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A Review of the Mississippi Brownfields Voluntary Cleanup and Redevelopment Act

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A REVIEW OF THE MISSISSIPPI BROWNFIELDS VOLUNTARY CLEANUP AND REDEVELOPMENT ACT

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I. INTRODUCTION

During the 1998 legislative session, the Mississippi legislature passed S.B. No. 2989, the Mississippi Brownfields Voluntary Cleanup and Redevelopment Act ("Act").[1] The Act established a program to encourage the cleanup and redevelopment of contaminated property by providing protection from liability for contamination cleanup under state law and by lowering the potential cost of redevelopment through more lenient remediation levels than would otherwise be required under other state and federal environmental laws.

The purpose of this Comment is to give the background against which the legislature passed the Act and to suggest some possible improvements to the program. Part II of this Comment defines the brownfields problem and its origin. Part III is a review of various federal and state responses to the brownfields problem. This review provides a means of comparison and contrast of those efforts and Mississippi's initiative. Part IV gives an overview of the Act. Part V explores possible improvements to the Act.

The conclusion drawn from the analysis of the Act is that it represents merely an initial step toward revitalization of contaminated sites in Mississippi. The Act could, however, potentially have a significant effect on the health and environment of Mississippians. In addition, by putting those contaminated sites back into use, the program could greatly improve the state's economy.

II. THE BROWNFIELDS PROBLEM

Brownfields are "abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination."[2] The number of brownfield sites in the United States is estimated to be as high as 450,000.[3] Brownfields tend to be properties in low-income neighborhoods where unemployment is high.[4] The fact that these sites are not developed generally means that unemployment remains high, which causes local tax revenues to be too low for local governments to afford to clean up the sites.[5] These contaminated sites also pose health risks to the local residents.[6]

The main reason these sites exist is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended by the

*I thank my mother, Betty, my father, Ken, my wife, Catherine, and the rest of my family for their love, support, and encouragement throughout this and my many other endeavors.

1. Codified at MISS. CODE ANN. §§ 49-35-1 to -27 (Supp. 1998).

2. CHRISTIAN VOLZ & PETER L. GRAY, 1998 WILEY ENVIRONMENTAL LAW UPDATE 244 (1998) (citing OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PUB. NO. 9230.0-30, THE BROWNFIELDS ECONOMIC REDEVELOPMENT INITIATIVE; APPLICATION GUIDELINES FOR DEMONSTRATION PILOTS 1 (1995)).

3. Christopher Williams, *Brownfields-Redevelopment Effort Grows*, WALL ST. J., Sept. 22, 1995, at A9.

4. VOLZ & GRAY, *supra* note 2, at 245.

5. *Id.*

6. Eric D. Madden, *The Voluntary Cleanup and Property Redevelopment Act - The Limits of the Kansas Brownfields Law*, 46 U. KAN. L. REV. 593, 595-96 (1998).

Superfund Amendments and Reauthorization Act of 1986,[7] or state law equivalents of CERCLA.[8] CERCLA imposes strict liability for the release of hazardous substances on owners and operators of contaminated facilities or property, transporters of hazardous substances, and on those who arrange for the disposal of hazardous substances.[9] The owner/operator liability is not limited to past owners, who may have actually caused the release, but includes present owners or operators of a facility as well.[10] Most courts also hold that liability is joint and several for all Potentially Responsible Parties ("PRP").[11] The only way a PRP may avoid joint and several liability is to prove that the harm it caused is divisible from the harm caused by other PRPs.[12] Another harsh aspect of CERCLA liability is that most courts have not required proof of causation under CERCLA.[13]

In addition to strict, joint and several liability and no requirement of causation, lenders have, in the past, been held liable for CERCLA violations,[14] although Congress acted to protect lenders from liability as "owners or operators" under CERCLA in 1996 with the Asset Conservation, Lender Liability and Deposit Insurance Act.[15] These harsh effects of CERCLA have combined to prevent the development of brownfields because potential developers and financers fear liability for any contamination present on a site.

III. SOME SOLUTIONS TO THE BROWNFIELDS PROBLEM

As has happened with other radical environmental laws, such as the Clean Air Act,[16] the initial euphoria over the potential environmental benefits of CERCLA has begun to wear off. People have begun to realize that CERCLA was perhaps too ambitious—an overreaction. Such feelings have caused a reevaluation of CERCLA and a movement, especially at the state level, toward moderating the effects of CERCLA.

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7. 42 U.S.C. §§ 9601-9675 (1994 & Supp. 1996).

8. *See, e.g.*, 415 ILL. COMP. STAT. ANN. 5/22.2 (West Supp. 1998); MASS. ANN. LAWS ch. 21E, §§ 1-18 (Law. Co-op 1996 & Supp. 1997); MINN. STAT. § 115B (1997 & Supp. 1998); N.C. GEN. STAT. §§ 130A-310 to 310.24 (1997); N.H. REV. STAT. ANN. §§ 147-B:1- :15 (1996 & Supp. 1997).

9. 42 U.S.C. § 9607(a) (1994 & Supp. 1996).

10. *Id.* at § 9607(a)(1).

11. *See, e.g.*, United States v. Alcan Aluminum Corp., 964 F.2d 252, 267-71 (3d Cir. 1992); O'Neil v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989); United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989); United States v. Monsanto, 858 F.2d 160, 171 (4th Cir. 1988); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 n.13 (2d Cir. 1985).

