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The Brownfields Revitalization and Environmental Restoration Act of 2001: The Benefits and the Limitations

Andrew S. Levine

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ANDREW S. LEVINE†

I. INTRODUCTION

After years of bipartisan wrangling and deadlock surrounding an overhaul of the Comprehensive, Environmental Response, Compensation and Liability Act (CERCLA), the United States Senate has finally hammered out a compromise. The compromise, the Brownfields Revitalization and Environmental Restoration Act of 2001 (the Act) became Public Law No. 107-118 on January 11, 2002. The Act is aimed at spurring the cleanup and development of brownfields. It provides financial assistance to state remediation

† Mr. Levine is Of Counsel at Stradley Ronon Stevens & Young, LLP in Philadelphia, Pennsylvania. Mr. Levine’s practice areas include Environmental Law and Litigation. Mr. Levine received his B.A. magna cum laude and his J.D. cum laude from Tulane University. Mr. Levine extends his thanks to David Burkholder, a summer associate at Stradley Ronon Stevens & Young, LLP, for his assistance in researching and drafting this article.


(A) In General.—The term brownfield site means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.

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

(i) a facility that is the subject of a planned or ongoing removal action under this title;
(ii) a facility that is listed on the National Priorities List or is proposed for listing;

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

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

(v) a facility that—
   (I) is subject to corrective action under section 3004(u) or 3008(h) of the Solid Waste Disposal Act (42 U.S.C. § 6924(u), 6928(h)); and
   (II) to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures;

(vi) a land disposal unit with respect to which—
   (I) a closure notification under subtitle C of the Solid Waste Disposal Act has been submitted; and
   (II) closure requirements have been specified in a closure plan or permit;

(vii) a facility that is subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States, except for land held in trust by the United States for an Indian tribe;

(viii) a portion of a facility—
   (I) at which there has been a release of polychlorinated biphenyls; and
   (II) that is subject to remediation under the Toxic Substances Control Act; or

(ix) a portion of a facility, for which portion, assistance for response activity has been obtained under subtitle I of the Solid Waste Disposal Act from the Leaking Underground Storage Tank Trust Fund established under section 9508 of the Internal Revenue Code of 1986.

(C) Site-by-site determinations.—
Notwithstanding subparagraph (B) and on a site-by-site basis, the President may authorize financial assistance under section 104(k) to an eligible entity at a site included in clause (i), (iv), (y), (vi), (viii), or (ix) of subparagraph (B) if the President finds that financial assistance will protect human health and the environment, and either promote economic development or enable the creation of, preservation of, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes.

(D) Additional areas.—For the purposes of section 104(k), the term brownfield site includes a site that—
(i) meets the definition of brownfield site under subparagraphs (A) through (C); and

(ii) is contaminated by a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802).
programs for brownfields revitalization and restricts authority for enforcement actions under CERCLA in hazardous substance releases addressed by a state response plan.4

On its face, the Act may appear comforting to investors and developers who have earnestly waited for an opportunity to capitalize on the myriad of brownfields opportunities, but the Act's practical reach is severely limited by its own shortcomings. Ultimately, the Act does little to change the weight given to CERCLA and other environmental liability factors in determining whether to invest in brownfields redevelopment.

II. BACKGROUND

Brownfields are lands that have been effectively removed from commercial use due to the presence or potential presence of hazardous substances, contaminants or pollutants.5 Brownfield sites are often located in particularly strategic areas close to existing and well-maintained infrastructure, such as docks, ports, entry and exit ramps, and major roadways.6 Despite the proximity to such infrastructures, brownfields frequently lay blighted and dormant without improvements, and often exist as repositories for local dumping ac-

(1) (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 
(III) is mine-scarred land.

Id.


