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Before the Subcommittee on Superfund, Waste Control,  
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Public Works, U.S. Senate

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# SUPERFUND

## Proposals to Remove Barriers to Brownfield Redevelopment

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Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss the Committee's efforts to support the cleanup and redevelopment of hazardous waste properties across the country. Over the past several decades, manufacturing has been declining in many of the nation's cities. When businesses closed, they often left abandoned and idled properties, commonly known as "brownfields." These properties are sometimes contaminated with chemical wastes from manufacturing processes. Partly to avoid the costs of assessing and cleaning up these properties according to federal and state environmental laws, some new businesses have chosen to locate in uncontaminated areas outside cities known as "greenfields." These decisions have led to the loss of tax revenue and employment in central city neighborhoods.

The Congress has been interested in finding ways to help localities clean up and redevelop brownfields. This Committee asked us to provide it with information on the (1) legal barriers that the Comprehensive Environmental Response, Compensation and Liability Act, commonly known as Superfund, presents for redeveloping brownfields and (2) types of federal financial support that states and localities would like to help them address such properties. This testimony summarizes the major findings from our June 1996 report on brownfield redevelopment and information from an ongoing review for this Committee of states' voluntary cleanup programs.<sup>1</sup> These programs substitute incentives for enforcement actions to encourage, rather than compel, private parties to clean up contaminated properties. States are beginning to use these programs to address brownfields because they are faster and less costly than enforcement programs. This testimony also comments on how liability and funding provisions in two legislative proposals pending before this Committee respond to the legal barriers and funding needs we identified in our work.<sup>2</sup>

In summary, we found the following:

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<sup>1</sup>Superfund: Barriers to Brownfield Redevelopment (GAO/RCED-96-125, June 17, 1996).

<sup>2</sup>S. 8, the Superfund Cleanup Acceleration Act of 1997, includes provisions that would (1) limit Superfund liability for prospective purchasers; (2) clarify the circumstances under which landowners who did not contribute contamination at a site (innocent landowners) may avoid liability; (3) limit liability for property owners whose property is contiguous to a contaminated site; and (4) limit liability at any site subject to a state cleanup plan. S. 18, the Brownfield Remediation and Environmental Cleanup Act, also includes provisions that would limit liability for prospective purchasers and would clarify liability for innocent landowners. Both bills would establish grant programs and provide assistance for brownfield redevelopment.

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- Superfund’s liability provisions make brownfields difficult to redevelop, in part because owners are unwilling to identify contaminated properties and prospective developers and property purchasers are reluctant to invest in a redevelopment project that could leave them liable for cleanup costs. While brownfields are usually not contaminated seriously enough to be listed as Superfund sites, these parties still fear that they may be sued under Superfund and state laws for cleanup costs if they become involved with a contaminated property. In addition, most of the voluntary cleanup program managers in the 15 states we surveyed judged that volunteers’ concerns about being held liable for a property under federal Superfund law, once a cleanup is complete, discouraged some of them from initiating a cleanup. Both bills include provisions that would help to address these concerns, including provisions to limit liability for some prospective purchasers.
  - To help promote the redevelopment of brownfields, states and localities would like federal financial support to cover some of the costs of assessing these properties for contamination, cleaning them up, and developing their voluntary cleanup programs. Over the past few years, the Environmental Protection Agency (EPA) and the Congress have provided some funds which states and localities have used for activities such as developing an inventory of brownfield properties. Funding provisions in the bills would continue and expand this support and respond to the states’ and localities’ needs. For example, Senate bills S. 8 and S. 18 would authorize EPA to provide grants to support the characterization and assessment of brownfields. We determined that the amounts of the grants proposed in the bills for these activities would be sufficient to cover the costs for most brownfield properties. Additional provisions in the bills for grants to fund some cleanup costs and provisions in S. 8 to fund the development of state voluntary cleanup programs should also promote brownfield cleanup and redevelopment.

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## Background

Under Superfund, EPA can compel the parties responsible for hazardous waste contamination to clean up a contaminated property, or pay for its cleanup, in order to protect public health and the environment. Also, any party that contributed to the contamination, even if this action was legal at the time, may be liable and may be held responsible for the entire cost of the cleanup. The federal government targets its enforcement and cleanup resources to properties on the National Priorities List (NPL), a list of highly contaminated sites. However, parties may be subject to Superfund’s liability and enforcement provisions even if a property is not on the NPL. Most states have adopted similar liability laws and enforcement programs.

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States find that these stringent liability provisions have provided leverage to convince responsible parties to clean up the more highly contaminated sites in the states' inventories. As we reported last year in a separate study of the potential cleanup workload in eight states, the program managers in these states pointed out that the threat of having a site placed on the NPL and identified as one of the most contaminated sites in the country created a major incentive for responsible parties to clean up their sites.<sup>3</sup>

Brownfields, however, are typically urban properties that are less contaminated than NPL sites. EPA defines brownfields as abandoned or underused facilities, usually in industrial or commercial areas, where redevelopment is hampered by real or perceived environmental contamination. While we identified no official nationwide count of brownfields, the states estimated in a study conducted for EPA that they may have about 85,000 potentially contaminated properties, including brownfields, that need investigation and may need cleanup.<sup>4</sup> The federal Superfund program and similar programs in the states do not have the capacity to address these properties. These programs have limited resources, which EPA and the states target to small numbers of highly contaminated properties. As a result, states and localities are looking for alternative ways to address brownfields, including voluntary programs.