12. *See In re* Bell Petroleum Serv., Inc., 3 F.3d 889 (5th Cir. 1993); United States v. Alcan Aluminum Corp., 990 F.2d 711 (2d Cir. 1993); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 811 (S.D. Ohio 1983).

13. United States v. Alcan Aluminum Corp., 990 F.2d 711 (2d Cir. 1993); *see also* Farmland Indus. v. Colorado Eastern R.R. Co., 922 F. Supp. 437 (D. Colo. 1996); Premium Plastics v. LaSalle Nat'l Bank, 904 F. Supp. 809 (N.D. Ill. 1995); Northwestern Mutual Life Ins. Co. v. Atlantic Research Corp., 847 F. Supp. 389 (E.D. Va. 1994). Two commentators have opined, however, that the United States Supreme Court decision in *United States v. Bestfoods*, 118 S. Ct. 1876 (June 8, 1998), which applied the traditional common law rules of parent corporation liability for the actions of a subsidiary, may lead the way to application of similar common law rules respecting tort liability, such as causation, in CERCLA cases. Robert S. Sanoff & Jeffrey L. Roelofs, *'Bestfoods' - A Return to Common Sense*, 13 TOXICS LAW REPORTER 127 (1998).

14. *See, e.g.*, United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990).

15. Pub. L. No. 104-208, 110 Stat. 3009, §§ 2501-05 (1996).

16. 42 U.S.C. §§ 7401-7671(q) (1994).

A. Attempts by Congress and the EPA to Address the Brownfields Problem

Congress has, to some degree, addressed the backlash toward CERLA by passing the Brownfields Tax Incentive in the Taxpayer Relief Act of 1997.[17] If a particular brownfields site is in an area that meets certain use, contamination, and geographic or demographic criteria, environmental cleanup costs associated with the site are tax deductible in the year they are incurred.[18] Despite this step by Congress, however, CERCLA remains a major hurdle to the development and restoration of contaminated properties.

Indeed, major statutory reform is required for a complete solution to the brownfields dilemma. However, Congress has failed to pass bills in recent years that would have amended CERCLA to address various concerns including brownfields.[19] In fact, one such proposed bill would have established a federal brownfields program.[20]

The EPA has reacted to the backlash against environmental legislation by implementing various administrative reforms aimed at encouraging the development of brownfields. Those measures include: (1) decreasing the number of hazardous substance release sites listed on the Comprehensive Environmental Response, Compensation, and Liability Information System ("CERCLIS"), which many developers may view as an EPA "most wanted" list and, therefore, avoid the listed sites; (2) changing the procedure for taking sites off of the National Priorities List (NPL) to allow portions of sites to be taken off the list before complete remediation of the site; (3) establishing a pilot project grant program; (4) entering into "Prospective Purchaser Agreements"[21] and issuing "guidances" and policy statements providing for covenants not to sue or to bring enforcement actions against those involved in cleaning up contaminated sites; and (5) issuing a guidance that encourages the consideration of prospective industrial or other land use as a factor in determining the level to which a site must be remediated, instead of requiring the site be remediated to a level suited for residential use.[22]

The guidances are especially significant in conjunction with the state brownfields programs. They afford prospective developers some protection from CERCLA, which otherwise still exists, despite participation in a state brownfields program. This is particularly true of the guidances on "Prospective Purchaser Agreements," which may include covenants not to sue.[23]

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17. Pub. L. No. 105-34, 111 Stat. 788, 882 (1997).

18. *Id.* at 883-84.

19. *See, e.g.*, S. 1285, 104th Cong. (1995); H.R. 2500, 104th Cong. (1995); S. 1497, 105th Cong. (1997).

20. H.R. 3020, 105th Cong. (1997).

21. Superfund Program; De Minimis Landowner Settlements, Prospective Purchaser Settlements, 54 Fed. Reg. 34,235 (1989). That policy provides for releases from liability under CERCLA and covenants not to sue purchasers of contaminated properties who commit to specific cleanups. *See* Joel B. Eisen, *'Brownfields of dreams'?: Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883, 982 (1996).

22. *See generally* VOLZ & GRAY, *supra* note 2, at 257-58.

23. *See* Announcement and Publication of Guidance on Agreements with Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34,792 (1995); Superfund Program; De Minimis Landowner Settlements, Prospective Purchaser Settlements, 54 Fed. Reg. 34,235 (1989); *see also* VOLZ & GRAY, *supra* note 2, at 258 and Eisen, *supra* note 21, at 982.

In 1997, the EPA proposed a guidance for developing Memoranda of Agreement, which would have essentially allowed delegation of CERCLA enforcement to the states. The Final Draft Guidance was withdrawn, however, due to unfavorable comments.[24] Although this does not appear to prohibit or preclude a Memorandum of Agreement between the EPA and a state environmental agency, the lack of guidance may effectively guarantee that the EPA will not enter into any new agreements. This is unfortunate for prospective developers because if state law or state enforcement of CERCLA were the only threats, liability protection under a state brownfields program would be significantly increased.[25]

B. State Brownfields Redevelopment Programs

State CERCLA-equivalent statutes[26] pose another substantial barrier to redevelopment of brownfields. The state statutes generally apply to smaller or less contaminated sites than those with which the EPA is concerned.[27] Although the state statutes do not preclude the application of CERCLA, a state brownfields program that protects a prospective developer from liability under state law can be a significant incentive for redevelopment of a site.

