

# CRS Issue Brief for Congress

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## **Brownfields and Superfund Issues in the 108<sup>th</sup> Congress**

**Updated October 27, 2004**

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# **CONTENTS**

SUMMARY

MOST RECENT DEVELOPMENTS

BACKGROUND AND ANALYSIS

Introduction

Historical Perspective

A Brief Summary of the Cleanup Program

Superfund Issues

Revenue Issues: Appropriations and the Superfund Taxes

Appropriations

The Superfund Taxes

Reauthorizing the Ombudsman

Comprehensive Reauthorization

Liability

Remedy Selection and Cleanup Standards

State Role

Natural Resource Damages

Brownfield Issues

LEGISLATION

FOR ADDITIONAL READING

## Brownfields and Superfund Issues in the 108<sup>th</sup> Congress

### SUMMARY

The Superfund program for cleaning up the nation's worst hazardous waste sites was created by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, or CERCLA (P.L. 96-510, as amended). The brownfields program addresses less serious hazardous waste sites.

Three enactments of the 108<sup>th</sup> Congress contain brownfield-related measures, and three other bills have had action. The Economic Development Administration Reauthorization Act, S. 1134/H.R. 2535, establishes a demonstration program for brownfield sites employing solar energy technology (termed brightfields); it was presented to the President on October 15, 2004. P.L. 108-311 (H.R. 1308, H.Rept. 108-696), a tax bill signed by the President on October 4, 2004, reinstated the brownfields tax incentive. Another tax bill, signed by the President on October 22, 2004 (H.R. 4520, H.Rept. 108-755), contains two brownfield provisions. One authorizes tax-exempt facility bonds for "green building and sustainable design projects" that include a brownfield and meet other requirements. The other allows tax-exempt entities to invest in the cleanup and redevelopment of brownfields without incurring unrelated business income tax when they sell the property.

A bill to make the brownfields program in the Department of Housing and Urban Development more accessible to small communities, H.R. 239, was reported on March 5, 2003 (H.Rept. 108-22).

A provision of the Energy Policy Act, H.R. 6, directs EPA to establish criteria for the safe and environmentally protective use of mine wastes from the Tar Creek, Oklahoma,

Superfund site for federally funded transportation projects. The conference report (H.Rept. 108-375) passed the House and is before the Senate.

A bill, S. 515, to establish an independent ombudsman with expanded authorities related to Superfund, brownfields, and other programs in the Office of Solid Waste and Emergency Response passed the Senate by unanimous consent on May 21, 2003; a companion bill, H.R. 347, was introduced in the House.

CERCLA's stringent liability regime has drawn in many parties to pay for hazardous waste cleanup and has contributed to the law's unpopularity in some quarters, although enactment of the Small Business Liability Relief and Brownfields Revitalization Act, P.L. 107-118, may have blunted some criticism. CERCLA also established the Superfund trust fund that was supported by dedicated taxes until the authorization for these taxes expired in 1995. The Administration's decision not to request renewal of the taxes as the trust fund's balance has declined is another continuing issue. H.R. 610 and S. 173 have been introduced to reinstate the taxes.

The Superfund appropriation for FY2004 is \$1.265 billion, and the brownfield appropriation is \$171 million (P.L. 108-199). The budget request for FY2005 is \$1.4 billion for Superfund and \$210 million for brownfields.

As of October 2004, 926 non-federal sites (67%) placed on the Superfund's National Priorities List (NPL) had been removed to the Construction Completed List.



## **MOST RECENT DEVELOPMENTS**

The American Jobs Creation Act (H.R. 4520, H.Rept. 108-755), which the President signed on October 22, 2004, contains two brownfields provisions. One authorizes tax-exempt facility bonds for “green building and sustainable design projects” that include a brownfield and meet other requirements. The other allows tax-exempt entities to invest in the cleanup and redevelopment of brownfields without incurring unrelated business income tax when they sell the property.

The Economic Development Administration (EDA) Reauthorization Act, which was presented to the President on October 15, 2004 (S. 1134, S.Rept. 108-382; H.R. 2535, H.Rept. 108-242, Part I), establishes a demonstration program to use solar energy technology at brownfield sites (referred to as “brightfields”), and directs GAO to report on EDA’s grants for brownfields. Other brownfields language was dropped.

The Working Families Tax Relief Act (P.L. 108-311, H.R. 1308, H.Rept. 108-696), signed on October 4, 2004, reinstated the brownfields tax incentive, which allows developers to fully deduct the costs of environmental cleanup in the same year the costs are incurred.

The President’s budget request for FY2005 asked for \$1,381.4 million for Superfund and \$210 million for brownfields. The House Appropriations Committee approved \$1,257.5 million for Superfund, and \$168 million for brownfields (H.R. 5041, H.Rept. 108-674). Senate Appropriations approved \$1,381.4 million for Superfund and \$165 million for brownfields (S. 2825, S.Rept. 108-353).

A provision of the comprehensive energy bill, H.R. 6, reported from the conference committee (H.Rept. 108-375) and passed by the House on November 18, 2003, authorizes the use of mine wastes from the Tar Creek Superfund site in highway construction projects after EPA establishes safe and environmentally protective standards.

The Senate passed Senator Crapo’s S. 515 (S.Rept. 108-50), the Ombudsman Reauthorization Act, on May 21, 2003; it is now before the House Energy and Commerce Committee. Representative Michael Bilirakis introduced a companion bill, H.R. 347, in the House on January 27, 2003.