6. See American Society of Civil Engineers, supra note 5; see also EPA, Brownfields, available at http://www.epa.gov/epahome/hi-brownfields.htm (last visited March 20, 2002) (noting that new development on brownfield sites is made difficult by real or perceived environmental contamination).
tivities.\textsuperscript{7} Parties best able to revitalize brownfield sites, including developers, lenders, and investors, have frequently avoided these properties because of the potential that the owner or operator of the parcel could be held liable for substantial remediation expenses under federal and state environmental laws, such as CERCLA.\textsuperscript{8} While the risk may be small in the aggregate, the economic loss in the event the risk materializes could be catastrophic to the property owner. Lenders are substantially insulated from these risks under CERCLA, which provides broad protection for lenders, as long as they are acting only to protect their security interest in the property at issue.\textsuperscript{9} However, CERCLA does nothing to protect the lender from a borrower who defaults on his loan because he is unable to pay both for an expensive remediation and a sizeable construction loan.\textsuperscript{10}

As a result, prime urban real estate remained as anchors dragging down local economies and as threats to the public health, while jobs and local tax revenues migrated to suburban and rural areas.\textsuperscript{11} Missing from the equation was a method to revitalize these lost centers of commerce and provide would-be developers legal certainty that their efforts to rehabilitate these lands would be a worthwhile investment. The central purpose of the Act is to help property owners and developers take advantage of strategically located properties, rehabilitate any environmental stigma associated with them, provide local governments access to tax revenue from increased real estate values, and help communities designate eli-
ble parcels and give those communities a clear process by which these parcels can become productive.\textsuperscript{12}

III. THE BENEFITS

At its core, the Act pumps money and some certainty into the CERCLA arena. First, the Act authorizes the Environmental Protection Agency (EPA) to provide $1 billion over five years to assist states with brownfields cleanup and remediation programs.\textsuperscript{13} Second, the Act clarifies CERCLA's liability provisions by providing potential exemptions for bona fide prospective purchasers, contiguous property owners, and innocent landowners.\textsuperscript{14} Third, the Act establishes a limited bar to CERCLA enforcement by EPA at sites rehabilitated to the satisfaction of a state remediation program, or for which the State evidences a clear intent to implement a site remediation.\textsuperscript{15}

Under the Act, EPA may authorize grants to eligible entities, including a general purpose unit of a local government, a land clearance authority or other quasi-governmental entity operating under the supervision and control of, or as an agent of, a general purpose unit of local government, a government entity created by state legislature, a regional council or group of general purpose units of local government, a redevelopment agency, a State, and Indian Tribes with narrow exceptions.\textsuperscript{16} The eligible entities take inventory, characterize, assess, remediate, and conduct planning re-


\textsuperscript{14}. See id. at \textsection\textsection 221-23, 115 Stat. at 2368-74 (restricting class of persons personally liable under CERCLA in order to spur redevelopment of brownfields by individuals and companies).

\textsuperscript{15}. See id. at sec. 231(b), 115 Stat. at 2377. Section 231(b) provides, in pertinent part:

Except as provided in subparagraph (B) and subject to subparagraph (C), in the case of an eligible response site at which – (i) there is a release or threatened release of a hazardous substance, pollutant, or contaminant; and (ii) a person is conducting or has completed a response action regarding the specific release that is addressed by the response action that is in compliance with the State program that specifically governs response actions for the protections of public health and the environment, the President may not use authority under this Act to take an administrative or judicial enforcement action under section 106(a) or take a judicial enforcement action to recover response costs under section 107(a) against the person regarding the specific release that is addressed by the response action.

\textsuperscript{16}. See id. at \textsection 211(b), 115 Stat. at 2362 (defining "eligible entity").
lated to brownfield sites. Specifically, the Act appropriates $200 million a year for fiscal years 2002 through 2006 for use by eligible entities across the country. The additional funding is an attempt to give greater local control to the revitalization of brownfield sites.

With the average CERCLA remediation costing about $20 million, investors and developers have been wary of trying to develop a site while running the risk of incurring expensive and often unknown liability. Through the years, EPA has tried to minimize the wariness of potential brownfield investors by allowing the use of "prospective purchaser agreements" and "comfort letters." A prospective purchaser agreement is basically a "no action assurance" to the prospective buyer who purchases contaminated property for redevelopment. EPA will not enforce an action under CERCLA if EPA or the community containing the site derive a clear benefit from the development plan. Comfort letters essentially notify prospective purchasers that EPA does not intend to take enforcement action with respect to the subject parcel based on information

17. See id. at § 211, 115 Stat. at 2363 (defining permissible scope of program established by program Administrator).


19. See Pianin, supra note 4 (noting that Act will give consideration to public needs, including local, state and regional planning objectives).

