

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 second installment of a two-part series of articles reviews the portions of the Act that target CERCLA's liability provisions.

LIABILITY REFORMS

Liability Exemptions For Prospective Purchasers And Certain Landowners

Under CERCLA before the Act, anyone who purchased contaminated property became liable to remediate all contamination regardless of when the contamination occurred. This strict liability made many developers unwilling to acquire contaminated property. To address this problem, EPA developed a "Prospective Purchaser Agreement" program under which it negotiates agreements that protect prospective purchasers from CERCLA liability in exchange for agreements to perform specific remediation work or to reimburse EPA for a portion of an EPA cleanup. Such agreements normally require the purchaser to allow EPA access for any

further cleanup that may be needed, and to exercise due care regarding any hazardous substances that remain on the property.

The Act now provides qualified protection from CERCLA liability for those who purchase property after January 11, 2002 and after all disposal of hazardous substances has ceased. This may make it less necessary to negotiate a site-specific prospective purchaser agreement if the buyer is sure that he qualifies as a “bona fide prospective purchaser” (BFPP) as defined in the Act. To qualify, the purchaser must: 1) before the purchase, investigate the property to determine whether it is contaminated; 2) take “reasonable steps” to stop ongoing releases of hazardous substances, prevent future releases, and limit human and environmental exposures to hazardous substances; 3) not be affiliated in any way with a liable party; 4) not be the successor by reorganization of a liable party; 5) fully cooperate with efforts to investigate or remediate the site; 6) provide assistance and access for any cleanup or natural resource restoration performed by authorities; 7) comply with any land use restrictions and institutional controls required as part of a remediation plan; 8) comply with EPA information requests; and 9) provide any legally required notices concerning hazardous substances on the property. A BFPP may not be affiliated with any party that is liable for response costs at the facility by any family, contract, corporate or financial connection.

If EPA incurs response costs at a facility acquired by a BFPP, EPA has a “windfall lien” on the facility equal to the amount by which EPA’s cleanup increased the fair market value of the property above the value that existed before the cleanup. EPA’s lien is subject to the interests of purchasers or creditors who perfect their interests before EPA records notice of its lien with the local land records. There are many unanswered questions about how the “windfall lien” provision would work. At least until these questions are resolved, the prospect of a federal

lien in an unquantified amount may discourage investors, developers, and their lenders from relying on the statutory prospective purchaser exemption.

In many cases, it will not be clear whether a prospective purchaser meets all conditions for this exemption. If there is significant contamination on the property, a prospective purchaser may want to know just what “reasonable steps” he or she must take to stop or prevent hazardous substance releases. Many prospective purchasers will decide that it is not prudent to rely on the statutory prospective purchaser exemption, and will ask EPA to negotiate a site-specific prospective purchaser agreement to specify what “reasonable steps” the new owner must take regarding contamination on the property, and to waive or quantify the “windfall lien.”

The Act also creates a qualified exemption for those who own property onto which hazardous substances have migrated from property owned by another. New CERCLA § 107(q) provides that an owner who did not “cause, contribute, or consent to” a release of hazardous substances from a neighbor is exempt from liability, provided that the owner: 1) investigated the environmental condition of the property before acquiring it, and had no reason to know that it was contaminated; 2) takes “reasonable steps” to stop ongoing releases, prevent future releases, and limit human and environmental exposures to hazardous substances; 3) is not affiliated with any liable party; 4) fully cooperates with authorized environmental cleanups or natural resource restoration; and 5) complies with land use restrictions and institutional controls.

The Act makes it more difficult to qualify for the “innocent landowner defense” that was added to CERCLA in 1986. In the past, an innocent landowner was required to exercise “due care” regarding hazardous substances on the property, and to take precautions against the foreseeable acts of third parties. These requirements remain. However, the Act now requires that owners also take “reasonable steps” to stop or prevent ongoing and future releases, to

cooperate fully in the performance of cleanups and natural resource restoration, and to comply with land use restrictions that are part of a cleanup. It is unclear why Congress decided to narrow the innocent landowner defense in this fashion.

Liability Exemptions For *De Micromis* Wastes And Municipal Solid Waste

The Act exempts from liability parties that disposed of or transported very small quantities of hazardous substances (*de micromis* wastes) and parties that disposed of municipal solid waste (MSW). § 107(o) and (p). Both exemptions are roughly similar to enforcement discretion policies issued by EPA and the Department of Justice.

New CERCLA § 107(o) exempts from liability any party (including both large and small business entities) that proves that it disposed of or transported less than 110 gallons or 200 pounds of hazardous substances at a National Priorities List (NPL) site and that all or part of the disposal occurred before April 1, 2001. EPA may increase or decrease the thresholds for the *de micromis* exemption by regulation. The exemption does not apply if the President determines that: 1) the materials disposed of by the defendant “could contribute significantly, either individually or in the aggregate,” to cleanup costs; 2) the defendant failed to comply with an EPA information request or impeded a response action; or 3) the defendant was convicted of a criminal violation for the conduct to which the exemption would apply. The President’s determination is exempt from judicial review; therefore, federal authorities can unilaterally prevent a person from qualifying for the *de micromis* exemption.

New CERCLA § 107(p) creates a complex exemption for certain generators of MSW. Homeowners, small business entities, and nonprofit organizations are exempted from liability based on disposal of MSW at NPL sites. As with the *de micromis* exemption, the MSW

exemption does not apply if the President determines that: 1) the MSW could “contribute significantly, either individually or in the aggregate,” to cleanup costs; 2) the defendant failed to comply with an EPA information request; or 3) the person has impeded a cleanup. The President’s determination is not subject to judicial review, thus again giving the President unfettered authority to deny the benefit of the MSW exemption.

Neither the MSW exemption nor the *de micromis* exemption affects any judicial or administrative settlement entered into before January 11, 2002.

CONCLUSION

The Act contains no bold new initiatives. Much of it simply adopts, with changes, enforcement policies or “pilot programs” that EPA pioneered in the 1990s in its “Superfund Administrative Reforms.” In contrast with environmental legislation of the 1980s, the Act gives EPA great latitude on many important issues, but also clearly instructs EPA to allow the states to play the major role in remediating and redeveloping most brownfield sites. Unfortunately for would-be brownfield developers, Congress has left plenty of room for EPA to become involved in brownfield remediation when it chooses to do so, and has complicated matters by creating a poorly defined “windfall lien.” The amendments thus present both opportunities and risks for potential brownfield developers.

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