The House Financial Services Committee reported H.R. 239 (H.Rept. 108-22) on March 5, 2003. The bill improves the HUD brownfields program.

## **BACKGROUND AND ANALYSIS**

### **Introduction**

Created in 1980 by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, P.L. 96-510), Superfund is the principal federal program for cleaning up hazardous waste sites to protect public health and the environment from releases of hazardous substances.

After the taxes that fed the Superfund trust fund ended in 1995, the available balance in the fund steadily declined. How much was needed to finish addressing the nation's worst sites was unknown. To help answer that question Congress directed EPA, in the conference report dealing with Superfund's FY2000 appropriation,<sup>1</sup> to contract with Resources for the Future (RFF), an independent research institute, "for an independent analysis of the projected federal costs over the ten-year period of fiscal years 2000-2010 for implementation of the Superfund program..." The study was released in July 2001 and found, among other things, that the costs of cleaning up sites and administering the program will increase in the near term and are not likely to fall below current levels until FY2008. It also identified areas where EPA could improve its performance.

Prompted by the report, EPA convened an advisory panel of 32 individuals to make recommendations to the agency on the future costs and direction of the program. The Superfund Subcommittee of the National Council for Environmental Policy and Technology (NACEPT) reported in April 2004 with 17 consensus recommendations, and discussions and opinions of other issues where consensus could not be reached.<sup>2</sup> Five members, representing environmental groups and the New Jersey state environmental agency, did not sign the report. Among their objections were the report's failure to acknowledge the need for a stable source of increased funding, and the lack of a position that had been in earlier drafts that EPA not consider expected costs when deciding whether to list a site on the NPL.

Regarding the NPL, the group recommended that EPA be consistent over time in applying the factors it uses in selecting sites for the NPL, and that the Hazard Ranking System be reviewed by the agency and stakeholders to ensure it adequately considers sites in sparsely populated areas and takes account of environmental justice concerns.

They also recommended that EPA reach out to affected communities, local governments, and potentially responsible parties earlier in the site assessment process, and that it improve its cooperative relationship with the Agency for Toxic Substances and Disease Registry, and the National Institute of Environmental Health Sciences. The subcommittee was unable to reach agreement on how to approach and fund "mega sites," those NPL sites where cleanup costs are expected to exceed \$50 million.

Thus far in the 108<sup>th</sup> Congress three laws with brownfields provisions have been enacted. They are discussed in the "Brownfield Issues" section. Also, two relatively noncontroversial bills have received action, and a rider to the Energy Policy Act, H.R. 6, directs EPA to establish criteria for the use of granular mine tailings from the Tar Creek, Oklahoma, Superfund site. The mining wastes would be used for cement or concrete projects, and for transportation construction projects that employ federal funds. The EPA criteria are to include an evaluation of whether to establish a numerical standard for concentrations of lead and other hazardous substances. The House agreed to the conference report (H.Rept. 108-375) for H.R. 6 on November 18, 2003. The Senate considered the report on November 21, 2003. A cloture vote to end debate did not pass, 57-40, and there has been no further action.

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<sup>1</sup> H.Rept. 106-379 accompanying H.R. 2684, the FY2000 appropriations bill for the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies.

<sup>2</sup> The *NACEPT Superfund Subcommittee Report* can be accessed at [<http://www.epa.gov/superfund/>].

The Senate passed the Ombudsman Reauthorization Act (S. 515, S.Rept. 108-50) on May 21, 2003. The bill would establish the ombudsman's independence and give the officer investigative powers over programs in EPA's Office of Solid Waste and Emergency Response. (See "Reauthorizing the Ombudsman," below).

And in the House, the Committee on Financial Services reported H.R. 239 on March 5, 2003 (H.Rept. 108-22). The bill would make brownfield grants administered by the Department of Housing and Urban Development more accessible, especially to smaller communities.

## Historical Perspective

CERCLA was enacted in 1980 in the wake of discoveries of abandoned hazardous waste sites around the country. The situation was brought to public attention by the 1978 declaration of a health emergency at the Love Canal neighborhood of Niagara Falls, N.Y., where a residential subdivision and a school had been built atop a former chemical dump, and chemicals were seeping into residents' basements and surfacing in their yards. In the following weeks news stories told of greater than normal occurrences of miscarriages, birth defects, and cancer among the residents.<sup>3</sup> Discoveries of other toxic sites in other parts of the United States were leading news items in the months that followed, and congressional committees, EPA, and the Surgeon General among others, launched investigations to determine the number of hazardous sites and related risks to human health.

President Jimmy Carter declared a federal emergency at Love Canal, the first (and only) time a pollution incident was made eligible for disaster assistance. He did so because existing federal authority was limited to two small programs under the Clean Water Act, and to the imminent hazard provision of the Resource Conservation and Recovery Act (RCRA),<sup>4</sup> which lacked the full range of authorities necessary to allow comprehensive emergency action. Among other issues RCRA provided no funds for cleanup. At the state level, response capability was either very limited or nonexistent.

The legislative track for what became Superfund combined hazardous waste cleanup with oil spill and chemical spill provisions, amending the Clean Water Act which had passed the House and Senate in different versions in the 95<sup>th</sup> Congress. But during the 96<sup>th</sup> Congress (1979-1980), one news report after another kept attention focused on the cleanup of dumps containing hazardous wastes, and this issue was the driving force that ultimately brought forth the Comprehensive Environmental, Response, Compensation, and Liability Act of 1980, or CERCLA (P.L. 96-510) known by its short title as "Superfund." The law was amended and enlarged in 1986 by the Superfund Amendments and Reauthorization Act (SARA, P.L. 99-499).