20. See Reisch, supra note 11 (summarizing effects of high costs of CERCLA cleanup programs).


22. See EPA, Model Prospective Purchaser Agreement, Section VIII, United States' Covenant Not to Sue, available at http://www.epa.gov/brownfields/pdf/9811-8.pdf (last visited Feb. 3, 2002). The EPA's Model Prospective Purchaser Agreement, Section VIII, United States' Covenant Not to Sue provides, in pertinent part:

Subject to the Reservation of Rights in Section IX of this Agreement, upon payment of the amount specified in Section IV (Payment), of this Agreement, the United States [and the state] covenants not to sue or take any other civil or administrative action against Settling Respondent for any and all civil liability for injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a) with respect to the Existing Contamination.

Id.

23. See id.
then known to EPA. The letters are solely informational and not binding, making them substantially less valuable than prospective purchaser agreements.

These initiatives, while conceptually responsive to the concerns voiced by potential buyers of contaminated properties hinge not on the direct operation of law, but rather upon the discretion of EPA. Because these efforts are governed by guidance and policy documents, and not by statute, the process of obtaining such protections can be unclear, and may depend as much on political will as merit. However, the Act provides bona fide prospective purchasers at least some of the uniformity and assurances needed to promote more brownfields redevelopment. The Act affords limited protection from CERCLA enforcement actions to bona fide prospective purchasers to the extent that the release or threatened release of hazardous substances was not the fault of the purchaser, but only if the purchaser makes all appropriate inquiries into the previous ownership, and takes steps to stop, prevent, or minimize exposure to hazardous substances. Moreover, where a bona fide purchaser’s liability is premised solely on his being an owner/operator under CERCLA, the Act absolves the purchaser of liability if he does not impede a response action or natural resource restoration.

Although the Act does not directly increase protection for innocent landowners from CERCLA liability, it does clarify the requirements necessary for an innocent landowner defense. An innocent landowner can defend against CERCLA enforcement by showing that he had no reason to know that there was a hazardous


25. See id. (explaining that “comfort/status letters are provided solely for informational purposes and relate only to EPA’s intent to exercise its response and enforcement authorities under CERCLA at a property based upon the information presently known to EPA.”).


27. See id. at § 222, 115 Stat. 2356, 2372. It is also necessary that the bona fide prospective purchaser provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility, cooperates with and provides access to persons that are authorized to conduct response actions or natural resource restoration at a vessel or facility, complies with institutional controls and land-use restrictions, supplies information sought through a subpoena, and not be affiliated with the person or entity liable for the response costs. See id.

28. See id. at § 222, 115 Stat. at 2371 (stating to avoid liability, prospective purchaser must not have impeded performance or response action or natural resource restoration).
substance release on the property. In order for an innocent landowner to successfully assert the defense, he must satisfy two requirements. First, the landowner must demonstrate to a court that on or before the date on which the landowner acquired the facility, the landowner carried out all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted and good commercial and customary standards and practices. Second, the landowner must demonstrate the taking of reasonable steps to stop any continuing release, to prevent any threatened future release and to prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance. The specific standards and practices will be promulgated not later than two years after the Act is passed, though in the interim typical ASTM Phase I Reports are deemed to suffice, at least for properties purchased after May 31, 1997.

Although EPA has stated that it will not impose CERCLA liability on contiguous landowners unless their activities have led or contributed to the release of a hazardous substance, the risk of becoming a potentially responsible party (PRP) exists. The Act amends CERCLA to statutorily codify the protections afforded to contiguous landowners of contaminated or threatened property. A contiguous landowner holds property touching or similarly situ-

29. See id. at § 223 at 2372 (suggesting innocent landowner can defend against liability from CERCLA enforcement by showing all appropriate inquiries were made).

