

# CRS Report for Congress

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## **The Brownfields Program Authorization: Cleanup of Contaminated Sites**

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# The Brownfields Program Authorization: Cleanup of Contaminated Sites

## Summary

The Environmental Protection Agency (EPA) defines brownfields as abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. The brownfields program was established administratively by EPA under the aegis of the Superfund program; without explicit authority for it in the law, it has been financed by the Superfund appropriation. The program provides financial and technical assistance to help communities restore less seriously contaminated sites that have the potential for economic development. A combination of potential environmental, economic and social benefits gives this program broad support among governments, environmentalists, developers, and communities.

The program began in 1993 and has grown to include 398 brownfields assessment grants (most for \$200,000 over 2 years); 151 grants of up to \$350,000 (up to \$1 million beginning in FY2001) to establish revolving loan funds to help finance the actual cleanups; 47 job training grants; and 28 Brownfields Showcase Communities where technical and financial assistance from 20 participating federal agencies is being coordinated with state, local and non-governmental efforts.

EPA also addressed some liability and cleanup issues affecting brownfields by changing its hazardous waste site tracking system, and issuing guidance clarifying the situations where it will not bring enforcement actions against brownfield property owners.

FY1997 was the first year brownfields became a separate budgetary line item, at \$37.7 million. For FY2000 the appropriation was \$91.7 million, in FY2001 the appropriation was \$91.6 million, and in FY2002 it is \$97.7 million

The 106<sup>th</sup> Congress extended the brownfields cleanup tax incentive to December 31, 2003, and expanded it to make all brownfields certified by a state environmental agency eligible for the tax break. The provision allows the costs of redeveloping brownfields to be deducted in the current year rather than being capitalized over a period of years. The administration favors making the provision permanent.

Congress passed H.R. 2869 on December 20, 2001, and the President signed it on January 11 (P.L. 107-118). The act provides statutory authority to the brownfields program, authorizes funding at \$250 million per year, and protects certain property owners from Superfund liability. Ten other bills have also been introduced.

This report provides background on the issue (including state voluntary cleanup programs), surveys the Environmental Protection Agency's current program, and reviews congressional action, including a description of the new law. The report will be updated as events dictate. For additional information on legislative activity, see CRS Issue Brief IB10078, *Superfund and Brownfields in the 107<sup>th</sup> Congress*.

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# The Brownfields Program Authorization: Cleanup of Contaminated Sites

The brownfields program to assist in cleaning up less seriously contaminated sites has been popular since its inception in 1993, and has been funded by Congress at about \$91 million for the past 4 years. On January 11, 2002, the President signed H.R. 2869 (P.L. 107-118), an Act which provides the statutory authority the program currently lacks, limits Superfund liability for certain parties, and limits the Environmental Protection Agency's (EPA) authority to intervene at sites cleaned up under state jurisdiction. (A separate title of the Act protects small businesses from Superfund liability if they were responsible for only small amounts of contamination at a site.) This report provides background on the brownfields issue (including state voluntary cleanup programs), surveys EPA's current program, and reviews congressional action, including a description of the enacted law: the Brownfields Revitalization and Environmental Restoration Act of 2001.<sup>1</sup>

## Background

The Brownfields Economic Redevelopment Initiative is an effort begun in 1993 by the EPA to address sites that may be contaminated by hazardous substances,<sup>2</sup> but do not pose a serious enough public health or environmental risk to qualify for cleanup under the Superfund program.<sup>3</sup> The purpose of the program is to provide seed money for activities prior to cleanup, but not to fund the actual cleanup (or "remedial action," as it is called in the Superfund program). The Environmental Protection Agency (EPA) defines brownfields as abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.<sup>4</sup> They range in size from a corner gas station to abandoned factories and mill sites. Estimates of the number of sites

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<sup>1</sup>The name of the enacted law is the "Small Business Liability Relief and Brownfields Revitalization Act." Title I (originally H.R. 1831) is named the "Small Business Liability Protection Act." Title II (originally S. 350) is named the "Brownfields Revitalization and Environmental Restoration Act of 2001."

<sup>2</sup>The degree of contamination ranges from nonexistent to very contaminated but not serious enough to warrant listing on Superfund's National Priorities List.

<sup>3</sup>The Superfund program was created by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, P.L. 96-510).

<sup>4</sup>See EPA's brownfields home page for additional information, available at: [<http://www.epa.gov/swerosps/bf/index.html>]

range from 500,000 to a million;<sup>5</sup> they are often in economically distressed areas. Brownfield sites face a paradox: they are generally not eligible for remediation funding under the Superfund program because they pose a low public health risk while, at the same time, developers may avoid them because of cleanup costs, potential future liability, or related reasons, thereby stalling economic development.

The brownfields program is not specifically mentioned in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or the Superfund law) – it was created administratively by EPA. Congress has recognized it through a separate line item appropriation since FY1997, and there is a desire among many members to formally establish the brownfields program by law and provide it with legislative guidance and structure. Brownfield issues have been the subject of several hearings, and have been discussed in Superfund and appropriations hearings.<sup>6</sup> In the 106<sup>th</sup> Congress approximately 32 bills with significant brownfields provisions were introduced, some of them with broad bipartisan cosponsorship. In 2001, the Senate passed S. 350 (S.Rept. 107-2), which would provide the statutory authority for the program, \$250 million per year for various brownfield initiatives, and relief from Superfund liability for some property owners, among other things.