The states that have passed brownfields legislation vary in their approaches to solving the brownfields problem. Some provide liability protection, while others provide flexible cleanup criteria or economic incentives.[28] However, there are some common aspects. Most state programs are voluntary,[29] and they generally allow for revocation of the benefits, or "re-opening" of a brownfields redevelopment plan, when the participating party provides false information or otherwise abuses the program.[30] This section of the Comment is a review of some of the existing state voluntary cleanup programs. The reader may use this review to compare the incentives offered under those programs with the incentives offered under the Mississippi Brownfields Voluntary Cleanup and Redevelopment Act.[31] The focus of this review is mainly upon the programs of some Southeastern

24. Notice of Availability of Final Draft Guidance for Developing Superfund Memoranda of Agreement (MOA) Language Concerning State Voluntary Cleanup Programs, 62 Fed. Reg. 47,495 (1997); *see 1997: The Year in Review* (1998) A.B.A. SEC. NATURAL RESOURCES, ENERGY, AND ENVIRONMENTAL LAW 263.

25. *See infra* Part III.B. *See also* Notice of Availability of Final Draft Guidance for Developing Superfund Memoranda of Agreement (MOA) Language Concerning State Voluntary Cleanup Programs, 62 Fed. Reg. 47,495 (1997).

26. *See supra* note 8; *see also* ENVIRONMENTAL PROTECTION AGENCY PUB. NO. 96-963249, AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY (1995).

27. *See* VOLZ & GRAY, *supra* note 2, at 246.

28. *Id.* at 248

29. *Id.* at 248; *see also* ENVIRONMENTAL PROTECTION AGENCY, *supra* note 26.

30. *See, e.g.*, N.C. GEN. STAT. § 130A-310.33(c) (1997); FLA. STAT. ch. 376.82(3) (Supp. 1998).

31. *See infra* Part IV.

states and some representative programs from other parts of the nation, although there are many other such programs across the country.[32]

1. Tennessee

Several of Mississippi's neighbors have established brownfields cleanup programs. Tennessee is one of the states that has led the way in the brownfields initiative. Tennessee was one of the first states to enter into a Prospective-Purchaser Agreement,[33] which allowed the continued industrial use of a severely contaminated site called Copper Hill, while requiring a gradual cleanup of the site.[34]

Tennessee's brownfields program is a combination of the Voluntary Cleanup Oversight and Assistance Program ("VOAP"),[35] an amendment to its state Superfund statutes,[36] and two provisions of the state Superfund statutes that differ from their federal inspiration—apportioned liability[37] and lender-liability protection.[38] Under the VOAP, a prospective developer must: (1) pay a $5,000 fee for participating in the program;[39] (2) conduct an investigation of the contamination on the site;[40] and (3) enter into a consent order with the state environmental protection agency and complete the prescribed cleanup.[41] Upon completion of the cleanup, the agency issues a "no further action" letter, "if appropriate."[42]

The major liability protection provided by the Tennessee program is the apportioned liability under the state Superfund statutes. Instead of imposing joint and several liability, the program apportions liability based on a list of equitable considerations.[43] The other major protection from liability applies to lenders who merely maintain indicia of ownership for purposes of protecting their investment,

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32. *See* COLO. REV. STAT. §§ 25-16-301 to -310 (1995); 415 ILL. COMP. STAT. 5/22.2 (West 1997); IND. CODE § 13-25-5 (1997); KY. REV. STAT. ANN. §§ 224.01-450 to -465 (Michie Supp. 1996); ME. REV. STAT. ANN. tit. 38, § 343-E (West 1995); MD. CODE ANN., ENVIR. §§ 3-901 to -905 (Supp. 1997); MINN. STAT. § 115B.17 (1995); MO. REV. STAT. §§ 260.565-75 and 447.700-716 (1996); NEB. REV. STAT. §§ 81-15, 181-188 (1994 & Supp. 1996); N.C. GEN. STAT. §§ 130A-310.30-.40 (1997); R.I. GEN. LAWS §§ 23-19.14-1 to -14 (1996); TEX. HEALTH & SAFETY CODE ANN. §§ 361.601-.613 (West Supp. 1998); UTAH CODE ANN. §§ 19-6-301 to -325 (1995 & Supp. 1998); VT. STAT. ANN. tit. 10, § 6615(a) (1995); VA. CODE ANN. §§ 10.1-1429.1 to 10.1-1429.3 (Michie 1997); WASH. REV. CODE ANN. §§ 70.105D.010 and 70.105D.090 (West Supp. 1998); W. VA. CODE §§ 22-22-1 to -17 (1996); WIS. STAT. §§ 292.11-.21 (1995). Arizona, California, Connecticut, Delaware, Massachusetts, and New Jersey have programs that are not consolidated into a single statutory provision. The brownfields programs in those states are a result of the interaction of various statutory provisions. For a discussion of these programs, *see* TODD S. DAVIS & KEVIN D. MARGOLIS, BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY 287-96; 313-32; 357-69; 374-81; 443-56; 518-27 (1997), respectively. States, such as New Jersey and New York, do not have statutory programs, but the environmental protection agencies of both states have administrative programs to encourage redevelopment. *See id.* at 518-38.

33. DAVIS AND MARGOLIS, *supra* note 32, at 592.

34. *Id.*

35. TENN. CODE ANN. § 68-212-224 (1996).

36. *Id.* §§ 68-212-201 to -223.

37. *Id.* § 68-212-207.