30. See id.


32. See ASTM, supra note 31 (noting standards and practices, including interim standards and practices). One would have to assume that to the extent the Phase I Report recommended any Phase II or further study, such additional measures would have to be undertaken in order to qualify for this statutory protection. See id.


EPA policies state that the agency will not seek to impose CERCLA liability on residential homeowners unless their activities led to the release, and on owners of land above aquifers contaminated by subsurface migration from outside the property . . . . [Nonetheless,] CERCLA does not exempt a landowner from liability merely because the contamination on his property arrived there from elsewhere . . . .

Id.

34. See id. (protecting contiguous landowners from contaminated or threatened property).
ated to a site that may be contaminated or potentially contaminated. The party seeking protection under this new provision is typically the victim of passive surface or groundwater migration from the known area of a hazardous substance release on a neighboring parcel. The term “facility” in CERCLA includes any area in which hazardous substances “come to be located,” which arguably includes any down gradient property onto which contaminated surface or groundwater flows. Essentially, the Act shields a contiguous landowner from CERCLA liability as an owner of part of the “facility” provided that the owner did not cause or in any way contribute to the contamination, takes reasonable steps to stop the contamination, and cooperates with the appropriate authorities.

The Act’s proposals are groundbreaking, given the long history of CERCLA’s, or perhaps just EPA’s, aversion to deferring enforcement to state remediation programs. States have lobbied for more control over lands held inside their borders, but EPA has been reluctant to give up CERCLA enforcement actions to the states. The experience of conducting numerous remediations has led many states to develop adequate resources and technical expertise to perform their own remedial actions without aid or oversight from EPA. As a result, a developer has no assurance that the fulfillment of all state remediation requirements will free him from any further inquiry or enforcement by the federal government under CERCLA. Generally, the Act exempts sites where an eligible entity is conducting or has completed a response action addressing the specific release that was the impetus of the response.


36. See id. at § 211, 115 Stat. at 2369 (clarifying contiguous property owner not liable if he did not cause, contribute, or consent to release or threatened release).

37. See 42 U.S.C. § 9601(9)(B) (1994) (defining “facility” to also include site or area where hazardous substance has been deposited, stored, disposed of or placed).


39. See Reisch, supra note 11 (noting that states and EPA presently enter into agreements on site-by-site basis which authorize states to undertake many cleanup activities otherwise under EPA’s control).

40. See id. (observing states’ increased experience in managing cleanups as well as now having resources and technical expertise to independently oversee remedial actions).

41. See id. (stating “disagreements between federal and state regulators regarding . . . the ultimate selection of a remedy can significantly delay a cleanup and increase its costs.”).
plan. The provision further limits enforcement actions brought by the President to certain instances, such as where the state requests assistance, contamination migrates across state lines or into federal property, imminent and substantial endangerment to public health or welfare exists, or where additional response actions are likely to be necessary.

Interestingly, petroleum leaks from underground storage tanks are not automatically afforded the rights otherwise applicable to brownfield sites under the Act. These sites are subject to the enforcement deference provisions of Section 231. This provision gives partial relief to owners and operators of sites subject to this form of contamination by generally limiting enforcement to state authorities, if those state programs are deemed adequate under the elements set forth in that same section. It then becomes a matter of state law to afford comprehensive liability protection for such sites.


43. See id. at § 231(b), § 9628(b)(1)(A)(ii), 115 Stat. at 2377 (delineating occasions where President may bring administrative or judicial action under Act).

44. See id. at § 211, 115 Stat. at 2362. The lack of liability protection for petroleum sites present a troubling problem for the Act's efficacy in reducing brownfield sites. See Brownfields Exemption Sought, INSURANCE CHRONICLE, March 11, 2002, at 6. According to National Association of Home Builders, the failure to grant liability relief to innocent parties for sites contaminated with petroleum will hinder revitalization efforts covering roughly half of the brownfields sites in this country. See id. For a further discussion of the problems associated with this lack of liability protection for petroleum sites, see infra notes 78-81 and accompanying text.

