

# Comparison of Alabama and Georgia Brownfield Program Limitation of Liability Provisions

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## Introduction

This paper provides a comparison of the limitation of liability provisions in Alabama and Georgia's Brownfield programs.<sup>1</sup> As described below, the limitation of liability provisions of both programs are very similar; however, the State of Alabama's provision is somewhat broader in scope than Georgia's.

### Alabama's Brownfield Limitation of Liability Provision:

Subject to Section 22-30E-8 and 22-30E-10, upon [ADEM's] approval of a voluntary property assessment plan, approval of a voluntary cleanup plan, or concurrence with the certificate of compliance described in this section, whichever first occurs, an *applicant*<sup>2</sup> who is not a responsible person as defined in Section 22-30E-3, at the qualifying property, shall not be liable to the state or any third party for costs incurred in the investigation or cleanup of, or equitable relief relating to, or damages resultant from, in whole or part, a preexisting release at the qualifying property, including, but not limited to, any liability to the state for the cleanup of property under Chapters 22, 27, 30, 30A, and 35 of this title, or a new release of a substance, constituent, or material which had been part of a preexisting release at the property, unless such new release results from noncompliance with an approved voluntary property assessment plan or voluntary cleanup plan or from the negligent, wanton, willful or intentional conduct of the applicant.

ALA. CODE §22-30E-9(a) (emphasis added).

### Georgia's Brownfield Limitation of Liability Provision:

Upon the director's approval of the prospective purchaser's corrective action plan or concurrence with the certification of compliance described in this Code section, whichever first occurs, a *prospective purchaser*<sup>3</sup> shall not be liable to the state or any third party for costs incurred in the remediation of, equitable relief relating to, or damages resulting from the preexisting release, nor shall the prospective purchaser be required to certify compliance with risk reduction standards for groundwater, perform corrective action, or otherwise be liable for any preexisting releases to groundwater associated with the qualifying property.

GA. CODE ANN. §12-8-207(a) (Emphasis added).

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<sup>1</sup> See ALA. CODE § 22-30E-1 *et seq.* and GA. CODE ANN. § 12-8-200 *et seq.*, respectively.

<sup>2</sup> "Applicant" is defined as "an owner or operator or prospective purchaser of a qualifying property seeking to participate in the voluntary cleanup program established pursuant to this chapter." See ALA. CODE § 22-30E-3(2) (emphasis added).

<sup>3</sup> "Prospective purchaser" is defined as "a person who intends to purchase a property where there is a preexisting release." See GA. CODE ANN. § 12-8-202(6); see also ALA. CODE § 22-30E-3(15) for Alabama's definition which is substantially the same.

### **Protected Parties:**

Alabama's provision applies to owners and operators, as long as they are not a responsible person<sup>4</sup>, in addition to prospective purchasers. Conversely, Georgia's provision only limits liability for prospective purchasers. As a result, on its face, Alabama's provision appears to be broader in scope and allows a present owner or operator to be entitled to liability protection. However, upon closer examination, Alabama's definition of "responsible person," for all intents and purposes, limits protected parties to prospective purchasers of a qualifying property.<sup>5</sup> Therefore, parties protected under either State provision are substantially the same.

### **Protected Activities:**

Both States' provisions provide that a protected party will not be liable to the state or third parties for costs incurred in "equitable relief related to, or damages resultant from" a preexisting release. However there is a slight difference between the provisions related to the investigation and clean-up of a property. Specifically, Alabama provides that a qualifying party will be exempt from liability in relation to the investigation and the cleanup of the property, while Georgia limits the exemption from liability to only the remediation, *i.e.*, cleanup, of the property. In environmental issues, remediation is commonly understood to mean the actual clean-up of the property, not the pre-requisite investigation needed to determine the extent and type of cleanup needed. Furthermore, Georgia's Brownfield statute does not provide a definition for remediation. Therefore, it is not clear whether Georgia exempts a prospective purchaser from paying the costs of any necessary preliminary investigation or if it would simply consider it a necessary aspect of the needed remediation.

In addition, Alabama's provision further provides that the scope of the liability limitation specifically includes any liability to the state for the cleanup of qualifying property related to water pollution, solid waste, hazardous waste, and underground storage tanks and any new releases associated with a preexisting release at the property. This language is substantially broader in scope than Georgia's provision, which only addresses the applicability of its provision to preexisting releases that effect groundwater. Furthermore, Georgia does not address, as Alabama does, a party's liability should a new release related to the preexisting contamination occur.

### **Conclusion**

Based on the above, Alabama and Georgia's Brownfield program limitation of liability provisions are substantially the same, with Alabama's provision offering a slightly larger and defined scope of applicability. Therefore, Alabama's program could be viewed as providing greater protection to qualifying parties and does not warrant any changes to reflect Georgia's provision.

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<sup>4</sup> "Responsible person" is defined as "any person who has contributed or is contributing to a release of any hazardous waste, hazardous constituent, or hazardous substance at a property. This term specifically includes those persons described in Sections 107(a)(1) through 107(a)(4) of the federal Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601, *et seq.* This term specifically excludes those persons described in Section 107(b) of the federal Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601, *et seq.*" See ALA. CODE § 22-30E-3(20).

<sup>5</sup> Specifically, ALA. CODE § 22-30E-3(20) incorporates the federal Comprehensive Environmental Response, Compensation, and Liability Act's ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, definition of "covered persons," See 42 U.S.C. § 9607(a). Under CERCLA, a covered person includes owners and operators of a facility. Furthermore, under CERCLA, only owners and operators which could prove the contamination was caused by an act or omission of a third party which was not an employee or agent of the owner and operator could potentially escape liability. See 42 U.S.C. § 9607(b).