Addendum

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Restoring Inactive and Abandoned Mine Sites: A Guide to Managing Environmental Liabilities

THE SMALL BUSINESS LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION ACT

On January 11, 2002, the President signed the Small Business Liability Relief and Brownfields Revitalization Act (the "Act") into law.[1] This Act amends portions of the Comprehensive Environmental Response and Liability Act (CERCLA) to promote the cleanup and reuse of brownfields, to provide financial assistance for brownfields revitalization projects, and to provide small businesses with relief from certain CERCLA liabilities.[2]

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[1] Pub. L. No. 107-118, 115 Stat. 2356 (2002) (codified at 42 U.S.C. §§ 9601-9675).

[2] *Id.*

This legislation is significant for conservation organizations interested in the restoration and preservation of inactive and abandoned mine sites (IAMs) for two reasons. First, the Act clearly establishes that brownfields tools and funding mechanisms, which have traditionally been used to clean up contaminated facilities in urban areas, can be used for the restoration and preservation of IAMs in non-urban areas. Second, the Act will make it easier for conservation organizations interested in restoring and preserving IAMs to manage certain CERCLA liabilities associated with these projects.

I
OVERVIEW OF THE ACT

The Small Business Liability Relief and Brownfields Revitalization Act contains two titles. The first title, which is called the "Small Business Liability Protection Act," contains a series of CERCLA amendments that are designed to protect small businesses from certain CERCLA liabilities. Although most of this title will not be relevant to conservation organizations involved in the restoration and preservation of IAMs, this title of the Act does authorize the President to enter into expedited settlement agreements with potentially responsible parties who can demonstrate that they have an inability or limited ability to pay CERCLA response costs.[3] Under certain circumstances, this provision of the Act could assist conservation organizations that become subject to CERCLA liability to negotiate favorable settlement agreements with the U.S. Environmental Protection Agency (EPA).

The second title of the Act, which is called the "Brownfields Revitalization and Environmental Restoration Act of 2001," codified and expanded the EPA's brownfields program and authorized substantial funding for the characterization, assessment and cleanup of brownfields sites. As more fully set forth below, this title could provide a significant benefit to conservation organizations interested in the restoration and preservation of IAMs.

The Brownfields Revitalization and Environmental Restoration Act of 2001 (the "Brownfields Revitalization Act") defines a brownfield site as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a

[3] Small Business Liability Protection Act § 102(b), Pub. L. No. 107-118, 115 Stat. 2356, 2359 (2002) (codified as amended at 42 U.S.C. §§ 9622(g)).

hazardous substance, pollutant, or contaminant."[4] The Brownfields Revitalization Act excludes a number of sites from the definition of "brownfield sites," but gives the President the authority to provide financial assistance for the characterization, assessment and cleanup for some of the excluded sites if it will protect human health and the environment and either promote economic development or be used to create or preserve parks, greenways, undeveloped property, other recreational property or other property used for nonprofit purposes.[5]

II

BROWNFIELDS CLEANUPS IN NONURBAN AREAS

The financial assistance provisions of the Brownfields Revitalization Act firmly establish the applicability of brownfields tools, which have traditionally been used to clean up industrial and commercial facilities in urban settings, to the restoration and preservation of IAMs in nonurban areas. This section of the Act includes "mine-scarred land" in the definition of brownfields sites that are eligible to receive federal funding for site characterization, assessment and cleanup.[6] Although the Act does not define mine-scarred land, this term presumably includes many IAMs.

The financial assistance provisions of the Brownfields Revitalization Act also set forth a number of criteria for the EPA to consider when evaluating applications for funding. These criteria include "[t]he extent to which a grant would facilitate the creation of, preservation of, or addition to a park, greenway, undeveloped property, [or] recreational property," and "[t]he extent to which a grant will further the fair distribution of funding between urban and non-urban areas."[7] These sections of the Brownfields Revitalization Act clearly demonstrate that Congress intended to encourage the use

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[4] Brownfields Revitalization Act, § 211(a), Pub. L. No. 107-118, 115 Stat. 2356, 2360-61 (2002) (codified as amended at 42 U.S.C. § 9601(39)(A)).

[5] Brownfields Revitalization Act, § 211(a), Pub. L. No. 107-118, 115 Stat. 2356, 2360-61 (2002) (codified as amended at 42 U.S.C. § 9601(39)(B), (C). The sites that are excluded from the definition relate primarily to sites that are subject to federal environmental enforcement actions, including sites listed on the National Priority List.