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### Superfund's Liability Provisions Raise a Legal Barrier to Redeveloping Brownfields

Most brownfields are not likely to be added to the NPL because they are not severely contaminated. However, investors are still wary of the cleanup liability provisions of both federal and state legislation because these can apply to all sites, including brownfields. As a result, developers who purchase properties may become liable for any contamination later found there. Former property owners may also be liable for cleanup costs if the contamination occurred while they owned the properties. Thus, even the suspicion of current or prior contamination may make developers hesitant to purchase brownfield properties and owners reluctant to place their properties on the real estate market.

The voluntary program managers in the 15 states we surveyed also identified Superfund liability as a barrier to attracting volunteers to accomplish cleanups, including those at brownfields. All but one of these managers reported that their programs were addressing brownfields so that they could be returned to productive use through redevelopment and

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<sup>3</sup>Impact on States of Capping Superfund Sites (GAO/RCED-96-106R, March 18, 1996).

<sup>4</sup>An Analysis of State Superfund Programs, Environmental Law Institute under contract with EPA (1996).

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expansion. Twelve of the managers reported that the limits on state liability that their voluntary programs provide are a good incentive to attract volunteers. However, state officials judged that some potential volunteers would still find Superfund liability a deterrent to participation. Moreover, managers cited limiting federal liability as one of the more important ways the federal government could assist voluntary cleanups.

The Congress has considered actions to help address some of these issues. For example, because lenders had feared being named as responsible parties if they foreclosed on contaminated properties, the Congress passed legislation limiting lenders' liability at such sites.<sup>5</sup> S. 8 and S. 18 also include various provisions to help address Superfund liability issues at brownfields, including limiting the liability of prospective purchasers of these properties and clarifying circumstances under which current landowners would not be liable for past contamination.

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## Federal Funding Can Help Support Brownfield Redevelopment

During our reviews of brownfields and voluntary programs, we found that states and localities would like federal funding support to help them characterize, assess, and clean up brownfields, and establish and support voluntary programs. Most of the states in our ongoing review of voluntary programs—even those states that levied fees on volunteers that were high enough to cover their program costs—identified federal funding as a key way for the Congress to promote their programs. Some states said they would use the funds to help municipalities cover the costs of assessing properties where no parties had been identified as responsible for the contamination or where the cleanup costs would otherwise be too high to attract voluntary cleanups. One state sought to use the support to establish a revolving loan fund to support brownfield cleanups, similar to provisions in both the bills. Others said they would use the funds to, for example, publicize the programs or develop information systems to better manage and evaluate the programs.

To date, both federal agencies and the Congress have provided some funds in support of brownfield cleanups and voluntary programs, and the pending two bills would continue and expand on this support. In 1995, EPA issued a “brownfields action agenda” which, among other things, currently provides grants of up to \$200,000 each to 76 state and local governments to fund a wide variety of brownfield demonstration projects. These include developing inventories of brownfields and establishing policies to govern

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<sup>5</sup>The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, contained in the Omnibus Consolidated Appropriations Act, 1997 (P.L. 104-208).

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brownfield redevelopment. The Department of Housing and Urban Development has also provided funding to communities to redevelop brownfields once they have been cleaned up. The Congress, in the House Conference report accompanying EPA's fiscal year 1997 appropriations act, indicated that more than \$36.7 million of the current Superfund appropriation would go to support EPA's brownfield activities and voluntary programs.

The two pending bills would provide substantial amounts of additional funding that states and localities could directly use to characterize, assess and clean up sites. Specifically, the bills give EPA the authority to provide Superfund grants of up to \$200,000 per property, to characterize and assess brownfields.<sup>6</sup> Before these properties can be redeveloped, an assessment must be performed to determine the nature and extent of the contamination present. Because the assessment requires research into a property's history and a technical analysis of its conditions, a substantial expenditure may be involved. For some brownfields, this expenditure may be significant enough to discourage developers. We estimated that for most brownfields, assessment costs could average \$60,000 to \$85,000 and for some properties with groundwater contamination could exceed \$200,000. Therefore, the grant provisions in the bills to help fund property characterization and assessment should be sufficient for most brownfields.

In addition to these assessment funds, both bills would give EPA the authority to issue Superfund grants to pay for actual cleanup actions at brownfields. S. 8 would also provide funds to assist states in establishing and administering voluntary cleanup programs. Although we asked the states for information on their costs to clean up brownfield properties and to operate their voluntary programs, most states did not yet systematically collect such data. Therefore, we cannot offer a perspective on the sufficiency of the grants proposed for brownfield cleanup actions or state voluntary programs.

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Mr. Chairman, this concludes my prepared remarks. At this point, I would be glad to respond to any questions you may have.

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<sup>6</sup>The grants would be provided out of the Superfund trust fund which has been primarily financed from taxes on crude oil and certain chemicals.

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