Support for the brownfields program as it has been operating comes from a wide array of states and localities, environmental groups, business associations, developers, and community activists. Proponents argue that the program has the potential to leverage federal, state, local and private funds to improve the environment by addressing low-level, low-risk contamination that otherwise might not be remediated. Once the environmental problems are remedied, the economic potential of (previous) brownfield sites can be realized, they argue. This might include a wide range of economic uses, possibly creating jobs, recreational opportunities, and local tax revenues. From this, there may be positive social benefits for communities negatively affected by environmental contamination and economic decline.

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<sup>5</sup> “Remarks by the President in Signing of H.R. 2869, the Small Business Liability Relief and Brownfields Revitalization Act,” found at the White House web site: <http://www.whitehouse.gov/news/releases/2002/01/20020111-3.html>

<sup>6</sup>Hearing testimony in the 107<sup>th</sup> Congress is available at the following committee Web sites: for the Senate Environment and Public Works Committee hearing on February 27, 2001: [[http://www.senate.gov/~epw/stmts\\_0.htm](http://www.senate.gov/~epw/stmts_0.htm)] for the House Energy and Commerce Committee hearing on March 7, 2001: [<http://energycommerce.house.gov/107/keywords/Superfund.htm>] for the Transportation and Infrastructure Committee hearing on March 15, 2001: [<http://www.house.gov/transportation/ctisub5.html>] For published hearings in past Congresses, see, for example: U.S. Senate. Committee on Environment and Public Works, Subcommittee on Superfund, Waste Control, and Risk Assessment. *Brownfield Revitalization and Environmental Restoration Act, S. 2700*. Hearing, 106<sup>th</sup> Cong., 2<sup>nd</sup> sess. June 29, 2000; and U.S. House. Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment. *Brownfields Redevelopment and Superfund Reform Legislation*. May 12, 1999.

There are, of course, a variety of federal programs that target urban renewal,<sup>7</sup> and the brownfields program is designed to supplement, not duplicate them. The program itself, as it presently exists, does not aim to perform the cleanups. It generally provides grants which are to serve as catalysts to bring together other resources in the communities to provide the environmental cleanup component of redevelopment efforts. Overall, the brownfields program is intended to fill a previously unmet need and to offer hope for a cleaner environment, new jobs, a stronger tax base, and economic recovery.

**Voluntary Cleanups vs. Brownfields.** One way states are dealing with contaminated sites is through voluntary cleanup programs, which had been adopted by 44 states as of the end of 1997. These programs encourage the owners or developers to work cooperatively with the state outside of the state's enforcement-driven cleanup program, thereby avoiding some of the costs and delays associated with that approach. Cleanup standards are usually identical to those the states enforce at other hazardous waste sites, according to the Environmental Law Institute (ELI).<sup>8</sup> Most states provide incentives for participating in the program – most commonly some form of liability release. Other incentives include a streamlined process, financial or tax incentives, and technical assistance. States created voluntary cleanup programs in the absence of federal legislation or standards, and these programs vary considerably.

States define brownfield sites in different ways, but they usually echo EPA's definition, encompassing "urban industrial or commercial facilities that are abandoned or underutilized due, in part, to environmental contamination or fear of contamination."<sup>9</sup> ELI noted that a few states have different standards or cleanup approaches for brownfields than they do for voluntary cleanup sites. For brownfield sites, Florida provides for site-specific cleanup levels based on risk, allowing institutional or engineering controls instead of the state-wide remediation levels otherwise required. North Carolina allows for alternative cleanup strategies focusing on removal of exposure pathways at certain brownfield sites. And Mississippi did not set specific standards – the statute requires that risk assessment be used.<sup>10</sup> The difference between brownfields and voluntary programs in the states is often a matter of semantics. The Environmental Law Institute distinguished them thus:

Typically, ... voluntary programs do not focus on redevelopment nor do they target urban sites specifically. Rather voluntary programs are more often aimed at getting simple, less contaminated sites cleaned up regardless of whether they are reused. Brownfield programs, on the other hand, are more likely to focus on

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<sup>7</sup> For more information see CRS Report 96-503 GOV, *Community Development Block Grants: An Overview*. 11 p.

<sup>8</sup>Environmental Law Institute, *An Analysis of State Superfund Programs: 50-State Study, 1998 Update*. Washington, 1998. p. 40.

<sup>9</sup> Environmental Law Institute, p. 43.

<sup>10</sup> Environmental Law Institute, p. 46.

redevelopment and be part of a broader State strategy or set of social policies aimed at improving distressed urban areas.<sup>11</sup>

Prior to enactment of P.L. 107-118, the legal underpinnings of the brownfields program were somewhat nebulous, since the program is not mentioned in CERCLA. The authorized uses of Superfund monies are specified in section 111, and cleanup of brownfield sites is not among them. Nevertheless, Congress appeared to tacitly approve the program by providing it a line item in the FY1997 and subsequent Superfund appropriations.