38. *Id.* §§ 68-212-202(E)(ii), 68-212-401 to -407.

39. *Id.* § 68-212-224(b).

40. *Id.* § 68-212-224(a).

41. *Id.; see generally* DAVIS AND MARGOLIS, *supra* note 32, at 593-94.

42. TENN. CODE ANN. § 68-212-224(g).

43. *Id.* § 68-212-207(b)(1).

but who do not participate in the operation of the site.[44] Finally, the Tennessee program bases cleanup standards, or requirements, on risk-based criteria and remedy selection, based on factors, including cost-effectiveness of technology alternatives and the nature of the danger to human health and the environment posed by the contamination.[45]

2. Florida

In 1997, the Florida legislature passed the Brownfields Redevelopment Act.[46] The program is available to private parties or municipalities.[47] Any person not responsible for contributing to the contamination is eligible for the program.[48] Once a municipality notifies the state environmental agency of its intention to designate a site for brownfield cleanup, the municipality or a private party may negotiate a brownfields site rehabilitation agreement with the agency.[49] The agreement must contain rehabilitation requirements, including risk-based clean-up criteria to be established by regulation by July 1, 1998, as well as certain assurances from the party performing the rehabilitation.[50]

The Florida program provides liability protection from state law, including protection from third parties for recovery of remediation costs.[51] The liability protection extends to lenders.[52] The program also provides economic incentives, including tax exemptions and credits, minority enterprise programs, community development block grants, and low- or zero-interest loans for cleanup costs.[53] Finally, the program provides regulatory incentives, including waiver of fees, zoning incentives, and stream-lined permitting procedures.[54]

3. Arkansas

Arkansas's first attempt at a brownfields program was an amendment to the Remedial Action Trust Fund Act.[55] That program was a failure from the beginning because it provided no practical protection from liability, or any other realistic incentives to redevelopment of brownfields. Subsequently, the Arkansas legislature repealed that statute and established a new program.[56] Any person desiring to "acquire an abandoned site and [who] is not responsible for any pre-exist-

44. *Id.* §§ 68-212-401 to -407.
45. *Id.* § 68-212-206; *see* DAVIS AND MARGOLIS, *supra* note 32, at 596-97 (citing TENN. COMP. R. & REGS. tit. 1200, ch. 13 (1996)).
46. FLA. STAT. ch. 376.77-376.83 (Supp. 1998).
47. *Id.* ch. 376.80.
48. *Id.* ch. 376.82(1).
49. *Id.* ch. 376.80.
50. *Id.* ch. 376.80, 376.81(1).
51. *Id.* ch. 376.82.
52. *Id.*
53. *Id.* ch. 376.84.
54. *Id.*
55. *Id.* § 8-7-523.
56. *Id.* §§ 8-7-1101 to -1104 (Michie Supp. 1997).

ing pollution at or contamination on the site" is eligible to participate in the program.[57] The goal of the program is to put abandoned properties back into productive use and create employment opportunities.[58]

Under the new program, the state environmental protection agency may enter into a consent administrative order with a prospective purchaser.[59] The order delineates all "liabilities and obligations" associated with the brownfields site.[60] The agreement must include remediation requirements based on consideration of the risk to humans and the environment,[61] as well as future land use limitations and engineering controls intended to be used on the site.[62] An interesting aspect of the Arkansas program is that the consent order is transferable to subsequent purchasers of the property.[63]

4. Michigan

Other states across the nation have established brownfields programs as well. Michigan has taken a unique approach in this area. Instead of a typical voluntary cleanup program, Michigan has changed its CERCLA-equivalent statute in an attempt to solve the problems that it created.[64] Before being amended, the Michigan Environmental Response Act[65] contained liability provisions almost identical to those under CERCLA.[66]

Amendments enacted in June 1995 added a causation requirement for property owner liability and also provided cleanup liability protection for future purchasers.[67] Future purchasers are protected from liability only if they perform a Baseline Environmental Assessment, which is an assessment of contamination existing on the property at the time of purchase,[68] and submit a report to the Michigan Department of Environmental Quality ("Michigan DEQ").[69] The amendments also exempt lenders from liability, in certain circumstances, as an incentive for them to finance the development of brownfields.[70]

Although the amendments eliminated liability for a person based solely on his or her "status" as an owner or operator, they impose upon owners and operators a duty not to exacerbate existing contamination, as well as a duty to exercise due care in the use of the property.[71] These duties ensure a balance between investment protection for the property owner and public health and safety.[72]

57. *Id.* §§ 8-7-1102 and 8-7-1104(a).
58. *Id.* §§ 8-7-1101(2) and 8-7-1104(a)(3).
59. *Id.* § 8-7-1104(d).
60. *Id.*
61. *Id.* §§ 8-7-1104(g), (h), (j)(1).
62. *Id.* § 8-7-1104(j).
63. *Id.* § 8-7-1104(o).
64. VOLZ & GRAY, *supra* note 2, at 250.
65. MICH. COMP. LAWS §§ 324.20101-.20141 (Supp. 1996).
66. VOLZ & GRAY, *supra* note 2, at 249.
67. MICH. COMP. LAWS §§ 324.20126(1)(a) and (c); *see* VOLZ & GRAY, *supra* note 2, at 249.
68. *Id.* § 324.20101(d).
69. VOLZ & GRAY, *supra* note 2, at 249.
70. MICH. COMP. LAWS § 324.20126(4)(b); *see* VOLZ & GRAY, *supra* note 2, at 249.
71. *Id.* §§ 324.20107(a)(1)(a)-(b).
72. *See* VOLZ & GRAY, *supra* note 2, at 250.

