup) can be funded with the same restrictions as the brownfields cleanup and RLF programs, i.e. private developers are only eligible for loans.

The legislation should also establish an interagency taskforce on waterfront brownfields restoration. The task force would be led by the U.S. Environmental Protection Agency's Office of Brownfields Cleanup and Redevelopment and include the participation of other EPA offices as well as agencies involved in waterfront revitalization, such as the National Oceanographic and Atmospheric Administration, the Army Corps of Engineers, the Department of Transportation, the Economic Development Administration, the Department of Housing and Urban Development, the U.S. Fish and Wildlife Service, and other appropriate federal agencies, as well as representatives from appropriate state government, local government, community-based organizations, and other stakeholder organizations involved in waterfront revitalization. The interagency waterfront brownfields task force would identify current and potential resources for waterfront brownfields revitalization, identify barriers and potential solutions to waterfront brownfields revitalization, and identify methods for federal interagency collaboration on such projects. The task force should provide a report to Congress on these issues. The Act should authorize funding for EPA to organize, staff and conduct the task force, as well as provide technical assistance to localities on waterfront brownfields revitalization through EPA's 10 regional offices.

The Act would authorize a total of $20 million annually for these waterfront brownfields grants and activities.

PROPOSED LEGISLATIVE LANGUAGE

Establish waterfront pilots: insert new Section 104(k)(4) provision [and renumber existing provisions 104(k)(4) to (k)(12) accordingly]; amend section 104(3)(B) so that the current restrictions that relate to grants and loans to private entities apply to the new section.

Section 104(K):

****

`(3) GRANTS AND LOANS FOR BROWNFIELD REMEDIATION-

`(A) GRANTS PROVIDED BY THE PRESIDENT- Subject to paragraphs (4) and (5), the President shall establish a program to provide grants to--

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

`(ii) eligible entities or nonprofit organizations, where warranted, as determined by the President based on considerations under subparagraph (C), to be used directly for remediation of one 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.

`(B) LOANS AND GRANTS PROVIDED BY ELIGIBLE ENTITIES- An eligible entity that receives a grant under subparagraph (A)(i) or subparagraph (k)(4)(b) shall use the grant funds to provide assistance for the remediation of brownfield sites in the form of--

`(i) one or more loans to an eligible entity, a site owner, a site developer, or another person; or

`(ii) one 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 subparagraph (C), to remediate sites owned by the eligible entity or nonprofit organization that receives the grant.

(4) GRANTS FOR WATERFRONT BROWNFIELDS REVITALIZATION. – Subject to paragraphs (5) and (6) [formerly (4) and (5)], the President shall establish a program to provide grants to eligible entities and non-profit organizations to be used at one or more brownfield sites that are adjacent to waterbodies or floodplains of waterbodies. A grant for waterfront brownfields revitalization shall not exceed $500,000 per entity. Such grants may be used for:

(A) Reuse planning and site characterization and assessment, including the planning and design of environmentally-beneficial site improvements, such as riparian zones, green infrastructure, low impact development, remediation and management of sediments, flood damage prevention; and other improvements designed to improve water quality.

(B) Cleanup of sites and, if integral to the cleanup, implementation of other environmentally-beneficial site improvements, such as riparian zones, green infrastructure, remediation and management of sediments, flood damage prevention; and other improvements designed to improve water quality, except that grants and loans by the eligible entity must comply with the provisions in section 212(K)(3)(b).

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Add $20 million authorization for waterfront brownfields:

`(A) AUTHORIZATION OF APPROPRIATIONS- There is authorized to be appropriated to carry out subsection 211(K)(2) and 211(K)(3) $200,000,000 for each of fiscal years 2002 through 2006.
(B) AUTHORIZATION OF APPROPRIATIONS - There is authorized to be appropriated to carry out subsection 211 (K) (4) $20,000,000 for each of fiscal years 2007 through 2012.

Amend Section 104(k)(6)(A) as follows:

(6) IMPLEMENTATION OF BROWNFIELDS PROGRAMS.—
(A) 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, waterfront brownfields revitalization, or site preparation.

Add new Section 104(k)(6)(B) [and renumber existing (6)(B) as (6)(C)] to create interagency task force on waterfront brownfields revitalization:

(6) IMPLEMENTATION OF BROWNFIELDS PROGRAMS. –

* * *

(B) WATERFRONT BROWNFIELDS TASK FORCE. – The Administrator shall establish a federal interagency taskforce on waterfront brownfields revitalization. The task force shall be led by the U.S. Environmental Protection Agency and include the participation of relevant offices within the Agency as well as other federal agencies involved in waterfront revitalization, including the National Oceanographic and Atmospheric Administration, the U.S. Army Corps of Engineers, the Department of Transportation, the Economic Development Administration, the Department of Housing and Urban Development, the U.S. Fish and Wildlife Service, and other appropriate federal agencies, as well as representatives designated by the Administrator from appropriate state government, local government, community-based organizations, and other stakeholder organizations involved in waterfront revitalization. The interagency waterfront brownfields task force shall identify current and potential resources for waterfront brownfields revitalization, identify barriers and potential approaches to waterfront brownfields revitalization, and identify methods for federal interagency collaboration on such projects. Not later than 3 years after the date of the enactment of this subsection, the Administrator shall provide a report to Congress on these waterfront brownfields issues.

"RECYCLING AMERICA'S BROWNFIELDS ACT"

II. MAKING BROWNFIELDS GRANTS WORK BETTER AT THE LOCAL LEVEL

"RECYCLING AMERICA'S BROWNFIELDS ACT"

FACILITATE PETROLEUM/UST BROWNFIELD CLEANUPS

BACKGROUND – The EPA Brownfields Program, authorized in 2002 and now being considered for reauthorization, included provision for and funding for the assessment and cleanup of petroleum-contaminated sites. Congressional intent was to assure that the brownfields program worked for petroleum cleanups, as well as CERCLA/hazardous waste sites. As mandated, EPA has spent 25% of the site assessment and cleanup funds on petroleum sites.

The result has been that numerous abandoned gas stations have been cleaned up and redeveloped; underground storage tanks have been removed as an impediment to new investment, and sites with mixed petroleum and hazardous waste have cleaned up. Petroleum sites have often been key elements of neighborhood revitalization strategies. Cleaning up the corner gas station and turning an eyesore into an asset – a coffee shop or a pocket park – is often strategically important to neighborhood revitalization efforts. Similarly, a string of vacant gas stations, such as those left behind on the renowned Route 66 in Arizona, can visually blight an entire region OR they can be cleaned up and function to symbolize a revitalized economy. Numerous petroleum/brownfields successes are cited in Northeast-Midwest Institute reports - see http://www.nemw.org/brownfields.htm#petro.

CURRENT SITUATION & PROBLEM – There are three problems with the current program, which, taken together, discourage interest in the petroleum/UST cleanups. These are:

- Petroleum sites must be demonstrated to be "low risk;"
- Petroleum sites are not eligible if there is a "viable responsible party;"
- There is a 25% set-aside for petroleum which was intended to encourage petroleum cleanups but in fact has the opposite effect.

Low-risk. The current statute establishes a high bar for petroleum site eligibility for brownfields funding - it must be "of relatively low risk, as compared with other petroleum-only sites in the State" This requirement resulted from a concern that brownfields funding would supplant LUST funding which is designed to address higher risk sites. However, the requirement is not needed, as EPA is barred from using brownfields funds on sites that are being assisted by LUST. Further, the requirement burdens applicants with extra steps (not required in the hazardous waste side of the program), including the difficult task of estimating the risk at the site before a brownfields assessment is performed.

No Viable Responsible Party. The current statute allows petroleum funding only for a "site for which there is no viable Responsible Party (RP) and which will be assessed, investigated or cleaned up by a person that is not potentially liable for cleaning up the site." This requirement is an extension of the "Polluter Pays" philosophy. However, the effect of the policy is that the only sites that are clearly eligible are so-called orphan sites – ones where all responsible persons are defunct or not viable.

The "No viable RP" requirement places a heavy burden on applicants, requiring knowledge of three things: knowledge of who were past owners and operators; identification of which owner/operator was involved when there was a release; and determination of whether or not the responsible entity is currently financially viable or even reachable. Resolving each of these items requires a heavy

investment of time and resources, and many cities have been either unwilling to make the investment (remembering that the highest grant amount is $200,000) or they have been unable to satisfy the requirements and their applications have been determined to be ineligible.

The "No Viable RP" requirement is also inconsistent with the CERCLA/hazardous waste side of the brownfields program which forbids any funds going directly to an RP, i.e. it is the PERSON that is ineligible, not the SITE.

It should also be noted that most state brownfields incentives are structured so that funding cannot go directly to RP's, but they can assist the innocent purchaser of virtually any site, as long as the site is not on the NPL or subject to enforcement actions.

25% Set-Aside. The current Brownfields Revitalization Act specifies that $50,000,000 or 25 percent of annually appropriated EPA brownfield grant funding (whichever is less) shall be used for assessment and cleanup of low-risk petroleum-contaminated sites. To implement this "petroleum set-aside" directive, U.S. EPA has established a two-track grant application, award, and administration process, with one track for non-petroleum hazardous waste sites, and the second for petroleum sites. Grant applicants must file a separate application for petroleum assessment funding. EPA and the grantees must maintain separate administration accounting for these sites.