## **EPA's Brownfields Program: Grant-Award Activities**

EPA has redefined and expanded the brownfields program several times. The number of grants to assess brownfields (which EPA calls assessment pilot project awards) has been increased from the original 50 announced in 1995 to nearly 400; brownfields cleanup revolving loan fund grants and job training grants have been initiated; and the Brownfields Showcase Communities have been inaugurated. EPA has also used "targeted brownfield assessments" to hire contractors to conduct assessments, and beginning in FY2000 has provided supplemental awards, and awards for greenspace enhancement.

In addition to these grant programs, EPA has taken several steps to relieve uncertainty over cleanup liability. It has changed the way it keeps track of potentially contaminated sites, and has issued guidances to clarify the situations where it will use its enforcement discretion and not bring legal action to force cleanups, such as against prospective purchasers of brownfields. Several of EPA's actions relate to property transfer, as the sale of real estate is frequently a central element to redevelopment.

**Brownfield Assessment Pilot Projects.** EPA provides funding for brownfields through cooperative agreements with state, local and tribal governments, as well as with multi-jurisdictional authorities such as regional planning commissions and economic development agencies. The awards are for up to \$200,000 over 2 years to be used to bring together governmental entities, community groups, investors, lenders, developers, and other affected parties to address site assessment and cleanup planning issues.

The agency awards grants for the brownfields assessment pilots on a competitive basis. In selecting projects, EPA focuses on firm redevelopment plans, as well as a commitment from the public and private parties to both cleanup and redevelopment after the brownfields assessment is completed. From FY1995 (October 1994) through April 2001, \$78.9 million was awarded to 398 grantees.

**Targeted Brownfield Assessments.** The Targeted Brownfields Assessment program is managed by each of EPA's 10 regional offices. The selection criteria include a strong development potential, a clear municipal-community vision of and support for the property's future use, and a crucial need for the assessment for the project to move forward. The funds are used to hire contractors to identify the

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<sup>11</sup> Environmental Law Institute, p. 44.

extent of contamination at a site when this appears preferable to making an assessment pilot award. Targeted assessments might be used in the case of a small town that does not intend to establish a brownfields program, for example, but does have a site that is ripe for renewal. Through FY2000, EPA has awarded \$32.8 million to fund 500 targeted assessments.

**Supplemental Awards.** Beginning in FY2000 previous recipients of funding for brownfield assessments can receive a supplemental award of \$150,000 for continuation and expansion of their efforts. These, too, are awarded on a competitive basis, as are the greenspace awards.

**Greenspace Awards.** An additional \$50,000 may be awarded to an applicant to assess the contamination of a brownfield site that is or will be used for “greenspace” purposes. Greenspace purposes may include, but are not limited to, parks, playgrounds, trails, gardens, habitat restoration, open space, and/or greenspace preservation. The \$50,000 is available in addition to a brownfield assessment award (\$250,000 total), or in addition to a supplemental award (\$200,000 total).

**Brownfield Cleanup Revolving Loan Fund (BCRLF) grants.** Communities, as well as state and tribal governments, that have received brownfield assessment (or targeted assessment) grants are subsequently eligible for grants for Brownfields Cleanup Revolving Loan Fund pilot projects (BCRLF). The grants, for up to \$500,000, are to enable the recipient to make low interest loans to public or private entities to facilitate the cleanup and redevelopment of brownfields. Originally limited to \$350,000, BCRLF awards can now be made for up to \$1 million over 5 years. Loans may be made to the owner or operator of a facility only if he or she is not liable for the cleanup under CERCLA. It is intended that upon repayment, the loans will replenish the fund to be loaned again for other sites. Some facilities are not eligible for loans: sites on or proposed for the National Priorities List,<sup>12</sup> sites requiring a Superfund removal action within 6 months, and sites where a federal or state enforcement action is planned or underway (including sites that are the subject of a unilateral administrative order, a court order, an administrative order on consent, or a judicial consent decree). Through April 2001, 151 BCRLF grants have been made, totaling \$64.8 million.

**Job Training Grants.** To assure that residents of brownfields communities benefit from the industrial and commercial activities associated with site cleanup, job training grants of up to \$200,000 over 2 years may be awarded to colleges, universities, non-profit training centers, and community job training programs as well as to governmental entities. Their purpose is to train residents of the brownfields communities in handling and removing hazardous materials. The grant recipient must establish procedures to recruit participants from the neighborhoods and to employ them in cleaning up hazardous waste facilities. To the extent possible the trainees are

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<sup>12</sup>The National Priorities List itemizes the most seriously contaminated sites in the U.S. being cleaned up through the Superfund program. For more information, see CRS Issue Brief 10078, *Superfund and Brownfields in the 107<sup>th</sup> Congress*, and CRS Report RL30798, *Environmental Laws: Summaries of Statutes Administered by the Environmental Protection Agency*, p. 67-77.



to include the unemployed, those in welfare-to-work programs, and members of disadvantaged groups. Through December 2000, EPA made 46 awards totaling \$8.7 million.

**State voluntary cleanup program grants.** EPA also provides funds to state and tribal governments to enhance and develop voluntary cleanup programs. Uses of the funds include writing regulations for voluntary cleanup programs, purchasing equipment, paying the salaries of agency staff to develop program procedures, building their own capacity to oversee cleanups, and promoting greater community involvement. EPA has awarded \$41.6 million in this category to the states through FY2000.