[6] Brownfields Revitalization Act, § 211(a), Pub. L. No. 107-118, 115 Stat. 2356, 2362 (2002) (codified as amended at 42 U.S.C. § 9601(39)(D)(ii)(III)). This section of the Act provides that "[f]or the purpose of section 104(k)(which authorizes funding for the characterization, assessment and cleanup of brownfields sites), the term 'brownfield site' includes a site that (i) meets the definition of 'brownfield site' [and] is mine-scarred land."

[7] Brownfields Revitalization Act, § 211(b), Pub. L. No. 107-118, 115 Stat. 2356, 2366 (2002) (codified as amended at 42 U.S.C. § 9604(k)(5)(C)(v), (viii)).

of brownfields tools for the restoration and preservation of IAMs in non-urban areas.

III
LIABILITY PROTECTIONS

The Brownfields Revitalization Act also contains several provisions that are designed to codify and expand the liability protections that the EPA created in its brownfields programs. The codification of a brownfields program will, to some extent, help to achieve the intended purpose of promoting the cleanup and reuse of contaminated properties. Since some of the liability protections set forth in this Act are subject to differing interpretations, however, the EPA could further the legislative purpose of the Act by promulgating detailed guidance or policy documents to clarify the implementation of this legislation.

A. The Prospective Purchaser Exemption

The Brownfields Revitalization Act's prospective purchaser exemption may add the most significant liability protection for conservation organizations interested in the restoration and preservation of IAMs. Before Congress enacted this legislation, a person who purchased a contaminated property could be held liable under CERCLA for the cost of cleaning up the property even though they did not cause or contribute to the disposal or release of hazardous substances on the property.[8] CERCLA's imposition of retroactive liability created significant financial risk for conservation organizations interested in acquiring, restoring and preserving IAMs.

The prospective purchaser section of the Brownfields Revitalization Act will exempt conservation organizations that acquire, restore and preserve IAMs from retroactive liability if they meet the criteria set forth in the exemption. This exemption amends Section 107(a) of CERCLA to provide that a person who would otherwise be liable based solely on the person being an "owner or operator" of a facility shall not be liable as long as the person meets the definition of a "bona fide prospective purchaser" and does not impede the performance of a response action or natural resource restoration.[9]

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[8] 42 U.S.C. § 9607(a)(1)-(4) (1994).

[9] Brownfields Revitalization Act § 222(b), Pub. L. No. 107-118, 115 Stat. 2356, 2372 (2002) (codified as amended at 42 U.S.C. § 9607(r) (1)).

The definition of a "bona fide prospective purchaser" limits the applicability of this exemption. The Brownfields Revitalization Act defines a bona fide prospective purchaser as a person who acquires ownership of a facility after enactment of the legislation and who establishes each of the following eight criteria by a preponderance of the evidence:

> 1. The disposal of hazardous substances occurred before the person acquired the property;
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> 2. The person made "all appropriate inquiries" into the condition of the property;[10]
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> 3. The person provides all legally required notices relating to the discovery or release of the hazardous substance;
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> 4. The person exercises appropriate care by taking reasonable steps to:
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> a. stop continuing release;
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> b. prevent any threatened future release; and
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> c. prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance;
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> 5. The person provides cooperation, assistance and access to people who are authorized to take actions at the site under CERCLA;
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> 6. The person is in compliance with institutional controls and does not impede the effectiveness or integrity of institutional controls;
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> 7. The person complies with all information requests; and
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> 8. The person is not already a potentially responsible party (PRP) and does not have any family or financial relationship (other than the purchase of the property) with any other PRP.[11]

If a conservation organization interested in the acquisition, restoration and preservation of IAM sites undertakes all appropriate inquiries before acquiring a contaminated property and is able and

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[10] The Brownfields Revitalization Act clarifies what steps a person must take to meet the "all appropriate inquiries" requirements. See Brownfields Revitalization Act § 223, Pub. L. No. 107-118, 115 Stat. 2356, 2372 (2002) (codified as amended at 42 U.S.C. § 9601(35)).

