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DELAWARE STATE SENATE

142nd GENERAL ASSEMBLY

SENATE BILL NO. 328

AN ACT TO AMEND TITLE 29 OF THE DELAWARE CODE PERTAINING TO MATCHING GRANTS FROM THE DELAWARE STRATEGIC FUND FOR THE COSTS OF ENVIRONMENTAL ASSESSMENT AND REMEDIATION AT CERTIFIED BROWNFIELDS AND TO AMEND TITLE 7 OF THE DELAWARE CODE RELATING TO THE HAZARDOUS SUBSTANCE CLEANUP ACT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. Amend paragraph (4) of subsection (a) of section 5028 of Title 29 of the Delaware Code by inserting after
2 the word "section" and before the comma immediately following such word the following words and punctuation "and for one
3 or more of the purposes set forth in paragraphs (1) through (3) of this subsection (a)".

4 Section 2. Amend subsection (c) of section 5028 of Title 29 of the Delaware Code by striking the phrase "\$50,000"
5 and substituting in lieu thereof the phrase "\$100,000".

6 Section 3. Amend Chapter 91 of Title 7 of the Delaware Code by designating sections 9101 through 9120 as
7 Subchapter I, entitled "Subchapter I. General Provisions and Enforcement".

8 Section 4. Amend Chapter 91, Title 7, Delaware Code by adding the following new Subchapter II, to read as follows:

9 "Subchapter II. Brownfields Development Program.

10 § 9121. Short title.

11 This subchapter shall be known, and may be cited, as the 'Brownfields Development Program.'

12 § 9122. Declaration of Purposes.

13 (a) In addition to the provisions of the foregoing Subchapter I of this Chapter, this Subchapter is intended to implement a
14 Brownfields Development Program, supplementing the powers and duties of the Secretary as set forth in section 9104 of this
15 Chapter.

16 (b) The General Assembly recognizes that:

17 (1) There are Brownfield sites throughout the State of Delaware;

18 (2) The underutilization of brownfields in the State of Delaware operates to the economic detriment of the citizens of
19 the State of Delaware, because the underutilization of these sites limits employment opportunities and needlessly uses
20 valuable ‘greenfield’ resources; and

21 (3) There is a need to establish a program to effectively investigate, remediate, and redevelop these sites, thus
22 returning these sites to more productive use and enhancing the economic well being of the citizens of the State of
23 Delaware.

24 § 9123. Definitions.

25 As used in this subchapter:

26 (1) ‘Brownfields Developer’ shall mean a person who, with respect to a facility:

27 (a) Proposes to conduct investigations and/or development activity at a facility that is a Certified Brownfield, and seeks to
28 enter into a Brownfields Development Agreement with the Secretary;

29 (b) At the time of application for a Brownfields Development Agreement, is not liable for a release or Imminent threat of
30 release at the facility under § 9105 (a) (1) – (6); and

31 (c) Is not affiliated with any other person that is liable for a release or imminent threat of release at the facility, within the
32 meaning of §9105(c)(4)b.5.

33 (2) ‘Brownfields Development Agreement’ means an agreement between the Secretary and a Brownfield Developer
34 with respect to a Certified Brownfield that sets forth a scope and schedule of activities to assess and respond to the actual,
35 threatened, or perceived release of hazardous substances at the facility.

36 (3) ‘Certified Brownfield’ means a brownfield, as defined in section 9103(3) of the Title, that the Secretary has
37 certified pursuant to the Regulations Governing Hazardous Substance Cleanup.

38 (4) ‘Existing environmental condition’ means all known or discovered releases of hazardous substances which are
39 found to be, or to have been, existing at or in the vicinity of the facility prior to a person entering into a Brownfields
40 Development Agreement with the Secretary.

41 (5) ‘Plan(s)’ means any workplan(s) as required by the Secretary for the performance of an investigation and/or
42 remedy of a site.

43 § 9124. Secretary’s powers and duties.

44 The Secretary may exercise the following powers in addition to any other powers granted by law:

45 (1) The Secretary may plan, study or conduct, or permit a Brownfields Developer or other persons to plan, study or
46 conduct, appropriate actions at a Certified Brownfield to perform a remedy of a release, imminent threat of release, or where
47 there may be a reasonably held perception of a release or imminent threat of a release.

48 (2) The Secretary shall, after notice and public hearing, promulgate and revise regulations as deemed necessary for the
49 implementation and administration of this Subchapter.

50 § 9125. Standard of liability.

51 (a) Notwithstanding §9105, a Brownfields Developer who enters into a Brownfields Development Agreement with the
52 Secretary is not liable with respect to the facility that is the subject of the Brownfields Development Agreement for any release
53 or imminent threat of release of hazardous substances existing at the time the Brownfields Development Agreement is entered
54 into, or for a remedy, or for any costs incurred by the State or any other person related to a remedy, for such a release or
55 imminent threat of release at a facility, provided that:

56 (1) The Brownfields Developer submits a plan or plans for approval by the Secretary to address the actual or
57 perceived presence of hazardous substances at the facility; and

58 (2) Any land disturbing activity at the facility by the Brownfields Developer in areas affected by the release or
59 imminent threat of release of hazardous substances is performed in accordance with a plan, or modified plan or plans,
60 as approved by the Secretary.