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<sup>3</sup> Subsequent studies cast doubts that the wastes were causally related to these effects, however.

<sup>4</sup> RCRA established the federal program regulating solid and hazardous waste management.

CERCLA, as amended, makes potentially responsible parties<sup>5</sup> (PRPs) liable for the costs of response (primarily cleanup) associated with releases<sup>6</sup> of hazardous substances, and for damages (monetary compensation) for injuries to publicly owned natural resources. The law's liability standard is strict, joint and several, and retroactive. Generators of hazardous substances, transporters who selected the disposal site, and past and present owners and operators of the site can all be held liable. CERCLA also allows PRPs to sue other parties (usually waste generators) to contribute to the cost of cleanup, sometimes leading to hundreds of others — including small businesses — being brought into Superfund's liability net. This stringent liability regime and its consequent expenses have contributed to the law's unpopularity in some quarters, and is a major sticking point in reauthorization. (See "Comprehensive Reauthorization" below.) The most common source of waste is manufacturing operations (38.9% of total waste at Superfund sites) and common waste destinations include municipal landfills (16.5%), recycling operations (8.5%), and industrial landfills (6.5%).

CERCLA also established the Superfund Trust Fund, which was created primarily from a corporate environmental income tax, and excise taxes on petroleum and specified chemicals. It received about \$1.5 billion per year before the legislative authority to collect the taxes expired on December 31, 1995. Congress annually appropriates monies from the trust fund to EPA, and in most years has added a contribution from the general fund of the Treasury. Normally the Treasury provided \$250 million per year. For FY1999, however, as the trust fund balance declined in the absence of tax receipts, the Treasury contribution was increased to \$325 million. In each of FY2000-FY2002 \$635 million came from general revenues, for FY2003 the President's budget requested \$700 million from general revenues, and for FY2004 the budget request included \$1.1 billion from general revenues, and effectively reduced the balance in the fund to zero.

Monies from the fund are used where a financially viable party cannot be found to pay for cleanups, as well as to support the EPA's Superfund-related enforcement, management, and research and development activities. The lack of revenue-producing taxes adds to the pressure to reauthorize the law. But renewing the taxes involves a political trade-off: some call for amending CERCLA to address the criticisms of unfair liability rules, slow cleanups, and overly stringent cleanup requirements.

Although there were serious efforts in the 103<sup>rd</sup> to 106<sup>th</sup> Congresses (1993-2000) to change the law, and comprehensive reauthorization bills were reported in the 103<sup>rd</sup>, 105<sup>th</sup>, and 106<sup>th</sup> Congresses, none reached the floor in either chamber because of opposition by key members. The successful amendments to CERCLA during that time period have had general agreement and targeted a fairly narrow area: limiting the liability of financial institutions that had made loans to PRPs, easing the transfer of military bases to local entities (related to the

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<sup>5</sup> The party who may ultimately bear the burden of paying for the cleanup and related costs may not be directly responsible for the activities that caused contamination at the site. Examples are insurers, and banks that have made loans to the owner or operator of the site.

<sup>6</sup> The term "release" is broadly defined to include not only such things as spilling and leaking, but also the "abandonment or discarding of barrels" and other closed receptacles (CERCLA Section 101(22)). Also, courts have held that a release need not be a discrete event, but can include seepage over a long period of time.

Base Realignment and Closure laws), limiting the liability of recyclers, and providing a tax incentive to encourage the cleanup of brownfields.<sup>7</sup> Last Congress's enactment of the Small Business Liability Relief and Brownfields Revitalization Act (P.L. 107-118) also fit that pattern.

Meanwhile, EPA moved to address the criticisms on its own and in 1993 started what became three rounds of 49 administrative reforms to make the agency's operation of the program "faster, fairer, and more efficient." Industry groups gave the agency credit for improving the program, but said additional changes requiring legislation were still needed. From their perspective, these should include replacing CERCLA's liability regime, reforming cleanup standards and remedy selection, changing the law's provisions on natural resource damages, and instituting a different means of funding the program.

By the end of 2000 the tone of the Superfund reauthorization debate had changed. According to EPA, 92% of all sites that had been listed on the NPL since its beginning were either undergoing cleanup construction (remedial or removal), were completed and on the Construction Completion List, or had been deleted from the NPL because cleanup goals were met. Attention was more focused on "brownfields," less seriously contaminated sites where redevelopment is complicated by potential environmental contamination.

The growth of the brownfields effort coincided with sentiment by some in Congress (and elsewhere) that Superfund has largely accomplished its original purpose of cleaning up the worst hazardous waste sites in the nation, and it was time to begin winding the program down. A 1998 General Accounting Office report<sup>8</sup> stated that of approximately 3,000 sites identified as possible NPL sites, only 232 were named by either EPA (106 sites), a state (100 sites), or both (26 sites), as likely to be placed on the National Priorities List. The reported bills of the 105<sup>th</sup> and 106<sup>th</sup> Congresses also reflected this outlook. The bills enlarged the brownfields program on the one hand and on the other hand looked to the end of Superfund by limiting the number of sites that could be added to the NPL or by authorizing declining appropriations to carry out the program.<sup>9</sup>

It was in this climate of an uncertain need for the program and a dwindling balance in the trust fund that Congress commissioned Resources for the Future (RFF) to estimate future Superfund costs. The study, *Superfund's Future: What Will It Cost?*, came out in July 2001 and calculated that in the 10 years from FY2000 to FY2009 the cost of cleaning up nonfederal sites on the NPL (including estimated additions to the list) and administering the program would range between \$14.0 billion and \$16.4 billion, with the best estimate being \$15.1 billion. "A ramp-down of the program is not imminent," RFF wrote. "EPA's need for Superfund monies will not decrease appreciably below FY1999 expenditures of \$1.54 billion until FY2006," when they would be \$1.47 billion in the base case scenario. "Total annual costs peak in FY2003 [\$1.70 billion], driven principally by the cost of Fund-lead actions at a few mega sites, and then begin a steady but small decline each year. In FY2009, the final

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<sup>7</sup> For additional details, see CRS Report RL31154, *Superfund: A Summary of the Law*.