On July 10, 1996, Region V of the EPA entered into a Memorandum of Agreement with the Michigan DEQ.[73] In that memorandum, the EPA "promised not to 'plan or anticipate any federal action'" under CERCLA against any party covered by the Michigan Environmental Response Act, as long as the party was in compliance with the Act.[74] This is a significant added incentive to redevelopment.

5. Ohio

Ohio's brownfields program is a voluntary program and "is one of the most detailed and comprehensive" programs that has been enacted.[75] The program allows private voluntary cleanups, and when the party conducting the cleanup proves that the property meets applicable standards, the Ohio EPA issues a covenant not to sue.[76] The voluntary cleanup begins with a phase I assessment of the property, which includes investigation of past ownership of the property, past use of the property and surrounding property, and a cursory inspection of the property.[77] If the phase I assessment shows that all applicable standards are, or will be, met because (1) there is no reason to believe a release of hazardous substances has occurred, (2) any releases that have occurred do not exceed the standards, or (3) the planned remedial activity will meet the standards, the certified professional conducting the assessment may issue a "no further action letter" to the Ohio EPA.[78] The Ohio EPA may then be petitioned for a covenant not to sue, which it must grant if public health and the environment are protected.[79] The covenant is revocable if the standards cease to be met.[80] The covenant runs with the land.[81]

To ensure proper cleanups, the Ohio EPA is required to audit at least twenty-five percent of all "no further action" letters.[82] Among the incentives offered by the program are flexible cleanup criteria based on the intended future use of the property, such as industrial, instead of residential, uses, and lender liability protection to encourage financing for brownfields purchases.[83] The Ohio program also provides low-interest cleanup loans through the Ohio Water Pollution Loan Fund, the Ohio Pollution Prevention Loan Program, the Ohio Department of Development, and the Ohio Water Development Authority.[84] Finally, the Ohio program provides for franchise and personal tax credits to persons involved in the program.[85]

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73. DAVIS AND MARGOLIS, *supra* note 32, at 468.
74. *Id.*
75. OHIO REV. CODE ANN. §§ 3746.01-.99 (Banks-Baldwin 1998); *see* VOLZ & GRAY, *supra* note 2, at 250-51.
76. *Id.* §§ 3746.10 and .12.
77. VOLZ & GRAY, *supra* note 2, at 251.
78. *Id.* at 251 (citing OHIO REV. CODE ANN. §§ 3746.10 and .11).
79. VOLZ & GRAY, *supra* note 2, at 251 (citing OHIO REV. CODE ANN. §§ 3746.12(A), (C)).
80. OHIO REV. CODE ANN. §§ 3746.12(B), (E).
81. *Id.* § 3746.14.
82. *Id.* § 3746.17.
83. *Id.* §§ 3746.04 and .26.
84. *Id.* §§ 6111.036, 6123.032, 6123.04, 6123.041; *see* DAVIS AND MARGOLIS, *supra* note 32, at 546.
85. DAVIS AND MARGOLIS, *supra* note 32, at 546 (citing OHIO REV. CODE ANN. § 122.19).

6. Oregon

The Oregon legislature passed the Recycled Lands Act of 1995 to address the brownfields problem.[86] The program has three major provisions. First, the program requires a prospective purchaser to perform a "probabilistic risk-based assessment" of the site, taking into consideration numerous factors, including risk of future human exposure, estimates of exposure levels, and current and future land uses.[87] Once the risk assessment is performed, the prospective purchaser may negotiate with the Oregon Department of Environmental Quality ("Oregon DEQ") on remedy selection.[88] The program allows the Oregon DEQ to approve any remedy, including "excavation, disposal, containment, . . . any other engineering or institutional controls . . . [or] any combination of other methods," that will provide adequate protection to human health and the environment.[89] Therefore, a prospective developer is not limited to expensive remediation. Finally, once a remedy is agreed upon, the Oregon DEQ may enter into an agreement with the prospective developer or purchaser, in which the Oregon DEQ agrees to provide a release of liability after the prospective developer completes the agreed-upon remediation.[90]

7. Pennsylvania

Pennsylvania has three acts that combine to form the state's brownfields program. First, the Land Recycling and Environmental Remediation Standards Act[91] provides for setting risk-based remediation standards, sets a definite procedure for the approval or denial of remediation plans, and provides liability protection, including releases from the state and protection from citizen suits and contribution actions.[92] Next, the Economic Development Agency, Fiduciary, and Lender Environmental Liability Protection Act[93] provides protection from state and common law liability for lenders, fiduciaries, and economic development agencies, provided they did not contribute to the contamination on the site.[94] Finally, the Industrial Sites Environmental Assessment Act[95] provides grant funds of two million dollars per year for environmental site assessments in certain communities.[96] Other parts of the Pennsylvania program provide further funds for grants and loans for voluntary cleanup.[97]

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86. OR. REV. STAT. §§ 465.257, .315, .327 (1997).
87. *See* DAVIS AND MARGOLIS, *supra* note 32, at 559 (citing OR. REV. STAT. § 465.315(2) (1995)).
88. DAVIS AND MARGOLIS, *supra* note 32, at 559.
89. *See id.* at 560 (citing OR. REV. STAT. §§ 465.315(1)(b), (c)).
90. *See* DAVIS AND MARGOLIS, *supra* note 32, at 560-61 (citing OR. REV. STAT. § 465.327).
91. 35 PA. CONS. STAT. §§ 6026.101-.908 (Supp. 1998).
92. DAVIS AND MARGOLIS, *supra* note 32, at 568.
93. 35 PA. CONS. STAT. §§ 6027.1-.14 (Supp. 1998).
94. DAVIS AND MARGOLIS, *supra* note 32, at 568.
95. 35 PA. CONS. STAT. §§ 6028.1-.5 (Supp. 1998).
96. DAVIS AND MARGOLIS, *supra* note 32, at 568.
97. 35 PA. CONS. STAT. §§ 6026.701 and .702 (1995).