[11] Brownfields Revitalization Act § 222(a), Pub. L. No. 107-118, 115 Stat. 2356, 2370-71 (2002) (codified as amended at 42 U.S.C. § 9601(40)).

willing to meet all of the additional criteria in order to qualify as a "bona fide prospective purchaser," the Brownfields Revitalization Act will protect the conservation organization from "owner or operator" liability under CERCLA.[12]

The Brownfields Revitalization Act does, however, contain a provision that is apparently designed to prevent people who purchase contaminated properties from obtaining a financial windfall from the transaction. This section of the Act provides that if the federal government incurs unrecovered response costs at a facility that a bona fide prospective purchaser acquires, the government shall have a lien on the facility to help cover the government's response costs.[13] The lien shall not exceed the increase in fair market value of the property that is attributable to the response action at the time of sale or other disposition of the property.[14]

Before Congress enacted the Brownfields Revitalization Act, the EPA published a guidance document on settlements with prospective purchasers of contaminated properties. Pursuant to this guidance document, the EPA and Department of Justice entered into settlement agreements that provided certain prospective purchasers with liability protection in exchange for the prospective purchaser's agreement to clean up the property or provide some other environmental benefit.[15]

Since the Brownfields Revitalization Act addresses the circumstances in which people that acquire contaminated properties will be exempt from retroactive CERCLA liability, the EPA must reevaluate its policy involving prospective purchaser agreements. The agency will most likely address this issue by publishing a new guidance or policy document explaining under what circumstances, if any, the EPA will enter into prospective purchaser agreements.

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[12] Since a conservation organization that qualifies for the prospective purchaser exemption will not be considered an "owner or operator" under CERCLA, the organization should also be protected from third party contribution actions under § 113 (f) of CERCLA, 42 U.S.C. § 9613(f).

[13] Brownfields Revitalization Act § 222(b), Pub. L. No. 107-118, 115 Stat. 2356, 2372 (2002) (codified as amended at 42 U.S.C. § 9607(r) (2)).

[14] Brownfields Revitalization Act § 222(b), Pub. L. No. 107-118, 115 Stat. 2356, 2372 (2002) (codified as amended at 42 U.S.C. § 9607(r) (4)).

[15] *See* ENVIRONMENTAL PROTECTION AGENCY, GUIDANCE ON SETTLEMENTS WITH PROSPECTIVE PURCHASES OF CONTAMINATED PROPERTY, *available at* http://www.epa.gov/brownfields/html-doc/purchase.htm (last visited Apr. 6, 2002).

B. Contiguous Property Exemption

The Brownfields Revitalization Act also amends Section 107(a) of CERCLA, which defines PRPs, to specifically exclude a person from "owner or operator" liability if their property is contaminated solely by a release of hazardous substances from a contiguous, or similarly situated property owned by someone else.[16] If a person is entitled to protection under this exemption, the Act authorizes the EPA to issue assurance that no enforcement action will be taken and grant the person protection from cost recovery action under Section 113(f) of CERCLA.[17]

This exemption contains several conditions that are similar to the conditions for the prospective purchaser exemption. The prospective purchaser exemption and the contiguous property exemption both require a person to conduct "all appropriate inquiries" in order to be eligible for the exemptions. The contiguous property exemption is not available if the result of this inquiry causes the property owner to know or have reason to know that the property was or could be contaminated by a release of hazardous substances from other real property.[18] If this inquiry does cause a person to know or have reason to know that the property was or could be contaminated, however, the person can still invoke the prospective purchaser exemption.[19]

C. "All Appropriate Inquiries" Clarifications

The Act also clarifies what actions a person must take to satisfy the "all appropriate inquiries" requirement of the innocent landowner defense. The innocent landowner defense will generally be inapplicable to conservation organizations that are involved in the acquisition and restoration of IAMs because these organizations will likely know of the existence of hazardous substances prior to acquisition of the degraded property. Since a person must also

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16 Brownfields Revitalization Act § 221, Pub. L. No. 107-118, 115 Stat. 2356, 2368-70 (2002) (codified as amended at 42 U.S.C. § 9607(q)). Since a conservation organization that qualifies for the contiguous property exemption will not be considered an "owner or operator" under CERCLA, the organization should also be protected from third party contribution actions under § 113(f) of CERCLA, 42 U.S.C. § 9613(f).

17 Brownfields Revitalization Act § 221, Pub. L. No. 107-118, 115 Stat. 2356, 2370 (2002) (codified as amended at 42 U.S.C. § 9607(q)(3)).

18 Brownfields Revitalization Act § 221, Pub. L. No. 107-118, 115 Stat. 2356, 2368-69 (2002) (codified as amended at 42 U.S.C. § 9607(q)(1)(A)(viii)(II)).

19 Brownfields Revitalization Act § 221, Pub. L. No. 107-118, 115 Stat. 2356, 2370 (2002) (codified as amended at 42 U.S.C. § 9607(q)(1)(C)).

conduct "all appropriate inquiries" to qualify for the prospective purchaser exemption and the contiguous property exemption, however, it is critically important for conservation organization to understand this clarification.