<sup>8</sup> *Hazardous Waste: Information on Potential Superfund Sites*, Nov. 30, 1998, GAO/RCED-99-22.

<sup>9</sup> In the 105<sup>th</sup> Congress: S. 8. In the 106<sup>th</sup> Congress: S. 1090, H.R. 1300, and H.R. 2580.



year of our estimates, the total annual cost ... is \$1.33 billion.”<sup>10</sup> “Fund-lead actions” are financed in whole or in part by EPA, and “mega sites” are those with actual or expected costs of \$50 million or more.

Other findings of the report include:

- There are more mega sites, costing an average of \$140 million (versus \$12 million for non-mega sites) to clean up that will be eligible for the NPL. Whether they are listed is dependent on such factors as the availability of funding, political leverage, technological advances, and demographic trends. This ties into the question of the role and priorities of the NPL, and is an issue Congress needs to address, according to RFF.<sup>11</sup>
- EPA needs to improve the quality of the five-year reviews of NPL sites that CERCLA requires where nonpermanent remedies (e.g., landfill caps) were employed to verify they still protect human health and the environment. RFF found that EPA classified many of them as “protective” despite information in the reviews suggesting that the remedies were either not fully implemented, not functioning as designed, or are unlikely to meet cleanup objectives.<sup>12</sup>
- Two of EPA’s major internal management systems — the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS), and the Integrated Financial Management System (IFMS) — need to be improved so Congress can better follow Superfund dollars.

## A Brief Summary of the Cleanup Program

When a hazardous waste site or an incident such as a spill is reported to EPA, the hazardous substance release is entered into CERCLIS (Comprehensive Environmental Response, Compensation, and Liability Information System), the agency’s site tracking database. There were 11,922 active sites in CERCLIS as of November 10, 2003, and 33,387 in the CERCLIS archives; archive status indicates that EPA has completed its assessment of a site and has determined that no further steps will be taken to list it on the National Priorities List (NPL). A preliminary assessment is conducted at all CERCLIS sites to quickly determine if the site poses a sufficient threat to health and the environment to warrant further investigation, and if it might require an emergency removal. An “emergency removal” is a short-term, fast-track response to mitigate a dangerous situation that can be ordered at any time if conditions warrant, regardless of whether a site is on the NPL or not.

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<sup>10</sup> Katherine N. Probst and David M. Konisky, *Superfund’s Future: What Will It Cost?* (Washington: Resources for the Future, 2001), p. xxi.

<sup>11</sup> *Superfund’s Future: What Will It Cost?*, pp. 85-93.

<sup>12</sup> *Superfund’s Future: What Will It Cost?*, pp. 65-70.

If recommended by the preliminary assessment, a site inspection is conducted, during which environmental and waste samples are taken for laboratory analysis to determine if hazardous substances are present and the extent of their migration. Information from the site assessment is used in the Hazard Ranking System, and sites receiving a sufficiently high score are placed on the National Priorities List. The term “Superfund site” generally means a site on the NPL, and the long-term cleanup activities at an NPL site are referred to as “remedial actions.”

As of October 2004, there were 1,237 sites on the NPL (see [<http://www.epa.gov/superfund/sites/npl/npl.htm>]), of which 158 were federal facility sites; another 68 were proposed for listing, of which 7 were federal facility sites. Proposed and final NPL sites total 1,305. Through December 31, 2002, EPA and the Coast Guard had also conducted more than 7,399 removal actions, 69% of which were “time critical” in nature. (The Coast Guard is the lead agency in coastal areas.) There are or have been Superfund sites in all 50 states, as well as in American Samoa, Guam, the Northern Marianas, Puerto Rico, the District of Columbia, the Trust Territories of the Pacific, and the Virgin Islands.

After listing on the NPL, the next step is the remedial investigation, a detailed examination of the site and the wastes present, which is followed by (or conducted concurrently with) a feasibility study that examines alternative cleanup approaches. (These two steps are frequently referred to together as the “RI/FS.”) In the Record of Decision (ROD) EPA decides which alternative to pursue, and the Agency or its designee — frequently the U.S. Army Corps of Engineers — prepares specifications and plans for the selected remedy. Cleanup construction may be followed by a requirement to operate, maintain, or monitor the site for a period of years (which is almost always the case if groundwater cleanup is involved). As of October 2004, 926 non-federal sites (67% of the 1,378 total non-federal sites listed since inception) had been placed on the Construction Completion List; and 292 (21% of the 1,378) of those sites and portions of 38 others have also been deleted from the NPL.