Congressional intent in establishing the 25% set-aside was to boost petroleum cleanups, especially smaller corner gas station-type sites, which may not rank very high on the economic development ranking criteria. The Brownfields Coalition contends that the set-aside inadvertently DISCOURAGES petroleum cleanups because it creates bureaucratic barriers to the use of the funds:

- ***Paperwork Burdens*** – Grantees convey that it is burdensome to be required to file and manage separate grants for hazardous waste versus petroleum waste sites. Contractors must carefully allocate all site costs to hazardous waste and petroleum, even though in most cases the same remedial measures (*e.g.* site capping) are addressing both kinds of contamination.
- ***Lack of Flexibility*** – Localities often apply for a cleanup grant under one category, for example under petroleum, but later discover the presence of hazardous waste, as well. Because they cannot switch even a portion of the EPA funding to hazardous waste, the site may get stuck Another common occurrence is that cities with both kinds of assessment grants will deplete one category (*e.g.* hazardous waste) but cannot switch available funds from the other category (petroleum), with the result that sites needing hazardous waste assessment funding may go begging, while petroleum assessment funds go unused for the lack of eligible sites. Also, the current segregation of petroleum and hazardous assessment funding limits flexibility in areas where there is a mix of petroleum and hazardous substance contamination.

In recommending that the petroleum set-aside be eliminated, the Brownfields Coalition is fully cognizant of the concern that this will lead to fewer petroleum sites (particularly corner gas station sites) being cleaned up because they will not rank as high on economic development criteria. To this concern the Coalition points out that economic development is only one of ten ranking criteria that EPA must consider in ranking applications. The Coalition is also recommending a new, strongly worded ranking criteria that mandates the Administrator to give special consideration to applications for petroleum-contaminated sites to ensure that "a representative number of such sites receive funding."

LOCAL EXAMPLES

- A rural Pennsylvania community has established a "Land Recycling Initiative" to support redevelopment of targeted brownfield areas. The community has received both a hazardous waste assessment grant and a petroleum assessment grant. This County reports that it has been hindered from using these funds in an effective and cost-efficient manner, because of the difficulties in leveraging and co-mingling these segregated funds. The community also reports a substantial bureaucratic burden associated with management and accounting for these segregated funds.

- Baltimore's Brownfields Director indicated that Baltimore never applied for a petroleum grant, (despite numerous potential sites), because the "No Viable RP" test and the extra administrative burdens made it a poor investment of time – "These applications are all difficult, but when you layer that 'low risk, viable RP test' on top of everything else, then you factor in the greater likelihood of being turned down because of these tests, plus there is the extra administrative headaches of keeping separate petroleum records, the bottom line was we just could not justify the investment of time and resources in a petroleum application." (Evans Paull, former Director of Baltimore's Brownfields Initiative)

- The State of Michigan reports that a site in Washtenaw County was ruled ineligible for assessment funds because the previous owner could not be located, and therefore could not be measured for "viability."

- The Washington Department of Community, Trade, and Economic Development states: "I find that hundreds of gas stations may benefit from a change in this law. While it was intended to remove the Exxon and Chrevon's from benefiting, the rural communities are suffering…The … rural communities are faced with a legacy of old petroleum sites. The town of Aberdeen had 241 former petroleum sites"

- The South Carolina Department of Health & Environmental Control reports that a former BP Station in Greenville, South Carolina was ruled ineligible. The property was a key piece of a masterplan developed by the City and the neighborhood that called for mixed income residential development. The property is owned by Dorothy Chapman and the Kimiko Chapman Rife Living Trust.

PROPOSED APPROACH

1. ***Eliminate the extra site eligibility hurdles for petroleum sites.*** Grantees that seek to use assessment, cleanup or multi-purpose grants on sites with petroleum contamination should not be required to make the difficult demonstrations that the site is "low risk" and that there is "no viable responsible party" connected with the site. Replace the "No Viable Responsible Party" language with a prohibition on using funds to pay for cleanup costs at a brownfield site for which the recipient of the grant is potentially liable under the petroleum statutes (parallels the CERCLA/hazardous waste side of the brownfields program)
2. ***Eliminate the currently defined set-aside and substitute a new ranking criterion.*** Eliminate the 25% set-aside of total grant funding for petroleum brownfields and substitute a new "Ranking Criterion" that gives weight to petroleum-contaminated sites and other smaller sites.

The Administrator should be directed to give special consideration to applications related to petroleum-contaminated sites to ensure that a representative number of such sites receive funding.

EPA should establish one unified system for assessment, cleanup and revolving loan fund grants that allows applicants to combine hazardous waste and petroleum brownfields activities. Grantees should be required by EPA to report what portion of grant funding is directed toward petroleum assessment and cleanup activities, so that EPA and Congress will understand the demands for such petroleum funding. This can be conducted by grantees within a single grants management and paperwork process, reducing administrative burden on both applicants and EPA.

PROPOSED LEGISLATIVE LANGUAGE

1. Eliminate the "low risk" test and modify "No Viable RP" test: amend CERCLA Section 101(39)(D) is amended as follows:

`(D) ADDITIONAL AREAS- For the purposes of section 104(k), 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));

`(II)(aa) is contaminated by petroleum or a petroleum product excluded from the definition of `hazardous substance' under section 101; and

~~`(bb) is a site determined by the Administrator or the State, as appropriate, to be--~~

~~`(AA) of relatively low risk, as compared with other petroleum-only sites in the State; and~~

~~`(BB) a site for which there is no viable responsible party and which will be assessed, investigated, or cleaned up by a person that is not potentially liable for cleaning up the site; and~~

`(cc) is not subject to any order issued under section 9003(h) of the Solid Waste Disposal Act (42 U.S.C. 6991b(h)); or . . .

(B) PROHIBITION-

(i) IN GENERAL- No part of a grant or loan under this subsection 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;

<u>(V) A response cost at a brownfield site contaminated by petroleum or a petroleum product for which the recipient of the grant or loan is potentially liable under section under the Solid Waste Disposal Act (42 U.S.C. Sections 6921-6925),</u> or

2. ***Eliminate the Petroleum set-aside:*** ***Section 104(k) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9604(k)) is amended by striking paragraph (12) (B):***

> `(12) FUNDING-
>
> `(A) AUTHORIZATION OF APPROPRIATIONS- There is authorized to be appropriated to carry out this subsection $200,000,000 for each of fiscal years 2002 through 2006.
>
> ~~`(B) USE OF CERTAIN FUNDS- Of the amount made available under subparagraph (A), $50,000,000, or, if the amount made available is less than $200,000,000, 25 percent of the amount made available, shall be used for site characterization, assessment, and remediation of facilities described in section 101(39)(D)(ii)(II).'.~~

3. ***Add a Petroleum criteria under "Ranking Criteria: CERCLA 104 (k) (5) (c) Amended by adding****:*

> (xi) The extent to which the grant would address the need to clean up abandoned gas stations and petroleum-contaminated sites, particularly smaller sites. The Administrator shall give special consideration to applications for to petroleum-contaminated sites to ensure that a representative number of such sites receive funding under this section.

"RECYCLING AMERICA'S BROWNFIELDS ACT"

CLARIFY ELIGIBILITY OF PUBLICLY-OWNED SITES ACQUIRED BEFORE 2002

CURRENT SITUATION & PROBLEM – Currently all EPA grant applicants for assistance in any of the three major categories (site assessments, cleanup grants, and revolving loan funds) must meet the site/applicant eligibility requirements as Bona Fide Prospective Purchasers (BFPP), which entails demonstrating that the entity carried out "All Appropriate Inquiry (AAI)" at the site to be assessed or cleaned up. However, no AAI law, rule, or standard existed prior to the enactment of the Brownfields Act. For sites that were acquired prior to the January 11, 2002 date-of-enactment, the only clear way to comply with this AAI requirement is to be able to demonstrate that a Phase I environmental assessment was undertaken prior to acquisition of the property.

Some of the most pro-active brownfields localities in the country have been acquiring blighted areas and brownfield sites for environmental and community revitalization for decades. Many publicly-owned sites were acquired in the distant past and conventional practices related to acquisition of properties were quite different than they are today. For example, in the 1970s or the 1980s, it was typical for a locality to acquire property without performing a Phase I prior to acquisition. This was not an irresponsible action on the part of local government for a number of reasons:

- Most such sites were acquired for community development and blight removal purposes – contamination issues may have been unknown or were assumed to be modest and manageable;
- If the site was acquired under eminent domain, the locality may have been unable to get site access prior to acquisition; or;
- An assessment may have been performed, but finding the records with the passage of 20 or more years may be difficult or impossible.

EXAMPLES

- A major city in the upper Midwest acquired a waterfront site in the early 1970s. Although the community has taken due care to prevent the spread of brownfields contamination or exposure to the public, the city has not yet redeveloped the site. The city, which has been very pro-active in brownfields revitalization, wishes to apply for EPA cleanup grant funding to revitalize this brownfield, but will be unable to document whether or what type of due diligence and "appropriate inquiries" might have taken place at the property, because no records have been found.
- The State of Wisconsin reported that a small town that had acquired a key downtown site in the 1990's was ruled ineligible for an RLF sub-grant because it could not demonstrate AAI, and EPA determined that the acquisition did not qualify as an "involuntary acquisition."
- Kansas City did not submit the 900-acre Richards Gebaur Air Force Base because the site was acquired in 1985 by the City and was judged as ineligible by virtue of AAI.
- City of New York Mariners Marsh parcel was purchased by the City of New York in 1974 in anticipation of construction of containerport operations. No development had occurred on

the site since the early 20th century, and it was not standard practice at the time to routinely conduct environmental testing, especially if land was slated for industrial use. The site was acquired prior to the enactment of CERCLA and prior to the institution of standardized due diligence protocols (e.g., the ASTM Phase I) for real estate transactions. Documentation on this purchase was very hard to come by thirty years later – a staff person was diverted for two weeks in trying to recover records. Inquiries failed to yield any of the persons who may have had first-hand knowledge of the site conditions in 1974.

- Detroit was turned down for a proposed RLF loan to a housing developer because the property was owned by the City and the City was unable to demonstrate AAI. The property had been purchased by the City in the 1970's (pre-CERCLA). An adjoining City-owned area (6 parcels) was later approved for EPA funding, but only after protracted discussions and time-consuming research to provide complete property histories for each of the six parcels. EPA determined that the sites did NOT meet the AAI standard, because site testing had been carried out after acquisition. The basis for the approval was that the properties were acquired through tax foreclosure and eminent domain, and therefore qualified for a defense against CERCLA liability.