The Brownfields Revitalization Act requires the EPA to promulgate regulations establishing the standards and practices that a purchaser must comply with in order to satisfy the "all appropriate inquiries" requirement, and sets forth two separate standards that apply until these regulations are implemented.[20] The first standard applies to properties purchased before May 31, 1997. Under this standard, the Act directs the courts to consider: 1) the specialized knowledge of the defendant; 2) the relationship of the purchase price to the value of the property if it were not contaminated; 3) commonly known information; 4) obviousness of contamination; and 5) the ability of the purchaser to detect contamination by appropriate inspection.[21]

The second standard applies to property purchased after May 31, 1997. Under this standard, the Act directs the court to consider whether the purchaser undertook an ASTM Phase I Environmental Assessment.[22]

D. State Voluntary Cleanup Programs and Federal Enforcement Limitations

Many States have implemented Voluntary Cleanup Programs to encourage the cleanup and reuse of contaminated sites. Since states and the United States EPA have overlapping and independent authority to direct and oversee cleanup activities at contaminated sites, many states entered into Memorandums of Agreement (MOAs) with the EPA to clarify when the EPA will refrain from taking enforcement actions against participants in State Voluntary Cleanup Programs.

The Brownfields Revitalization Act codifies this concept by limiting the EPA's ability to take CERCLA enforcement actions at

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[20] Brownfields Revitalization Act § 223, Pub. L. No. 107-118, 115 Stat. 2356, 2372-74 (2002) (codified as amended at 42 U.S.C. § 9601(35)).

[21] Brownfields Revitalization Act § 223, Pub. L. No. 107-118, 115 Stat. 2356, 2374 (2002) (codified as amended at 42 U.S.C. § 9601(35)(B)(iv)(I)).

[22] Brownfields Revitalization Act § 223, Pub. L. No. 107-118, 115 Stat. 2356, 2374 (2002) (codified as amended at 42 U.S.C. § 9601(35)(B)(iv)(II)). The Act identifies the American Society for Testing and Materials, Standard E1527-97 as the appropriate ASSTM standard.

certain sites that are subject to qualified state cleanup programs.[23] The Act provides that the federal government shall not pursue a CERCLA enforcement action against a person that is conducting or has completed a response action in compliance with a qualified State cleanup program.[24] This limitation applies to response actions conducted after February 15, 2001.[25]

There are four exceptions to this limitation that would allow the EPA to pursue a CERCLA enforcement action against a person even if the person that is conducting or has completed a response action in compliance with a State program. These four exceptions are: 1) the State requests assistance in the performance of a response action; 2) the EPA determines that contamination will migrate across a state line; 3) a release presents an imminent and substantial endangerment and additional response actions are necessary; and 4) the EPA has discovered new information that the facility will require further remediation.[26]

The federal enforcement limitations will help conservation organizations that participate in qualified state voluntary cleanup programs manage the liabilities associated with the restoration and preservation of IAMs by clarifying the EPA's role at these sites.

CONCLUSION

The Small Business Liability Relief and Brownfields Revitalization Act is important legislation for conservation organizations interested in the acquisition and restoration of IAMs. The Act provides significant funding for the characterization, assessment and cleanup of "mine-scarred land" and provides conservation organizations with additional tools to manage some of the environmental liabilities associated with these projects. Although there are still significant risks associated with the acquisition and restoration of IAMs, the Act

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23 Brownfields Revitalization Act § 231(b), Pub. L. No. 107-118, 115 Stat. 2356, 2375-79 (2002) (codified as amended at 42 U.S.C. § 9628).

24 Brownfields Revitalization Act § 231(b), Pub. L. No. 107-118, 115 Stat. 2356, 2377 (2002) (codified as amended at 42 U.S.C. § 9628(b)(1). The Act excludes two categories of sites from the federal enforcement limitations. They are 1) facilities that have been inspected and are qualified for listing on the National Priority List, and 2) facilities that "warrant particular consideration as identified by regulations, such as sites posing a threat to a sole-source drinking water aquifer or a sensitive ecosystem."

25 Brownfields Revitalization Act § 231(b), Pub. L. No. 107-118, 115 Stat. 2356, 2379 (2002) (codified as amended at 42 U.S.C. § 9628(b)(3).

26 Brownfields Revitalization Act § 231(b), Pub. L. No. 107-118, 115 Stat. 2356, 2378 (2002) (codified as amended at 42 U.S.C. § 9628(b)(1)(B)).

will help conservation organizations that are involved in these projects manage these risks.