## Interagency Efforts and the HUD Program

In July 1996 EPA created a federal Interagency Working Group on Brownfields to share knowledge on economic redevelopment and environmental principles, and to coordinate agency efforts and resources. The most visible outgrowth of their efforts is the Showcase Communities, described below, as is the program of the Department of Housing and Urban Development. More than 20 federal agencies continue to participate, and links to Web sites describing their activities can be found at EPA's "Brownfields Partnerships and Outreach" site:  
[<http://www.epa.gov/swerosps/bf/partnr.htm>]

**Showcase Communities.** The Showcase Communities project is an effort to develop a comprehensive, coordinated federal approach to dealing with brownfields in local communities. Sixteen Showcase Communities were designated in 1998, and another 12 were named in October 2000. These 28 communities of different types (such as urban, rural, coastal) were selected to serve as national models and demonstrate how collaborative support from a variety of federal agencies could be applied successfully to redevelop their brownfields properties. GAO reported that the 10 federal agencies they reviewed had improved their coordination of brownfield activities both within their own agency and between agencies. The showcase communities also acknowledged improvement: "They are now better aware of the federal resources available ... to support brownfield redevelopment and how to access them and are getting more technical and financial help from agencies.... [A] major reason for this success is that EPA loaned a staff person to each city under the Intergovernmental Personnel Act, for 2 years."<sup>13</sup> According to GAO, four professional associations involved with brownfield issues agreed with this assessment.<sup>14</sup>

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<sup>13</sup>U.S. GAO. *Environmental Protection: Agencies Have Made Progress in Implementing the Federal Brownfield Partnership Initiative*. April 1999. 20 p. (GAO/RCED-99-86) Hereinafter cited as GAO 1999 report. p. 9-12.

<sup>14</sup>The professional associations are the Association of State and Territorial Solid Waste Management Officials, the National Association of Counties, the National Association of Local Government Environmental Professionals, and the U.S. Conference of Mayors. GAO 1999 report, p. 11.

**HUD program.** In addition to EPA's program, the Department of Housing and Urban Development (HUD) has its Brownfields Economic Development Initiative (BEDI). BEDI provides start-up funds to attract private financing for brownfield cleanup and redevelopment. The program works through and in conjunction with the Community Development Block Grants and the Section 108 Loan Guarantee programs. BEDI provides funds and loan guarantees to clean up and redevelop brownfields.<sup>15</sup> Congress appropriated \$25 million for BEDI for FY2002.

## **Non-grant Activities: Clarification of Liability and Cleanup Issues, and Outreach**

EPA has also made an effort to address liability and cleanup issues that lenders, developers, and property owners see as barriers to brownfields development.

**CERCLIS: Listing of Sites.** In a key move in 1995, EPA revamped the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS), the Superfund program's database of sites suspected of being contaminated by hazardous substances. As required by law, the worst of the CERCLIS sites (which numbered about 38,000 at the time) are placed on the National Priorities List (NPL) to be cleaned up under the Superfund program. However, no procedures existed to remove less seriously contaminated facilities — many of them brownfields — from the registry, and the stigma of being associated with the Superfund program reputedly often prevented sale or development of CERCLIS-listed properties, even if they had never been contaminated in the first place. Since then more than 32,000 CERCLIS sites have been archived. Procedures are now in place to remove from CERCLIS those sites where no further response action is planned.

**Liability.** EPA issued guidances that addressed the liability status of prospective purchasers of contaminated property, and of property owners with groundwater contamination that originated on neighboring property. The current Senate vehicle, S. 350, would put these protections against liability into law, and would also clarify CERCLA's innocent landowner defense.<sup>16</sup> Other guidances addressed the transfer of federally owned property, aspects of the underground storage tank cleanup program, soil testing, and the RCRA corrective action program.<sup>17</sup> In addition, EPA and the Department of Justice clarified enforcement policy regarding lenders and governmental entities that acquire contaminated property involuntarily. (The 104<sup>th</sup> Congress enacted the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act<sup>18</sup> in December 1996 which essentially incorporated the policy into law.)

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<sup>15</sup>Applications and other information are available at the BEDI website: [http://www.hud.gov/nofa/suprnofa/suprnofa2/bedi.html]

<sup>16</sup>For a detailed discussion of these issues, see CRS report RS20869, *The Liability Exemptions in the Senate Brownfields Bill (S. 350)*. Mar. 30, 2001. 6 p.

<sup>17</sup>This program of the Resource Conservation and Recovery Act (RCRA) exists to clean up currently operating hazardous waste treatment, storage, and disposal facilities.

<sup>18</sup>Public Law 104-208, Omnibus Consolidated Appropriations Act, 1997, §2504.

