

**DEFERRAL STRATEGIES: STEERING OVERSIGHT OF YOUR
CONTAMINATED SITE CLEANUP TO THE MOST APPROPRIATE FORUM**

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I. Introduction

In general, either the United States Environmental Protection Agency (“EPA”), or the state environmental agency for the state in which the contaminated site is located, may provide oversight for environmental remediation of a contaminated site. Most responsible parties believe that it is more advantageous to proceed with state agency oversight of a remediation as opposed to EPA oversight. This is because most responsible parties believe that, even though EPA has adopted a risk-based approach to remediation in the past few years, state agencies are still generally more cost-effective and flexible in their approach to remediation. In addition, remediations conducted under state agency oversight often provide additional incentives, such as orphan share funding. Prior to 2002, EPA deferral to state agency oversight at a particular contaminated site was governed by EPA guidance documents that created no legally binding obligations and that could be changed with little notice. In addition, even if a responsible party was successful in having a contaminated site addressed under state oversight, there was no guarantee that EPA would not “overfile” by coming in after the fact to require additional remediation measures at the site.

On January 11, 2002, President Bush signed into law the Small Business Liability Relief and Brownfields Revitalization Act. The Act is divided into two titles, the first of which addresses small business liability relief, and the second of which addresses brownfields redevelopment. The purpose of the second title is to promote the revitalization of brownfields properties where redevelopment is hindered by the presence or potential presence of contamination. In general, the Act provides federal funding for state brownfields programs, and grants and loans for brownfields assessment and remediation. Most importantly for purposes of this paper, the second title also generally prohibits federal enforcement at contaminated sites being remediated under state oversight, and also provides for deferral from listing on the National Priorities List (“NPL”) for sites that are being addressed by state authorities. Interestingly, despite the obvious concern of Congress regarding the threat of EPA overfilling, according to the Senate Report for the Act, EPA had never taken an enforcement action at a brownfield site being addressed by a state program without a request from the state. In any event, while no panacea, the statutory amendments provide some additional protection and eliminate some of the uncertainty that was generated by the guidance documents governing deferral.

This paper will first examine the criteria for deferral and for foregoing enforcement set forth in the pre-2002 EPA guidance documents. The paper will then examine the criteria for deferral and for foregoing enforcement as set forth in the 2002 amendments to the CERCLA statute, and compare the 2002 statutory criteria with the pre-2002 guidance criteria. The paper

will identify the additional protections provided by the 2002 CERCLA statutory amendments, and identify areas of uncertainty that still exist. Finally, the paper will identify important considerations for responsible parties wishing to obtain deferral of oversight to state authorities.

II. Mechanisms to Achieve Deferral Prior to 2002

Historically, deferral issues under CERCLA have been handled by EPA guidance documents. All EPA guidance contains the following, or similar, statement: “The policies set forth in this directive are intended solely as guidance. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the guidance provided in this directive, or to act at variance with the directive, on the basis of an analysis of specific circumstances. The Agency also reserves the right to change this directive at any time without public notice.” In addition to guidance discussed below regarding the deferral of sites to state authorities, and the foregoing of federal enforcement, EPA also has guidance regarding the deferral of contaminated sites to other programs, such as the Resource Conservation and Recovery Act (“RCRA”). For example, in 1995, EPA announced its policy of deferring a site “if the site is being, or will be, adequately addressed by the RCRA corrective action program under an existing permit or order.” 60 Fed. Reg. 14641 (March 20, 1995).

A. Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions

EPA’s June 1993 “Superfund Administrative Improvements Final Report,” identified numerous initiatives to improve EPA’s implementation of CERCLA. One of these initiatives sought to enhance the role of the states in the Superfund program. OSWER Directive 9200.0-14-2. To implement this initiative, in August 1993, EPA established a work group to develop deferral guidance, and worked with several states to pilot the deferral concept prior to issuing final guidance. On May 3, 1995, EPA promulgated its “Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions.” OSWER Directive 9375.6-11. The stated purpose of this deferral program is to “encourage qualified, interested States to address, under state laws, the large number of sites now in EPA’s listing queue, thereby accelerating cleanup, minimizing the risk of duplicative state/federal efforts, and offering PRPs a measure of confidence that only one agency will address the site.” *Id.*, at 1.