- Other projects turned down because of the AAI requirement:

    - Trenton/Canal Plaza
    - Trenton/Crescent Wire

PROPOSED APPROACH

Publicly-owned sites acquired before January 11, 2002 should be defined as eligible for brownfields funding assistance if the applicant did not cause or contribute to the contamination and the applicant has met the requirements of "appropriate care." For such sites, an applicant would not have to demonstrate that it performed all appropriate inquiries.

PROPOSED LEGISLATIVE LANGUAGE

Option 1

Eliminate the All Appropriate Inquiry requirement for public sites acquired before 2002, but retain all other BFPP requirements, including "Appropriate Care:" CERCLA Section 104(k)(4)(B) (including the provision added by SAFETEA-LU) is amended as follows:

(B) PROHIBITION.—

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

* * *

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

* * *

(ii) EXCLUSIONS.

(ii) EXCLUSIONS.

* * *

[From SAFETEA-LU:]

~~(iii) EXCEPTION.--Notwithstanding clause (i)(IV), the Administrator may use up to 25 percent of the funds made available to carry out this subsection to make a grant or loan under this subsection to eligible entities that satisfy all of the elements set forth in section 101(40) to qualify as a bona fide prospective purchaser, except that the date of acquisition of the property was on or before January 11, 2002.~~

(iii) EXCEPTION: Notwithstanding clause (i)(IV), the Administrator may make a grant or loan under this subsection to an eligible entity as defined in Section 104(k)(1) or a nonprofit organization, that acquired the property prior to January 11, 2002, if the eligible entity or nonprofit organization satisfies the elements set forth in section 101(40)(A), (C), (D), (E), (F), (G), and (H).

Option 2

Modify the prohibited activities such that the funds cannot be used to assist a non-governmental responsible person. This approach essentially exempts public agencies from the RP test, but retains the RP test for it for non-governmental entities. In order to assure that "polluter pays" is still applied, add language to the eligible entity section clarifying that, if the entities that caused or contributed are not eligible. Option 2 is the clearest, least ambiguous option and may represent the original congressional intent.

`(k) BROWNFIELDS REVITALIZATION FUNDING-

`(1) DEFINITION OF ELIGIBLE ENTITY- In this subsection, the term `eligible entity' means AN ENTITY THAT DID NOT CAUSE OR CONTRIBUTE TO CONTAMINATION AT AN ELIGIBLE SITE AND IS--

`(A) a general purpose unit of local government;

`(B) 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;

`(C) a government entity created by a State legislature;

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

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

`(F) a State;

`(G) an Indian Tribe other than in Alaska; or

`(H) an Alaska Native Regional Corporation and an Alaska Native Village Corporation as those terms are defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1601 and following) and the Metlakatla Indian community.

`(B) PROHIBITION-

`(i) IN GENERAL- No part of a grant or loan under this subsection 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~~ A NON-GOVERNMENTAL 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.

~~(iii) EXCEPTION.—Notwithstanding clause (i)(IV), the Administrator may use up to 25 percent of the funds made available to carry out this subsection to make a grant or loan under this subsection to eligible entities that satisfy all of the elements set forth in section 101(40) to qualify as a bona fide prospective purchaser, except that the date of acquisition of the property was on or before January 11, 2002.~~

"RECYCLING AMERICA'S BROWNFIELDS ACT"

ESTABLISH THAT NON-PROFITS ARE ELIGIBLE FOR SITE ASSESSMENT AND RLF FUNDING

CURRENT SITUATION & PROBLEM

The 2002 Brownfields Act made nonprofit organizations eligible for brownfield cleanup grants and job training grants. However, it did not make nonprofits eligible for assessment grants or Revolving Loan Fund (RLF) grants. This represents a lost opportunity to maximize these government resources by taking advantage of the community development and financing infrastructure that has developed over the last twenty years, and make more efficient use of public and nonprofit resources for successful brownfield redevelopment. Community Development Corporations (CDCs), Community Development Financial Institutions (CDFIs), and other nonprofit organizations have in place the infrastructure that will allow them to leverage these funds with other public and private resources and expeditiously deliver these resources to revitalize brownfields in struggling neighborhoods of all sizes.

Nonprofit Capacity. CDFIs, CDCs, and many other nonprofits have established track records developing and implementing cutting edge brownfield remediation loan products and successfully navigating the complicated and multi-faceted world of brownfield development financing. For example, as administrators of California's Cal ReUSE program, the Center for Creative Land Recycling (CCLR) has awarded nearly $1.5 Million in brownfield assessment loans that will result in over 900 residential units, 7,000 sq. ft. of retail space, 325,000 sq. ft. of commercial/industrial space, and 3 acres of open space. Direct RLF grants to nonprofits would maximize the pre-existing community development finance infrastructure already in place (e.g. CDFIs) and make more efficient use of public and nonprofit resources for successful brownfield redevelopment.

The case for nonprofits to be eligible for site assessment funds is particularly clear and, to our knowledge, not controversial. This change probably remedies a drafting oversight.

Some observers have questioned whether nonprofits have the financial capacities necessary to manage RLF programs. There are two answers to that question.

- First, many nonprofits, particularly CDFIs and Community Development Entity's (CDE's for the New Markets Tax Credit Program) have developed highly efficient infrastructure that successfully get private sector dollars into underserved neighborhoods. This will finally allow EPA's brownfields RLF dollars to take advantage of that enormous community finance network that has existed in communities across the country for decades.
- Second, the presumption should be that EPA has sufficient authority and discretion to fund organizations that have financial capabilities and not fund those that do not have those capacities. As with all application review, there be a careful evaluation of the capacity of the applicant nonprofit to insure that it has the requisite financial management skills..

Value of Nonprofits in Brownfield Redevelopment. Nonprofits are uniquely positioned in a number of key ways to revitalize communities through brownfield redevelopment. First, community based nonprofits have the long-term vision and active presence necessary to guide revitalization efforts that often last well beyond the limits of an election cycle. Second, nonprofits can serve a

crucial role as a credible, neutral intermediary between the community and public and private entities, advocating for brownfield redevelopment projects that are in the interest of the public good, not just in the interest of a private developer. Third, nonprofits have the specialized brownfield knowledge to act as catalysts, managing and coordinating brownfield activities on behalf of, and in support of, community based organizations that would otherwise pass up these sites without the nonprofit's assistance. Lastly, nonprofits have the capacity to leverage brownfield funding with both private sector resources and with other public funds, including transit-oriented development, anti-sprawl, and smart growth program funds.

Success Stories. Many nonprofit organizations across the nation have developed extensive expertise in the revitalization of brownfields. Organizations like CCLR conduct a myriad of advanced brownfield initiatives, including grants, loans, technical assistance, and training.

- CCLR recently assisted a nonprofit in the safe capping of abandoned oil wells and development of 24 affordable housing units in a blighted, East Los Angeles neighborhood where 55% live below the poverty level and redevelopment of the site was considered impossible.
- In NYC, New Partners for Community Revitalization, Inc. (NPCR) is providing technical and financial assistance to advance a mixed use project in Harlem on a contaminated site that has been vacant since the 1950s.
- In northwest Indiana, REDI partnered with the local economic development corporation (also a nonprofit) to clean up and redevelop a foreclosed foundry. With financial assistance from county and state sources, the site was assessed, remediated, and cleared of existing structures. The site is now economically active as the new home of a lumberyard, which plans to redevelop their original lakefront location for waterfront residential and recreational uses.

None of these projects could have moved forward without the crucial nonprofit assistance.

EXAMPLES ILLUSTRATING THE NEGATIVE IMPACT OF CURRENT INELIGIBILITY

In North Philadelphia, the Allegheny West Foundation convened a committee of public officials and business leaders that facilitated the environmental assessment of twelve sites. Allowing nonprofit to receive assessment grants will allow experienced CDCs and other nonprofit to play a more comprehensive role in brownfields redevelopment.

Delta Redevelopment Institute (REDI) is negotiating a donation agreement with the owner of a vacant and dilapidated chemical manufacturing facility in an economically depressed area of Lake County, Illinois. REDI has half of the assessment funding secured through a county grant. The ability to obtain the other half of the assessment dollars from the US EPA would ensure that the project would make it through the assessment phase and provide the information needed to craft a clean-up and redevelopment strategy.

In New York, attempts to acquire brownfield cleanup funding for a number of sites in economically depressed neighborhoods, where conventional financing is not available, have been stymied by the extremely complicated and bureaucratic process associated with multiple government partners.

The Colorado Brownfields Foundation has identified the need for a micro-loan program to clean dozens of clandestine methamphetamine labs, but without access to the EPA RLF loan program, these properties remain tainted and uninhabitable.

In all these cases, the availability of EPA brownfield assessment or RLF grants for nonprofits would have significantly increased the chances of a successful brownfield revitalization project.

PROPOSED APPROACH

Nonprofit organizations and nonprofit-controlled entities should be eligible to receive brownfield assessment and RLF grants along with cleanup and job training grants. This change recognizes the value that nonprofits—whether single-handedly or in partnerships — play in redeveloping brownfields.

Because nonprofit often form subsidiary Limited Liability Corporations (LLC's) when they are addressing brownfields sites, it is necessary to include subsidiary LLC's in the expanded definition of an eligible entity. Similarly, nonprofit may also be formed as a Community Development Entity (CDE), which is the vehicle to deploy private capital raised through the New Markets Tax Credit program. CDE's have high level capabilities to manage brownfields financing and they should be eligible for EPA funding.