61 (b) Notwithstanding section (a) above, a Brownfields Developer who causes any exacerbation of the existing environmental
62 condition is responsible for entering into an agreement approved by the Secretary to mitigate any increased risk to human
63 health or the environment or increased remedial costs at the facility caused by such exacerbation. Furthermore, the Secretary
64 may modify the plan to address any changed circumstances in the environmental condition of the facility. If the Brownfields
65 Developer fails or refuses to comply with any modified plan or plans addressing any exacerbation of the existing
66 environmental condition, it is liable for the cost of mitigating any increased risk to the public health or the environment or
67 increased remedial costs caused by the exacerbation of the existing environmental condition.

68 (c) Notwithstanding section (a) above, if a Brownfields Developer, or his successors or assigns, materially disturbs or interferes
69 with a remedy at the facility in a manner not approved of by the Secretary, including institutional controls, said person shall be
70 liable for the reasonable costs of restoring or replacing the affected portions of the remedy, including any administrative or
71 injunctive relief allowed by Subchapter I.

72 (d) The protection afforded by subsection (a) shall be transferable to the successors or assigns of the Brownfields Developer.
73 Any person whose interest in or connection to a facility arises solely from a contractual relationship with the Brownfields

74 Developer, or his successors or assigns, subsequent to the entering into of a Brownfields Development Agreement, shall not be
75 liable for any release or threat of release, remedy, or costs associated with conditions existing prior to the entry of the
76 Brownfields Development Agreement.

77 (e) Nothing in this section shall affect the liability of a Brownfields Developer for new releases, or imminent threat of releases
78 of hazardous substances not part of the existing environmental conditions at a facility.

79 § 9126. Public notice, public comment.

80 (a) The Secretary shall provide public notice within twenty days after entering into negotiations for a Brownfields
81 Development Agreement. Such public notice shall be published in a newspaper of general circulation in the county in which
82 the facility is located. Such notice shall also be provided to:

83 (1) All elected members of the General Assembly in whose district such facility or any part thereof lies;

84 (2) If the facility or any part thereof is located within the boundaries of any municipality, then such notice shall also be
85 given to the governing body of all municipalities in which the facility or any part thereof lies;

86 (3) In the event the facility or any part thereof is not located within the boundaries of a municipality, then such notice
87 shall also be given to the governing body of the county in which the facility or any part thereof lies; and

88 4) The governing body of any civic, neighborhood or similar association in which the facility or any part thereof lies,
89 provided that such association makes itself known to the Department and provides a legal mailing address.

90 (b) The Secretary shall provide public notice within twenty days after entering into a Brownfields Development Agreement.
91 Such notice shall provide for a twenty day written comment period.

92 (c) Upon receiving a request following the entry of the Department into a Brownfields Development Agreement, the Secretary
93 shall conduct a public meeting to provide the public information regarding the proposed project, in or near the area where the
94 facility is located.

95 Section 5. Amend section 9108(a) of Title 7 by adding the following language after the phrase “facility,” in the first
96 sentence, the phrase:

97 “or an operable unit thereof,”.

98 Section 6. Amend section 9103 of Title 7 by re-designating subsections (13) through (23) as subsections (14) through
99 (24) and by adding a new subsection (13) to read as follows:

100 “(13) ‘Operable unit’ means any subdivision of a facility in terms of area or environmental media or any other manner
101 approved by the Secretary.”

102 Section 7. Amend the newly designated subsection (15) of Title 7, Delaware Code, by adding a new paragraph f to
103 read as follows:

104 “(f) The term 'owner or operator' does not include a person who, without acquiring legal title, conducts or directs activities in
105 connection with the actual or potential acquisition or evaluation of a facility, including due diligence, site inspections, site
106 assessments, or other pre-closing activities in connection with the acquisition of a facility.”

107 Section 8. Amend subsection 9113(c) of Title 7 by adding a new paragraph (8) to read as follows:

108 “(8) Provide for a remedy, or for reimbursement of allowable costs, for certified Brownfields.”

SYNOPSIS

This Act creates a Brownfields Development Program to encourage the redevelopment of brownfields by providing an independent program that includes liability protections to Brownfields Developers, establishes a Brownfields Development Agreement separate from the Voluntary Cleanup Program agreement, and allows for certificates of completion of remedy to be issued for approved operable units. This Act also changes DEDO’s matching grant program to assist in the cost of environmental assessment and remediation of certified brownfields (the “Brownfields Program”) that is part of the Delaware Strategic Fund program.

Section 1 makes clear that grants made pursuant to the Brownfields Program must also be made for one of the primary purposes of the Delaware Strategic Fund, namely, the retention and expansion of existing firms, the recruitment of new firms and the formation of new businesses.

Section 2 increases the size of matching grant that may be made under the Brownfields Program with respect to a single certified brownfield to the lesser of \$100,000 (rather than \$50,000, as prior to the Act) or 50 percent of the environmental assessment and remediation costs. Notwithstanding this amendment, the Chairperson of the Authority retains the existing power set forth in 29 Del. C. §5028(c) to suspend the making of grants under the Brownfields Program.

Section 3 of the Bill divides Hazardous Substance Cleanup Act into two Subchapters: Subchapter I entitled General Provisions and Enforcement; Subchapter II entitled Brownfields Development Program.

Section 4 of the Bill creates Subchapter II in its entirety.

Section 5 of the Bill provides that Certificates of Completion of Remedy may be issued for “operable units”.

Section 6 of the Bill defines “Operable Unit”.

Section 7 of the Bill clarifies the definition of “owner or operator” by exempting persons who conduct due diligence investigations on properties in anticipation of taking title.

Section 8 of the Bill allows monies from the HSCA Trust Fund to be used in the Brownfields Development Program

Author: Senator McBride