IV. AN OVERVIEW OF THE MISSISSIPPI BROWNFIELDS VOLUNTARY CLEANUP AND REDEVELOPMENT ACT

On April 8, 1998, the Mississippi Legislature passed the Mississippi Brownfields Voluntary Cleanup and Redevelopment Act.[98] The purpose of the Act is to "provide incentives for the voluntary cleanup of brownfields property (which the legislature has determined exists in Mississippi)[99] without use of taxpayer funds."[100]

A. Sites Eligible for the Program

The Act defines "brownfields property" as property that is limited in use because of contamination or potential contamination and is subject to remediation under any state environmental program or CERCLA.[101] The Act does not cover sites that are on the National Priorities List, except those for which the EPA has issued "certificates of completion of the remediation."[102] The Act also excludes from the definition of brownfields those sites subject to an existing administrative order, sites involved in an enforcement action under CERCLA or the Resource Conservation and Recovery Act ("RCRA"), and sites undergoing corrective action under RCRA.[103]

B. How to Participate in the Program

A party wishing to participate in the program—a "brownfields party"—must provide the Mississippi Department of Environmental Quality ("DEQ") with an application.[104] The application must demonstrate that the property will be put to a suitable use after remediation and that the brownfields party has the financial and technical resources to undertake and complete the remediation.[105] The party submitting an application must pay a $2,000 fee.[106]

If the application is approved, the DEQ will prepare a proposed brownfields agreement.[107] The agreement must contain a legal description of the property, a description and schedule of remediation to be performed, the proposed uses of the property, and any other requirements the department deems necessary for completion of the agreement.[108] Remediation requirements are to be "based on public health and environmental risks."[109] In setting remediation requirements, the department must also take into consideration the projected future use of the property, any land-use restrictions on the property, engineering controls to be

98. MISS. CODE ANN. §§ 49-35-1 to -27 (Supp. 1998).
99. However, as of December 1995, there were no brownfields sites identified in Mississippi. ENVIRONMENTAL PROTECTION AGENCY, AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY, Table V-21 (1995).
100. MISS. CODE ANN. § 49-35-3(e) (Supp. 1998).
101. *Id.* § 49-35-5(d).
102. *Id.* § 49-35-5(d)(i).
103. *Id.* §§ 49-35-5(d)(ii) and (iii).
104. *Id.* § 49-35-7.
105. *Id.* §§ 49-35-7(1)(a)(i) and (ii).
106. *Id.* § 49-35-25(2).
107. *Id.* § 49-35-9.
108. *Id.* § 49-35-7.
109. *Id.* § 49-35-7(6).

applied to the property, and cost effectiveness.[110] The department must publish a notice of the proposed agreement and allow public comment.[111] The Commission on Environmental Quality ("Commission"), if satisfied that the agreement complies with all applicable laws and regulations, will then approve the agreement by order.[112]

C. *Benefits of Participating in the Program*

Compliance with the brownfields agreement affords the brownfields party protection from liability for remediation and any costs reasonably related to such remediation, except those costs required in the agreement.[113] However, the extent of the liability protection is limited. Execution of a brownfields agreement relieves a brownfields party from liability to all parties *except* the United States.[114] Violation of the terms of the agreement and failure to correct the violation subjects the brownfields party to removal of all liability protection and possible civil penalties.[115] The protection from liability extends to the contractor performing the remediation work, current and future owners of the property, future developers or occupants of the property, lenders financing the remediation, and any successors or assigns of these parties.[116]

Curiously, however, the Act expressly states that, except for the liability protection listed above, the Act in no way affects a person's right to seek relief from any party to the brownfields agreement who has any liability associated with the brownfields site.[117] This language will likely require judicial interpretation and could be interpreted in such a manner that thwarts the overall purpose of the statute.[118]

The Act also fails to provide any economic incentives to redevelopment of brownfields. Although the Act establishes the "Brownfields Cleanup and Redevelopment Trust Fund,"[119] the fund is expressly intended to defer administrative costs of the program, not to provide any economic boost to redevelopment.[120] The Act does not provide for loans, grants, or tax incentives of any kind. The only economic incentive produced by the Act is the inherent benefit of lower development costs due to a lower level of remediation than likely would be required under CERCLA.