The guidance provides that a state may participate in the deferral program on an area-wide or site-specific basis. *Id.*, at 2. A state hazardous waste management or remedial program must meet certain criteria in order to participate in the area-wide deferral program. First, the state program should have statutory, regulatory or administrative provisions which ensure that remedies at deferred sites are protective of human health and the environment. *Id.*, at 3. The program should also have the statutory authority and the administrative provisions necessary to pursue enforcement actions at a site to identify and compel PRPs to conduct cleanups. The guidance provides that in analyzing this criterion, EPA will do more than just look at the state’s law. EPA will also consider the state’s past and current ability to select protective remedies and to enter into and enforce consent agreements or orders. *Id.* The second criterion provides that the state program should have sufficient capabilities, resources and expertise to ensure that a CERCLA-quality cleanup is conducted. *Id.* Specifically, the state should have adequate, capable

staff, funds and other resources to conduct enforcement actions, maintain adequate supervision of response actions, and undertake appropriate community participation activities. *Id.* In considering this criterion, EPA will consider a state's past response actions, as well as the state program's projected workload. *Id.*

Under the area-wide approach, EPA and the state will mutually determine, generally based on an annual submission of deferral site candidates, which sites are to be deferred. *Id.*, at 4. If the state is interested in deferral but does not meet all of the criteria for establishing an area-wide deferral program, EPA and the state may enter into site specific deferral agreements provided that the site eligibility criteria are met. The guidance provides that, for example, a site at which the state enters into an enforceable agreement with a PRP to conduct a CERCLA-protective clean up, even though the state does not have the statutory authority to compel response actions, may be appropriate for deferral. Further, EPA may determine, as needed, that closer oversight and the application of other conditions are necessary to ensure a successful response action. In determining the eligibility of sites for deferral, the guidance provides that certain criteria are considered. First, the state must express an interest in having the site deferred to it. *Id.* Further, the state and EPA should agree that the state will address the site quicker, or at least as quickly, as EPA would have. Second, the site proposed for deferral must be included in the CERCLIS inventory. *Id.* Third, the site should be an NPL-caliber site. *Id.*, at 4-5. Sites that are less than NPL caliber are generally not of federal interest and the deferral program requirements need not apply at those sites. Fourth, viable and cooperative PRPs generally must be available to conduct the response actions at the deferred site. *Id.*, at 5. The PRPs at a deferred site should be willing to enter into an enforcement agreement with the state to conduct all response actions. At sites where no viable PRPs exist, or where the state is willing to settle for less than the full cost of the response action, the state must demonstrate that it has adequate resources of its own or viable agreements with other parties, such as prospective purchasers, to pay the necessary costs for the response action. *Id.*

The Fifth criterion has to do with the timing of the deferral request in relation to the NPL listing process. In general, a site is eligible for deferral until a contractor has been tasked to develop a site-specific Hazard Ranking System package for the site. *Id.* If a contractor has been tasked to develop such a package, then EPA will defer to state authorities only where the state provides a compelling argument as to why the listing process should be stopped. Sites that are on the NPL are not eligible for deferral, although EPA may, through a cooperative agreement, assign to the state the lead for response at such a site. *Id.* The Sixth criterion has to do with community acceptance of the deferral, which is important to achieving deferral. *Id.*, at 5-6. The state should take appropriate steps to inform the affected community and other affected parties of the proposed deferral thirty days prior to requesting that EPA defer the site, and should seek affirmation from the community of its proposal. *Id.* As appropriate, the state should explain to the community any differences in a response conducted by the state under the deferral and a response conducted by EPA under the NCP. *Id.* The guidance provides that the state should document all of its interactions with the community and inform EPA of possible opposition to the deferral. Finally, a site that is on land under tribal jurisdiction may be deferred to a federally-recognized tribe if the appropriate criteria are met. *Id.* EPA will not defer such a site to a state unless the affected tribe agrees to the deferral through a three-party agreement with the state and EPA. Federal facilities are not eligible for deferral. *Id.*