The National Contingency Plan (NCP, codified at 40 CFR 300) provides a blueprint of how EPA is to respond to hazardous substance releases. It covers methods for discovering and investigating hazardous waste sites, the roles of federal and state agencies, the appropriate level of response activities, and other subjects. The Hazard Ranking System and the National Priorities List are appendices to the NCP. (For details on this and other Superfund topics, see EPA’s Superfund website: [<http://www.epa.gov/superfund/index.htm>]).

## Superfund Issues

### Revenue Issues: Appropriations and the Superfund Taxes

**Appropriations.** Congress appropriated \$1,264.6 million for the Superfund program for FY2004 and directed that “such sums as are available from the Superfund trust fund upon the date of enactment” be used, with the remainder coming from general revenues (H.R. 2673, H.Rept. 108-401). (After a legislatively required rescission, the FY2004 amount is \$1,257.5 million.) For FY2003 the appropriation was also \$1,264.6 million, of which \$700 million came from the Superfund trust fund and the remainder from the general fund of the

Treasury. The FY2005 request is for \$1,381.4 million, and the House Appropriations Committee approved \$1,257.5 million (H.R. 5041, H.Rept. 108-674). The Senate Appropriations Committee approved the requested amount (S. 2825, S.Rept. 108-353).

For brownfields, the FY2004 appropriation is \$171 million (\$170 million after the recision), an increase from the \$167.7 million provided for FY2003. Beginning with FY2003 the brownfields program is no longer funded from the Superfund account. The FY2005 request was \$210 million, the House committee approved \$168 million, and the Senate committee approved \$165 million.

**The Superfund Taxes.** Until the legislative taxing authority expired on December 31, 1995, the Superfund Trust Fund's principal sources of revenue were excise taxes on petroleum and designated chemical feedstocks, and a corporate environmental income tax. The trust fund historically supplied most of the monies appropriated (about 83%) for the Superfund program, with general revenues from the Treasury providing the rest (about 17%).

Superfund taxes have become an issue because the Administration has not requested that they be renewed. Since FY1999 Congress has extended the life of the fund by increasing the General Revenues contribution from the usual \$250 million in most previous years, and reducing the amount taken from the fund. The fund still receives monies from fines and penalties, cost recoveries from PRPs to reimburse government expenditures where private parties are legally responsible, and interest earned on the unexpended balance in the fund; the budget request projects income of \$209 million from these sources for FY2005.

The Natural Resources Defense Council and the Environmental Defense Fund have expressed their "strong concern" that the taxes be reauthorized in order to keep cleanups moving forward. Business interests, including the Business Roundtable, the American Petroleum Institute (API), and the American Chemistry Council (ACC; formerly the Chemical Manufacturers Association) have testified against authorizing any taxes unless there is comprehensive reform of the law, and API and ACC want Congress to change the overall tax structure. (For additional information, see CRS Report RL31410, *Superfund Taxes or General Revenues: Future Funding Options for the Superfund Program.*)

## Reauthorizing the Ombudsman

Congress first created an ombudsman at EPA in the 1984 amendments to the Resource Conservation and Recovery Act (RCRA) to handle concerns and inquiries from the public, and to help small businesses comply with the many new hazardous waste management requirements of that law. The agency gradually increased the position's purview to include other programs in the Office of Solid Waste and Emergency Response (OSWER), including Superfund. When the legislative authorization for the officer expired in 1988, the agency continued the position, and later installed ombudsmen in each of EPA's 10 regional offices. In recent years the post became more visible as the ombudsman investigated citizen complaints referred by Members of Congress, and questions arose about the adequacy of the position's resources and independence from agency influence.

The Senate passed the Ombudsman Reauthorization Act, S. 515 (S.Rept. 108-50), on May 21, 2003. The bill would establish an independent Office of the Ombudsman within EPA to receive complaints and render assistance to any person regarding the agency's

hazardous waste programs. Introduced by Senator Mike Crapo, S. 515 passed without amendment under unanimous consent, and is now before the House Committee on Energy and Commerce. Representative Michael Bilirakis introduced a companion bill, H.R. 347, on January 27, 2003.

The bills are essentially the same as S. 606 (S.Rept. 107-320), which passed the Senate in the last Congress. They specify that the ombudsman shall be appointed by the President and confirmed by the Senate for a five-year term, and may be reappointed once. The ombudsman would be empowered to conduct investigations, issue subpoenas, make findings of fact, hold public hearings, and make nonbinding recommendations to the EPA Administrator concerning programs under the jurisdiction of OSWER. In addition to the Superfund and brownfield programs, OSWER administers EPA's solid waste (RCRA), leaking underground storage tank, oil spill, and chemical emergency preparedness and prevention activities. The ombudsman is to appoint a deputy ombudsman in each EPA region, and would have control over an independent staff, and an annual budget of \$3 million for FY2003-FY2004, \$4 million for FY2005-FY2008, and \$5 million for FY2009-FY2012. The bills contain whistle-blower protection for anyone contacting the ombudsman, and provide criminal penalties for obstructing the proceedings of or making false or fraudulent statements to the ombudsman.

EPA Administrator Whitman opposed S. 515, saying in a letter to Chairman Inhofe that it gave the ombudsman "extraordinarily broad and intrusive investigatory powers," and would hamper EPA's enforcement efforts.

## Comprehensive Reauthorization

Several issues proved particularly challenging in the attempts to reauthorize CERCLA during the 1990s. The ones most debated are briefly discussed below, with a comment on how the reported bills during that time generally dealt with the issue.