PROPOSED LEGISLATIVE LANGUAGE

Make nonprofits eligible for site assessment and RLF funding: Amend CERCLA Section 104(k)(1) by adding a new provision (k)(1)(I) as follows:

"(k) BROWNFIELDS REVITALIZATION FUNDING.—

"(1) DEFINITION OF ELIGIBLE ENTITY.—In this subsection, the term 'eligible entity' means—

* * *

(I) a 501(c)(3) corporation

(J) a limited liability corporation in which all managing members are 501(c)(3) corporations and/or limited liability corporations whose sole members are 501(c)(3) corporations

(K) a limited partnership in which all general partners are 501(c)(3) corporations and/or limited liability corporations whose sole members are 501(c)(3) corporations

(L) a Community Development Entity as defined in section 45D(c)(1) of the Internal Revenue Code

Jan. 30, 2007

"RECYCLING AMERICA'S BROWNFIELDS ACT"

STREAMLINE FUNDING APPROVALS BY REDUCING REDUNDANT EPA REVIEWS

CURRENT SITUATION & PROBLEM – Currently a number of states have brownfields response programs that require several types of reviews of each brownfield assessment or cleanup, including reviews of quality assurance/quality control requirements, community involvement requirements, analysis of cleanup alternatives requirements, and determinations that the selected cleanup is protective of human health and the environment. In fact, the Brownfields Revitalization Act at Section 128(a) requires qualified state brownfield response programs to include such review elements in order to receive federal brownfields funding. Likewise, the Act recognizes that 22 states have Memoranda of Agreement with U.S. EPA placing responsibility for these review elements at the state level.

Yet, under current federal statute and regulatory practice, U.S. EPA is often conducting the same reviews after the state reviews have concluded. For each cleanup conducted with a cleanup grant, and for each loan or subgrant made from a state or local Revolving Loan Fund, EPA conducts secondary reviews. This can include EPA regional review of: quality assurance project plans for cleanups, EPA review of community involvement plans for cleanups, EPA review of assessments of cleanup alternatives, and EPA review of whether the selected cleanup remedy is protective of human health and the environment. When brownfields redevelopment depends so often on timely response from local and state government, it is unnecessary to add layers of redundant federal review to the brownfields assessment and cleanup oversight already being provided at the state level.

LOCAL EXAMPLE

- In one major North Carolina city dealing with a large number of brownfields, local officials have sought the ability to make Brownfields Cleanup Revolving Loan Fund loans and subgrants without having to get EPA review of the cleanup plans for each loan, in order to make the funding more timely and attractive for the private sector. The State of North Carolina has a strong voluntary cleanup and response program, as recognized in the Memorandum of Agreement between North Carolina and U.S. EPA. Brownfield cleanups in the city are typically conducted through the State VCP. Yet, under current EPA interpretation of the need to apply National Contingency Plan requirements to every cleanup activity, the city must wait for federal reviews before loans are provided to the private sector.

- In Emeryville, California, four potential borrowers did not proceed with RLF applications due to the time it takes to obtain approval for SAPs, QAPPs, ABCAs. Three of these were housing sites, where at least 20% of the units would be affordable to very-low to moderate households. Another site is an R&D building.

- A Midwestern city was bogged down in EPA review of a proposed RLF loan for more than a year. The resulting delay and uncertainty held up a $15 million mixed use redevelopment plan.

- Baltimore reported the developers of a large-scale residential redevelopment in Inner Harbor West considered an EPA RLF for cleanup, but rejected that option partly because of the extra EPA review.

- Michigan's Department of Environmental Quality commented that: "The biggest amount of uncertainty comes with the review of the loan document itself, and the associated exhibits and loan guarantees, in that EPA review of a final document (agreed to by both the Cooperative Agreement Recipient and the Borrower), can take up to a month, and EPA can request that changes be made to the document, further lengthening the time to be able to close on the loan. This did occur with one such site in Detroit, (although the borrower finally backed out of the deal), and is likely to impact a currently in-progress loan agreement."

PROPOSED APPROACH

At this time, the Coalition is engaged in discussions with EPA on a possible administrative solution to the duplicative oversight issue. If those discussions fail, the Coalition will propose an amendment to remedy the problem.

"RECYCLING AMERICA'S BROWNFIELDS ACT

ALLOW FUNDING FOR REASONABLE ADMINISTRATIVE COSTS FOR LOCAL BROWNFIELDS PROGRAMS

CURRENT SITUATION & PROBLEM

The Brownfields Act prohibits grantees from using assessment, cleanup or RLF grants for reasonable administrative costs. This limitation makes it extremely difficult for local governments, community organizations and non–profit entities to effectively develop and implement their site assessment and cleanup programs and projects. All other EPA programs (Clean Water, Drinking Water, Superfund, RCRA, etc) and virtually all Federal grant programs allow a portion of grant funds to be allocated to cover reasonable administrative costs.

State agencies that receive brownfield response program funding from EPA are permitted to pay administrative costs with their grants. Only local governments and non-profit organizations are penalized by this prohibition and only the Brownfields program is singled out for this unfair treatment. As a result, many localities and organizations are unable to use brownfields funds – particularly small, rural and disadvantaged communities.

EXAMPLE

- The Land-of-Sky Regional Council in western North Carolina is one of the most pro-active organizations in the nation helping small and rural communities address blighted brownfields. Land-of-Sky operates a "Regional Brownfield Initiative" that provides technical assistance, limited funding, and guidance to localities on seeking federal and state funding for brownfields revitalization, in a four-county, 14-municipality area. Land-of-Sky has identified the administrative cost prohibition in the Brownfields Act as the major impediment to brownfields redevelopment in small and rural communities, because these small localities do not have the capacity or funding to start and carry effective brownfields programs without more effective federal support.

PROPOSED APPROACH

The Act should allow a portion of EPA brownfields grants to be used to pay reasonable administrative costs related to establishing and maintaining brownfields assessment and cleanup programs and projects.

PROPOSED LEGISLATIVE LANGUAGE

Eliminate the administrative cost prohibition: Amend CERCLA Section 104(k)(4)(B) as follows:

"(B) PROHIBITION.—

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

(I) a penalty or fine;
(II) a Federal cost-share requirement;
~~(III) an administrative cost;~~

****

~~`(ii) EXCLUSIONS- For the purposes of clause (i)(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.~~

"RECYCLING AMERICA'S BROWNFIELDS ACT"

CLARIFY ELIGIBLE BROWNFIELD REMEDIAL ACTIVITIES

CURRENT SITUATION & PROBLEM

Currently brownfields grants can be used only for the eligible activities named in the Brownfields Act, which include site characterization, site inventories, planning, and assessments (all under assessment grants), and remediation under cleanup grants. EPA brownfields funding can also be used for environmental insurance and for monitoring and enforcement of institutional controls, but the law limits the use of funding on institutional controls to a limit of 10 percent of a grant) However, EPA brownfields funding for remedial activities connected with demolition of blighted structures, site clearance, and site preparation (usually asbestos and lead paint remediation) may be ruled ineligible or lower priority for EPA funding – even though these activities are critical to brownfields revitalization.

EXAMPLE

In St. Louis, a developer was looking for a large parcel of vacant property that was clear and ready for a new industrial development. St. Louis had assembled some vacant properties (most of which were brownfield properties) to the size specifications of the developer. The city had completed the site assessments and was beginning to begin remediation. However, there were vacant buildings on some portions of the property, some of which were contaminated with lead paint and/or asbestos. St. Louis was also in the process of securing additional money to make changes in the water and sewer lines as well as the roads to accommodate an industrial development. The city was prohibited from using brownfields grant funding for remedial activities associated with demolition or site preparation. St. Louis was unable to meet the developer's timeline and the development went to a greenfield site outside of the city.

PROPOSED APPROACH

The Act should clarify that remedial activities connected with demolition, site clearance, and site preparation can be conducted with remediation, RLF and multi-purpose grants, along with the current eligible activities for these grants.

PROPOSED LEGISLATIVE LANGUAGE

Clarify eligible activities: Amend CERCLA Section 104(k)(3) as follows:

"(3) GRANTS AND LOANS FOR BROWNFIELD REMEDIATION.—

"(A) GRANTS PROVIDED BY THE PRESIDENT.—Subject to paragraphs (4) and (5), the President shall establish a program to provide grants to—

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

"(ii) eligible entities or nonprofit organizations, where warranted, as determined by the President based on considerations under subparagraph (C), to be used directly for remediation (including remedial activities associated with demolition, site clearance and site preparation) of one or more brownfield sites owned by the entity or organization that receives the grant and in amounts not to exceed $1,000,000 for each site to be remediated.

"(B) LOANS AND GRANTS PROVIDED BY ELIGIBLE ENTITIES.—An eligible entity that receives a grant under subparagraph (A)(i) shall use the grant funds to provide assistance for the remediation (including remedial activities associated with demolition, site clearance and site preparation) of brownfield sites in the form of—

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"RECYCLING AMERICA'S BROWNFIELDS ACT"

III. TOOLS TO HELP FREE THE MOTHBALLED BROWNFIELD SITES

"RECYCLING AMERICA'S BROWNFIELDS ACT"

PROMOTE STATE INSTITUTIONAL CONTROLS PROGRAMS

CURRENT SITUATION & PROBLEM

Brownfield redevelopment strategies that use various institutional and engineering controls (collectively referred to here as ICs) – approaches ranging from deed restrictions to capping and installation of monitoring wells – are now widely used, and interest in them continues to grow.

Most states allow – even encourage – use of ICs as part of the cleanup remedy for sites taken through voluntary cleanup programs (VCPs). The majority of the thousands of sites that receive VCP sign off each year have used some sort of institutional or engineering control in their remediation plan. And numerous examples illustrate that such IC strategies can lead to deal-making cost savings, while remaining protective of human health and the environment.

However, widespread IC use has raised concerns in some quarters (among neighborhood activists, among lenders and tenants, for example) that they are being inconsistently applied, and sporadically monitored. Therefore, a brownfield reauthorization statute should anticipate these prospective issues and provide a way to address them over the next few years. These IC issues include:

- Many states rely on deed restrictions as the primary method of enforcing ICs. Deed restrictions generally come into play when a property is bought/sold; however, changes in the use of the property can occur without a change in ownership;
- Neighborhood residents and adjoining property owners need greater assurance that ICs do work, and can remain protective of human health and the environment;
- State VCPs or other response/enforcement programs may not have sufficient staff to monitor the growing number of sites that employ institutional and engineering controls, and enforce ICs as necessary;
- Information about ICs is not always easily accessible to those who would be most directly affected if the institutional or engineering controls failed;
- Some corporate landowners tend to mothball contaminated property, partly because corporations have little confidence in ICs as the primary mechanism to assure that future property owners will abide by the restrictions.