45. See Brownfields Revitalization and Environmental Restoration Act of 2001, Pub. L. No. 107-18, § 231(b), 115 Stat. 2356, 2376 (2002) (amending CERCLA and adding to coverage of state response programs under section 231(b)). Section 231(b) prevents the President from exercising administrative or judicial enforcement authority over an eligible response site in the absence of certain conditions. See id. These conditions include instances when a state requests federal intervention when the potential that contamination will spread across state lines and when imminent and substantial endangerment to the public health, welfare, or environment.

46. See id. at § 231(b), 115 Stat. at 2377. Section 231(a) sets forth the elements necessary for a state response program to become eligible for a federal grant from the Administrator. See id. at § 231(b), 115 Stat. at 2376. First, the state or Indian tribe response program must "timely survey and inventory brownfield sites in the State." See id. at § 231(b), 115 Stat. at 2376. Second, the program must contain oversight and enforcement mechanisms to ensure that a response action will protect human health and the environment. See id. at § 231(b), 115 Stat. at 2376. The program must also demonstrate mechanisms adequate to complete the necessary response activities in the event of failure to do so by the group conducting the response action. See id. at § 231(b), 115 Stat. at 2376. Third, the state program must provide meaningful opportunities to allow public participation. See id. at § 231(b), 115 Stat. at 2376-77. Finally, the state program must contain "[m]echanisms for approval of a cleanup plan, and a requirement for verification
sites unless the owner/operator can make a case under section 211.47 This provision allows a petroleum contaminated site to be considered a "brownfield site" if either EPA or the state determine the site poses a relatively low risk in comparison to "other petroleum-only sites in the State."48 This relief only seems available for so-called orphan sites at which there is no potentially responsible party.49 On the one hand, this could be a distinction without meaning given the definition of "bona fide prospective purchaser."50 Section 222 of the Act makes clear that such status attaches to any eligible "facility," the definition of which is broad enough to include service stations.51 On the other hand, much of the focus of the Act itself is providing for the assessment funding mechanisms to allow communities or other eligible entities to assist in transitioning brownfield properties back into productive use, which does not appear to apply to service stations.

Thus, a currently operating service station with historic petroleum contamination in the underlying groundwater may not be eligible for many of the Brownfield Revitalization funding provided in section 211 of the Act, and otherwise available for non-petroleum sites.52 This creates a regrettable situation, since an eligible entity may not be able to assist a financially viable service station owner with loans or assessment funding, whereas a similarly situated

by and certification . . . from the State . . . indicating the response is complete." Id. at § 231(b), 115 Stat. at 2377.

47. See id. at § 211(b), 115 Stat. at 2362 (setting out additional areas covered as brownfield sites). In lieu of an established state response program with all of the necessary elements, a state can also qualify for a grant if it "is taking reasonable steps to include each of those elements . . . ." Id. at § 231(b), 115 Stat. at 2376. Furthermore, a state may obtain a federal grant by executing a memorandum of agreement with the EPA Administrator. See id. at § 231(b), 115 Stat. at 2376.

48. Id. at § 211, 115 Stat. at 2362.

49. See id. at § 211, 115 Stat. at 2361 (requiring that eligible site does not have viable responsible party).


51. See id. at § 222, 115 Stat. at 2371; see also 42 U.S.C. § 9601(9)(B) (1994). For a further discussion of the definition of "facility," see supra note 37 and accompanying text.

52. See Brownfields Revitalization and Environmental Restoration Act of 2001, Pub. L. No. 107-18, § 211(b), 115 Stat. 2356, 2368 (2002). Section 211 of the Act provides for some consideration of the financial need of the applicant for Brownfield Revitalization funding. See id. at § 211(b)(3)(C)(ii), 115 Stat., at 2368. However, in order for a facility to be considered eligible for funding in the first instance, it must first be a "brownfield." The financial viability analysis in that context applies only to the petroleum-contaminated site absent an upfront demonstration that there is no financially viable remediator. See id.
owner of a different form of contaminated property could benefit from such "seed money" funds.53