**Outreach.** EPA is also working to improve communication with minority communities, and to increase their involvement early and meaningfully in the brownfields effort. The Agency's National Environmental Justice Advisory Council (NEJAC) held a series of public hearings in five cities, and released a report containing a number of recommendations to incorporate the communities' own visions of the future and to identify ways to create healthy and sustainable communities.<sup>19</sup> A June 1999 report found that "the quality and scope of community involvement ... minimizes the likelihood that ... complaints [of discrimination under Title VI of the Civil Rights Act] would be raised at brownfield sites and hinder redevelopment of these areas."<sup>20</sup>

## Congressional Action

The popularity of the brownfields program led Congress to approve its rapid expansion from \$8 million in FY1996 to \$87.4 million 2 years later. It also prompted a number of legislative proposals to provide the program with legislative authority and direction, and to give it funding outside the Superfund framework.

## Appropriations

To date, all funding for brownfields has come from Superfund appropriations. For the first years of the program, FY1993 - FY1996, EPA funded brownfield activities without a line item but from money appropriated for the Superfund program. (See **Figure 1**.) In FY1997, proposing major expansion of the program, the agency requested and received \$37.7 million in a line item, specifically for brownfields. That amount was 2.6% of the Superfund appropriation for that year. In addition to continuing the grants for site assessment and other pre-remedial activities, EPA used FY1997 appropriations to support revolving loan funds (RLFs) to help finance actual cleanups. Through these RLFs EPA funded 24 \$350,000 grants to communities.

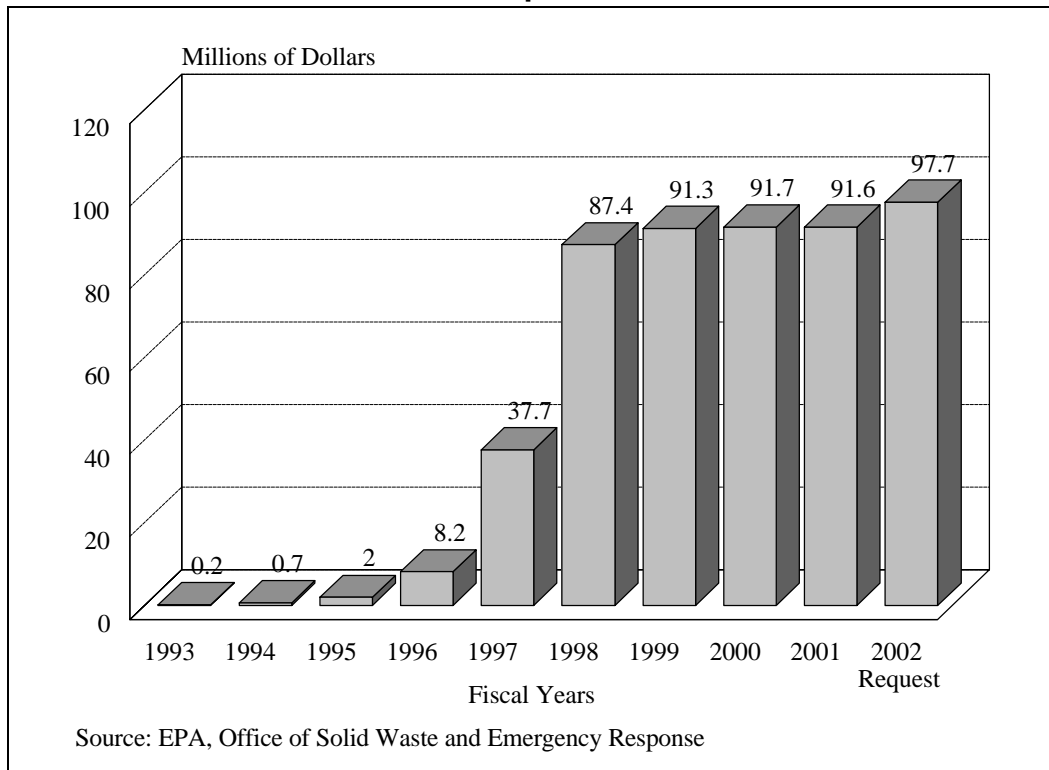
The FY1998 appropriation (P.L. 105-65) increased EPA's brownfields program by \$50 million, to \$87.4 million (5.8% of the Superfund appropriation). It also provided \$25 million for HUD's Brownfield Economic Development Initiative (BEDI), the amount requested by the Administration. However, questioning EPA's authority to use Superfund monies for revolving loan funds (RLF) "to clean up sites

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<sup>19</sup>National Environmental Justice Advisory Council. *Environmental Justice, Urban Revitalization, and Brownfields: The Search for Authentic Signs of Hope*. November 1996.

<sup>20</sup>U.S. EPA. OSWER. *Brownfields Title VI Case Studies: Summary Report*. June 1999. p. 23. (EPA 500-R-99-003). Available at:  
[\[http://www.epa.gov/swerosps/ej/pdf/Report.pdf\]](http://www.epa.gov/swerosps/ej/pdf/Report.pdf).  
 See also: [\[http://es.epa.gov/oeca/main/ej/nejac/index.html\]](http://es.epa.gov/oeca/main/ej/nejac/index.html)

**Figure 1. Brownfields  
Funding: FY1993 to FY2002  
Request**



which are neither emergency in nature nor eligible for NPL listing,<sup>21</sup> the conference committee denied the request unless RLFs were specifically authorized in subsequent legislation.