EXAMPLE

Most brownfields sites use ICs as part of the remedial action plan. We are unaware of specific examples of the failure of ICs, but weaknesses in the current system are well known.

PROPOSED APPROACH

Reauthorization language should require states, as a condition of the bar on federal enforcement action, to use some portion of their Section 128(a)(2) brownfield grants to develop a plan for establishing, monitoring, and enforcing appropriate institutional control mechanisms designed to

assure that all future uses of brownfields sites are consistent with any restrictions placed on such sites.

To accommodate these changes, this reauthorization proposal suggests (as noted above) increasing current Section 128(a) appropriations for brownfield grants to states from the current level of $50 million to $70 million in FY07, rising to $120 million in FY 2012 and thereafter.

PROPOSED LEGISLATIVE LANGUAGE

Require states to prepare institutional control plans: CERCLA Section 128(b)(1) amended, as follows:

(C) Public record
The limitations on the authority of the President under subparagraph (A) apply only at sites in States that:

(i) ~~maintain~~ 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) of this section shall maintain and make available to the public a record of sites as provided in this paragraph.

(ii) By September 30, 2009, produce a plan for establishing, monitoring, and enforcing appropriate institutional control mechanisms designed to assure that all future uses of brownfields sites are consistent with any restrictions placed on such sites. After September 30, 2008 states must submit annual progress and monitoring reports relative the implementation of the institutional controls plan.

Increase funding of state programs, in part, to assure adequate funding for institutional control planning, implementation, and monitoring: Section 128(a)(3) of the Brownfields Revitalization Act is replaced as follows –

3) FUNDING.—There is authorized to be appropriated to carry out this subsection $70,000,000 for FY2007, $80,000,000 for FY2008, $90,000,000 for FY2009, $100,000,000 for FY2010, $110,000,000 for FY2011, and $120,000,000 for FY2012 and in fiscal years thereafter.

"RECYCLING AMERICA'S BROWNFIELDS ACT"

PROMOTE STATE AND LOCAL ENVIRONMENTAL INSURANCE PROGRAMS

CURRENT SITUATION & PROBLEM

The 2002 federal brownfields reforms, as well as similar reforms that have been adopted by states through their VCP programs, have established excellent innocent purchaser liability protections relative to state and federal enforcement action. This reduces but does not eliminate the uncertainties that tend to make brownfields investments more risky than greenfields investments. There are two principal risks that remain are:

- That cleanup costs will exceed that predicted by the environmental site assessment;
- That positive project economics will be turned into a loss by a third party toxic tort lawsuit or other environmental liabilities, including Business Interruption due to environmental conditions and reopener provisions.

Environmental insurance is the primary vehicle to combat these remaining uncertainties. Several states (Massachusetts, Wisconsin, and California) have recognized these risks and have adopted environmental insurance programs that offer discounted or subsidized premiums through pre-negotiated rates and terms. The most advanced program is the Massachusetts Brownfield Redevelopment Access to Capital (Mass BRAC) program. Created in 1998 by the Massachusetts Legislature and implemented by Mass Business Development Corporation, this program is helping to move 300 Brownfields in Massachusetts from contaminated unused or underutilized sites into cleaned up and redeveloped sites.

Specifically, Mass Business entered into a contract with AIG Environmental® where AIG would provide to site owners or developers, Pollution Legal Liability and Cleanup Cost Cap Insurance at pre-negotiated rates and coverage. Mass Business would subsidize the premium cost of the insurance to qualified developers. Such subsidies ranged from 25% to 50% of the insurance premium cost. This program has led to rapid growth in the Massachusetts Brownfield program:

- Number of Sites in Mass BRAC Program: 300
- Dollar Value of Cleanups: $200 Million
- Investment and Loans by Developers: $3.0 Billion
- Job Impact: 20,000
- Program Funds spent on EI: $5.0M

EXAMPLE

A highly successful project in Dorchester, Massachusetts illustrates the approach. The Dorchester Bay Economic Development Corporation (DBEDC) turned a formerly contaminated 4.7 acre site into a place for new jobs and hope for the community. The site was home to

industrial use for 80 years and then abandoned for ten years before the DBEDC bought the site in 1994 and planned its redevelopment. A new building was opened on the site in 2002 which serves as the headquarters for a Boston-based marketing firm which designs, prints and distributes marketing materials from its two-story facility. The marketing firm's new headquarters employs over 100 people, which includes some entry level positions. The firm offers job training for local residents in this lower income area of Dorchester to prepare them for some of these entry level positions.

PROPOSED APPROACH

The Act should foster the use of environmental insurance at brownfield sites by supporting State, Local or Tribe-sponsored environmental insurance programs like the successful program in the Commonwealth of Massachusetts, which assist purchasers of environmental insurance who are remediating a brownfield through the state response program. The Act should allow flexibility so that the grantee can use the funds to purchase and/or subsidize the premium of environmental insurance for various types of Brownfields, including coverage of multiple sites. The Act should authorize $20 million annually for EPA to provide grants of up to $2 million to States, localities or Tribes for to support the establishment of environmental insurance programs for brownfields, with a 50% match from the applicant.

PROPOSED LEGISLATIVE LANGUAGE

Create new environmental insurance program: Amend CERCLA 104(k) ("Brownfields Revitalization Funding") – new section, as follows:

(4) BROWNFIELD ENVIRONMENTAL INSURANCE PROGRAM

`(A) ESTABLISHMENT OF PROGRAM- The Administrator shall establish a program to provide --

(i) PLANNING AND FEASIBILITY ASSISTANCE - provide grants to states and eligible entities to plan and assess the feasibility of a subsidized/pooled environmental insurance program. Eligible activities would include feasibility studies, cost-benefit analysis, evaluation of alternatives, assessment of non-federal funding sources, and preparing proposals for a pre-negotiated environmental insurance product. Grants provided under this section may be up a total of $200,000 for two years. Grants require a 25% non-federal share.

(ii) OPERATING ASSISTANCE – provide grants to states and eligible entities to operate a pre-negotiated subsidized/pooled environmental insurance program. Applicants must demonstrate the feasibility of the proposed program. The maximum grant is $2 million. The maximum term of the grant is five years. Grants require a 50% non-federal match. Eligible activities include:

(a) – the cost of providing subsidized environmental insurance to an eligible entity or a Bona Fide Prospective Purchaser for one or multiple brownfields sites,

(b) – the cost of managing a discounted or subsidized pre-negotiated environmental insurance program.

(iii) RANKING CRITERIA – The Administrator shall develop ranking criteria for reviewing applications under this section. The criteria shall include:

(a) – the degree to which the applicant has demonstrated the capacity to manage the program;

(b) – the degree to which the applicant has demonstrated demand for the program.

"RECYCLING AMERICA'S BROWNFIELDS ACT"

REMOVE BARRIERS TO LOCAL GOVERNMENTS ADDRESSING MOTHBALLED SITES

CURRENT SITUATION & PROBLEM

Local governments throughout the country have long recognized the harm abandoned and underdeveloped brownfield properties can pose to their communities. Properties that lie idle because of fear of environmental contamination, unknown cleanup costs, and liability risks can cause and perpetuate neighborhood blight, with associated threats to a community's health, environment, and economic development.

Local government property acquisition authority is one of the key tools to facilitate the redevelopment of brownfields. Through a variety of means including tax liens, foreclosures and the use of eminent domain, local governments can take control of brownfields in order to clear title, conduct site assessment, remediate environmental hazards, and otherwise prepare the property for development by the private sector or for public and community facilities.

Although property acquisition is a vital tool for facilitating the development of brownfields, many local governments have been dissuaded by fears of environmental liability. The primary federal environmental liability law, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), was also amended to include liability defenses and exemptions that may protect local governments that "involuntarily" acquire brownfields. A substantial number of local governments avoid acquiring brownfield sites because of fear of environmental liability due to the

A secondary problem is that many potential brownfields projects on publicly-owned sites have been ruled ineligible, in part, because the localities cannot satisfy the requirements to establish "involuntary acquisition."

EXAMPLES

Allied-Signal (now Honeywel). This 27-acre site, located downtown, on the waterfront near Baltimore's famed Inner Harbor, was heavily contaminated with chromium from Allied Chemical's manufacturing operation which closed in 1985. Allied-Signal carried out a $100 million cleanup/containment remediation. In 2002, a partnership between Struever Brothers, Eccles & Rouse and H & S Bakeries took control of the property. The site's master plan called for the construction of 1.8-million square feet of mixed-use space and a number of internal streets. While these streets were originally proposed to be constructed by the developer, the plans were turned over to the City. The City Law Department was opposed to the City having any ownership or right-of-way of land that had been the subject of the

cleanup. They feared that in the future, if the containment remedy failed or if there were toxic tort lawsuits, the City could be the only deep pocket left in the chain of title to be held accountable. The Law Department's point of view prevailed. The developer eventually figured out a way to develop the property with all private streets. The project was slowed significantly but currently plans are proceeding for the first major building on the site.

Wisconsin. The State of Michigan reported that a small town that had acquired a key downtown site in the 1990's was ruled ineligible for an RLF sub-grant because it could not demonstrate AAI, and EPA determined that the acquisition did not qualify as an "involuntary acquisition." Following this precedent, Michigan advised numerous other communities that they do not qualify for EPA funding.