The guidance further provides that under the deferral program, although the state will oversee the response action using its own authorities, the quality of the response action should be substantially similar to a response required under CERCLA, i.e., it should be a CERCLA-protective clean up. *Id.*, at 7. The guidance states that a CERCLA-protective clean up should be protective of human health and the environment as defined generally by 10-4 to 10-6 risk range and a hazard index of 1 or less. *Id.* Generally, the state should give preference to remedies that will be reliable over the long term. *Id.* Additionally, the guidance provides that the remedy selected at a deferred site must comply with all applicable federal and state requirements. *Id.* Further, the state should generally select a remedy which provides a level of protectiveness comparable to relevant and appropriate federal requirements for the site. *Id.*

Procedural requirements for dealing with deferred sites are set forth in a generic deferral memorandum, with site-specific information being added to the agreement or provided separately. *Id.*, at 7-8. The guidance sets forth certain items that at a minimum should be addressed in an agreement. *Id.*, at 8. The agreement should address the relationship, roles and responsibilities of EPA and the state. This includes the degree to which EPA will provide oversight, document review and technical assistance. *Id.* EPA and the state should agree to a timeframe for commencing and conducting actions. *Id.* The guidance provides that state negotiations with PRPs generally should be completed within six months of initiation, although EPA may allow a state up to an additional six months, as appropriate. *Id.* The state should agree to make data and documents available to EPA to allow it to conduct oversight. *Id.* The state should agree to provide for a CERCLA-protective clean up, and to involve affected communities in decisions involving response actions. *Id.* Finally, the guidance provides that the state should agree to promptly notify the appropriate state and federal natural resource trustees regarding releases and discharges that may injure natural resources at a deferred site. *Id.*

Once the state considers the response action at a deferred site to be complete, it should certify to EPA and the affected community that it has successfully completed its response and achieved its intended clean up levels. *Id.*, at 12. A Remedial Action Report or similar document must also be submitted to EPA. Upon receiving the state's certification, EPA should confirm in writing that the response action has been completed. *Id.* Alternatively, within 90 days after the receipt of certification, EPA may undertake a Deferral Completion Inquiry to validate the certification. *Id.* As part of the inquiry, EPA is to work with the state to address any deficiencies hindering confirmation. Upon completing the inquiry, EPA should either confirm completion of the response, or terminate the deferral status of the site. *Id.* If EPA does not confirm the completion, terminate the deferral status or initiate an inquiry within 90 days of the receipt of the state's certification, the status of the site will be recorded in CERCLIS as complete. Once listed as complete, the site will not be evaluated further for NPL listing or another response action unless EPA receives new information of a release or potential release at the site that poses a significant threat to human health or the environment. *Id.*

EPA may terminate the deferral for a site on thirty days notice to the state if EPA determines that the response action (1) is not CERCLA-protective; (2) is unreasonably delayed or inappropriate; or (3) does not adequately address the affected community's concerns. *Id.* The guidance also provides that EPA should terminate the deferral if significant PRPs have breached their agreement to undertake the response action and the state is unable to either enforce compliance with the agreement or come up with other sources of funding. *Id.* The guidance then

provides that EPA may terminate the deferral on thirty days notice if EPA “determines such action is necessary” or “for any reason.” *Id.* After termination of deferral, EPA is to immediately consider taking any necessary response actions and should consider the site for listing on the NPL. *Id.*, at 13. In addition, it was also EPA policy not to list a site on the NPL without the concurrence of the governor of the state in which the site was located. *See* EPA Appropriations Reports, FY 1995 and 1996.

B. Draft Guidance for Developing Superfund Memorandum of Agreement Language Concerning State Voluntary Programs

On July 31, 1997, EPA issued its draft Guidance for Developing Superfund Memorandum of Agreement Language Concerning State Voluntary Cleanup Programs. The guidance provides that EPA would not exercise cost recovery authority or take a removal or remedial action at certain sites being addressed by a State’s voluntary cleanup program except under limited circumstances. The guidance starts off by specifying that the policy does not apply to sites: (1) that are designated as Higher Risk (or Tier I); (2) that are proposed for or listed on the NPL, or those sites where ranking packages proposing their inclusion on the NPL are submitted to EPA; (3) for which an order or other enforcement action is issued or entered under CERCLA, or under sections 3008(h), 3013(a), or 7003(a) of RCRA, and is still in effect; and (4) undergoing RCRA corrective action. *Id.*, at 4.