For FY1999 Congress approved the \$91 million requested by the Administration for the brownfields program, which included funds to capitalize RLFs in 100 communities. HUD's request to double its brownfields funding to \$50 million was rejected; it remained at \$25 million. For FY2000 Congress appropriated \$91.7 million, for FY2001, \$91.6 million, and for FY2002 \$97.7 million, matching EPA's request in all 3 years. HUD's appropriation has remained steady at \$25 million.

On January 11, 2002, the day the Brownfields Revitalization and Environmental Restoration Act of 2001 was signed, EPA announced it would seek \$200 million for FY2003, and the administration would ask for \$25 million for HUD's brownfields program.

<sup>21</sup>H.Rept. 105-297, Conference report to accompany H.R. 2158. p. 121.

## Legislation

**Brownfields Tax Incentive.** A tax incentive allowing the costs of redeveloping brownfields to be deducted in the current year was enacted in the 105<sup>th</sup> Congress as part of the Taxpayer Relief Act of 1997 (P.L. 105-34). Initially good for 3 years, until December 31, 2000, the tax break was extended to the end of 2003 by the 106<sup>th</sup> Congress, and expanded to include all brownfields certified by the appropriate state agency. The administration has announced that it will seek to make the provision permanent, as part of its FY2003 budget request.

The 1997 act limited eligibility for the tax break to the 76 brownfield pilots announced prior to February 1, 1997, areas with a poverty rate of 20% or more, adjacent industrial or commercial areas, and Empowerment Zones and Enterprise Communities (EZ/ECs). The Tax Extenders Act of 1999 (P.L. 106-170) added a year to the life of the incentive to December 31, 2000, and the Consolidated Appropriations Act, 2001 (P.L. 106-554) extended the brownfields tax incentive for an additional 2 years, to December 31, 2003. The latter act also broadened eligibility for the tax break to include any site containing a hazardous substance that is certified by the appropriate state environmental agency; Superfund sites are excluded.

### Tax Incentive Background

A 1994 ruling by the Internal Revenue Service, Revenue Ruling 94-38, held that the costs of cleaning up contaminated land and groundwater are currently deductible, but only for the person who contaminated the land. Also, the cleanup would have to be done without any anticipation of putting the land to a new use. Further, any monitoring equipment with a useful life beyond the year it was acquired would have to be capitalized. On the other hand, a person who acquired previously contaminated land, such as a brownfield site, would have to capitalize his cleanup costs, spreading them out over a number of years. Cleanup costs are a major barrier to redevelopment, and the IRS ruling made a challenging situation even more difficult for developers. The Taxpayer Relief Act thus had the effect of overturning the ruling and allowing developers who had not caused the contamination to deduct cleanup costs in the current year, rather than to have to capitalize them.

Congress enacted this incentive to resolve an issue that arose from the tax treatment of costs of cleaning up contaminated land. In general, costs incurred for new buildings or for permanent improvements to increase the value of a property must be *capitalized* (that is, the cost must be deducted over a period of years). Some expenses, such as repairs, are *currently deductible* (that is, deductible in the year in which the cost is incurred — this is also called *expensing*). It is a considerable financial advantage to be able to fully deduct a cost in one year rather than many.

However, the benefit of the brownfields tax incentive is reduced to a certain degree over time by what is called in tax terminology the “recapture” provision. Recapture mandates that the gain realized from the value of the property when it is later sold be taxed as ordinary income (rather than at the generally lower capital gains rate) *to the extent of the expensing allowance previously claimed*. In effect, the tax

incentive helps to encourage development of brownfield sites by postponing a certain amount of the developer's tax liability in the early days of a project when the developer is spending money to clean up the property. When the developed property is later sold, the deferred tax "comes due" by reason of the recapture provision. As a stimulus to development, the overall value of the brownfields tax break is dependent on a number of factors, including the total cost of the project, the cost of cleanup, how long the developer intends to hold the property before selling it, and the developer's individual tax situation.

**Action in the 107<sup>th</sup> Congress.**<sup>22</sup> Eleven brownfields bills have been introduced in the 107<sup>th</sup> Congress, and one of them, S. 350 (subsequently H.R. 2869) was enacted as P.L. 107-118. See Table 1 on page 15 for a summary of their major provisions.

**S. 350.** Senator Lincoln Chafee, then chairman of the Superfund, Waste Control, and Risk Assessment Subcommittee of the Committee on Environment and Public Works introduced S. 350 on February 15, 2001. The full committee reported it on March 12 (S.Rept. 107-2) with the understanding that negotiations on the "state finality" question would continue. Hearing witnesses have testified over several Congresses that a barrier to cleanup and development at many brownfield sites is the concern that even though a site might meet state cleanup standards and be released from liability under state law (thereby achieving "finality"), the U.S. Environmental Protection Agency could still intervene (or "overfile") and require a second cleanup to meet more stringent federal requirements.

S. 350 has such finality language, but it also contains exceptions that are meant to provide an "environmental safety net," allowing EPA to step in if a threat to public health or the environment is not being met by a state. Some Senators felt that these exceptions to the finality language in the bill were too broad, and that the state should have an opportunity to act before EPA initiates an enforcement action.<sup>23</sup> The post-markup negotiations led to a managers' amendment satisfying their objections which was adopted in the Senate debate on April 25, 2001.