PROPOSED APPROACH

1. Liability protection for state and local government: Two key provisions in CERCLA directly address the liability of local governments when they purchase property. Unfortunately, the two provisions are inconsistent, ambiguous, and confusing. A unified and simplified liability exemption for local government brownfield ownership would lessen confusion and provide the certainty needed to cleanup and redevelop brownfield sites. The Coalition recommends two alternative approaches to statutory language that would clarify the liability of local governments when they acquire property that is, or may be, contaminated.

2. Give EPA authority to promulgate regulations. With the ability to influence regulation, EPA could address many of the uncertainties and ambiguities in the current law. It is unrealistic to expect legislation to anticipate all possible scenarios in which a local government may be liable for cleaning up and redeveloping brownfields. Statutory reform is needed to grant EPA clear authority to draft regulations on the acquisition by local governments of contaminated property. This authority would enable EPA to clarify ambiguities without Congressional action.

As discussed above, courts have issued rulings on the interpretation of the involuntary acquisition protections that conflict with other court opinions or with EPA's interpretations of the same provisions. Under the recent *Brand X* decision by the U.S. Supreme Court,51 EPA may be empowered to resolve present and future conflicts in the courts through regulations. EPA currently does not "have authority to, by regulation, define liability for a class of potential defendants" under CERCLA. Granting EPA clear authority to promulgate regulations on the definition of involuntary acquisitions would help to resolve ambiguities in the law.

PROPOSED LEGISLATIVE LANGUAGE

Amendment 1 - Liability protection for state and local government. *There are two alternate amendments.*

Alternate 1-A. The first approach would amend section 101(20)(D) to establish a simplified clear exemption from CERCLA liability for local governments that acquire brownfields sites

(D) The term "owner or operator" does not include a unit of state or local government which:

i. acquired ownership or control . . . by virtue of its function as a sovereign; or

ii. owns a brownfield, as defined by section 101(39), and exercises due care with respect to any known contamination at the site.

Alternate 1-B. The second approach would amend section 101(20)(D) of CERCLA to include language which would clarify that the acquisition of property by eminent domain would fall within this exemption.

> "The term 'owner or operator' does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, through the exercise of eminent domain authority by purchase or condemnation**,** or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign."

Amendment 2. Give EPA authority to promulgate regulations: Add a sentence to the end of section 101(20)(D) of CERCLA to read as follows:

"EPA shall have the authority to promulgate regulations on the liability of state and local governments as described in this paragraph."

"RECYCLING AMERICA'S BROWNFIELDS ACT"

EXTEND BONA FIDE PROSPECTIVE PURCHASER PROTECTIONS TO INNOCENT PROSPECTIVE LEASEHOLDERS

CURRENT SITUATION & PROBLEM

An oversight in the 2002 reforms left lessees vulnerable to liability on properties they are cleaning up. The Brownfields Revitalization Act failed to clearly provide innocent prospective lessees of contaminated property BFPP immunities if the lessee is directly leasing property from the owner and if the owner is not classified as a bona fide prospective purchaser. The lessee may have undertaken all appropriate inquiry prior to entering into the lease agreement, and may be managing cleanup as part of appropriate care requirements, but the lessee is still not protected as a bona fide prospective purchaser.

Lessees should be treated similarly to "innocent purchasers" under BFPP as such lessee's, if they obtain the BFPP status, will characterize and potentially cleanup brownfields sites for redevelopment. The inconsistent application of the law inhibits brownfields cleanup and encourages the "mothballing" of sites owned by large corporate entities, who may be reluctant to sell a site (because of liability exposure), but are willing to grant a long-term lease.

A minor clarification of the law should allow would allow and encourage these kinds of transactions.

EXAMPLES

1. Prospective lessee plans to utilize a site for a mixed us retail, commercial and residential facility. The fee owner of the land is willing to lease the property and discloses that certain contamination may exist. The lessee, even if it undertakes all appropriate inquiry steps can risk liability at the site as its status as a lessee, even though the lessee is redeveloping the site and even though if it were the fee owner of the land and undertook the exact same actions, it would enjoy BFPP protection. The lessee will question whether the CERCLA risk is worth proceeding.
2. Larger corporate owners of contaminated brownfields are concerned that buyers, redevelopers and/or end users of such properties may fail to complete the cleanup to regulatory standards, or may breach remedial controls in the future and cause a release. If such owners could maintain control and oversight of the remediation and future land uses at the site through a long-term ground lease, their concerns would be addressed and cleanup initiated. The responsible party could be confident that the remediation would meet regulatory requirements and maintain contractual control over the cleanup and use of the property, oversee and inspect the property, approve sub-tenancies and all occupancy and use changes, and be protected through ongoing contractual remedies for unauthorized use by the lessee.

PROPOSED APPROACH

The BFPP definition should be amended to include innocent prospective lessees of contaminated property owned and/or leased by a party potentially liable for response costs.
For such sites, an innocent prospective lessee would have to demonstrate that it performed all appropriate inquiries and meet all other BFPP qualifications that would apply to lessees. If property lessees and tenants of the owners of cleaned brownfields can obtain CERCLA liability protections after conducting all appropriate inquiries and complying with the "due care" or "continuing obligations" provisions of CERCLA, there may be an incentive for owners of mothballed properties to clean up and lease their properties.

PROPOSED LEGISLATIVE LANGUAGE

Amend Section 101(40) of CERCLA as follows:

> "(40) Bona fide prospective purchaser. The term "bona fide prospective purchaser" means a person (or a tenant of a person) that acquires ownership or a leasehold interest of a facility after the date of the enactment of this paragraph [enacted Jan. 11, 2002] and that establishes each of the following by a preponderance of the evidence:"
>
> . . . .
>
> (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 leasehold interest acquired after the date of the enactment of this paragraph [enacted Jan. 11, 2002], 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.

"RECYCLING AMERICA'S BROWNFIELDS ACT" ENCOURAGE UST VOLUNTARY CLEANUPS

CURRENT SITUATION & PROBLEM

Under the existing federal brownfields law, (see section 128(b) "Enforcement in Cases of a Release Subject to a State Program"), Congress expressly provided landowners a federal enforcement bar under CERCLA §106(a) or §107(a) if the landowners/developers have enrolled their brownfield site into an existing state clean-up program and are successfully completing (or have completed) the state prescribed remedial action plan. This bar on federal enforcement was Congress' method of streamlining the administrative process, reducing delay, and providing landowners/developers the prerequisite regulatory clarity needed to undertake brownfields redevelopment. Under the existing federal brownfields law, Congress recognized the primacy of state clean-up programs to both determine clean-up standards for brownfields sites and confirm when those clean-up standards have been successfully achieved.

Unfortunately, Congress failed to extend those same critical incentives and enforcement protections for two categories of pollutants which are common on most brownfield sites such as petroleum from abandoned underground storage tanks and PCBs from electrical equipment, which are specifically excluded from the definition of an eligible "brownfield site" (see 42 U.S.C.A. §9601(39)(B)) along with additional statutory and regulatory barriers under TSCA and RCRA preventing these brownfield sites from being remediated under existing state clean-up program and brought back to productive reuse.

The current federal brownfields law protects qualifying prospective purchasers from both the liability for contamination caused by a previous owner and the risk of federal enforcement action because of prior contamination. Because the existing federal brownfields law only applies to CERCLA liability, this prospective purchaser provision does not apply to the estimated 600,000 sites with USTs where a release of petroleum has potentially occurred. Under the Resource Conservation and Recovery Act (RCRA), the federal statute that governs UST systems, anyone who owns a property which contains a UST system that was in use on or after 1984 may be considered an "owner" or "operator" of that UST system and is thereby potentially subject to RCRA liability, including compliance orders and civil penalties as high as $32,500 per day. Unfortunately, the current "prospective purchasers" provisions under the existing federal brownfields law do not provide any protections against RCRA liability. This failure to include a prospective purchaser provision in RCRA leaves developers and future owners of former UST sites unnecessarily at risk for future enforcement actions.

EXAMPLES

Thousands of UST cleanups have been undertaken under state programs, and many states offer a degree of liability protection from state enforcement actions. However, the lack of either liability protection or an enforcement bar at the federal level, leaves innocent purchasers with a level of risk that is higher than it should be. This level of risk is minor in the larger scheme of brownfields cleanups, and may not dissuade the purchaser; never-the-less, it is in the public interest to lower barriers and minimize risks to brownfields developers.

PROPOSED APPROACH

The purpose of these amendments is to establish defenses to liability under RCRA's underground storage tank program similar to those available under CERCLA for persons qualifying as bona fide prospective purchasers (BFPPs) and to persons cleaning up petroleum releases under State Programs. Currently, under CERCLA, a person who qualifies as a BFPP (i.e., complies with the "all appropriate inquiry rule" prior to acquisition and takes certain other steps with respect to contamination at the property) is excluded from CERCLA liability. In addition, CERCLA currently precludes EPA from requiring a federal cleanup at "eligible response sites" (i.e., brownfield sites) for releases that are being cleaned up under State Programs. The amendments set forth below amend RCRA to provide similar relief under that statute by establishing that:

- That persons who qualify as BFPPs under CERCLA and who are not managing an underground storage tank (UST) or otherwise conducting commercial petroleum activities and are not subject to liability as an owner or operator of a UST (Amendment 2); and
- Petroleum brownfield sites (a newly defined term – Amendment 1) that are cleaned up under State Programs are not subject to federal enforcement under RCRA's underground storage tank program (Amendment 3).

PROPOSED LEGISLATIVE LANGUAGE

Amendment 1. ***Amend RCRA to add the term "petroleum brownfield site" Title 42, Chapter 82, Subchapter IX, new subsection 6991(9), as follows:***

Sec. 6991. Definitions and exemptions

For the purposes of this subchapter--

* * * * *

(9) (A) In general. The term "petroleum brownfield site" means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of petroleum or petroleum products excluded from the definition of "hazardous substances" under 42 USC 9601(14).

(B) Exclusions. The term "petroleum brownfield site" does not include any facility excluded from the definition of "brownfield site" under 42 USC 9601(39)(B).