The guidance explains that sites included within the scope of the Memorandum of Agreement (“MOA”) will often be those sites that are less contaminated or that pose less of a risk to public health, welfare or the environment. *Id.*, at 4-5. These sites are typically not addressed by EPA CERCLA cleanup actions. EPA refers to these types of sites as Tier II sites and, pursuant to the draft guidance, intends that the state will address the contamination at such sites. *Id.*, at 5. EPA developed a screening mechanism to distinguish Tier I (Higher Risk) sites from Tier II (Lower Risk) sites, and the state is responsible for screening and classifying sites. *Id.* Alternatively, a state could develop a screening process to distinguish Tier I and Tier II sites and have that process approved by EPA. Documentation of the screening process must be maintained. *Id.*

The draft guidance further provides that if a site is being cleaned up pursuant to a state Voluntary Cleanup Program that meets certain criteria, then EPA will not exercise its cost recovery authority unless: (1) EPA determines that the release or threat of release may present an imminent and substantial endangerment to public health, welfare, or the environment; (2) the state requests the EPA to take action; (3) conditions at the site, unknown to the state at the time the response action plan was approved, are discovered, and such conditions indicate, as determined by EPA or the state, that the response action is not protective of human health or the environment; or (4) the cleanup is no longer protective of human health or the environment, as determined by EPA or the state, because of a change or proposed change in the use of the site. *Id.*, at 7.

In order to be eligible, EPA must ensure that the state Voluntary Cleanup Program meets certain criteria. *Id.*, at 8. The first of these criteria concerns community involvement. *Id.*, at 9-10. The state Voluntary Cleanup Program should provide opportunities for meaningful community involvement that are responsive to the risk posed by the site contamination and the level of

public interest. *Id.* The community involvement should, at a minimum, provide for adequate notification of the proposed cleanup plan to the affected parties. *Id.* The second criterion is protectiveness. *Id.*, at 11-12. The state Voluntary Cleanup Program should ensure that response actions are protective of human health, welfare, and the environment. *Id.* The draft guidance specifically provides that reasonably anticipated future land use should be considered in establishing protective contaminant concentrations. *Id.*, at 11. All response actions must comply with applicable federal, state or local requirements. *Id.* The draft guidance then provides that ways to determine protectiveness may include, but are not limited to: (1) background concentrations; (2) site specific risk assessments; (3) contaminant-specific models; (4) ARARs; (5) consistency with a human health risk range; and (6) risk-based corrective action assessments. *Id.* Response actions should be conducted cost effectively, consistent with projected future uses at the site. *Id.* One goal when selecting response actions should be long-term reliability. *Id.* Response actions may include one or more of the following: (1) treatment that eliminates or reduces the toxicity, mobility, or volume of hazardous substances, pollutants or contaminants; (2) containment; (3) transport to off-site treatment; and (4) restricted access through institutional controls. *Id.*, at 11-12.

As the third criterion, the state should demonstrate that its Voluntary Cleanup Program has adequate resources, including financial, legal and technical, to ensure that voluntary response actions are conducted in an appropriate and timely manner, and that meaningful outreach efforts are made to the affected community. *Id.*, at 12. As the fourth criterion, the draft guidance provides that a state Voluntary Cleanup Program should provide adequate mechanisms for the written approval of response action plans and a certification or similar documentation indicating that the response actions are complete. *Id.* As the fifth criterion, the program should provide adequate oversight to ensure that response actions are conducted in such a manner to assure protection of human health, welfare and the environment. *Id.* For sites that have nonpermanent remedies premised on the restricted use of the land, the program should require progress reports on site conditions, or reserve the state's rights to conduct future inspections. Finally, the sixth criterion requires that the state Voluntary Cleanup Program show the capability, through enforcement or other state authorities, of ensuring completion of response actions if the volunteering party conducting the response action fails or refuses to complete the necessary response activities. *Id.*, at 13.

On November 26, 1997, EPA withdrew the draft guidance. EPA explained that, based on the comments received on the draft guidance, it had determined that there was "no consensus among various stakeholders on critical aspects of the guidance or on the appropriate course of action for EPA." Critics of the draft guidance had been particularly concerned with what they perceived to be the broad definition of a Tier I site that would result in many low-risk and brownfields sites being excluded from coverage under the policy. As a result of the withdrawal, EPA referred interested parties to an EPA memorandum dated November 14, 1996, and entitled "Interim Approaches for Interim Relations with State Voluntary Cleanup Programs."