IV. THE LIMITATIONS

Despite the accomplishments of the Act, there remains potentially serious problems and uncertainty surrounding CERCLA liability. First, the provisions prohibiting enforcement actions against developers that satisfy qualifying state remediation programs contain elements subject to substantial interpretational breadth.54 Second, these provisions do not automatically afford enforcement protections to subsequent purchasers or tenants of the property.55

A severe limitation of the Act is the broad reopener provision.56 The provision allows EPA to bring an enforcement action notwithstanding an adequate State Response Program if "new" information is discovered that was unknown on the earlier of the date on which cleanup was approved or completed and that indicates a threat exists at the facility.57 The Act provides that information is

53. See id. at § 211(b), 115 Stat. at 2363. For example, an eligible entity could provide loan funds to a site owner of a "brownfield site." See id. Such funding, however, may not be available to a service station unless the owner is not financially viable. See id. If the owner does not qualify under that criterion, there is a significant question as to whether that owner is a loan candidate in the first instance. See id. Thus, the owner of a more traditional brownfield site, for example, a lot contaminated with dry cleaning fluid, having a significant cash flow could qualify for brownfield loans under this program. See id. However, a service station with a steady cash flow would not qualify to enter the loan pool. See id.

54. See id. at § 231(b), 115 Stat. at 2376-77 (stating ineligibility of state's response program if it fails to provide adequate opportunity for public comment and participation). For example, if a Pennsylvania developer chooses to implement a remedy under Act 2, attaining state-wide health standards, public input into the nature of the remediation may be minimal. See id.

55. For a further discussion of tenant liability under CERCLA, see infra notes 71-79 and accompanying text.


57. Id. Section 231(b) provides, in pertinent part:

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

(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.

Id.
considered “new” only to the extent it was unknown to the State at the earlier of when the cleanup was approved or completed.\(^{58}\) This provision equates roughly to the typical reopener injected by EPA into Superfund Consent Decrees.\(^{59}\) However, EPA’s reopener generally impacts adversely the same party that entered into the Consent Decree to resolve its outstanding liabilities with EPA. With

\(^{58}\) See id. One would normally assume that a cleanup is always completed before it is approved by the State. In the alternative, if EPA wanted to give a broader interpretation, perhaps the relevant date would be when the State approved the cleanup plan.

\(^{59}\) See EPA, EPA Model RD/RA Consent Decree, available at http://es.epa.gov/oeca/osre/docs/010615-a.pdf (last visited March 22, 2002). Section XXI, Covenants Not to Sue By Plaintiffs, of the Model RD/RA Consent Decree provides, in pertinent part:

91. United States’ Pre-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants a. to perform further response actions relating to the Site, or b. to reimburse the United States for additional costs of response if, prior to Certification of Completion of the Remedial Action:

(1) conditions at the Site, previously unknown to EPA, are discovered, or (2) information, previously unknown to EPA, is received, in whole or in part, and EPA determines that these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment.

92. United States’ Post-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants a. to perform further response actions relating to the Site, or b. to reimburse the United States for additional costs of response if, subsequent to Certification of Completion of the Remedial Action: (1) conditions at the Site, previously unknown to EPA, are discovered, or (2) information, previously unknown to EPA, is received, in whole or in part, and EPA determines that these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

93. For purposes of Paragraph 91, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date the ROD was signed and set forth in the Record of Decision for the Site and the administrative record supporting the Record of Decision. For purposes of Paragraph 92, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of Certification of Completion of the Remedial Action and set forth in the Record of Decision, the administrative record supporting the Record of Decision, the post-ROD administrative record, or in any information received by EPA pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Remedial Action.