Amendment 2. Amend RCRA Section 9003(h)(9) as follows to exclude Innocent Landowners and BFPPs from the terms "owner" and "operator" with the same conditions and requirements as under CERCLA.

Sec. 6991b. Release detection, prevention, and correction regulations

* * * *

(h) EPA response program for petroleum

* * * * *

(9) Definition of owner or operator

(A) In general

As used in this subchapter, the terms ``owner'' and ``operator'' do not include a person that, without participating in the management of an underground storage tank and otherwise not engaged in petroleum production, refining, or marketing, (1) holds indicia of ownership primarily to protect the person's security interest, or (2) did not know and had no reason to know that any petroleum which is the subject of a release or threatened release at the property was disposed of on, in or at the property, or (3) is a bona fide prospective purchaser who does not impede the performance of a response action or natural resource restoration.

* * * * *

(D) Innocent Landowners and Bona Fide Prospective Purchasers

The provisions regarding all appropriate inquiries in subparagraph 9601(35)(B) of this title shall apply in determining a person's liability as an owner or operator of an underground storage tank under subsection (A)(2), and the definition of bona fide prospective purchasers in section 9601(40) of this title shall apply in determining a person's liability as an owner or operator of an underground storage tank for purposes of subsection (A)(3), except that for purposes of this subchapter all references to hazardous substances in section 9601(35)(B) and 9601(40) shall be deemed to include petroleum.

Amendment 3 - Amend RCRA Section 9006 to establish within the petroleum program the same federal enforcement bar as that adopted in 2002 for CERCLA/Brownfields (affects only sites in a qualified state program), as follows:

Sec. 6991e. Federal Enforcement

* * * * *

(e) 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 a petroleum brownfield site at which—

(i) there is a release or threatened release of petroleum or a petroleum product excluded from the definition of hazardous substances under 42 USC 9601; and

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

the President may not use authority under section 6991b(h) or 6991e of this title or recover response costs under section 6991b of this title against the person regarding the specific release that is addressed by the corrective action.

(B) Exceptions

The President may bring an administrative or judicial enforcement action under this chapter during or after completion of a corrective action described in subparagraph (A) with respect to a release or threatened release at a petroleum brownfield site described in that subparagraph if—

(i) the State requests that the President provide assistance in the performance of a corrective 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 corrective actions are likely to be necessary to address, prevent, limit, or mitigate the release or threatened release; or

(iv) the Administrator, after consultation with the State, 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. Consultation with the State shall not limit the ability of the Administrator to make this determination.

(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 corrective actions have been completed in the previous year and are planned to be addressed under the State program that specifically governs corrective 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 corrective 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) of this section 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 a petroleum brownfield site at which there is a release or threatened release of petroleum 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 petroleum brownfield 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 one 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 this amendment], 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 chapter between a State agency or an Indian tribe and the Administrator that is in effect on or before [the date of this amendment] (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 corrective actions conducted after [the date of this amendment].

"RECYCLING AMERICA'S BROWNFIELDS ACT"

ENCOURAGE PCB VOLUNTARY CLEANUPS

CURRENT SITUATION & PROBLEM

Under the existing federal brownfields law, (see section 128(b) "Enforcement in Cases of a Release Subject to a State Program"), Congress expressly provided landowners a federal enforcement bar under CERCLA §106(a) or §107(a) to all landowners/developers who have enrolled their brownfield site into an existing state clean-up program and are successfully completing (or have completed) the state prescribed remedial action plan. This bar on federal enforcement was Congress' method of streamlining the administrative process, reducing delay, and providing landowners/developers the prerequisite regulatory clarity needed to undertake brownfields redevelopment. Under the existing federal brownfields law, Congress recognized the primacy of state clean-up programs to both determine clean-up standards for brownfields sites and confirm when those clean-up standards have been successfully achieved.

Unfortunately, Congress failed to extend those same critical incentives and enforcement protections for two categories of pollutants which are common on most brownfield sites such as petroleum from abandoned underground storage tanks and PCBs from electrical equipment, which are specifically excluded from the definition of an eligible "brownfield site" (see 42 U.S.C.A. §9601(39)(B)) along with additional statutory and regulatory barriers under TSCA and RCRA preventing these brownfield sites from being remediated under existing state clean-up program and brought back to productive reuse.

Under existing brownfields law a landowner/developer who is remediating a property with PCB-contaminated soil (e.g., from a historic leak from a PCB-containing transformer), would enroll his/her property in an existing state clean-up program. The state requires that the landowner/developer conduct extensive environmental sampling and monitoring to determine PCB levels. The state then uses the environmental sampling data to identify the appropriate state and federal PCB clean-up standards the landowner/developer must achieve.

Unlike most federal environmental statutes, no aspect of the federal TSCA PCB program is currently delegable to the states. This means, as a practical matter, that state-supervised PCB cleanups – no matter how stringent and comprehensive – must also generally go through a second round of evaluation by EPA under EPA's own array of PCB cleanup procedures and mechanisms established under TSCA (*e.g.*, different sampling and site-certification cleanup measures). This second layer of federal oversight results in a duplicative, confusing and protracted regulatory regime for voluntarily cleaning up any PCB site. In most cases landowner/developers can and do remediate PCB contaminated properties under existing state clean-up programs to the same levels as required under the federal PCB program; however, the redundant layer of federal involvement causes significant delays and often times unwarranted additional expenditures. The specter of duplicative federal oversight and the resulting delays serves as a significant disincentive to landowners/prospective purchasers entering state voluntary cleanup programs for PCB sites.

To remove this statutory disincentive to voluntarily cleaning-up sites contaminated with PCBs, the first amendment set forth below would establish that the remediation of PCB sites under

qualified State cleanup programs satisfy the federal requirements established under TSCA section 6(e) for cleaning up releases of PCBs. This amendment is patterned after the provision in CERCLA that provides protection from CERCLA liability for purchasers/developers who cleanup contaminated sites in accordance with qualified State response programs. *See* CERCLA section 128(b), 42 U.S.C. § 9628(b)). The rationale underlying this amendment is that if the PCB contamination is addressed in a manner that is deemed protective under CERCLA, then such qualified State cleanup should also be deemed protective under TSCA.

These amendments are necessary because EPA has taken the position that *innocent* purchasers of PCB-contaminated property (*i.e.*, persons who are not responsible for the release of PCBs that contaminated the site) are nonetheless obligated to clean up the property because their mere ownership of the contaminated property constitutes the "unauthorized use" of PCBs. *See* EPA PCB Site Revitalization Guidance Under the Toxic Substances Control Act (November 2005), at pp. 1-2. Under EPA's interpretation of TSCA, the continuing presence of PCBs on the property constitutes the unlawful "use" of the PCBs, thus subjecting the new owner to potentially significant TSCA monetary penalties. Placing innocent parties interested in remediating PCB-contaminated sites into immediate non-compliance with TSCA by the mere act of purchasing the property intended for cleanup is a significant practical and legal impediment to cleaning up these sites. The amendment set forth below would correct this disincentive by establishing that qualified innocent purchasers are not subject to liability under TSCA resulting solely from the pre-existing PCB contamination on the subject property.

EXAMPLES

Belinda Pesti, Cleveland's Assistant Director for Economic Development, called the cost and liability issues associated with RCRA "the biggest issue facing the entire Cuyohoga River Valley in the City of Cleveland and its revitalization. The City tries to steer clear of (ownership/liability for) any site with RCRA or PCB's …because of major costs, unknown timelines, and duplication of process and oversight."

A number of state Voluntary Cleanup Program directors have indicated that sites contaminated with PCB's tend to proceed much more slowly and are sometimes dropped altogether because of federal involvement in oversight.

PROPOSED APPROACH

- **Amendment No. 1** - Modifies CERCLA's definition of "Brownfield site" to expand the protection from CERCLA liability to include persons cleaning up sites contaminated by PCBs under a State Program. To do this, it is necessary to remove the exclusion from the definition of "Brownfield site" for facilities on which there have been releases of PCBs where such releases are subject to remediation under the Toxic Substances Control Act ("TSCA"). Once that exclusion is removed from the definition, facilities at which there have been releases of PCBs will be included in the definition of a "Brownfield site" and persons cleaning up such site will be eligible for protection from CERCLA liability.
- **Amendment No 2 (a)** - Allow the cleanup of PCBs under qualified State cleanup programs to satisfy the requirements for the cleanup of PCBs under TSCA section 6(e), and (b) establish defenses to TSCA liability similar to those available under CERCLA for persons qualifying as "bona fide prospective purchasers" ("BFPPs") and "innocent purchasers" of contaminated properties.

- **Amendment 2 (b**) - Ensure that persons purchasing PCB-contaminated sites for purposes of redevelopment will not be subject to TSCA liability simply by their mere purchase of the property if such persons otherwise qualify as a "bona fide prospective purchaser" ("BFPPs") or "innocent land owners" as those terms are used under CERCLA.

PROPOSED LEGISLATIVE LANGUAGE

Amendment No. 1 - Amendment to CERCLA to Include PCB Sites Within The Definition of "Eligible Facility" for Purposes of CERCLA "Brownfield Site" Protection.

Amend CERCLA section 101(39)(B) as follows:

"(39) Brownfield site

(A) In general

* * * * *

(B) Exclusions

The term 'brownfield site' does not include -

* * * * *

~~(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~~[1]~~"~~

Amendment No. 2 - Amendments to TSCA to Allow For State Cleanups of PCBs and to Provide BFPP and Innocent Landowner Protection from TSCA PCB Liability

Amendment 2 (a) - Amend TSCA to Recognize State Cleanup of PCBs and to define circumstances when EPA is allowed to override state decisions (same "enforcement bar" as CERCLA/brownfields)

1. Amend section 6(e)(5) of TSCA (15 U.S.C. § 2605(e)(5)) by adding the following text :

"(5) (A) Except as provided subparagraph (B), this subsection does not limit the authority of the Administrator, under any other provision of this

[1] A number of conforming changes are needed – to be supplied on request.

chapter or any other Federal law, to take action respecting any polychlorinated biphenyl.