Once the agreement has been completed to the Commission's satisfaction, the Executive Director of the DEQ issues a "no further action" letter.[121] The letter

110. *Id.*
111. *Id.* § 49-35-9.
112. *Id.* § 49-35-11(1).
113. *Id.* § 49-35-15(1).
114. *Id.*
115. *Id.* § 49-35-13(2).
116. *Id.* § 49-35-15(2).
117. *Id.* § 49-35-15(1).
118. *See infra* notes 143-45 and accompanying text.
119. MISS. CODE ANN. § 49-35-25(4) (Supp. 1998).
120. *Id.* § 49-35-25(4)(b).
121. *Id.* § 49-35-15(6).

states that no further action is required "to assure that the remediation . . . is protective of public health and the environment."[122] No further remediation will be required on the property unless: (1) the DEQ becomes aware that the brownfields party provided false information about the extent of contamination that formed the basis for the brownfields agreement or about the completion of the agreement; (2) new information about the contamination, which requires further action, becomes available after completion of the remediation; (3) the level of risk to public health or the environment changes in such a way that requires further action; or (4) proper notice of the brownfields agreement is not filed pursuant to Section 49-35-17 of the Mississippi Code.[123]

D. Limitations on the Effect of the Act

Section 49-35-23 of the Mississippi Code states the limitations on the Act. The Act does not affect the zoning power of local governments.[124] The Act also is not intended to impinge on the Commission's enforcement powers regarding other environmental laws.[125] The Act in no way prohibits immediate responses to emergency situations by the DEQ.[126] Moreover, a brownfields party may not be relieved from liability for contamination occurring after completion of the agreement or for contamination exacerbated by conduct of the brownfields party.[127] Parties to the agreement retain their right to seek contribution from third parties.[128] The Commission and the DEQ are not prohibited in any way from enforcing federal directives required to retain delegation of federal programs or to receive federal funding.[129] The Act is explicitly not intended to "[c]reate a defense against the imposition of criminal and civil penalties or other administrative enforcement remedies authorized by law and imposed . . . for the pollution of the land, air, or waters of this state on or under a brownfield agreement site."[130] Finally, the Act does not relieve any person of the duty to exercise "due diligence" in performing environmental assessments.[131]

V. SOME COMMENTS ON THE MISSISSIPPI BROWNFIELDS ACT

The Mississippi Brownfields Voluntary Cleanup and Redevelopment Act is a noble effort on the part of the Mississippi legislature, but is, at best, merely a first step toward correcting a problem that will otherwise continue to grow. One must ask, "what effect will it really have?" There seems to be ample room for improvement in the Act.

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122. *Id.*
123. *Id.* § 49-35-15(5).
124. *Id.* § 49-35-23(a).
125. *Id.* § 49-35-23(b).
126. *Id.* § 49-35-23(c).
127. *Id.* § 49-35-23(d).
128. *Id.* § 49-35-23(e).
129. *Id.* § 49-35-23(f).
130. *Id.* § 49-35-23(g).
131. *Id.* § 49-35-23(h).

As discussed previously in this Comment, CERCLA and its state-level counterparts are the root of the brownfields problem.[132] The main weakness of the Act is that Mississippi does not have a CERCLA-equivalent statute,[133] although Mississippi does have some environmental statutes, such as the Nonhazardous Solid Waste Planning Act,[134] the Mississippi Water Pollution Control Revolving Fund and Emergency Loan Fund Act,[135] the Mississippi Underground Storage Tank Act,[136] and the penalties section of the Mississippi pollution prevention statutes,[137] which serve some functions similar to CERCLA. The Pollution Emergency Fund is the Mississippi statute with the closest resemblance to the Superfund aspects of CERCLA.[138] That statute authorizes the Commission to use the fund "for the purpose of mitigation, abatement, clean-up or other remedial actions" related to the "introduction of . . . hazardous wastes, upon or into the land . . . of this state . . . . [The fund] may be used for purposes of providing the required state matching funds to assist the U.S. Environmental Protection Agency in furtherance of its remedial clean-up program."[139] Conspicuously missing from all of these statutes are liability provisions substantially similar to the ones that are the root of the brownfields problem in other states.

The absence of a corresponding CERCLA-equivalent statute is a weakness of the Act because, without liability provisions in other state statutes, the liability protection afforded by the Act[140] is, at best, limited. Since the Act provides protection from liability to "all persons other than the United States,"[141] there is no state law liability, but a prospective purchaser or developer of a brownfields site in Mississippi is still potentially liable to the EPA under CERCLA. Therefore, it is not clear that the liability protection under the Act actually provides much of an incentive to prospective purchasers.

Additionally, vague language in §§ 49-35-15(1) and 49-35-23 could be interpreted in such a way as to defeat the stated purpose of protecting a brownfields party from liability. Section 49-35-15(1) first states that a brownfields party is protected from liability for remediation, and costs associated with it, to "all persons other than the United States."[142] However, the last sentence of that same section says that any right to relief that a third party would have from a brownfields party, beyond remediation and costs, is not affected by the Act.[143] Section 49-35-23(g) then specifies that the provisions of the Act are not intended to

132. *See supra* Part II.

133. *But see* MISS CODE ANN. § 49-17-43(d) (Supp. 1998). That statute has language reminiscent of CERCLA, but it is part of the Mississippi Air and Water Pollution Control Law and applies only to owners or operators of facilities. Therefore, liability under the statute is not as extensive as under CERCLA.

134. MISS. CODE ANN. §§ 17-17-201 to -235 (1995).

135. *Id.* §§ 49-17-81 to -89.

136. *Id.* §§ 49-17-401 to -433. The foregoing statutes are actually more akin to RCRA than to CERCLA, especially the Underground Storage Tank Act.