**Liability.** CERCLA's liability scheme (joint and several liability on a strict and retroactive basis) drew in many parties, sometimes hundreds at a particular site, in protracted and expensive litigation. The bills of the 1990s consequently provided protection against CERCLA liability for more than a dozen categories of parties (although not all categories appeared in each bill). Some of them (lenders and recyclers<sup>13</sup>) were granted relief in other legislation, and the 2002 enactment of the Small Business Liability Relief and Brownfields Revitalization Act (P.L. 107-118) protected a variety of groups including those who sent only very small quantities of hazardous waste to a Superfund site, who only sent municipal solid waste, and several categories of "innocent parties."

To limit litigation the bills would have established an allocation process, conducted by a neutral person, to divide cleanup costs among responsible parties. Those not accepting the allocation would have been subject to CERCLA's joint and several liability.

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<sup>13</sup> Asset Conservation, Lender Liability and Deposit Insurance Protection Act (P.L. 104-208, division A, title II, subtitle E), and the Superfund Recycling Equity Act (P.L. 106-113, appendix I, title VI).

**Remedy Selection and Cleanup Standards.** CERCLA states a preference for treatment of hazardous wastes (as opposed to removing them to another, safer, location). The bills either deleted the treatment preference or limited it to highly contaminated “hot spots.” The bills also sought to better tailor the remedy to the individual site by requiring remedy selection to consider current and reasonably anticipated uses of land and water resources, state and local viewpoints, and reasonableness of cost.

CERCLA also requires cleanups to meet “applicable or relevant and appropriate requirements” (ARARs) of other federal and state environmental laws, which has caused contention about which cleanup standards and levels should apply at each site. The bills deleted the words “relevant and appropriate” to help clarify which federal and state laws and regulations do apply to cleanups.

The bills all required EPA to conduct facility-specific risk assessments or evaluations and to communicate the results in easily understood language. They all also established modified groundwater cleanup and protection requirements, though in different ways and with different levels of stringency.

**State Role.** CERCLA gives the federal government the lead role in cleaning up hazardous waste sites, and unlike most other environmental laws, does not envision that states would assume responsibility to run the program. All of the bills of the 1990s would have authorized EPA either to delegate or authorize program responsibility over all or some NPL facilities in a state, and for all or some aspects of cleanup activity, give states the flexibility to choose which ones; federal funding would have been provided. The bills would have reduced states’ share of operation and maintenance costs from 100% to no more than 10%; and some of them would have given state governors a veto over the addition of new sites to the National Priorities List.

**Natural Resource Damages.** CERCLA requires liable parties to make good the environmental harm they cause by restoring or replacing publicly owned natural resources they have injured or destroyed, and by paying damages for the lost use of the resources.<sup>14</sup> Several large lawsuits in the multi-hundred-million-dollar range, and the possibility of others, have concerned industrial interests and led them to seek limits to the amounts of natural resource damages they are required to pay. The bills would have barred recovery for “non-use” values (values that are unrelated to actual use of the resource), and would have based damage assessments on site-specific conditions and restoration requirements.

## Brownfield Issues

The Brownfields program for cleaning up less seriously contaminated sites was formally established by Title II of the Small Business Liability Relief and Brownfields Revitalization Act (Brownfield Act, P.L. 107-118), signed by the President on January 11, 2002. Brownfields are “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or

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<sup>14</sup> Liability for lost use has resulted from judicial interpretation of CERCLA.

contaminant;”<sup>15</sup> they are not traditional Superfund sites. Generally, they are not highly contaminated and therefore present lower risks to health.

The new Brownfields Act provides for: (1) a program to provide “assessment grants” to characterize, assess, and conduct planning at brownfield sites, and to perform targeted site assessments; and (2) a program to provide “remediation grants” to capitalize revolving loan funds, or to be used directly to clean up one or more sites. Assessment 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 law authorizes \$200 million for each of five 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. Technical assistance, training, and research are also authorized.

The new law also provides protection from Superfund liability for individuals in certain situations that are said to inhibit brownfields development, namely 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>16</sup> In addition, the Brownfields Act 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 Brownfields Act spells out what comprises all appropriate inquiry for the purchaser to qualify as an innocent landowner under the law. These provisions would apply to all contaminated sites, not just brownfields.

In addition, the new law authorizes \$50 million per year for five years to assist states in establishing or enhancing their voluntary cleanup programs, which address contaminated sites that do not require federal action, but need cleanup before they can be considered for reuse. 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. The Brownfields Act also addresses the “state finality” issue,<sup>17</sup> and forbids the federal government from intervening 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. This ban on federal enforcement is contingent on the state maintaining a public record of sites where response action is completed, and sites that

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<sup>15</sup> New CERCLA §101(39).

<sup>16</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>17</sup> New CERCLA §128(b).

are scheduled to be cleaned up in the coming year. (See CRS Report RL30972, *The Brownfields Program Authorization: Cleanup of Contaminated Sites.*)

In the 108<sup>th</sup> Congress, at least 10 bills with brownfield components have been introduced, and four provisions in three laws were enacted. The tax bill that was signed by the President on October 22, 2004, the American Jobs Creation Act (H.R. 4520, H.Rept. 108-755), contains two of the provisions. One creates tax incentives for cleaning up moderately and heavily contaminated properties, and requires eligible entities to spend at least \$550,000 on remediation. The tax break is available only to tax-exempt investors such as university endowments, private pension funds, and charitable foundations and allows them to invest in larger brownfields without incurring unrelated business income tax when they sell the properties. (Similar provisions were in H.R. 3527 and S. 1936.)