B. Except as provided in subparagraph (C) and subject to subparagraph (D), in the case where:

(i) there has been a release of polychlorinated biphenyls at a facility meeting the definition of an eligible response site, as defined in 42 U.S.C. § 9601(41); and

(ii) a person is conducting or has completed a response action regarding the specific release of polychlorinated biphenyls that is addressed by the response action that is in compliance with the State program that specifically governs response actions so as to prevent an unreasonable risk of injury to health or the environment,

Such cleanup under the State program shall be deemed to meet any applicable requirement prescribed in this section, or applicable rule promulgated under this section, with respect to the disposal of polychlorinated biphenyls.

(C) Exceptions

The Administrator may determine that the disposal of polychlorinated biphenyls described under subparagraph B warrant further action under a requirement prescribed in this section, or a rule promulgated under this section, where

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

(ii) the Administrator determines that the polychlorinated biphenyl contamination has migrated or will migrate across a State line, resulting in the need for a further response action to prevent an unreasonable risk of injury to health or the environment, or the Administrator determines that the polychlorinated biphenyl 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) further action is necessary to address an imminent hazard associated with the polychlorinated biphenyl contamination, or

(II) additional response actions are likely to be necessary to address, prevent, limit, or mitigate the polychlorinated biphenyl contamination; or

(iv) the Administrator, after consultation with the State, 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 polychlorinated biphenyl contamination presents a threat requiring further remediation to prevent an unreasonable risk of injury to health or the environment. Consultation with the State shall not limit the ability of the Administrator to make this determination.

(D) Public record -- Subparagraph B extends only to the disposal of polychlorinated biphenyls 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 corrective actions for releases from the disposal of polychlorinated biphenyls have been completed in the previous year and are planned to be addressed under the State program that specifically governs corrective 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 corrective action with respect to polychlorinated biphenyls at the site, will be suitable for unrestricted use and, if not, shall identify the institutional controls relied on in the remedy.

(E) EPA notification

(i) In general

In the case of a eligible response site at which there is polychlorinated biphenyl contamination and for which the Administrator intends to carry out an action that may be barred under subparagraph (B), 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 (ii), 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 polychlorinated biphenyl contamination at the eligible response site 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 one or more exceptions under subparagraph (B) are met.

(F) Report to Congress

Not later than 90 days after the date of initiation of any supplemental action by the Administrator under clause (C), (D), or (E) of this subparagraph, the Administrator shall submit to Congress a report describing the basis for the supplemental action, including specific references to the facts demonstrating that the supplemental action permitted under this subparagraph (B).

(G) Effective date

This subsection applies only to State cleanups conducted after [the date of this amendment]."

2 Amend section 16 of TSCA (15 U.S.C. § 2615) by adding the new subparagraph (c) at the end thereof:

"(c) Enforcement of State PCB Cleanups

Any person who engages in the cleanup of polychlorinated biphenyls at a facility under section 2605(e)(5)(B) shall not be subject to penalties or enforcement under this section for any violation under section 2614 concerning the disposal of polychlorinated biphenyls at such facility unless the Administrator takes further action with respect to such disposal of polychlorinated biphenyls under section 2605(e)(5)(C)."

Amendment 2(b) - to TSCA to Provide Enforcement Protection for BFPPs and Innocent Land Owners

Amend section 15 of TSCA (15 U.S.C. § 2614) by adding the new subsection at the end thereof:

(4) Innocent Purchasers of PCB-Contaminated Property – Purchasers of facilities that are contaminated with polychlorinated biphenyls who are otherwise excluded from liability under 42 U.S.C. § 9607(a)(1) for such pre-existing contamination because they qualify for liability protection under 42 U.S.C. § 9607(b)(3) or 42 U.S.C. § 9607(r)(1), shall not be subject to civil penalties under this section with respect to such pre-existing contamination of polychlorinated biphenyls at such facilities.

"RECYCLING AMERICA'S BROWNFIELDS ACT"

IV. ENHANCED ASSISTANCE FOR HIGH PRIORITY COMMUNITIES AND SITES

"RECYCLING AMERICA'S BROWNFIELDS ACT"

OFFER EPA STAFF FOR DISADVANTAGED COMMUNITIES, SMALL COMMUNITIES, AND RURAL COMMUNITIES

CURRENT SITUATION & PROBLEM.

The growing success of brownfields redevelopment is unevenly distributed across America, - many disadvantaged communities and small or rural communities have not benefited. Many of these communities are affected by, not only abandoned industrial facilities, but also poverty, joblessness, injustice and fiscal distress. The job of promoting brownfields revitalization in these communities is often doubly difficult, partly because of poor market conditions, and partly because of lack of staff resources to get incentives lined up and to market their properties. The problem is further compounded by historic land use patterns that have resulted in often disproportionate impacts of living near contaminated properties, landfills, and polluting industries.

Utilizing loaned federal employees was a strategy that was successfully employed in EPA's Brownfields Showcase Communities program; that approach should be replicated, but targeted to communities that have the greatest need for assistance.

PROPOSED APPROACH

The Act should authorize EPA to provide EPA brownfield staff to small, disadvantaged, and rural communities that need support to build local capacity to cleanup and revitalize brownfields. These staff would be provided via Intergovernmental Personnel Act ("IPA") assignments of up to three (3) years to localities, States, Tribes, and eligible non-profit organizations that competitively apply for an IPA assignment. The Act should authorize the establishment of 50 of these Brownfield Builder IPA positions during the reauthorization period.

PROPOSED LEGISLATIVE LANGUAGE

Amend CERCLA 104 (K) – new section, as follows:

(13) ASSISTANCE FOR DISADVANTAGED, SMALL, AND RURAL COMMUNITIES - EPA shall develop a program of providing staffing assistance to disadvantaged, small, and rural communities that are impacted by brownfields sites.

(A). EPA may make use of the Intergovernmental Personnel Act and the Senior Environmental Employment (SEE) Program in order to provide staff assistance to disadvantaged, small, and rural communities.

(B). Eligible entities shall include local governments; regional councils and associations; quasi-public economic development corporations; and non-profit groups.

(C). EPA shall publish guidelines that define eligible communities and an application process. The criteria for approval shall include: poverty and unemployment; other indicators of economic distress; the extent of

brownfields and other vacant or abandoned properties; population decline, and other factors deemed appropriate by EPA.

"RECYCLING AMERICA'S BROWNFIELDS ACT"

ENCOURAGE BROWNFIELD CLEANUP BY GOOD SAMARITANS

CURRENT SITUATION & PROBLEM

Under current law, if innocent third-parties or "Good Samaritans" are willing to voluntarily clean up a property, even if they do not own or intend to own the site, they can be held liable under CERCLA's joint, several, and strict liability provisions. Further, a government agency or a charitable organization that grants funding for a cleanup, could be held liable.

The law should not discourage individuals or organizations that want to assist with cleanup, as long as they have no responsibility and are not connected to either prior ownership or a prospective purchaser. Such assistance might include: direct response activities; donation of equipment for a response action; and the granting of governmental or charitable funds for a response action.

EXAMPLES

- Contra Costa County is located in the San Francisco Bay area. In the center of county is Mount Diablo, which contains an abandoned mercury mine. In 1952 waste discharge requirements were issued to the mine operators but contaminated discharges continued even after the mine was abandoned in 1971. In 1974 the current owner purchased the site with no intention of mining the site but to reside there. In 1978 the State Water Quality Control Board issued to the owner a Cleanup and Abatement order because it was determined that mercury runoff from the mine was contaminating the water supplies as well as the surrounding area. The current owners have made efforts to cleanup the property and have spent close to $300,000 of their own money. However, the problem still remains.

  Contra Costa County wanted to apply for a grant to remediate the mercury mine in order to reduce the mercury transported from the mine. In light of the lawsuit that the East Bay Municipal Utility District was facing for their own cleanup work at the Penn Mine site, the County Counsel and the Risk Manager determined that the county would be exposed to the same liability if they proceeded. The County withdrew their application. The Flood Control District is still interested in remediating the mine but the liability barrier remains. They are looking for ways to proceed to cleanup the site, without owning the site, without the fear of liability.

- The wildlife restoration group, Trout Unlimited, received a grant from the Agriculture Department to cleanup a watershed area in Utah that was mine-scarred. Their goal was to restore the river to its original condition. Technically, under the current law, because they removed debris from the site, they could be held liable under CERCLA.

PROPOSED APPROACH

Encourage brownfields cleanup and remediation by providing an "operator" exemption from CERCLA liability for non-liable parties that take cleanup action or contribute funding or other substantial support to the cleanup of a brownfield, in conformance with a federal or state cleanup program, but who do not take ownership of that site.

PROPOSED LEGISLATIVE LANGUAGE

Amend CERCLA 101 (20) (H) providing an additional exclusion to the term "Owner or Operator," as follows:

(i) In this section the term "Person" has the meaning described in CERCLA 101 (21).

(ii) In this section the term "brownfield" has the meaning described in CERCLA 101 (39)

(iii) The term "Good Samaritan" means a person that with respect to a brownfield:

a. Did not participate in any way in the creation of or activities causing the historic environmental contamination at the site; and

b. Is not liable or responsible under any Federal, State, or tribal law for the remediation of that site. A person who has an ownership interest in the brownfield site is not eligible to act as a Good Samaritan at such a site, and

c. Is not a prospective purchaser of the site, and

d. Is not a response action contractor, as defined in CERCLA 119 (A); and

e. Is not a lender subject to the provisions of CERCLA 101 (20) (E), and

f. Is contributing to the cleanup of the site through direct response activities or through indirect activities such as the granting of governmental or charitable funds or the donation of equipment or material.

(iv) The term "owner or operator" does not include a Good Samaritan. This provision does not preclude liability for costs or damages as a result of negligence.