The Memorandum is much less detailed than the draft guidance and provides simply that if a site is being addressed by an adequate state Voluntary Remediation Program, EPA would plan to assume that state activities would be sufficient, and generally EPA would not anticipate taking removal or remedial actions at such sites unless EPA determines that there may be an imminent and substantial endangerment to the public health, welfare, or the environment.

However, EPA expressly states that it does not intend that MOAs negotiated pursuant to the Memorandum would constitute no-action assurances for any specific site by EPA. In determining the adequacy of a state Voluntary Remediation Program, EPA would consider whether the program: (1) provides opportunities for meaningful community involvement; (2) ensures that response actions are protective of human health and the environment; (3) has adequate resources to ensure the timeliness and appropriateness of response actions and the availability of technical assistance; (4) provides mechanisms for the written approval of response action plans and documentation that the response actions are complete; (5) provides adequate oversight to ensure that the response actions protect human health and the environment; and (6) shows the capabilities, through enforcement or other authorities, of ensuring completion of response actions if the party conducting the response action fails or refuses to complete the response action.

III. The Small Business Liability Relief and Brownfields Revitalization Act

The Act provides for a federal enforcement bar and deferral of NPL listing in favor of state response for eligible response sites. 42 U.S.C. § 9628(b)(1)(A). The term “Eligible Response Site” is defined by reference to the term “Brownfield Site” contained in the Act, with certain additions and deletions. 42 U.S.C. § 9601(41). The term “Brownfield Site” is defined to mean “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” 42 U.S.C. § 9601(39)(A). The term does not include the following: (1) a facility that is the subject of a planned or ongoing CERCLA Removal Action; (2) a facility that is listed or proposed for listing on the NPL; (3) a facility that is subject to a CERCLA unilateral, court issued or consent order or a CERCLA consent decree that has been issued to or entered into by the parties; (4) a facility that is the subject to a unilateral, court issued or consent order or a consent decree that has been entered into by or issued to the parties, or a facility to which a permit has been issued by the United States or an authorized state under the Solid Waste Disposal Act, Federal Water Pollution Control Act, Toxic Substances Control Act or Safe Drinking Water Act; (5) a facility that is subject to a RCRA corrective action and to which a corrective action permit or order has been issued; (6) a hazardous waste land disposal unit for which a closure notification has been submitted and for which closure requirements have been specified in a closure plan or permit; (7) a facility that is subject to the jurisdiction, custody or control of a department of the United States government, except for land held in trust by the United States for an Indian tribe; (8) a portion of a facility where there has been a release of polychlorinated biphenyls and that is subject to remediation under the Toxic Substances Control Act; and (9) a portion of a facility for which remediation assistance has been obtained from the Leaking Underground Storage Tank Trust Fund. 42 U.S.C. § 9601(39)(B).

The definition of “Eligible Response Site” then proceeds to eliminate the last exclusion mentioned in the preceding paragraph and to add two new exclusions for: (1) a facility for which the United States conducts a Preliminary Assessment or Site Inspection and, after consultation with the state, has determined that the site qualifies for listing on the NPL, unless a determination has been made that no further federal action will be taken; and (2) a facility that the United States determines warrants particular consideration as identified by regulation, such as a site posing a threat to a sole source drinking water aquifer. 42 U.S.C. § 9601(41)(C). There is also a provision that provides that an “Eligible Response Site” includes notwithstanding any specific exclusion, a

site that the United States determines, after consultation with the state, that limitations on enforcement would be appropriate and will protect human health and the environment, and promote economic development or facilitate the creation/preservation or addition to a park, greenway, undeveloped property, recreational property, or other property used for nonprofit purposes. 42 U.S.C. § 9601(41)(B).

A. The Federal Enforcement Bar

Despite the prohibition on enforcement actions, the United States may bring such a CERCLA enforcement action where (1) the state requests it; (2) the EPA determines that contamination has or will migrate across a state line necessitating a further response action; (3) the EPA determines that contamination has or will migrate onto federal property and may impact the authorized purposes of the federal property; (4) the EPA determines, after taking into consideration the response actions already taken, that the release or threatened release may present an imminent and substantial endangerment to public health, welfare or the environment, and additional response actions are likely to be necessary to address, prevent, limit or mitigate the release or threatened release; or (5) EPA determines, after consultation with the state, that information not known on the earlier of the date the clean up was approved or completed has been discovered regarding the contamination such that the contamination at the facility presents a threat requiring further remediation to protect public health, welfare or the environment. 42 U.S.C. § 9628(b)(1)(B).