Id.
respect to the Act, a "bona fide prospective purchaser" could bear the liability under the reopener.\(^\text{60}\) Thus, a party whose liability is supposed to have been well-defined and limited bears the risk, not the party that has been previously notified by EPA of its liability under CERCLA.\(^\text{61}\)

One specific concern with this reopener is whether it applies to new information discovered after a state approves, even preliminarily or conditionally, a proposed cleanup project.\(^\text{62}\) In implementing the program the remediating party will almost routinely detect "new" information based upon the most recent round of sampling data.\(^\text{63}\) An extreme reading of this provision puts the remediating party at risk of enforcement each time it submits new data to the regulating governmental authority.\(^\text{64}\) Whether this data reveals greater contaminant concentrations than previously detected or entirely new hazardous substances (perhaps daughter products resulting from degradation), the remediating party is placed, at least theoretically, at risk.\(^\text{65}\) Fortunately, the fact EPA must determine that the facility presents "a threat requiring further remediation to protect public health or welfare or the environment" partially tempers this result.\(^\text{66}\) The term "threat" in this context remains unqualified, and largely undefined. To that extent, remediating parties may find themselves subject to oppressive or undesirable loan terms because of the theoretical risk that EPA will employ a low threshold for determining "threat" under this provision. In light of EPA's potential misappropriation, it is not an overstatement to opine that this exception eclipses the value of the brownfield protections under the Act.

\(^{60}\) See Brownfields Revitalization and Environmental Restoration Act of 2001, Pub. L. No. 107-18, § 222(a), 115 Stat. 2356, 2370 (2002) (defining bona fide prospective purchaser as person or tenant of person that acquires ownership of facility who can establish by preponderance of evidence that disposal of hazardous substances at facility occurred prior to person acquiring facility).

\(^{61}\) See id. at § 222, 115 Stat. at 2370 (referring to inquiries bona fide prospective purchaser supposedly makes into previous ownership and use of facility in accordance with accepted commercial and customary standards and practices).

\(^{62}\) See id. at § 231(b), 115 Stat. at 2377-78 (asserting that administrative or judicial enforcement may be brought under Act during or after completion of response action).

\(^{63}\) See id.

\(^{64}\) See id. For the text of section 231(b), see supra note 57.

\(^{65}\) See Brownfields Revitalization and Environmental Restoration Act of 2001, Pub. L. No. 107-18, § 231(b), 115 Stat. 2356, 2377-78 (2002) (stating discovery of contamination or conditions that present threat even after EPA Administrator has consulted with State shall not limit Administrator in making determination of further remediation plans).

\(^{66}\) Id.
Also, the Act fails to protect subsequent owners and tenants from CERCLA liability. It specifically exempts a person who “is conducting or has completed a response action regarding the specific release” under a state response program.\textsuperscript{67} Taken literally, the provision protects only an owner/developer who actually is in the process of conducting or has completed a state response plan, and remains silent with respect to the transferability of the liability exemption.\textsuperscript{68} Once an owner completes a remediation at a brownfield site, no specific provision governs the transferability of the liability protections to the next owner should the current owner seek to sell the parcel.\textsuperscript{69} This result occurs because the prospective buyer did not “conduct” or “complete” any program.\textsuperscript{70} Since the Act is silent on this point, and given the draconian liabilities that could inure to the subsequent owner of a brownfield parcel, EPA will likely require that each new purchaser seek relief under the provisions of the Act. Presumably, given the property’s cleansed status, this new buyer should qualify as a “bona fide prospective purchaser,” and given the known status of the property in question, EPA will probably streamline the approval process.\textsuperscript{71} In that sense, the brownfield protection does not pass from owner to owner and each new purchaser becomes a separately protected party.\textsuperscript{72}

A tenant may face a more difficult process since the Act is geared toward property “purchasers.”\textsuperscript{73} Under the definition of “bona fide prospective purchaser,” the Act refers to tenants, but only in the situation in which a tenant buys the property from its current owner.\textsuperscript{74} Drafters could possibly inject creative language into lease agreements such that a lessee is contributing a portion of

\textsuperscript{67} Id. at § 231(b), 115 Stat. at 2377 (asserting that no administrative or enforcement action may be taken under section 106(a) nor may any judicial enforcement action to recover response costs under section 107(a) be taken).

\textsuperscript{68} See id. (referring to language that excludes persons conducting response actions regarding specific releases of hazardous substance, pollutant or contaminant at eligible response sites).

\textsuperscript{69} See id.


\textsuperscript{71} See id. at § 231(b), 115 Stat. at 2376 (contending that EPA Administrator may take immediate action after giving notice without State reply during or after completion of response action, thereby streamlining approval process).