The other provision in H.R. 4520 authorizes the issuance of tax-exempt facility bonds for certain green building and sustainable design projects that are to be certified by the U.S. Green Building Council's Leadership in Energy and Environmental Design activity. The projects must include at least 1 million square feet of building or 20 acres of land, and must include a brownfield site, and meet other requirements. The authority for issuing bonds ends on September 30, 2009.

Also enacted was the Working Families Tax Relief Act (P.L. 108-311, H.R. 1308, H.Rept. 108-696), which reinstated the brownfields tax incentive retroactively for two years (to December 31, 2005). The tax break allows a developer to fully deduct the costs of environmental cleanup in the year the costs are incurred (called "expensing"), rather than spreading the costs over a period of years ("capitalizing").

The fourth provision is in the Economic Development Administration (EDA) Reauthorization Act, S. 1134, and would establish a demonstration program for "brightfield" sites, which are defined as brownfields redeveloped using solar energy technologies. It also calls for GAO, within one year, to prepare an evaluation of EDA's grants for the economic development of brownfields that were made over the last 10 years. Other language making brownfields eligible for certain EDA grants was dropped. S. 1134 was reported, amended, on October 1, 2004 (S.Rept. 108-382), passed the Senate and the House on October 6 and 7, and was presented to the President on October 15, 2004. The companion House bill was H.R. 2535 (H.Rept. 108-242, Part I). Three other bills that would authorize brightfield or brownfield activities at EDA are H.R. 1341, H.R. 1491, and S. 645.

H.R. 239 was not enacted, but was reported by the House Financial Services Committee on March 5, 2003 (H.Rept. 108-22). The bill removes the connection between HUD's Brownfield Economic Development Initiative (BEDI) program and the department's Section 108 loan guarantees. The effect is to make the BEDI grants more obtainable by a larger number of cities, particularly smaller communities. The bill also authorizes a pilot program to set up a common loan pool for brownfield redevelopment projects, and authorizes funds as needed for five years, through FY2007. The President's FY2004 budget request proposes eliminating the HUD brownfields program.

Representative Andrews introduced H.R. 402, which would amend the Internal Revenue Code to allow a limited tax credit to holders of qualified brownfields cleanup bonds that are issued by state or local governments. It sets a national limit on the amount of such bonds and

provides for allocation among the states. Another tax-related bill is Representative Weller's H.R. 2815, which would make permanent the brownfields tax incentive that expired at the end of 2003. (As noted above, P.L. 108-311 extends the tax break through December 31, 2005.) The bill would also remove the "recapture" provision, making the tax break more valuable (and brownfield redevelopment more attractive), and would expand the class of substances eligible for tax-favored cleanup to include petroleum and other material.

## **LEGISLATION**

### **H.R. 239 (Gary Miller)**

Facilitates HUD assistance for redeveloping brownfields. Introduced January 8, 2003; referred to Committee on Financial Services; reported (H.Rept. 108-22), March 5, 2003.

### **H.R. 347 (Bilirakis)**

See S. 515.

### **H.R. 402 (Andrews)**

Provides a limited tax credit for qualified brownfields cleanup bonds issued by state or local governments. Introduced January 28, 2003; referred to Committee on Ways and Means.

### **H.R. 610 (Pallone)**

Reinstates the taxes funding the Superfund Trust Fund, and the Oil Spill Liability Trust Fund through FY2008, and extends the taxes funding the Leaking Underground Storage Tank Trust Fund through FY2008. Introduced February 5, 2003; referred to Committee on Ways and Means.

### **H.R. 805 (Houghton)**

Amends the Internal Revenue Code to exempt from tax certain "settlement funds" (escrow accounts) established under CERCLA to be used for cleanup if the U.S. government is effectively the beneficial owner, and other conditions are met. Introduced February 13, 2003; referred to Committee on Ways and Means.

### **H.R. 1334 (Quinn)**

See S. 645.

### **H.R. 1420 (Andrews)**

Requires anyone who undertakes a Superfund response action to make publicly available an accounting of the funds used for the response. Introduced March 25, 2003; referred to Committees on Energy and Commerce, and on Transportation and Infrastructure.

### **H.R. 1491 (Oberstar)**

Authorizes programs and activities to improve energy use related to transportation and infrastructure facilities. Among other things, authorizes \$200 million over five years for the Secretary of Commerce to provide demonstration grants for the development of "brightfield" sites (brownfields redeveloped using solar energy technologies). Introduced March 27, 2003;



referred to Committees on Transportation and Infrastructure, Science, Ways and Means, Resources, International Relations, and Financial Services.

**H.R. 2116 (Brad Carson)**

Directs EPA to provide relocation and other assistance for residents at the Tar Creek, Oklahoma, Superfund site. Introduced May 15, 2003; referred to Committees on Transportation and Infrastructure, and on Energy and Commerce. The bill was included in H.R. 6 (conference report H.Rept. 108-375); conference report agreed to in House November 18, 2003.

**H.R. 2535 (LaTourette)/S. 1134 (Bond)**

Economic Development Administration Reauthorization Act. H.R. 2535, among other things, authorizes grants for brownfield sites. Also authorizes \$5 million per year for five years for demonstration program for “brightfield” sites. Introduced June 19, 2003; referred to Committees on Transportation and Infrastructure (T&I), and on Financial Services (FS); reported, amended, from T&I, July 25, 2003 (H.Rept. 108-242, Part I); FS granted an extension for consideration not later than September 2; FS discharged, September 2, 2003; passed House October 21, 2003; referred to Senate Committee on Environment and Public Works (EPW). S. 1134 is similar; no provision for “brightfields.” Introduced May 22, 2003; referred to EPW; reported, amended, October 1, 2004 (S.Rept. 108-382); passed Senate and House, October 6 and 7; presented to President October 15, 2004.