The Act further provides that the enforcement bar applies only to sites in states that maintain a list of sites by name and location for which response actions have been completed in the past year and for which response actions are planned. 42 U.S.C. § 9628(b)(1)(C). The list must be updated no less frequently than annually and must be made available to the public. *Id.* The public record must contain information as to whether the site, after response actions are complete, will be subject to institutional controls or will be available for unrestricted use. *Id.*

If the United States will be carrying out a response action at a site where such action may be barred under the Act, the United States must notify the state of the action and wait forty-eight hours for a reply. 42 U.S.C. § 9628(b)(1)(D)(i). Within forty eight hours, the state must notify EPA if the site is subject to a clean up conducted under a state program and if the state is planning to abate the release or threatened release. U.S.C. § 9628(b)(1)(D)(ii). If the state fails to reply, then the EPA may take action. U.S.C. § 9628(b)(1)(D)(i). Alternatively, EPA may take immediate action after giving notice if it is determined that one of the exceptions to taking action that are described above apply. U.S.C. § 9628(b)(1)(D)(iii). If the EPA takes an enforcement action for any permissible exception other than when the enforcement action is requested by a state, then not later than ninety days after initiating the enforcement action, EPA must submit to Congress a report describing the basis for the action. U.S.C. § 9628(b)(1)(E). Finally, the statute provides that the enforcement bar does not modify or otherwise affect a MOA or similar agreement between a state agency and EPA that is in effect before or after the date of enactment. 42 U.S.C. §9628(b)(2)(B). Nothing limits the discretionary authority of the EPA to enter into or modify an agreement with a state. *Id.*

B. Deferral to State Response Authorities

A separate section added by the new law provides that at the request of a state, EPA generally shall defer final listing of an Eligible Response Site on the NPL if EPA determines that the state or another party under agreement with or order from the state is conducting a response action in compliance with the state program and that response action will provide long-term protection to human health and the environment, or if EPA determines that a state is pursuing an agreement to perform such a response action with a person that the state deems capable of conducting such action. 42 U.S.C. § 9605(h)(1). If after a year the EPA determines that the state or other party is not making reasonable progress toward completing the response action, the EPA may list the site on the NPL. 42 U.S.C. § 9605(h)(2). However, the EPA may decide to continue to defer the listing on the NPL of such site for an additional period no to exceed 180 days if the EPA determines that such additional deferral would be appropriate based on the complexity of the site, substantial progress made in negotiations between a state and another party, and any other appropriate factors as determined by EPA. 42 U.S.C. § 9605(h)(3). EPA may decline to defer NPL listing of an Eligible Response Site if the EPA determines that (1) deferral would not be appropriate because the state is a responsible party; (2) the criteria under the NCP for the issuance of a health advisory has been met; or (3) the conditions for deferral are no longer met. 42 U.S.C. § 9605(h)(4).

IV. Practical Considerations Regarding Deferral

Significantly, unlike both the draft guidance and the interim guidance on enforcement, the statute does not require EPA to approve a particular state's brownfield program in order for the enforcement bar to apply. In contrast, the statute does require that EPA approve a state program in order for the program to be eligible for a brownfield grant. 42 U.S.C. § 9628(a). In addition, unlike the draft guidance on enforcement, the statute is not limited to lower risk sites. On the other hand, the guidance is not limited to Eligible Response Sites as defined in the statute. Therefore, there may be a situation where deferral can be obtained under the guidance when it cannot be obtained under the statute.

The language of the statute places considerable importance for purposes of the federal enforcement bar on who was at the site first in an enforcement capacity. For example, if the United States had issued a 106 Order at the site, or had started a Removal Action, then the enforcement bar does not apply. Therefore, if deferral to state authorities is desired, an effort should be made to obtain state involvement early, and prior to any involvement by the United States. However, it should be noted that the statutory language still gives the EPA the discretion to undertake an enforcement action even if the state response action commenced first if the site "warrants particular consideration as identified by regulation," such as sites posing a threat to a sole source drinking water aquifer. In addition, in order for the enforcement bar to apply, the site must meet the definition of a "brownfields" site. It appears that means that there must be some expansion, redevelopment or reuse of the site that is hindered by the presence of contamination. If there is no expansion, redevelopment or reuse of the site contemplated, then the federal enforcement bar may not apply.

