Superfund Amendments Encourage Brownfield Development But May Hurt Property Owners And Prospective Purchasers

After years of unsuccessful efforts to reform the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act, HR 2869, Pub. Law 107-118, on December 20, 2001. The Act, which President Bush signed on January 11, 2002, avoids many of the controversial issues that doomed previous reform efforts, and addresses only issues for which there is bipartisan support — brownfield redevelopment and protection of small business from CERCLA liability. Several provisions in the Act may hinder rather than help brownfield redevelopment, and others contain ambiguous language that will certainly fuel future litigation. This first installment of a two-part series of articles reviews the portions of the Act that target brownfield revitalization. The next installment will address provisions for reforming CERCLA's liability provisions.

BROWNFIELD REVITALIZATION

The brownfield revitalization sections of the Act: 1) define "brownfield site;" 2) provide federal grants and loans to state and local governments to inventory, investigate, and remediate brownfield sites; 3) encourage state brownfield programs, also called "state response programs," and 4) limit federal enforcement under CERCLA at sites cleaned up under a state response program.

Definition Of Brownfield Site

New CERCLA § 101(39)(A) defines "brownfield site" as "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." This very broad definition

includes properties contaminated by petroleum, salt, or other materials that are not CERCLA hazardous substances. It also includes properties that suffer from the mere "potential presence" of contamination. The definition expressly includes mine-scarred land, and low-risk sites contaminated by petroleum that are not subject to federal corrective action orders.

This huge universe of properties is dramatically reduced by numerous exclusions. A property is excluded if it: 1) is on or proposed for the National Priorities List (NPL); 2) is the subject of a planned or ongoing CERCLA removal action; 3) is the subject of a CERCLA court order or administrative order; 4) is the subject of an enforcement action under, or the holder of a permit under, the Clean Water Act or other federal environmental statutes; 5) is subject to corrective action under the Solid Waste Disposal Act; 6) is a hazardous waste land disposal unit; 7) is a federal facility; 8) is contaminated by PCBs; or 9) has received money from the Leaking Underground Storage Tank (LUST) Trust Fund.

However, the President may provide financial assistance under the grant and loan programs discussed below for individual sites that come within exclusions #2, 4, 5, 6, 8, or 9.

Brownfield Loans And Grants

The Act directs EPA to establish two grant programs. The first program will provide grants to state and local governments to compile inventories of brownfield sites, to determine how contaminated they are, and to plan for their reuse. EPA may grant up to $200,000 per site for these purposes.

Under the second program, EPA will make grants of up to $1 million each to states and local governments, with a 20% match by the grantee, to capitalize revolving loan funds. Each fund may: 1) make low interest loans to site owners, redevelopers, or other persons for site development, and 2) make grants to local governments or nonprofit organizations to remediate

contaminated sites owned by the grantee. EPA may also make grants of up to $200,000 per site to remediate brownfield sites, subject to a 20% match by the grantee. EPA will make these grants directly to local or state governments or non-profit organizations rather than through a revolving loan fund. Such grants are to favor development of parks and recreation, facilitate reuse of existing infrastructure, and to provide assistance where other sources are not available.

These grant and loan programs are not radical new ideas. Instead, they build upon several "pilot programs" that EPA established in the late 1990s without express Congressional approval.

The Act authorizes $200 million per year for fiscal years 2002 through 2006 for these purposes, approximately double the $90 million EPA spent in 2001 under its pilot brownfield programs. Twenty-five percent of the available amounts must be used to characterize, assess, and remediate low-risk petroleum–contaminated sites (*e.g.* gasoline stations) for which there are no viable PRPs. If the full $1 billion authorized were distributed equally among the estimated 500,000 brownfield sites, each site would receive only about $2,000 of assistance. Because of these limitations on funding, for every brownfield that receives substantial financial help, many others will not.

Limits On EPA Enforcement Under CERCLA

The Act seeks to encourage brownfield redevelopment by limiting EPA's authority to enforce under CERCLA for properties that have been remediated under a "state response program." Among other things, a state response program must: 1) make an inventory of brownfield sites within the states; 2) have sufficient oversight and enforcement authority to ensure that cleanup actions performed under the program are effective and will be completed if the property owner fails to complete them; 3) provide for public participation in the selection of

cleanup plans; 4) have appropriate mechanisms for the review and approval of cleanup plans; and 5) require that either state officials or a "licensed site professional" verify that environmental cleanup has been properly completed at a site. Because the Act does not provide for EPA to review and approve state response programs, it may be difficult to determine whether a given state has a state response program.

The Act authorizes EPA to give grants to states and Indian tribes that are either developing state response programs, have full state response programs, or simply have a "memorandum of agreement" with EPA regarding that state's voluntary response program. Thus, just because EPA has given a grant to a state does not necessarily mean that the state has a full state response program. At present, the State of Michigan has a memorandum of agreement with EPA, but it is unclear whether Michigan has a "state response program."

Whether a state has a state response program is important because the Act prohibits federal enforcement action under CERCLA against a person who is conducting or has completed a cleanup at an "eligible response site" in compliance with a state response program. The purpose is to assure a developer that if he or she remediates a brownfield property to the satisfaction of a state with a state response program, then the federal government is highly unlikely to use its CERCLA authority to demand more extensive cleanup.

However, this prohibition applies only at "eligible response sites," which are defined to include all "brownfield sites," plus certain other sites, minus other categories of sites. § 101(41). Therefore, it may be difficult to determine whether a particular property qualifies as an "eligible response site."

EPA retains CERCLA enforcement authority: against hazardous substance releases that were not addressed by the cleanup; if the state requests federal assistance; if hazardous

substances migrate across a state line or onto federally owned property; if there is an "imminent and substantial endangerment;" or if information that the state was not aware of shows that additional cleanup is required to protect public health or the environment. § 128(b)(1)(B). EPA may commence an enforcement action under statutes other than CERCLA against the owner, developer, or other parties. Thus, the Act stops far short of providing blanket immunity from federal enforcement action.

The next article will address the liability reforms provided for by these amendments to CERCLA.

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