137. MISS. CODE ANN. § 49-17-43(d).

138. MISS. CODE ANN. §§ 49-17-43(d) and 49-17-68 (Supp. 1998).

139. *Id.*

140. *See supra* notes 114-117 and accompanying text.

141. MISS. CODE ANN. § 49-35-15(1).

142. *Id.*

143. *Id.*

create a defense for the brownfields party to any enforcement action authorized by other law.[144] This could include third party actions under CERCLA. By including these two provisions in the Act, the legislature indicates its awareness that CERCLA pre-empts state law. Because CERCLA does, in fact, pre-empt any state law, the state has no power to protect a brownfields party from liability to the United States, or *any other person*, under CERCLA.

To summarize the problem, the Act does not protect a brownfields party from liability to the United States under CERCLA, and since CERCLA pre-empts state law, the state may not protect a brownfields party from third party actions under certain provisions of CERCLA, such as citizen suits and contribution. Therefore, if the Act purports to provide protection from third party actions, that protection applies only to state law actions. As stated previously, Mississippi has no CERCLA-equivalent statute imposing liability or providing for third party actions. Therefore, the only liability protection practically afforded by the Act is from DEQ enforcement actions. Whether this provides a significant incentive to redevelopment remains to be seen. However, the fact that brownfields sites tend to be too small to warrant EPA involvement[145] may be a saving grace for the Act.

The Act's major weakness could be partially remedied by a Memorandum of Agreement ("MOA") between the state and the EPA. Such an agreement, stating that the EPA will not prosecute enforcement or cost recovery actions against a party participating in the state brownfields program, coupled with the liability provisions of the Act, would provide a significant incentive for prospective purchasers. Although the lack of EPA guidance on drafting MOAs in situations in which a state has a brownfields program is an obstacle to negotiating a MOA,[146] a state would not seem to be precluded from negotiating such an agreement.

The Act has additional room for improvement. In particular, the lack of economic incentives needs to be addressed. One suggestion is to incorporate some sort of tax credits or waivers, as other states have,[147] for parties involved in brownfields agreements.

One other interesting economic incentive that could be implemented is a low interest loan or grant program. The Act, as written, established the Brownfields Cleanup and Redevelopment Trust Fund.[148] As it stands, however, the fund is to be used only to pay the costs of administration of the brownfields program. While it is important to defer as many administrative costs as possible from the general budget of an agency that has limited resources, it does not seem infeasible to use money from the fund, or to establish another fund, to provide financial backing for the redevelopment of brownfields.

It must be noted that one of the stated purposes of the Act is to clean up and redevelop brownfields "without use of taxpayer funds."[149] However, sources of

144. *Id.* § 49-35-15.
145. *Williams, supra* note 3.
146. *See supra* note 24 and accompanying text.
147. *See, e.g., supra* notes 53 and 86 and accompanying text.
148. MISS. CODE ANN. § 49-35-25(4).
149. *Id.* § 49-35-3(e).

funds similar to the sources used for funding the present brownfields trust fund could be used to fund low interest loans without burdening the taxpayers of Mississippi. Moreover, the program could be set up as a long-term one, that is, allow the fund to build over time and gradually implement a loan program. Similar loan programs have been successful in other situations.[150]

There are, however, some insightful provisions in the Act. Basing cleanup criteria on cost effectiveness and available technology in terms of engineering controls, as well as risk-based factors,[151] will likely lower the cost of remediation. This is a good incentive for purchasers or developers who tend to be financially, as opposed to environmentally, conscious. Similarly, the lender liability provided by the Act[152] potentially could have a significant effect on the ability of prospective purchasers and developers to finance the revitalization of brownfields sites.

The Mississippi legislature recognized the fact that the Act, as written, has limitations. This is evidenced by the requirement in § 49-35-27 of the Act that the DEQ survey the programs in other states and make recommendations to the legislature for improvements to the program.[153] Also, § 49-35-21 of the Act requires the Commis-sion to "promulgate regulations necessary to implement this act by January 1, 1999."[154] Those provisions show good foresight by the legislature and allow the weaknesses in the Act to be improved. Of course, the ultimate success of the program remains to be seen, but the Act at least gives the Commission and DEQ a starting point from which to operate.

VI. CONCLUSION

The 1998 Mississippi legislature took a step toward the redevelopment and revitalization of historically industrial sites and other potentially contaminated sites in Mississippi. The Mississippi Brownfields Voluntary Cleanup and Redevelopment Act is similar to many such programs established in other states, but it pales in comparison to most of those programs.

The legislation demonstrates the desire to solve the brownfields problem in Mississippi, but the Act has some shortcomings. However, those shortcomings are better viewed as room for future improvement. By providing for the suggestion and implementation of additional programs, the legislature has indicated its understanding that the effort to cleanup brownfields in Mississippi will take time and that this Act is only a step toward achieving the ultimate goal. That goal is to clean up and redevelop contaminated sites which, in turn, could significantly improve the health of the citizens of the state, improve the environment in which they live, and improve the economy of the state by putting contaminated property to productive use.

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150. *See, e.g.*, MISS. CODE ANN. §§ 49-17-81 to -89. Those sections establish the Mississippi Water Pollution Control Revolving Fund and Emergency Loan Fund which, in part, provides low interest loans to cities for constructing waste water treatment facilities.

151. MISS. CODE ANN. § 49-35-7(6) (Supp. 1998).

152. *See id.* § 49-35-15(2)(e).

153. *Id.* § 49-35-27(2).

154. *Id.* § 49-35-21.