\textsuperscript{72} See id. at § 222(a), 115 Stat. at 2370-71 (protecting bona fide prospective purchasers making all appropriate inquiries into previous ownership and use of facility within Act's standard and practices).

\textsuperscript{73} See id. at §§ 221-23, 115 Stat. at 2368-74 (exemplifying many sections devoted to property owners).

\textsuperscript{74} See id. at § 222(a), 115 Stat. at 2370 (defining bona fide prospective purchaser to include “tenant of a person” acquiring ownership of facility).
its rent to a site's cleanup. In that sense, EPA can consider a tenant to be a party "conducting" a remediation under Section 231, but it is unclear whether such language will effectively preclude an EPA enforcement action.\textsuperscript{75} This remains an open issue, though it is difficult to imagine EPA taking a uniformly aggressive stance against tenants on this provision. However, until EPA or Congress provides greater clarity, tenants will likely insist upon indemnification from landlords within their lease agreements to insure that if EPA proceeds against the tenant for contamination not of the tenant's creation, the landlord will undertake the necessary response actions. This could create a thorny issue for lease negotiations, but it would be difficult to justify leaving such an issue unresolved within the lease.

Finally, the Act provides extremely limited and highly discretionary protection for sites contaminated by petroleum or petroleum-related substances.\textsuperscript{76} Consequently, despite all the "protections," the Act does not shield developers of sites contaminated by petroleum or petroleum-related substances.\textsuperscript{77} Although such sites may qualify for protection from federal enforcement as an "eligible response site," their inclusion within the definition of "brownfield site" thereby granting bona fide purchaser protections, requires special effort and evaluation by either the state or EPA.\textsuperscript{78} This in itself creates a bureaucratic hurdle that may be both time consuming and arbitrary.

This is a most unfortunate result given the sizeable proportion of potentially eligible sites adversely impacted by petroleum. EPA itself estimates that of the nearly 450,000 brownfield sites dotting the American landscape, nearly 100,000 to 200,000 of those sites contain underground storage tanks or are impacted by petroleum tank leaks.\textsuperscript{79} In addition, owners have traditionally located gasoline service stations in particularly strategic locations, and such locations often make highly desirable redevelopment sites. Thus, the Act

\textsuperscript{75.} See Brownfields Revitalization and Environmental Restoration Act of 2001, Pub. L. No. 107-18, § 231(b), 115 Stat. 2356, 2375-77 (2002) (excluding from enforcement action circumstances where "person is conducting or has completed a response action.").

\textsuperscript{76.} See id. at § 211(a), 115 Stat. at 2362 (referring to additional language defining brownfield site as one that is contaminated by controlled substance or petroleum product not found in definition of hazardous substance under § 101 of Act).

\textsuperscript{77.} See id. at § 231(a), 115 Stat. at 2375.

\textsuperscript{78.} See id. (requiring preliminary assessment or site inspection and consultation with State to determine whether eligible response site).

contains a gaping hole in its coverage that can be rectified only through the ill-defined discretion of the state or EPA.

V. CONCLUSION

Taken as a whole, the Act significantly moves brownfield redevelopment forward. Most importantly, it establishes statutory criteria that an interested party could use to obtain the necessary protections from EPA. This could be especially useful in instances in which EPA is exhibiting limited interest in giving prospective purchaser relief. From the author’s perspective, the successful implementation of this Act will still be a function of EPA’s and states’ political will to undertake such actions. EPA retains significant discretion when taking enforcement action at sites, depending upon the threshold set for determining “threat,” and can eviscerate the case-by-case consideration of including petroleum contamination within the brownfield program.

Most importantly, as long as EPA interprets the Act’s provisions reasonably, the state-deference provisions constitute a significant step forward not only in streamlining remediation planning, but also could serve to enhance the credibility of the state’s program. States will need to be prepared to substantially modify their existing redevelopment programs to meet all of EPA’s delineated approval criteria. However, for innovative developers, the Act may yet provide a meaningful opportunity to bolster investment in those communities in greatest need.