**H.R. 2815 (Weller)**

Makes permanent the brownfields tax incentive, expands the class of substances eligible for tax-favored cleanup, and eliminates the recapture provision. Introduced July 22, 2003; referred to the Committee on Ways and Means.

**H.R. 3543 (Capuano)**

Limits CERCLA liability for service station dealers for releases of recycled oil between the enactment date of the 1986 Superfund amendments and the promulgation of used oil regulations in 1993. Introduced November 20, 2003; referred to Committees on Energy and Commerce, and on Transportation and Infrastructure.

**H.R. 3527 (N. Johnson)/S. 1936 (Baucus)**

Allows eligible tax-exempt entities to invest in larger brownfields without incurring unrelated business income tax when they sell. See text. H.R. 3527 introduced November 19, 2003, referred to Committee on Ways and Means. S. 1936 introduced November 24, 2003; referred to Committee on Finance.

**H.R. 3891 (Hart)**

Allows the use of redevelopment bonds for environmental remediation. Introduced March 4, 2004; referred to Committee on Ways and Means.

**H.R. 3892 (Hart)**

Authorizes “Brownfield IRAs” allowing a site owner to put up to \$1 million per year free from federal taxation into a special account for future use in brownfield assessment and cleanup. The money would have to be used within 10 years. Introduced March 4, 2004; referred to Committee on Ways and Means.

**S. 173 (Boxer)**

Toxic Clean-up Polluter Pays Renewal Act. Reinstates the Superfund taxes until January 1, 2014. Introduced January 15, 2003; referred to Committee on Finance.

**S. 515 (Crapo)/H.R. 347 (Bilirakis)**

Ombudsman Reauthorization Act of 2003. See text. S. 515 introduced March 5, 2003; referred to Committee on Environment and Public Works; reported without amendment (S.Rept. 108-50) and passed Senate by unanimous consent, May 21, 2003; referred to House Committee on Energy and Commerce (E&C). H.R. 347 introduced January 27, 2003; referred to E&C.

**S. 645 (Levin)/H.R. 1334 (Quinn)**

Creates a brownfield program in the Economic Development Administration, and authorizes \$60 million per year for five years. S. 645 introduced March 18, 2003; referred to Committee on Environment and Public Works. H.R. 1334 introduced March 18, 2003; referred to Committees on Transportation and Infrastructure, and on Financial Services.

**S. 1072 (Inhofe, by request)/H.R. 2088 (Don Young, by request)**

The surface transportation reauthorization bill; among other things makes eligible for funding the remediation of brownfield sites associated with the construction of certain transportation projects. S. 1072 introduced May 15, 2003; referred to Committee on Environment and Public Works; reported (S.Rept. 108-222) with an amendment in the nature of a substitute with brownfield provisions deleted, January 9, 2004. H.R. 2088 introduced May 14, 2003; referred to Committees on Transportation and Infrastructure, Ways and Means, the Budget, Science, Resources, the Judiciary, Energy and Commerce, Government Reform, and Rules.

**S. 1936 (Baucus)**

See H.R. 3527.

**S.Amdt. 192, as modified, to H.J.Res. 2 (Lautenberg)**

Increases the FY2003 Superfund appropriation, \$1,272,888,000, in H.J.Res. 2 by \$100 million. Proposed January 23, 2003; tabled by vote of 53-45. (Cong. Rec. p. S1429-S1431)

**S.Amdt. 408 to S.Con.Res. 23 (Lautenberg)**

Reinstates the Superfund taxes. Proposed March 25, 2003; not agreed to by 43-56 vote.

**S.Amdt. 2703 to S.Con.Res. 95 (Lautenberg)**

Reinstates the Superfund taxes. Proposed March 11, 2004; not agreed to by 43-53 vote.

**FOR ADDITIONAL READING**

Klee, Ann R. and Ernie Rosenberg. "The Moribund State of CERCLA Reauthorization," *Natural Resources & Environment*, Winter 1999, pp. 451 ff.

Probst, Katherine N. "Superfund's Future," *The Environmental Forum*, March/April 2002, pp. 32-41.

Probst, Katherine N. and David M. Konisky. *Superfund's Future: What Will It Cost?* Washington: Resources for the Future, 2001. 294 pp.

U.S. EPA. Office of Inspector General. *EPA Regional Superfund Ombudsmen Program Needs Structure*. March 13, 2003. 11 pp. Report No. 2003-S-00004

U.S. General Accounting Office. *Issues Raised by the Reorganization of EPA's Ombudsman Function*. October 2002. 23 pp. GAO-03-92

\_\_\_\_\_. *EPA's National and Regional Ombudsmen Do Not Have Sufficient Independence*. July 2001. 35 pp. GAO-01-813

\_\_\_\_\_. *The Role of Ombudsmen in Dispute Resolution*. 49 pp. April 2001. GAO-01-466

### **CRS Reports**

CRS Report RL30972. *The Brownfields Program Authorization: Cleanup of Contaminated Sites*.

CRS Report RL31911. *"Innocent Landowners" and "Prospective Purchasers" under the Superfund Act*.

CRS Report RL31154. *Superfund: A Summary of the Law*.

CRS Report RL31410. *Superfund Taxes or General Revenues: Future Funding Options for the Superfund Program*.