As passed by the Senate, Title I of S. 350 directs EPA to establish: (1) a program to provide grants to characterize, assess, and conduct planning at brownfield sites, and to perform targeted site assessments; and (2) a program to provide grants to capitalize revolving loan funds, or to be used directly to remediate one or more sites. Characterization grants are limited to \$200,000, which EPA may increase to \$350,000 based on the anticipated level of contamination, the size, or the status of ownership of the site. The remediation grants may be awarded on a community-wide or site-by-site basis, and are limited to \$1 million. The bill authorizes \$200 million for each of 5 years for these programs, and dedicates \$50 million per year (or 25% of the amount appropriated if less than \$200 million) for the assessment and cleanup of relatively low-risk sites contaminated with petroleum or petroleum products.

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<sup>22</sup>Also see Issue Brief IB10078, *Superfund and Brownfields in the 107<sup>th</sup> Congress*, for regular updates on legislative activity.

<sup>23</sup>"Minority Views of Senator Voinovich," p. 23, and "Minority Views of Senators Inhofe, Crapo, and Bond," p. 31-32, in S.Rept. 107-2.

The bill's Title II provides protection from Superfund liability for owners of land contaminated by a source on contiguous property, and for prospective purchasers of property that is known to be contaminated. These provisions essentially codify existing EPA policy.<sup>24</sup> In addition, the bill clarifies the Superfund law's "innocent landowner" defense. CERCLA provides a defense against liability for a person who unknowingly purchased contaminated land, provided the person made "all appropriate inquiry" prior to the transaction. The bill spells out what comprises all appropriate inquiry for the purchaser to qualify as an innocent landowner under the law.<sup>25</sup> These provisions would apply to all contaminated sites, not just brownfields.

Title III of S. 350 authorizes \$50 million per year for 5 years to assist states in establishing or enhancing their voluntary cleanup programs. States may also use these grants to capitalize a revolving loan fund, or to develop a risk sharing-pool, an indemnity pool, or insurance mechanism to provide financing for response actions. Title III also addresses the finality issue, forbidding enforcement by the federal government at sites being cleaned up under a state program, except where: (1) the state requests assistance; (2) the contamination has or will migrate across state lines, or onto federally owned or controlled property; (3) EPA determines, after taking into account the response actions already taken, that a release or threatened release may present an imminent and substantial endangerment to public health or welfare, or the environment; or (4) EPA, after consultation with the state, determines that information not known by the state has been discovered that requires further remediation to protect public health or welfare, or the environment. The federal enforcement ban is contingent on the state maintaining a public record of sites where response action is completed, and sites that are scheduled to be cleaned up in the coming year.

The Environment and Public Works Committee noted in the bill report that, "The committee expects this [Title I] money to be funded through general revenues and to be in addition to appropriate Superfund funding."<sup>26</sup> Until now brownfields funding has been part of the Superfund appropriation, at least half of which has come from the Superfund trust fund. The report did not comment on the source of funds for the state voluntary cleanup programs in Title III.

**H.R. 2869.** After the Senate unanimously passed S. 350 on April 25, 2001, the House unanimously passed H.R. 1831 on May 22. That bill dealt with the Superfund liability of small businesses and other small contributors of hazardous wastes at sites on the National Priorities List. On September 10 Energy and Commerce Committee Chairman Paul Gillmor and Ranking Member Frank Pallone merged the two bills and introduced the result as H.R. 2869.

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<sup>24</sup>*Policy Towards Owners of Residential Property at Superfund Sites*, OSWER Dir. No. 9834.6 (July 3, 1991), and *Final Policy Toward Owners of Property Containing Contaminated Aquifers*, 60 Fed. Reg. 34790 (1995).

<sup>25</sup>For more information, see CRS Report RS20869, *The Liability Exemptions in the Senate Brownfields Bill (S. 350)*.

<sup>26</sup>*Brownfields Revitalization and Environmental Restoration Act of 2001*. Report to accompany S. 350 (S.Rept. 107-2). p. 5, 9.

There were two substantive issues that held up passage. The first was the “state finality” question, that is, the circumstances under which EPA should be allowed to intervene at a site that has been or is being cleaned up under a state program. This was the same issue that had proved a problem in the Senate. House Energy and Commerce Committee Chairman Billy Tauzin said he wanted a bill with stronger language than S. 350 to bolster state authority.<sup>27</sup> The second issue was whether the Davis-Bacon Act, which requires that workers be paid prevailing union wages in the area, would apply at brownfield cleanups. Davis-Bacon has been applicable at brownfield sites all along because the brownfield grants were made under CERCLA authority, and CERCLA requires it in Section 104(g). House Speaker Dennis Hastert reportedly used his influence in both cases to persuade reluctant members to go forward, and ultimately pass H.R. 2869.<sup>28</sup>

**Other Bills.** Ten other bills have been introduced in the 107<sup>th</sup> Congress and two of them, S. 23 and H.R. 324, would provide statutory authority for the brownfields program. S. 23 (introduced by Senator Specter) is an urban economic development bill, one title of which would approve EPA’s existing program. H.R. 324 (Representative Boehlert) is a Superfund reauthorization bill identical to one reported in the 106<sup>th</sup> Congress (H.R. 1300). They both address the state finality issue, and H.R. 324 also contains the liability relief provisions.