In addition, the statute still provides the United States with a certain amount of discretion as to whether to undertake enforcement even if the bar applies. The last two exceptions to the

enforcement bar are potentially the broadest. The first of these exceptions applies where the United States has determined that the release presents an imminent and substantial endangerment to public health, welfare or the environment. This exception was also contained in the draft guidance and interim guidance on enforcement. There is a body of case law already in existence that interprets this phrase because it is the standard required for the EPA to issue a unilateral order under CERCLA Section 106. In general, the standard is not hard to meet. However, the statute provides that the determination of whether an imminent and substantial endangerment exists is to be made after taking into account all response actions already taken. This is another reason that, if deferral to state authorities is desired, it is important to begin response actions under state oversight as soon as possible. Early response actions should be, and generally are, aimed at addressing any imminent and substantial endangerment at the site. Although it is unclear from the language of the statute, the exception to the enforcement bar should only apply to the extent that there remains an imminent and substantial endangerment. Once that is addressed, then the enforcement bar should apply for future response actions.

The second of these exceptions, also contained in the draft guidance, allows EPA to address contamination that it determines poses a threat to the extent that information concerning such contamination was not known at the earlier of the time that the clean up was approved or completed. Although the federal authorities are required to consult with the state in making this determination, the statute specifically provides that such consultation with the state does not limit EPA's ability to make its determination. Whether or not the information was known is to be based on documents prepared or relied on in selecting or conducting the clean up. In general, if deferral to the state is desired, then the parties must make sure that any contamination and threats that exist at the site must be thoroughly investigated and documented. It should be noted that the statute does not quantify the term threat, so potentially any threat, however minor, that new information reveals could trigger this exception. Further, the exception could be triggered by information discovered after the actual clean up begins. Therefore, in order to avoid triggering the exception, any new information should be addressed in a new clean up plan.

Further, the federal enforcement bar only applies to CERCLA enforcement actions. It does not bar EPA from seeking enforcement pursuant to other statutes, such as the Resource Conservation and Recovery Act. Additionally, the enforcement bar arguably only applies to prevent an enforcement action against the person that conducted the response action under the state program. It does not apply to others, including tenants, future owners, or those that arranged for the disposal of hazardous substances at the site. Finally, because CERCLA does not apply to petroleum contaminated sites, then the CERCLA enforcement bar does not apply to such sites. Thus, a large number of contaminated sites have no enforcement bar protection.

The statutory deferral provisions still provide EPA with substantial discretion. For example, EPA could decide to list the site based on its determination regarding whether the response action currently being undertaken is in compliance with the state program or whether it will provide long-term protection to human health and the environment. In addition, EPA could list the site if it determines that sufficient progress is not being made in the clean up. This determination by EPA would likely be subject to a deferential abuse of discretion review by a court. The same would be true for the exercise of enforcement authority pursuant to the two exceptions to the enforcement bar listed above. On the other hand, the 2002 statutory deferral provisions differ from the deferral guidance in some important respects. First, the statutory

deferral provisions contain no requirement that the state's response program meet certain criteria in order to be eligible for deferral. Second, under the statutory deferral program, EPA no longer determines whether the PRPs undertaking the response are viable and cooperative. That is up to the state to determine. Third, under statutory deferral, the state no longer has to demonstrate to EPA that it has adequate funds to undertake that portion of the response action that PRPs will not be doing.

The fourth way in which the statutory deferral provisions differ from the deferral guidance is that the statutory provisions do not contain a requirement for public acceptance of the deferral. The fifth difference is that, under the statutory provisions, there is no longer a deferral agreement needed. The deferral agreements entered into under the guidance typically contemplated some degree of EPA oversight. For example, the guidance provided that the state must submit a Remedial Action Report to EPA upon completion of the response action to allow EPA to determine if the response action was completed. On the other hand, in certain situations where deferral may not be obtained under the statutory criteria because the site is not an Eligible Response Site, deferral may be possible under the deferral guidance.