Another set of bills would promote brownfield programs in other agencies. Representative Quinn’s H.R. 2064 would give specific statutory authority to three agencies, enabling them to provide direct federal funding, loans and loan guarantees for brownfields within the context of their agency missions and existing programs. The three are the Department of Housing and Urban Development (HUD), the Small Business Administration, and the Economic Development Administration (EDA). Senator Levin’s S. 1078 and Representative Gary Miller’s H.R. 2941 address HUD’s brownfields program, and Levin’s S. 1079 provides authority to EDA, with S. 1079 employing the same language as H.R. 2064’s EDA provisions.

These same three bills, along with S. 350, would expand the list of sites eligible to receive brownfield grants. They would include former illegal drug labs, petroleum-contaminated sites, and mine-scarred lands within the definition of a brownfield site, making them eligible for federal assistance. For a petroleum-contaminated site to be eligible, it would have to be of relatively low risk, as compared to other petroleum-only sites in the state; have no viable responsible party; be assessed, investigated, or cleaned up by a person that is not potentially liable; and not be subject to a cleanup order under the leaking Underground Storage Tank program. The drug labs and mine-scarred lands have no other qualifying requirements.

The Quinn bill and three others would address the expensing of cleanup costs (see pages 10-11 above). The bills are Senator Torricelli’s S. 1082, Representative Weller’s H.R. 2264, and Representative Coyne’s H.R. 1439. All four bills would make

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<sup>27</sup>“House to Differ with Senate on Brownfields,” *Congressional Green Sheets Weekly Bulletin*, April 30, 2001. p. 11.

<sup>28</sup>Rebecca Adams. “Brownfields Redevelopment Measure Clears,” *Congressional Quarterly Weekly*, December 22, 2001, p. 3091.



the tax break permanent (it is due to expire at the end of 2003), a position the administration is backing. S. 1082 and H.R. 2264 would also eliminate the “recapture” provision, and would include additional substances in the definition of hazardous substances that may be cleaned up and be eligible for the tax break: asbestos, oil, pesticides, radon, and lead-based paint. And H.R. 2064 would make the expensing provision available to those who lease sites for more than 30 years.

H.R. 2064 would add four new tax breaks to stimulate brownfields redevelopment. The first is a 50% tax credit for cleanup costs incurred at a brownfield site. The credit is limited to \$50,000 per site, and must be taken over 5 years. A taxpayer would have the option of using this credit or the expensing provision, but could not take advantage of both.

Secondly, H.R. 2064 authorizes the establishment of “Brownfield IRAs.” The site owner could put up to \$1 million per year free from federal taxation into a special savings account (the IRA) for future use in brownfield assessment and cleanup. The money would have to be used within 10 years. The third tax incentive in the bill is aimed at banks and other lenders to encourage them to make loans for brownfield redevelopment. Interest earned on brownfield loans would be exempt from federal taxation, up to \$100,000 per year. The fourth tax break would provide a 20% tax credit for the costs of research and development of environmental remediation technology.

Representative Andrews’s H.R. 3170 would provide a limited tax credit for qualified brownfields cleanup bonds issued by state or local governments.

## **Outlook**

As noted previously, the administration has backed the idea of making the brownfields tax incentive permanent, and will include it in the budget request. With no vocal opponents, prospects for passage appear good.

**Table 1. Brownfields Bills in the 107<sup>th</sup> Congress**

Program or Activity	S. 23 (Specter)	S. 350 (Chafee)	S. 1078 (Levin)	S. 1079 (Levin)	S. 1082 (Torrice)	H.R. 324 (Boehler)	H.R. 1439 (Coyne)	H.R. 2064 (Quinn)	H.R. 2264 (Weller)	H.R. 2941 (Gary Miller)	H.R. 3170 (Andrews)
Brownfields Characterization Grants	X	X				X					
Brownfields Cleanup Grants and/or Revolving Loan Fund Grants	X	X				X					
Establish or Expand State Voluntary Cleanup Programs		X				X					
No Federal Enforcement at State Cleanup Sites, with Exceptions	X <sup>1</sup>	X				X					
Include Illegal Drug Labs, Petroleum Sites, and Mine-Scarred Land		X	X	X				X			
Brownfield Programs in: Dept. of Housing and Urban Dev. Economic Development Adm. Small Business Administration			X	X				X X X		X	
Liability Relief for: Contiguous Property Owners Prospective Purchasers Landowners		X X X				X X X					
Defer NPL Listing at State's Request		X									
Expensing of Cleanup Costs: Make It Permanent Eliminate the "Recapture" Provision Make Additional Substances Eligible <sup>2</sup> Make 30-Year Leases Eligible					X X X		X	X X X			
50% Tax Credit Taken Over 5 Years								X			
Brownfields "IRA"								X			
No Tax on Interest from Brownfield Loans								X			
Tax Credit: for Cleanup R & D for State and Local Gov. Cleanup Bonds								X			X

Notes: <sup>1</sup> S. 23 provides no exceptions to the ban on federal enforcement.

<sup>2</sup> The substances are asbestos, oil, pesticides, radon, and lead-based paint

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